

2012

# Outsourcing Childcare

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## Recommended Citation

Meredith J. Harbach, *Outsourcing Childcare*, 24 *Yale J.L. & Feminism* 254 (2012).

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# Outsourcing Childcare

Meredith Johnson Harbach†

“It is a maxim of every prudent master of a family never to attempt to make at home what it will cost him more to make than to buy. What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom.”

– Adam Smith<sup>1</sup>

**ABSTRACT:** Existing discourse on childcare decisions proceeds as if there were one “right” answer to the question of who should care for children. The law has preferences, too. But the reality is that parents, like businesses, make diverse, strategic decisions about when to keep work in-house, and when to collaborate with outside partners. This Article uses the lens of business outsourcing to gain fresh perspective on childcare decisionmaking, and the law’s relationship to it.

The outsourcing framework provides three key insights. First, it enables us to better understand the diversity of childcare decisions and the reasons underlying them. Second, the outsourcing model rejects a one-size-fits-all approach to childcare, and instead respects and values a diversity of approaches. Third, the normative value in this diversity suggests a particular role for the law in interacting with childcare decisions. The law should accommodate and support a variety of approaches, rather than take a position

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† Assistant Professor of Law, University of Richmond. I thank Kerry Abrams, Beth Burkstrand-Reid, Naomi Cahn, Janie Chuang, Peggy Davis, Jessica Erickson, Robert Ferguson, Keith Fogg, Jim Gibson, Theresa Glennon, David Harbach, Clare Huntington, Solangel Maldonado, Carol Sanger, Carol Tobias, Jonathan Todres, Kevin Walsh, Adam Zimmerman, and especially Corinna Lain for their insightful comments and guidance at various stages of this project. I also received generative feedback during workshops at Villanova Law School and the Virginia Junior Faculty Forum, as well during presentations at the following conferences: the Feminist Legal Theory Collaborative Research Network Conference, the Association of American Law Schools Mid-Year Workshop on Women Re-thinking Equality, the Race & the Family Conference at the University of South Carolina, and the Motherhood: Reclaiming our Past, Transforming our Future Conference at the University of Denver. Finally, I am grateful to Linda Evarts and Jamelia Morgan—as well as the editorial staff at the *Yale Journal of Law & Feminism*—for their hard work and thoughtful editing of this piece.

1. 4 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS ch. II, at 478 (Edwin Cannan ed., Univ. of Chi. Press ed. 1976) (1776).

on the substantive content of childcare decisions. Using this benchmark, this Article critically surveys existing law impacting childcare decisions and explores how it might evolve to better support the families making these decisions.

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## INTRODUCTION

June and Ward Cleaver are out. There is no typical modern American family.<sup>2</sup> Yet at least this much is true: Fewer and fewer parents are providing care for their children full-time. What do they do instead? They outsource childcare.

Although outsourcing has only recently gained national attention as a political issue,<sup>3</sup> the outsourcing phenomenon is nothing new. Businesses have outsourced for years to stay competitive in the global economy.<sup>4</sup> Outsourcing can save money and improve efficiency, effectiveness, expertise, and agility—critical components of competitive advantage.<sup>5</sup> To realize these benefits,

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2. That is, if there ever was. As Stephanie Coontz famously quipped: “Contrary to popular opinion, *Leave it to Beaver* was not a documentary.” STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 29 (2000). See *Troxel v. Granville*, 530 U.S. 57, 98 (2000); PEW RESEARCH CTR., *The Decline of Marriage and the Rise of New Families* (Nov. 18, 2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families>; see also PEW RESEARCH CTR., *The Typical Modern Mother: There Isn’t One* (June 11, 2010), <http://www.pewsocialtrends.org/2010/06/11/the-typical-modern-mother-there-isnt-one>.

3. See *infra* note 163.

4. Robert Malone, *Q and A: Beyond Outsourcing to Smartsourcing*, FORBES (Aug. 11, 2006), [http://www.forbes.com/2006/08/11/smartsourcing-outsourcing-business-improvement-cx\\_rm\\_0811smart.html](http://www.forbes.com/2006/08/11/smartsourcing-outsourcing-business-improvement-cx_rm_0811smart.html).

5. RICHARD BAILY, *CONTENT AND RECORDS MANAGEMENT: THE BUSINESS CASE FOR TRANSFORMATIVE OUTSOURCING* 2 (2008), available at <http://www.xerox.com/downloads/usa/en/t/>

American firms contract with third-party vendors to perform work they historically had done in-house.<sup>6</sup> Many modern American families do the same thing.

Outsourcing is a fitting (albeit imperfect<sup>7</sup>) way of thinking about how contemporary Americans allocate traditional family roles, work, and responsibilities. It's not hard to understand why. As Thomas Friedman defines it, outsourcing is taking a "specific, but limited, function that your company was doing in-house . . . and having another company perform that exact same function for you and then reintegrating that work back into your overall operation."<sup>8</sup> Friedman's definition also provides a compelling account of what families are doing in a variety of contexts.<sup>9</sup> Popular culture has made the connection in recent years, with references to "outsourcing family roles,"<sup>10</sup> "outsourcing childbirth,"<sup>11</sup> "outsourced wombs,"<sup>12</sup> and "outsourced wives."<sup>13</sup> And outsourcing is an especially provocative metaphor in debates about who should provide care for children. One blogger-parent recently framed the issue this way: "The Outsourcing of Parenting—Why Our Kids Are No Longer Our Problem."<sup>14</sup>

Despite the appeal of the metaphor, however, legal scholars have yet to consider outsourcing as a way of understanding how families allocate "family"

TL\_whitepaper\_records\_management\_Rich\_Baily.pdf; Richard C. Insinga & Michael J. Werle, *Linking Outsourcing to Business Strategy*, 14 ACAD. MGMT. EXEC. 58, 59 (2000).

6. STUART D. LEVI, *OUTSOURCING: A PRACTICAL GUIDE TO LAW AND BUSINESS*, § 1:1.1 (Practising Law Inst. 2011); George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955, 958 (2007); *id.* at 967 (specifying that "[outsourcing] moves an activity previously conducted within the firm beyond the corporate borders"); Justin Kent Holcombe, *Solutions for Regulating Offshore Outsourcing in the Service Sector: Using the Law, Market, International Mechanisms, and Collective Organization as Building Blocks*, 7 U. PA. J. LAB. & EMP. L. 539, 540 (2005).

7. I recognize that it is unorthodox, controversial, and even uncomfortable to use outsourcing as a framework for thinking about these issues. See *infra* notes 145-149 and accompanying text.

8. THOMAS FRIEDMAN, *THE WORLD IS FLAT* 3.0, at 137 (2007).

9. Families take a "specific, but limited, function [they were] doing in-house[,] hav[e] another [] perform that exact same function for [them,] and then reintegrat[e] their work back into [their] overall operation." *Id.*

10. In an online article entitled *Family Culture*, Oliver Demille laments, "as a society we are outsourcing family roles." *This Week in History*, THOMAS JEFFERSON EDUCATION (TJED), <http://www.tjedonline.com/phases/just-getting-started/family-culture.php> (last visited Nov. 9, 2012).

11. Cheryl Miller, *Outsourcing Childbirth*, WALL ST. J., Apr. 25, 2008, at W11.

12. Judith Warner, *Outsourced Wombs*, N.Y. TIMES: OPINIONATOR (Jan. 3, 2008, 6:29 PM), <http://opinionator.blogs.nytimes.com/2008/01/03/outsourced-wombs>.

13. Deborah Schoeneman, *Need a Life? She'll Arrange One*, N.Y. TIMES, Nov. 8, 2007, at G1; YOUR OUTSOURCED WIFE, <http://www.youroutsourcedwife.com> (last visited Sept. 26, 2012); see also Laura Vanderkam, *On Not Doing Dishes: The Rise of the Core Competency Mom*, HUFFINGTON POST, May 26, 2008, [http://www.huffingtonpost.com/laura-vandercam/on-not-doing-dishes-ther\\_b\\_103586.html](http://www.huffingtonpost.com/laura-vandercam/on-not-doing-dishes-ther_b_103586.html) ("Like corporations focused on their essential functions, or 'core competencies,' modern moms—particularly those who work full-time—are stripping the traditional 'mom' job description of the tangential chores it's long encompassed. Washing dishes is out. So are most things that can be outsourced or ignored.").

14. Tara Force, *Media Monday—The Outsourcing of Parenting—Why Our Kids Are No Longer Our Problem . . .*, MUMMEDIA (Sept. 10, 2012), <http://www.mummedia.net/2012/09/the-outsourcing-of-parenting-why-our-kids-are-no-longer-our-problem>.

work.<sup>15</sup> Maybe we should. It turns out that outsourcing is more than just a vernacular reference to having others do work we would rather not do ourselves. The outsourcing frame provides substantive insights into how families decide who cares for their children, and how the law interacts with those decisions.

This Article uses outsourcing as a lens through which to examine the childcare decisions parents make, and applies insights from business outsourcing to better understand and assess these decisions and the legal framework in which they are made. The outsourcing model provides three critical insights. First, outsourcing helps us better understand the diverse childcare choices parents make. Families, like businesses, make strategic decisions about how best to structure their overall operations. This first insight leads to a second: As a normative matter, outsourcing teaches that individual, rather than monolithic, approaches have value because they further the particular goals of particular families. It's not that there is a right choice or a wrong choice; it's that different choices are right for different families. And finally, the outsourcing framework signals a particular role for the law. As it does in the business outsourcing context, the law should generally accommodate, rather than constrain, outsourcing decisions. This legal prescription provides a benchmark for evaluating our existing policies, and helps us think through how the law might evolve to better respect and enhance family choice. Ultimately, then, outsourcing provides a fresh—and more complete—way of understanding childcare decisionmaking and the law's relationship to it.

Part I situates the project by providing an overview of existing debates about childcare decisions, and then contrasts those debates with childcare realities. Part II uses outsourcing to illuminate family childcare decisions, and uses insights from business outsourcing literature to explore the state's orientation toward outsourcing decisions. Part III then uses these insights to argue that enhancing family choice should be a central goal of our law and policy. Finally, Part III uses this goal to assess the existing legal framework in which childcare decisions are made, and explores how legal reform could

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15. The closest the law review literature gets is scholarship on surrogacy, which has used the term outsourcing literally, rather than metaphorically, to explore the phenomenon of entering into surrogacy contracts with women who live outside the United States. See, e.g., Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275 (2009). Legal scholars have likened families to corporations more broadly, however. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005); Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001). But see Larry E. Ribstein, *Incorporating the Hendrickses*, 35 J.L. & POL'Y 273 (2011) (rejecting a business model for family relationships). Renowned sociologist Arlie Hochschild has recently recognized how outsourcing extends to our daily lives in a book exploring the implications of the extensive commodification of intimate life. ARLIE RUSSELL HOCHSCHILD, *THE OUTSOURCED SELF: INTIMATE LIFE IN MARKET TIMES* (2012).

better empower childcare decisions. In the end, decisions about whether to outsource childcare are best made by families themselves. Outsourcing childcare is the right choice for some families, but not for others. The law's role should be to accommodate—rather than constrain—those choices.

## I. CHILDCARE DECISIONS: THE DEBATES AND REALITIES

Although nonparental childcare is now the norm for most American families, as a society we remain deeply divided about nonparental care.<sup>16</sup> Given the stakes involved, it's of course not surprising that different people have very different—and intensely held—opinions about who should provide care for children. What *is* surprising, however, is the disconnect between the terms of our childcare debates and realities of childcare decisions. In this Part, I expose that disconnect, revealing how our current conversations about childcare fall short. I begin with childcare debates, exploring how mothers, the media, and some feminist legal scholars oversimplify childcare decisions, portraying in black and white what in reality is a world of grays. I then contrast these debates with childcare realities, and illustrate the shortcomings in how our current discourse understands these decisions. These deficiencies in our existing discourse lead me to explore outsourcing as an alternative way of understanding childcare decisions in Part II.

Before I begin, however, a few observations about terminology: Recognizing our well entrenched social norm of parental care,<sup>17</sup> I use the term “childcare” to describe care (other than compulsory education) provided to children by those other than their parents or legal guardians. Although I will sometimes speak of “family” choices, and at other times refer specifically to “parents,” I mean these two terms to encompass the full range of adults who are legally responsible for childrearing, including legal parents, whether single, partnered, or married, as well as children's legal guardians, including foster parents and kinship legal guardians. “Childcare” includes institutional care, as well as care provided in the child's home, or in another's.<sup>18</sup> It includes multiple

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16. In particular, many are concerned about mothers of young children working outside the home. See Kim Parker, *Women, Work and Motherhood: A Sampler of Recent Pew Research Survey Findings*, PEW RESEARCH CTR. (Apr. 13, 2012), <http://www.pewsocialtrends.org/2012/04/13/women-work-and-motherhood>; cf. Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289, 297 (2002) (noting that women remain primary caretakers despite increasing participation in the labor market and despite calls for men to share in parenting responsibilities).

17. American society holds tightly to this “norm of parental care.” See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 52-63 (2000); see also NANCY BURSTEIN & JEAN I. LAYZER, *NATIONAL STUDY OF CHILD CARE FOR LOW-INCOME FAMILIES: PATTERNS OF CHILD CARE USE AMONG LOW-INCOME FAMILIES 2-1* (2007) (describing three main categories of care as parental care, self-care, and non-parental care).

18. See SONYA MICHEL, *CHILDREN'S INTERESTS/MOTHERS' RIGHTS: THE SHAPING OF AMERICA'S CHILD CARE POLICY* 4 (1999).

aspects of “care work,”<sup>19</sup> including providing for children’s physical, emotional, and social needs while not in the care of parents or guardians.

### A. Childcare Debates

Questions of who should provide care for children, and why, are among society’s most vexing. Although different in tenor and scope, discourse in both contemporary culture and legal academia has grappled with the issue and struggled to find middle ground. In contemporary culture, women in the so-called “Mommy Wars” disagree about which of two socially constructed images of motherhood represents the “good” mother.<sup>20</sup> Feminist legal theorists, by contrast, are less concerned with “good” mothers, and more focused on the intersections of childcare, market work, and the status of women. Despite their differences, however, both debates are animated by the assumption that there is one normatively correct answer to the childcare question, and have given considerably less attention to questions about families’ freedom to choose who cares for their children.

1. *Mommy v. Mommy*. The media has a preoccupation with mothers and frequently pits them against each other. The Mommy Wars, characterized by the media as epic and existential, has been the most culturally visible debate about childcare decisions. Since at least the 1990s, media coverage has focused intensely on the choice between being a stay-at-home mom and working for pay outside the home, characterizing each group of mothers as angry, defensive, and disrespectful of the other.<sup>21</sup> According to the Mommy Wars narrative, working “supermoms” indict “traditional mothers” as dependent, lazy, and boring, while traditional mothers condemn supermoms as neglectful and selfish.<sup>22</sup>

Despite the dramatic increase in mothers working outside the home, the Mommy Wars have persevered into the twenty-first century<sup>23</sup> with reports of an “Opt-Out Revolution” in the early 2000s. In a controversial and influential

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19. Joan Williams has helpfully named “care work” and disaggregated it into a number of distinct tasks, including growth work, housework and yardwork, household management, social capital development, emotion work, care for the sick, and daycare. See Joan Williams, *From Different to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1460-67 (2001).

20. SHARON HAYS, THE CULTURAL CONTRADICTIONS OF MOTHERHOOD 305-06 (1996); Toni Schindler Zimmerman et al., *Deconstructing the “Mommy Wars”: The Battle Over the Best Mom*, 20 J. FEMINIST FAM. THERAPY 203, 204 (2008).

21. HAYS, *supra* note 20, at 132; MIRIAM PESKOWITZ, THE TRUTH BEHIND THE MOMMY WARS: WHO DECIDES WHAT MAKES A GOOD MOTHER? 6 (2005).

22. HAYS, *supra* note 20, at 132; Zimmerman et al., *supra* note 20, at 205.

23. MARIA SHRIVER & CTR. FOR AM. PROGRESS, THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING 51, 54 (2009), [http://www.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/a\\_womans\\_nation.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/a_womans_nation.pdf) (“The reality is that mothers have taken up paid employment in great—and ever rising—numbers, yet the public discourse often remains mired in controversy over whether mothers should work . . .”).

article in *The New York Times Magazine*, Lisa Belkin reported that increasing numbers of highly educated, affluent, professional women were leaving prestigious jobs to be at home with their children.<sup>24</sup> With this clash, the debate has expanded to question whether these mothers make feminist decisions by leaving the paid labor market,<sup>25</sup> or are instead selling out and betraying feminist values.<sup>26</sup>

Examples of these clashes abound, always inflamed by media coverage. In the 1990s, Hillary Rodham Clinton infamously rejected staying at home to bake cookies and have teas in favor of continuing her law practice during her husband's presidential campaign.<sup>27</sup> Controversy ensued, resulting in a cookie bake-off between the presidential hopefuls' wives.<sup>28</sup> A decade later, Dr. Phil's episode on the Mommy Wars physically divided the audience into stay-at-home mothers and wage-work mothers. The show featured two women representing each camp, and two experts. When the show aired, it had been heavily edited to feature mothers insulting each other with comments like: "Working moms should hide in shame for putting their kids in a filthy daycare center." "Stay-at-home moms get their nails done all day long." "Working mothers are selfish." "Stay-at-home mothers waste their education and throw us back to the 1950s."<sup>29</sup> Just last spring, Democratic strategist Hilary Rosen pronounced that Ann Romney, a mother of five, had "never worked a day in her life," once again provoking a bitter exchange between those defending and criticizing stay-at-home moms.<sup>30</sup> And perhaps just as provocatively, Anne-

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24. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html>. In fact, research has largely debunked this so-called revolution. Zimmerman et al., *supra* note 20, at 216.

25. This emphasis on individual choice reflects what has alternately been labeled "choice feminism" or "third wave feminism." Michael L. Ferguson, *Choice Feminism and the Fear of Politics*, 8 PERSP. ON POL. 247, 247 (2010) (defining "choice feminism" as the belief that the "women's movement has liberated women to make whatever choices they want"); R. Claire Snyder-Hall, *Third-Wave Feminism and the Defense of "Choice"*, 8 PERSP. ON POL. 255, 255-56 (2010) (describing "third wave" "choice feminism" as an ideology with a deep respect for pluralism, self-determination, and nonjudgment).

26. See Nancy J. Hirschmann, *Choosing Betrayal*, 8 PERSP. ON POL. 271, 275 (2010) ("[W]omen who have benefited from terrific privilege and social resources are failing to realize their potential, to take leadership positions, and hence, most importantly, to give back. Because of these failures of responsibility, they have failed to change the power dynamics in the family and in society."); see also Ferguson, *supra* note 25, at 250 (summarizing feminist critiques of choice feminism); Jennet Kirkpatrick, *Introduction: Selling Out? Solidarity and Choice in the American Feminist Movement*, 8 PERSP. ON POL. 241, 241, 243 (2010) (same).

27. See PESKOWITZ, *supra* note 21, at 6; Gwen Ifill, *The 1992 Campaign: Hillary Clinton Defends Her Conduct in Law Firm*, N.Y. TIMES (Mar. 17, 1992), <http://www.nytimes.com/1992/03/17/us/the-1992-campaign-hillary-clinton-defends-her-conduct-in-law-firm.html>.

28. PESKOWITZ, *supra* note 21, at 6.

29. *Id.* at 20, 33-37.

30. See Kimberly Palmer, *The Truth Behind "Mommy Wars,"* USATODAY.COM (Apr. 17, 2012, 5:20 PM), <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-04-17/mom-wars-hilary-rosen-ann-romney-work-home/54357842/1>. Not to be outdone, *Time* threw down the gauntlet by controversially asking "Are You Mom Enough?" on its May 21, 2012 cover, and included a photograph of a woman breastfeeding a toddler. Kate Pikert, *The Man Who Remade Motherhood*, TIME MAG. (May 21, 2012), <http://www.time.com/time/magazine/article/0,9171,2114427,00.html>.

Marie Slaughter, former Dean of Princeton's Woodrow Wilson School of Public and International Affairs, and later Director of Policy Planning for the State Department, has flatly pronounced: "Women Still Can't Have It All."<sup>31</sup>

Underlying these accounts of childcare decisions are two assumptions: first, that there is a normatively superior, "right" choice, for which mothers can and should be held accountable (and about which there is intense disagreement);<sup>32</sup> and second, that mothers are free to choose whether to work outside the home or care for their children inside the home.<sup>33</sup> Although these characterizations of mothers' attitudes about home, work, and each other are manipulated and exaggerated,<sup>34</sup> they continue to exert a powerful cultural influence.

2. *Market Work v. Care Work.* The quality of conversations among feminist legal theorists is markedly different from those in the Mommy Wars. Rather than taking up the Mommy Wars debates, feminist jurisprudence instead considers how best to empower women. Yet in many ways, the binary nature of the debate remains: Different proponents advance distinct normative priorities regarding mothers' work, which in turn implicate whether mothers, or others, should provide childcare.<sup>35</sup>

Recognizing that most women become mothers,<sup>36</sup> one cohort of scholars seeks to support the care work that many mothers inevitably will do. Rather than focusing on how women's social and economic status might be elevated if they were relieved of the obligations of caring for their children, these

31. Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATL. MONTHLY (July-Aug. 2012), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020>.

32. Cf. PESKOWITZ, *supra* note 21, at 15.

33. Nora S. Newcombe, *Developmental Psychology Meets the Mommy Wars*, 28 J. APPLIED PSYCHOL. 553, 555 (2007) (reviewing NICHD EARLY CHILD CARE RESEARCH NETWORK, CHILD CARE AND CHILD DEVELOPMENT: RESULTS FROM THE NICHD STUDY OF EARLY CHILD CARE AND YOUTH DEVELOPMENT (2005)).

34. See HAYS, *supra* note 20, at 131-34; PESKOWITZ, *supra* note 21, at 21-22.

35. See Brenda Cossman, *The "Opt Out Revolution" and the Changing Narratives of Motherhood: Self Governing the Work/Family Conflict*, 2009 UTAH L. REV. 455, 472-73 ("Some feminist legal theorists have argued for an acknowledgment of women's caregiving roles within family and/or state policy, while others advocate policies to ensure women's labor market participation."); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 50 (2005) ("[T]he significance of domestic labor for women has defined some of the core controversies among legal feminists in the United States."); Dorothy E. Roberts, *Welfare Reform & Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1038 (2004) ("A clash has recently emerged between feminist legal scholars who emphasize the importance of women's equal participation in the paid workforce and those who emphasize the importance of state support for women's caregiving."); Williams, *supra* note 19, at 1447 ("[A] major issue for feminist jurisprudence is whether to fight the sacralization of care work, to embrace it—or both."); *id.* at 1452 ("[D]omesticity divides women against each other, in gender wars over divergent views of the proper role for women."); Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER RACE & JUST. 411, 430 (2002) [hereinafter Williams, *Mothers and Others*] ("There seems to be a controversy brewing within feminist jurisprudence" over various approaches to changing the relationship between women and economic security).

36. See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1535 (2001).

feminists focus on increasing the value, recognition, and compensation of care work.<sup>37</sup>

Others reject this focus as perpetuating the same gender segregation and hierarchy that feminists seek to dismantle,<sup>38</sup> as well as essentializing women as mothers.<sup>39</sup> Consequently, some theorists instead argue that paid market work is the better route to women's equality, emphasizing both the social and economic benefits of wage work.<sup>40</sup> And many feminist legal scholars have argued for better state and workplace supports to help parents balance both market work *and* care work.<sup>41</sup>

There is a sophisticated and extensive literature defending these different approaches,<sup>42</sup> but considerably less recognition that the answer to the childcare question might not be reducible to a single, monolithic solution, i.e., that all mothers should work in the market, or that all mothers should work at home caring for their children.<sup>43</sup> And once again, the conversation has given considerably less attention to the ability of families to choose *among* these alternatives, as opposed to endorsing one alternative over others.<sup>44</sup>

37. See, e.g., Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1409-13 (2001) [hereinafter Fineman, *Contract and Care*] (arguing that the economic consequences of caretaking should be addressed through government policy); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 18-26 (1999) [hereinafter Fineman, *Foundational Myths*] (arguing that caretaking work creates collective debt for which market and state should share responsibility); see also Becker, *supra* note 36, at 1539.

38. See, e.g., Martha Ertman, *Changing the Meaning of Motherhood*, 76 CHI.-KENT L. REV. 1733, 1735 (2001); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1888-1914 (2000); Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557, 1558, 1562 (2001); Selmi & Cahn, *supra* note 16, at 297-306.

39. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183-97 (2001) (critiquing the "repronormativity" of motherhood).

40. See, e.g., Peter B. Edelman, *Promoting Family by Promoting Work: The Hole in Martha Fineman's Doughnut*, 8 AM. U. J. GENDER SOC. POL'Y & L. 85, 88-89 (1999); Schultz, *supra* note 38, at 1942-45; Selmi, *supra* note 38, at 1565-66.

41. See Fineman, *Contract and Care*, *supra* note 37, at 1412-13; Fineman, *Foundational Myths*, *supra* note 37, at 27; Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834 (2002); Joan Williams, "It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate, 102 COLUM. L. REV. 812, 821-28 (2002) [hereinafter *Snowing Down South*]; Williams, *Mothers and Others*, *supra* note 35, at 431.

42. For thoughtful and thorough explorations of these divides, see Kessler, *supra* note 35, at 49-78; Roberts, *supra* note 35, at 1035-41.

43. Although she does not embrace traditional gender performances, Joan Williams recognizes that they have been remarkably persistent and seeks to build bridges between work- and care-identified mothers. See Williams, *Snowing Down South*, *supra* note 41, at 828-31 ("If the goal is to create an effective coalition to improve the economic position of women, one key is to bridge the divide between women with a workplace identity and women without one."); see also Williams, *Mothers and Others*, *supra* note 35, at 430. Similarly, Deborah Rhode acknowledges that "[w]hat mix of paid and unpaid work yields the greatest satisfaction varies among individuals and across life spans." Rhode, *supra* note 41, at 838.

44. Dorothy Roberts's work on the childcare decisions of low-income women is an important exception. See generally Roberts, *supra* note 35, at 1040-42.

### B. Childcare Realities

Although our childcare debates wrestle over which of these two dichotomous approaches is the best, the realities of family childcare decisionmaking are far more complex. There is no one, single answer to the childcare question, and the decisions families make are not made in a vacuum. Instead, families take a variety of approaches. Many parents choose nonparental childcare because they *have* to work. Others choose it because they *want* to work. Still others *don't* work but wish they could. Some families think parent care is essential. Others disagree. Many families feel as if they have little choice in the matter at all.

1. *Who Is Using Childcare, and How?* The most recent figures report that 34.3 million families in the United States have children<sup>45</sup> and that nonparental childcare is now the norm for most of them.<sup>46</sup> Although generalized data regarding the number of children in childcare arrangements are difficult to come by,<sup>47</sup> the Census Bureau reports that almost two-thirds of preschoolers are in some form of regular childcare arrangement.<sup>48</sup> Parents turn to a multitude of arrangements for children, and these arrangements are much more diverse than the mother-care/other-care dyad would suggest. Fathers play an important childcare role for working families.<sup>49</sup> Other relatives also frequently provide care for children, including siblings, grandparents, and other kin. Many children receive care in home settings. Babysitters, neighbors, and friends provide in-home care, and “family” daycare providers offer care for two or more children in provider homes. And finally, parents also use organized childcare facilities, like daycare, nursery schools, preschool, and Head Start.<sup>50</sup>

2. *Why Do (or Don't) Families Turn to Others for Childcare?* Contrary to assumptions underlying much of the Mommy Wars rhetoric, very few parents

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45. BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES—2011 (Apr. 26, 2012), <http://www.bls.gov/news.release/famee.htm>.

46. U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2005/SUMMER 2006, at 23 (2010), <http://www.census.gov/prod/2010pubs/p70-121.pdf> [hereinafter CENSUS].

47. See NAT'L CHILD CARE INFO. & TECHNICAL ASSISTANCE CTR., UNITED STATES CHILD CARE STATISTICS 2 (Dec. 2010) [hereinafter CHILD CARE STATISTICS] (on file with author). The statistics reported here are derived from the U.S. Census Bureau's Survey of Income and Program Participation (SIPP), the National Center for Education Statistics National Household Education Survey (NHES), and the National Survey of America's Families. The studies use different methodologies such that the data are not comparable. *Id.*

48. Statisticians estimate that about 63% of the 20 million children under age five are in some type of regular childcare arrangement; CENSUS, *supra* note 46, at 2 (observing that as of spring 2005, 12.7 million (63%) of the 20 million children under age five were in regular childcare). *But see* CHILD CARE STATISTICS, *supra* note 47, at 2 (observing that 11.2 million children were in child care arrangements).

49. CENSUS, *supra* note 46, at 15 (“The movement of married women into the labor force has changed the organization of daily life and has allowed fathers to be more available for child care while their wives are working.”).

50. See *id.* at 1 (defining “child care” for the purposes of the report).

make unconstrained decisions when it comes to childcare.<sup>51</sup> Although personal preferences certainly play a role for some families, many are limited in their choices by economic need, structural barriers to work, and other factors. As described by two social work scholars:

For parents, child care usually represents both a consumption choice related to employment and a caregiving practice. Parents' assessments of care alternatives involve an individual calculus of costs and benefits, and a social process through which they reconcile their decisions with cultural norms of what it means to be a good provider and a good parent. The alternatives from which they choose are structured by market processes that set their budget constraints and determine the supply of alternatives to which they have access, and by social processes through which they obtain information and receive signals about their resources and the legitimacy of these alternatives.<sup>52</sup>

Economic factors drive childcare decisions for many families, and these decisions are constrained by both family income and childcare price.<sup>53</sup> Parents work to provide for themselves and their families, and in order to work, they pay others to care for their children. Almost 90% of all families with minor children have at least one employed parent,<sup>54</sup> and 58.1% of married families include dual-earner couples.<sup>55</sup> Many families need two incomes to cover their basic expenses.<sup>56</sup> Moreover, changes in family structure and expectations have led to changes in parental work structures and, concomitantly, childcare needs.<sup>57</sup> Between the early 1970s and the mid-2000s, for example, the proportion of single-woman-headed households came close to doubling.<sup>58</sup> Currently, single mothers are employed 67% of the time, and single fathers 75.8% of the time.<sup>59</sup> For many working families, then, the decision to use nonparental care is driven by the need to work for pay outside the home.

Economic need drives another demographic of families to make different childcare decisions. In contrast to the two-worker families discussed above, other two-parent families cannot afford for both parents to work outside the home because childcare costs exceed the income that could be generated by the

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51. Marcia K. Meyers & Lucy P. Jordon, *Choice and Accommodation in Parental Child Care Decisions*, 37 COMMUNITY DEV. 53, 67 (2006) (cautioning against interpretation of current childcare arrangements as expressions of parents' essential tastes or unconstrained preferences).

52. *Id.* at 65.

53. *Id.* at 63.

54. See, e.g., BUREAU OF LABOR STATISTICS, *supra* note 45, at tbl.4 (showing that 87.4% of families with children had an employed parent in 2010).

55. *Id.* 30.2% have fathers as sole breadwinners, and 7.4% have sole-breadwinner mothers. *Id.*

56. See SHRIVER & CTR. FOR AM. PROGRESS, *supra* note 23, at 36.

57. CENSUS, *supra* note 46, at 23.

58. SHRIVER & CTR. FOR AM. PROGRESS, *supra* note 23, at 35.

59. BUREAU OF LABOR STATISTICS, *supra* note 45, at tbl.4.

second parent potentially working outside the home.<sup>60</sup> These families, therefore, elect to provide parent-care because they cannot afford the alternative. In short, some parents who might otherwise choose to use childcare so that they are able to work outside the home are precluded from doing so.<sup>61</sup>

But economic realities only partially explain why families make the childcare decisions they do. There is no cookie-cutter model for what parents contribute to their families, and different families have different values, desires, and goals. Consequently, an array of other factors also impact these decisions.

Personal preferences influence childcare decisions. For some, providing at-home parental care for young children is a top priority.<sup>62</sup> Many families prefer parental care because of convictions about appropriate divisions of family labor in and outside the home.<sup>63</sup> There is also agreement among many parents that there are real benefits for children—especially young children—in receiving care from parents at home.<sup>64</sup> Children benefit, especially in infancy, from attachment to parental caregivers, and they also benefit from the stability and consistency of the home environment.<sup>65</sup> Many parents also want to be intimately involved with providing care for young children and to experience firsthand the magical “firsts” of childhood.<sup>66</sup>

Others see things differently.<sup>67</sup> Some parents view full-time parent-care as less central to their roles, and instead believe that some aspects of childcare can be performed just as well (or better) by others.<sup>68</sup> These parents may identify “quality time” spent nurturing their children as a top priority, rather than full-time parental care.<sup>69</sup> Because they also view paid work outside the home as a family priority,<sup>70</sup> they may opt to have others provide some childcare. The

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60. SHRIVER & CTR. FOR AM. PROGRESS, *supra* note 23, at 55-56 (“Poor, working- and middle-class families alike are struggling to cope with the challenges of being unable to afford a stay-at-home parent yet are unable to afford decent alternatives to pay for care . . .”).

61. I will explore the law’s interaction with decisions whether to outsource in detail below.

62. See HAYS, *supra* note 20, at 100-01, 149-51.

63. The Western emphasis on distinctions between “private” and “public” spheres includes an expectation that children are to be raised in the private realm. Susan Walzer, *Contextualizing the Employment Decisions of New Mothers*, 20 QUAL. SOC. 211, 217 (1997). And often, convictions about who should provide this care in the home center around gendered role expectations: “[d]ominant cultural imagery associated with mothers and fathers in the United States reflects an equation of fatherhood with breadwinning, and motherhood with all other forms of care for children.” *Id.* at 211.

64. See HAYS, *supra* note 20, at 136-37. No doubt this consensus has been fueled, in part, by reports of some developmental psychologists who asserted that non-maternal care could reduce secure attachments to mothers, with long-term consequences. See Newcombe, *supra* note 33, at 553. These speculations about the importance of virtually exclusive care by mothers have proved false. *Id.*

65. See generally Mary Main et al., *Attachment Theory and Research: Overview with Suggested Applications to Child Custody*, 49. FAM. CT. REV. 426, 427-37 (2011) (summarizing the history of attachment theory); see also *infra* notes 97-100 and accompanying text.

66. See Claudia Wallis, *The Case for Staying at Home*, TIME MAG., Mar. 22, 2004, <http://www.time.com/time/magazine/article/0,9171,993641,00.html>.

67. See, e.g., HAYS, *supra* note 20, at 134-36 (describing employed mothers’ motivations to work outside the home).

68. See HAYS, *supra* note 20, at 147.

69. *Id.* at 147-48.

70. *Id.* at 134.

performance of market work, moreover, is a source of deep satisfaction and self-esteem for many parents.<sup>71</sup> And although it is not popular to acknowledge in this era of intensive parenting,<sup>72</sup> caring for children is hard work, and some parents use childcare so they can also take care of themselves.<sup>73</sup> In other words, many parents insist they are “better parents” when they are not working at home full-time.<sup>74</sup> Finally, social scientists and policymakers increasingly are recognizing the positive role of high-quality childcare in child development, enabling families to provide their children with educational enrichment.<sup>75</sup>

But these individual and family preferences don't exist in a social or cultural vacuum.<sup>76</sup> Gender norms and ideologies continue to exert powerful influence on our collective views about childcare, and on the pressures individual parents and families face in making these decisions.<sup>77</sup> The central thrust of these norms and ideologies is that fathers' primary function is market work and breadwinning, while mothers' work is childrearing and homemaking.<sup>78</sup> Public opinion consistently bears out the continued dominance of these norms, although they are less robust than they once were.<sup>79</sup>

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71. *Id.* at 135-36; Gregory Acs, *A Good Employee or a Good Parent? Challenges Facing Low-Income Working Families*, 4 ST. THOMAS L.J. 489, 491 (2007). Many women work, for example, not just because they need to, but because they want to work and take advantage of the broadening employment opportunities available to them. See SHRIVER & CTR FOR AM. PROGRESS, *supra* note 23, at 46.

72. See generally Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1225 (2011) (exploring the phenomenon of “intensive parenting”—a childrearing trend in which parents actively cultivate children, acquire sophisticated knowledge of childrearing “best practices,” and use this knowledge to closely monitor childhood development and activities).

73. See HAYS, *supra* note 20, at 135.

74. *Id.* at 147-48.

75. See BURSTEIN & LAYZER, *supra* note 17, at 4-10; CENSUS, *supra* note 46, at 23; see also HAYS, *supra* note 20, at 147. Gradeschoolers, for example, spend time outside of school playing sports, creating art, and participating in clubs and academic activities, as well as religious activities and community service. FED. INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING, 2011, at 7 (2011), available at [www.childstats.gov/pdf/ac2011/ac\\_11.pdf](http://www.childstats.gov/pdf/ac2011/ac_11.pdf).

76. Sharon Hays, for example, explains that both working and stay-at-home mothers engage in “ideological work” in an attempt to reconcile their parenting choices. See HAYS, *supra* note 20, at 133. Likewise, Susan Walzer theorizes that new mothers and fathers “construct narratives that serve as rationalizations or justifications for their work and family arrangements.” Walzer, *supra* note 63, at 212.

77. See, e.g., Walzer, *supra* note 63, at 212 (“[T]he employment behavior and preferences of new mothers are not simply a product of ‘choices’ that individual women make or characteristics they have.”).

78. WILLIAMS, *supra* note 17, at 1; Walzer, *supra* note 63, at 211.

79. Thirty-seven percent of Americans view the trend of mothers of young children working outside the home as bad for society. See PARKER, *supra* note 16. Forty-two percent of adults believe that an at-home mom is the ideal situation for children, and almost the same percentage of adults believes that part-time work for mothers is ideal. Only 9% believe that full-time work for mothers is ideal. See PEW RESEARCH CTR., FROM 1997 TO 2007: FEWER MOTHERS PREFER FULL-TIME WORK (2007), <http://pewresearch.org/pubs/536/working-women>. Just over two-thirds of adults believe that men must be able to support a family in order to be ready for marriage, while only one-third agree that the same is true for women. See PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 7 (2010).

These gender norms and ideologies find their genesis in a system Joan Williams has named “domesticity.”<sup>80</sup> Domesticity is a particular configuration of market work and family work, as well as “the gender norms that justify, sustain, and reproduce that organization.”<sup>81</sup> Williams identifies two defining features of domesticity: the organization of family and market work around an “ideal worker” who works full-time and therefore has little time or responsibility for caregiving, and the marginalization of the family worker who cares for home and children.<sup>82</sup> Domesticity’s doggedness continues to keep men in the ideal worker role, and women in caregiving roles. It influences both the decisions families make about how to allocate market work and care work, and the structural barriers parents face in full-time market work.

Domesticity, and the norms and expectations it perpetuates, shapes family decisions about childcare and market work.<sup>83</sup> In fact, although women—and others—frequently use choice rhetoric to describe decisions to “opt out” of market work in favor of fulltime childrearing, it is clear that gender norms and ideologies figure prominently in these decisions.<sup>84</sup> Domesticity mandates that mothers organize their lives around caregiving,<sup>85</sup> and that fathers live up to the ideal worker paradigm.<sup>86</sup> Most women are drawn (or led) to the role of mother. For many, it is integral to their self-definition, and because they are socialized to believe in the centrality of mothering to their identities, they are more likely than men to provide full-time care for children.<sup>87</sup> Likewise, men are socialized to be ideal workers and breadwinners, which eliminates any responsibility for childrearing.<sup>88</sup> In sum, “[c]hoice rhetoric serves to veil the powerful mandates of domesticity.”<sup>89</sup>

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80. WILLIAMS, *supra* note 17, at 1.

81. *Id.* Although Americans tend to identify this arrangement as the “traditional” family, in fact this divide did not exist until the nineteenth century, when industrialization separated market work and family work geographically and temporally. *Id.* at 20; Walzer, *supra* note 63, at 211. Prior to the rise of domesticity, men were involved in both market work and family work. WILLIAMS, *supra* note 17, at 3. With the rise of domesticity, women and men—mothers and fathers—were relegated to different spheres, with men working in the market, and women in the home. *Id.* at 1.

82. WILLIAMS, *supra* note 17, at 1.

83. *Id.* at 6.

84. *Id.*; see Selmi & Cahn, *supra* note 16, at 305; Walzer, *supra* note 63, at 224 (describing the intersection of structural factors and cultural imagery that maintain and reproduce gendered divisions of childcare and market work).

85. WILLIAMS, *supra* note 17, at 20. American culture has embraced the norm of “intensive mothering,” which emphasizes the mother as central caregiver, the image of maternal selflessness, and the elevation of childcare work above all other forms of work. See HAYS, *supra* note 20, at 6-9.

86. As Williams observes, the linking of masculinity to breadwinning has persisted despite the entry of women into the workforce in significant numbers. WILLIAMS, *supra* note 17, at 26-27.

87. See Naomi Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 528 (1999); Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 184 (2000) [hereinafter Cahn, *Power*]; Katrina M. Leupp, *Why Do Women Opt-Out? The Ideological and Economic Determinants of Women’s Employment Status* 20 (Feb. 10, 2010) (unpublished manuscript), available at <http://paa2010.princeton.edu/papers/100946> (suggesting that “intensive mothering ideology” affects decisions about market work).

88. See Cahn, *Power*, *supra* note 87, at 194.

89. WILLIAMS, *supra* note 17, at 39.

Domesticity also shapes market work by insisting on ideal workers who are not responsible for family work.<sup>90</sup> This insistence on ideal workers both perpetuates the need for a full-time, stay-at-home caregiver, and erects considerable hurdles for working parents who defy the ideal worker norm. Lack of accommodations and flexibility for the needs of these parents places a significant strain on many working families. These parents also frequently experience discrimination in the workplace. Working mothers, in particular, butt up against the well documented “maternal wall,”<sup>91</sup> where they must navigate a daunting maze of stereotypes and negotiate carefully among various ideas about working mothers in order to continue to remain successful at work. Working parents—and again especially mothers of young children—suffer from adverse employment decisions based on assumptions about their ability to balance work and parenthood,<sup>92</sup> or based on their need for workplace flexibility and accommodations for activities relating to motherhood, like breastfeeding.<sup>93</sup> Thus, domesticity’s translation into existing workplace norms and expectations “pushes” many parents out of the workplace and back into the home.<sup>94</sup>

In summary, a complex array of factors—economic, personal, social, and structural—combine to influence decisions about childcare. And, as I will develop in Part III, the law is complicit in these decisions, steering some families toward parental care and others toward nonparental care.

3. *How Does Childcare Affect Children?* Lurking in the background of debates about who should provide childcare is the question of what is best for children and, in particular, how nonparental (usually nonmaternal) childcare affects them.<sup>95</sup> With new studies documenting the developmental risks or benefits of maternal work on a seemingly daily basis, it’s difficult to determine whether there is any real consensus among researchers about the effects of maternal employment and childcare. To complicate matters further, results

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90. *Id.* at 20.

91. JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, UNIV. OF CAL. HASTINGS COLL. OF L., CTR. FOR WORKLIFE L., “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS THE WORK/FAMILY CONFLICT, 29-36 (2006), <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>.

92. *See, e.g.*, *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118-22 (2d Cir. 2004) (holding that employment actions based on stereotypes about pregnant women and mothers constitute sex discrimination).

93. *See, e.g.*, *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 624-25 (Ohio 2009) (holding that termination for unauthorized breast pumping breaks was a “legitimate, nondiscriminatory reason for termination” and not a pretext, and therefore that the termination was not prohibited by Ohio pregnancy discrimination law).

94. WILLIAMS, *supra* note 17, at 20; *see also* SHRIVER & CTR. FOR AM. PROGRESS, *supra* note 23, at 56-57 (showing how many professional mothers who “opted out” cited workplace factors like inflexible jobs).

95. This is evident, for example, in the criticisms lodged at mothers who work outside the home. *See supra* note 20 and accompanying text. A number of developmental psychologists have also speculated about the implications for children of nonmaternal childcare. Conflicts and confusion over the question of who should provide care for children prompted the National Institute of Child Health and Human Development to create the Study of Early Child Care and Youth Development. *See Newcombe, supra* note 33, at 553.

appear to differ depending on family demographics like income and children's ages.<sup>96</sup>

Historically, many studies suggested that full-time maternal work during infancy and early childhood was associated with developmental risks for children.<sup>97</sup> In particular, many psychologists maintained that children needed virtually exclusive maternal care to avoid impairing attachment to their mothers and long-term, negative consequences.<sup>98</sup> Recent studies, however, have significantly muted that concern, concluding that "[c]hildren who were cared for exclusively by their mothers [do] not develop differently than those who [are] also cared for by others."<sup>99</sup> Instead, parent and family characteristics appear to be more strongly linked to child development than does childcare use.<sup>100</sup>

A long-term, comprehensive study by the National Institute of Child Health and Human Development (the Study) has sought to investigate how variations in early childcare experience are related to children's socio-emotional adjustment, cognitive and linguistic performance, and health.<sup>101</sup> The Study found that exclusive maternal care versus childcare use did not predict child development outcomes.<sup>102</sup> Instead, the quality, quantity, and type of childcare predicted child outcomes, as did the quality of parenting.<sup>103</sup> Higher-quality childcare suggested advanced cognitive, language, and preacademic outcomes for all ages studied, and better socio-emotional and peer outcomes at some ages.<sup>104</sup> Increased childcare hours predicted modestly more behavior problems and conflict.<sup>105</sup> Increased time in center-based care was related to higher cognitive and language scores on the one hand, but also increased problem behaviors and fewer prosocial behaviors on the other.<sup>106</sup>

Overall, the data support a common sense conclusion: When parents are able to locate and afford high-quality childcare, and children don't spend too

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96. Acs, *supra* note 71, at 491-92.

97. *See id.* at 492; Newcombe, *supra* note 33, at 553.

98. *See* Newcombe, *supra* note 33, at 553.

99. U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L INSTS. OF HEALTH, & NAT'L INSTS. OF CHILD HEALTH AND HUMAN DEV., THE NICHD STUDY OF EARLY CHILD CARE AND YOUTH DEV.: FINDINGS FOR CHILDREN UP TO AGE 4 ½ YEARS 1 (2006).

100. *See id.* at 1, 22-25.

101. *See* NICHD Early Child Care Research Network, *Child-Care Effect Sizes for the HICHD Study of Early Child Care and Youth Development*, 61 AM. PSYCHOLOGIST 99, 101 (2006) [hereinafter NICHD Research Network].

102. *Id.* at 108. This is true even in the context of infants. *See* Jeanne Brooks-Gunn, Wen-Jui Han, & Jane Waldfogel, *First-Year Maternal Employment & Child Development in the First 7 Years*, 75 MONOGRAPHS SOC'Y RES. CHILD DEV. 1 (2010) ("[T]he overall effect of 1st-year maternal employment on child development is neutral."). The Study is significant, in part, because it suggests that mothers can choose, without guilt, whether to work in the marketplace or at home providing childcare. *See also* Daniel de Vise, *Study: Working Mothers Not Necessarily Harmful to Child Development*, WASH. POST, July 31, 2010, at A05.

103. NICHD Research Network, *supra* note 101, at 99, 108-11.

104. *Id.* at 99.

105. *Id.*

106. *Id.*

much time there, nonparental care is unlikely to negatively affect children and can have positive benefits.<sup>107</sup> In response to debates about the effects of parental care versus childcare on children, the Study answers specifically: “[e]xclusive maternal care was not related to better or worse outcomes for children. There is, thus, no reason for mothers to feel as though they are harming their children if they decided to work.”<sup>108</sup> The Study’s primary conclusion is that parenting impacts child development much more significantly than do childcare arrangements. And unlike the childcare debates I describe above, the Study recognizes that different parents may make different choices so as to have quality time with their children.<sup>109</sup> In fact, one scholar involved in the Study explicitly advocates “real choice” for families.<sup>110</sup>

To summarize the analysis thus far, contemporary debates about childcare stack up rather poorly against childcare realities for American families. Neither of the existing debates fully accepts the diversity of childcare decisions and the reasons underlying them. What the debates fail to consider is that, in the face of such diverse approaches, there may be no single, right answer. In contrast, the outsourcing model understands the value of diverse choices as part of an individualized assessment of strengths and goals, leading to optimal outcomes. I turn now to consider how outsourcing’s perspective can enrich our understanding of childcare decisionmaking.

## II. OUTSOURCING COMES HOME

Outsourcing is a logical—if surprising—metaphor for childcare decisionmaking. When businesses outsource, they use a variety of outside, third-party collaborations to substitute for in-house functions.<sup>111</sup> Like businesses, most families today rely on a series of third-party collaborations to provide childcare.<sup>112</sup> At first glance, the comparison may seem inapt—even perverse—given the obvious differences between businesses and families, and the negative connotations outsourcing often evokes.<sup>113</sup> But when we take the outsourcing metaphor seriously, we see that its real implications are insightful

107. Acs, *supra* note 71, at 494.

108. NICHD Research Network, *supra* note 101, at 113. Consequently, the Study supports policies aimed at supporting parents and improving parenting skills, improving the quality of childcare, and reducing the amount of time children spend in childcare. *Id.* at 114.

109. *Id.* at 113 (“[P]arents might make decisions that allow them to have quality time with their children. In some cases, this might mean that a mother decides to work less because the stress of both working and parenting limits her ability to provide sensitive and responsive care to her children. In other cases, parents might decide that child care is needed because the mother’s income is essential for the family and that the parents’ ability to provide sensitive parenting might be impaired without that income.”).

110. See JAY BELSKY, EFFECTS OF CHILD CARE ON CHILD DEVELOPMENT: GIVE PARENTS REAL CHOICE 7 (2009), available at [www.mpsv.cz/files/clanky/6640/9\\_Jay\\_Belsky\\_EN.pdf](http://www.mpsv.cz/files/clanky/6640/9_Jay_Belsky_EN.pdf).

111. See Insinga & Werle, *supra* note 5, at 58; Malone, *supra* note 4.

112. See *supra* notes 45-50 and accompanying text.

113. For qualifications, see *infra* notes 145-149 and accompanying text.

rather than inapt. In this Part, I explain how the metaphor works, and explore what it can teach us about childcare decisions.

### *A. Theorizing Childcare Decisions as Outsourcing Decisions*

In contemporary America, both firms and families make strategic decisions about how best to organize their work and functions. Both evaluate which tasks are so central to their mission and goals that they are best done in-house, and which tasks are good candidates for delegation to outside partners. In this section, I describe business outsourcing and then explore the parallels to childcare.

*1. Business Outsourcing.* The concept of outsourcing is by now firmly established as both a business practice and a part of our “social lexicon.”<sup>114</sup> Outsourcing advocates emphasize the potential for increased efficiency and profits. And of course, outsourcing today is controversial because of its potential drawbacks. Chief among these are job loss for American workers,<sup>115</sup> exploitation of third-party vendors,<sup>116</sup> and agency costs manifest in a lower quality of work by outsourcing vendors.<sup>117</sup>

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114. “Offshoring has rapidly become part of the everyday social lexicon. Conflicting and sensational reports of developed-world companies moving jobs to emerging markets . . . are now a staple of the news media and political debate.” Geis, *supra* note 6, at 964 (citing DIANA FARRELL ET AL., MCKINSEY & CO., *THE EMERGING GLOBAL LABOR MARKET: PART I—THE DEMAND FOR OFFSHORE TALENT IN SERVICES* (2005), available at [http://www.mckinsey.com/Insights/MGI/Research/Labor\\_Markets/The\\_emerging\\_global\\_labor\\_market\\_demand\\_for\\_offshore\\_talent](http://www.mckinsey.com/Insights/MGI/Research/Labor_Markets/The_emerging_global_labor_market_demand_for_offshore_talent)).

115. There has been profound concern over job loss and over the concomitant changing culture of the American workforce. Beverley Earle, Gerald A. Madek & Christina Madek, *A Finger in the Dike? An Examination of the Efficacy of State and Federal Attempts to Use Law to Stem Outsourcing*, 28 *NW. J. INT’L L. & BUS.* 89, 94 (2007) (“Predictably, these displaced workers, and their political representatives, are not soled by the promise of future national and global gain.”); Geis, *supra* note 6, at 960 n.20 (citing media accounts of increased outsourcing); Holcombe, *supra* note 6, at 547. The U.S. economy and businesses may profit overall, but at the expense of American jobs lost to overseas workers. *Id.* at 547-48. Even businesses that outsource, while recognizing outsourcing as a rational economic decision, are ambivalent about this change. Geis, *supra* note 6, at 966 & n.44 (citing examples of CEO anxiety over the implications of outsourcing).

116. Outsourcing also raises the specter of exploitation of third parties. Decisions to outsource labor frequently rely on cheaper labor, with fewer attendant costs and restrictions. Geis, *supra* note 6, at 963. In the context of international outsourcing (or “offshoring”) businesses may circumvent the more protective legislation in place for many American workers. Holcombe, *supra* note 6, at 550 (“[L]abor groups and politicians have raised concerns about inadequate labor protections. Typically, U.S. employment laws covering issues such as sexual harassment, age discrimination, and worker safety don’t protect foreign workers. Instead, these workers are covered by employment laws in their own countries that U.S. labor officials say are often not as strict.”) (internal quotations and citations omitted). Critics warn that outsourcing can lead to a “race to the bottom,” undermining labor standards for all workers. *Id.* at 576.

117. The decision to outsource markedly affects the level of control a business has over the outsourced activity, creating the potential for “agency costs.” LEVI, *supra* note 6, § 1:5.2 [B]; see also *More Multinationals Say BPO is A-OK*, *HR WIRE*, May 10, 1999 [hereinafter *HR WIRE*]; Michael Alan Smith et al., *Information Systems Outsourcing: A Study of Pre-Event Firm Characteristics*, 15 *J. MGMT. INFO. SYS.* 61, 65 (1998). With incomplete information and oversight, companies that outsource are less capable of monitoring behavior and guarding against abuse. Geis, *supra* note 6, at 979. As a result, there

But most of the existing controversy around outsourcing concerns “offshore” outsourcing<sup>118</sup>—when firms send work overseas, thereby displacing American workers.<sup>119</sup> In reality, much of the outsourcing businesses do is far less controversial. Businesses regularly make decisions about which tasks to keep in house and which to delegate to third-party vendors—frequently other American firms and workers. The less-explored backstory on outsourcing is that it isn’t just about economic savings, and it isn’t all bad.

Here, I explore how businesses outsource, what they seek to gain, and how they make outsourcing decisions. Firms have outsourced and continue to outsource a variety of tasks in order to save money, focus on what they do best, and access outside expertise. To reap the most value from outsourcing, outsourcing best practices recommend that businesses engage in a thoughtful and purposive evaluation of which functions they outsource, which will lead different businesses to different conclusions on the outsourcing question.

Although generally considered a recent business development, some scholars have argued that outsourcing is a straightforward manifestation of comparative advantage and trade that has been recognized since at least the days of Adam Smith.<sup>120</sup> The current business outsourcing trend emerged in the

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are multiple incentives for the outsourcing vendor to act out of self-interest in ways that don’t benefit the firm. *Id.* at 978.

118. Outsourcing can be accomplished in a number of different ways. First, there is “onshore outsourcing,” in which a centralized activity is conducted by a different firm that is still located in the United States. “Captive offshoring” occurs when the firm moves the work overseas, but has the work done under the auspices of the firm rather than by a third party. “Offshore outsourcing” moves the work both outside the legal boundaries of the firm, and outside the United States. Geis, *supra* note 6, at 965 & n.42.

119. Despite the outcry, however, it isn’t clear that there is a causal relationship between outsourcing of American jobs and domestic job loss. See Amar Gupta & Deth Sao, *Anti-Offshoring Legislation and United States Federalism: The Constitutionality of Federal and State Measures Against Global Outsourcing of Professional Services*, 44 TEX. INT’L L.J. 629, 633 (2009). In fact, some research indicates that offshore outsourcing may ultimately benefit the American labor market and American workers. Holcombe, *supra* note 6, at 548. Many economists maintain that outsourcing increases economic efficiency and overall economic wellbeing. CRAIG K. ELWELL, FOREIGN OUTSOURCING: ECONOMIC IMPLICATIONS AND POLICY RESPONSES 18 (2005). Outsourcing leads to the creation of innovative and high-value jobs in the U.S. See LEVI, *supra* note 6, § 1:3.1. This may include new jobs and investment in new business. ELWELL, *supra*, at 6, 8; Holcombe, *supra* note 6, at 548. Nevertheless, economic efficiency cannot be viewed in isolation; it is clear that outsourcing creates winners and losers. ELWELL, *supra*, at 24.

120. See Alan S. Blinder, *Fear of Offshoring 2-7* (2005) (unpublished manuscript) available at <http://www.princeton.edu/blinder/papers/05offshoringWP.pdf>. Both N. Gregory Mankiw and Alan S. Blinder, economists at Harvard University and Princeton University respectively, note that Adam Smith understood the basic idea of outsourcing/offshoring as a function of free trade. See *id.* at 3-4; N. Gregory Mankiw, *Outsourcing Redux*, GREG MANKIW’S BLOG: RANDOM OBSERVATIONS FOR STUDENTS OF ECONOMICS (May 7, 2006), <http://gregmankiw.blogspot.com/2006/05/outsourcing-redux.html>. Smith’s observation—an excerpt of which appears at the beginning of this article—is that:

It is a maxim of every prudent master of a family never to attempt to make at home what it will cost him more to make than to buy . . . What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it off them with some part of the produce of our own industry employed in a way in which we have some advantage.

4 SMITH, *supra* note 1, at 478.

1960s, when companies began using information technology systems to support particular business processes, like payroll processing. Because of high costs and low expertise associated with in-house information technology work, companies partnered with outside vendors that provided access to the newest technology and expertise.<sup>121</sup> Early outsourcing practices primarily used third parties to provide basic support services and lower-skill work like call center operation, technical services, and manufacturing.<sup>122</sup> But companies now outsource a much broader set of functions with increasing levels of sophistication, including professional services like derivative contracts processing, medical record interpretation, drug development and research, banking and brokerage services, and legal services.<sup>123</sup>

American firms outsource to improve their overall business performance.<sup>124</sup> Among the many incentives to outsource, the lure of cost savings, an internal focus on core competencies, and accessing outside expertise are most frequently cited and discussed. I explore each below.

First, the potential economic gains from outsourcing are a strong draw. Businesses engage in labor arbitrage to reduce overall costs.<sup>125</sup> Innovations in communication, digitization, and standardization have dramatically lowered the transaction costs<sup>126</sup> typically associated with contracting to have work done externally, making it economically possible—and attractive—to outsource work to third parties. Without these historical transaction costs, businesses can access cost savings by taking advantage of less expensive labor.<sup>127</sup> Cost savings are magnified when outsourcing service providers can take advantage of increased economies of scale and efficiently manage work within their areas of expertise.<sup>128</sup> Finally, the same forces that reduce outsourcing's transaction

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121. LEVI, *supra* note 6, § 1:2.1. At the time many companies could not afford to invest in computer mainframes and specialized workers, and instead relied on companies like Electronic Data Systems (“EDS”)—founded by Ross Perot—for access to computer mainframes and data-processing services. *Id.*

122. *Id.*; Jérôme Barthélemy, *The Seven Deadly Sins of Outsourcing*, 17 ACAD. MGMT. EXECUTIVE 87, 95 (2003); Gupta & Sao, *supra* note 119, at 632-33.

123. Barthélemy, *supra* note 122, at 95; Geis, *supra* note 6, at 964-65; Gupta & Sao, *supra* note 119, at 633; Holcombe, *supra* note 6, at 544.

124. Barthélemy, *supra* note 122, at 87.

125. LEVI, *supra* note 6, § 1:4.1; Holcombe, *supra* note 6, at 546.

126. “Transaction costs” are those costs incurred as a consequence of negotiating arms-length transactions. Geis, *supra* note 6, at 968-69. As Ronald Coase and others have explained, one of the traditional incentives to keep work in-house was a reduction in the transaction costs associated with using external markets. *Id.* Thus, decisions whether to keep work in-house or to outsource it are controlled by an evaluation of the potential cost savings of using external markets as offset by the transaction costs potentially incurred by using these markets. *Id.* at 970.

127. Especially in the case of overseas outsourcing, the vendor can pay its employees significantly less than would be required to pay in-house employees. LEVI, *supra* note 6, § 1:4.1. “The often-cited rationale is that the vendor typically has better economies of scale, tighter control over fringe benefits, better access to lower-cost labor pools, and more focused expertise in managing.” Smith et al., *supra* note 117, at 63-64. Overseas outsourcing also offers less regulated labor markets, often with lower taxes, subsidized energy, and lower healthcare costs. See Geis, *supra* note 6, at 963, 971-72.

128. LEVI, *supra* note 6, § 1:4.1.

costs also make it easier to lower the agency costs associated with outsourcing.<sup>129</sup>

But businesses are not simply after lower costs.<sup>130</sup> Outsourcing also enables firms to focus on their “core competenc[ies]”<sup>131</sup>—unique strengths that are difficult to imitate and that provide the company with a competitive advantage.<sup>132</sup> As characterized by one management scholar, “[r]esources and capabilities that are valuable, rare, difficult to imitate, and difficult to substitute for lead to superior performance.”<sup>133</sup> Core competencies are at the heart of a company’s “culture, brand, and behaviors.”<sup>134</sup> They are what companies do best. Nike Corporation, for example, has determined that its core competencies are branding and marketing, and now outsources all manufacturing of its products.<sup>135</sup> Focusing on core competencies helps leverage a business’s individuality to its strategic advantage,<sup>136</sup> enabling it to channel energy, resources, and managerial effort into those areas with the greatest strategic potential.<sup>137</sup> It prevents the diversion or dilution of resources and attention with work that is ancillary to a company’s “mission-critical activities.”<sup>138</sup>

Finally, outsourcing nonessential work also allows businesses to reap “dynamic value” by accessing the best practices and expertise of outsourcing vendors.<sup>139</sup> Consequently, outsourcing can help firms maintain the highest levels of performance in all areas because outsourcing vendors themselves provide services they have identified and honed as their *own* core competencies.

So how do companies make the most of outsourcing’s potential? Best practices in outsourcing emphasize a deliberative and firm-specific analysis of core and non-core competencies, focusing on the unique strengths, needs, and goals of particular businesses. When making these decisions, companies consider whether the work at issue delivers unique value to customers, how

129. See Geis, *supra* note 6, at 999-1000.

130. In fact, some management executives have moved toward the term “smartsourcing” to communicate that this globalization is about much more than labor arbitrage. See Malone, *supra* note 4.

131. Holcombe, *supra* note 6, at 541-42; see generally C.K. Prahalad & Gary Hamel, *The Core Competence of the Corporation*, 33 HARV. BUS. REV. 79 (1990).

132. BAILY, *supra* note 5, at 2-3; Insinga & Werle, *supra* note 5, at 59-60; Malone, *supra* note 4; Prahalad & Hamel, *supra* note 131, at 80; Smith et al., *supra* note 117, at 78; *What to Outsource? Identify Your Core Competencies, and Let Someone Else Take Care of the Rest*, DATAMARK, INC. (May 25, 2012), <http://www.datamark.net/blog/what-to-outsource> [hereinafter DATAMARK].

133. Barthélemy, *supra* note 122, at 88; see also C. Eden & F. Ackerman, *Mapping Distinctive Competencies: A Systemic Approach*, 51 J. OPERATIONAL RES. SOC’Y 12, 14 (2000); Insinga & Werle, *supra* note 5, at 59.

134. Malone, *supra* note 4.

135. See DATAMARK, *supra* note 132.

136. Eden & Ackerman, *supra* note 133, at 12.

137. Malone, *supra* note 4; Smith, *supra* note 117, at 64.

138. BAILY, *supra* note 5, at 3; see also LEVI, *supra* note 6, § 1:4.7; Malone, *supra* note 4.

139. BAILY, *supra* note 5, at 3; see also LEVI, *supra* note 6, § 1.1; Holcombe, *supra* note 6, at 543-44. “Outsourcing can give companies direct access to the best solutions and latest technology available in the market by capturing a supplier’s expertise in a particular area.” LEVI, *supra* note 6, § 1:4.8.

central the work is to the company's mission, whether the work performed in house uses best practices, and assess whether the business would benefit from a reallocation of internal resources to more "mission-critical tasks."<sup>140</sup>

Once firms determine what their core competencies are, they isolate "non-core" tasks as potential candidates for outsourcing.<sup>141</sup> They outsource this non-core work to outside vendors, who can perform the work just as well, and often better. Put another way, firms may view certain work as so central to their brand and services that they prefer to keep that work in house. By contrast, although necessary to a successful overall operation, non-core work is ancillary and need not be done internally.<sup>142</sup> But managers recognize the need to manage outsourcing and are mindful of its risks. Businesses will undermine their core missions and risk damage to their overall enterprise if they make strategic mistakes about what to outsource.<sup>143</sup>

Thus, outsourcing literature stresses that when deciding whether to outsource, businesses must engage in a careful, firm-specific analysis of their strengths and goals. This business-specific analysis necessarily will lead to different outsourcing decisions for different businesses: There is no universal answer to whether a firm should outsource. Two firms in the same industry may make radically different decisions about whether and what to outsource.<sup>144</sup> Consequently, from a management perspective, the outsourcing literature doesn't take a position on whether outsourcing is good or bad, only whether it

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140. BAILY, *supra* note 5, at 3.

141. *Id.* at 3-4, 8; see Holcombe, *supra* note 6, at 541-42. *But see* Smith et al., *supra* note 117, at 63, 78 (explaining that an empirical study of firms' outsourcing information systems found no direct evidence that outsourcing was part of a larger, firm-wide effort to focus on core competencies).

142. Some management scholars break down the distinctions among core and non-core work still further. In this typology, "key" core activities that provide the enterprise with significant competitive advantage should remain in house, but all others are potential candidates for outsourcing. Insinga & Werle, *supra* note 5, at 60. Likewise, those activities that play a crucial role in maintaining business distinctiveness should remain in-house. Eden & Ackerman, *supra* note 133, at 19. But some activities that are "core"—in the sense that they are essential to firm operations may nevertheless be "basic," and not sources of competitive advantage. These functions, too, are outsourcing candidates. Insinga & Werle, *supra* note 5, at 60; see also LEVI, *supra* note 6, § 1:4.7 (explaining that outsourced services may include those considered "core" inasmuch as they are critically important, but the organization cannot perform them at optimal levels).

Moreover, some question the accuracy and merit of the core vs. non-core distinction. *Id.* § 1:4.7; Lance B. Eliot, *Outsourcing of Organizational Functions*, DECISION LINE, July 1998, at 14, available at [http://www.decisionsciences.org/DecisionLine/vol29/29\\_4/info\\_29\\_4.pdf](http://www.decisionsciences.org/DecisionLine/vol29/29_4/info_29_4.pdf). The distinction is often a blurry one, leading some to suggest, alternatively, that businesses focus instead on which functions they can perform best internally, as opposed to externally, regardless of "core" status. LEVI, *supra* note 6, § 1:4.7. As Eliot observes, "[i]n the end, there is no single, precise way to state that a particular function or sub-function should be outsourced, but instead a process of reviewing functions or sub-functions as they currently exist in your organization and asking fundamental questions about the nature, contribution, and capability of your organization." Eliot, *supra*, at 14.

143. BAILY, *supra* note 5, at 4-7.

144. For example, Nike ultimately determined that branding is its core competency, and has outsourced all other aspects of its operation. See *supra* note 135 and accompanying text. Other athletic shoe companies insource much more of the work relating to the end product. See, e.g., NEW BALANCE, ABOUT NB, [http://newbalance.com/Domestic-Manufacturing/about\\_domestic\\_manufacturing\\_default.pg.html](http://newbalance.com/Domestic-Manufacturing/about_domestic_manufacturing_default.pg.html) (last visited Nov. 8, 2012).

works. In other words, the outsourcing literature takes a neutral approach to the outsourcing decision, focusing instead on whether businesses carefully engage the core competency analysis and, ultimately, whether outsourcing is successful. They are generally agnostic as to who performs the work.

2. *Outsourcing Childcare.* What, then, does it mean to “outsource” childcare? Playing out the analogy, the family replaces the firm. The default childcare arrangement is parental care performed “in house.” The family weighs whether to outsource this work—whether to collaborate with third parties to provide childcare and then integrate that care into the family’s overall functioning. The outsourcing vendor is the childcare provider—sometimes an extended family member or family friend, but often unrelated to the family.

Before proceeding further, several qualifications are in order. First, I recognize that the differences between families and markets are, in some ways, so vast, that the metaphor alone is discomfiting. This discomfort is surely caused in part by commodification anxiety. The concern is that by placing economic value on certain activities, we will remove all emotional value from them.<sup>145</sup> It’s certainly true that childcare decisions cannot be reduced to simple business transactions. The decision whether to outsource childcare isn’t simply about economic efficiency or leveraging competitive advantage; finding the right balance to maximize utility for all family members is a very different calculus. Nor do I claim that the analogy can entirely capture the nature of relationships in the childcare context. In childcare, the “customer” isn’t an arms-length consumer, but a member of the family itself. Nor are the relationships between families and childcare providers simple arms-length business relationships. There is an intimacy involved in these relationships that the business-outsourcing lens cannot apprehend. And yet, economic concerns are already implicated in family relationships in a variety of ways. At divorce, for example, the law assigns economic value to any number of affective tasks. Recognizing the role of market forces in family life does not necessarily devalue the family. Anxiety around commodification tends to obscure the fact that much family work is already commodified.<sup>146</sup>

Second, to say that parents outsource childcare when they engage third parties to provide that care does not mean that in-house, parental care was, is, or should be the default for *all* families. To use the term “outsourcing” in connection with childcare implies that childcare is an internal family matter, to be addressed privately by parents.<sup>147</sup> The notion that childcare is or should be

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145. See Naomi R. Cahn, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, 5 J. GENDER RACE & JUST. 1, 25-26 (2001).

146. See *id.* at 25-27.

147. In contemporary America, childcare is seen as a private matter to be resolved by individual parents and families, rather than a public concern. See Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J.L. & FEMINISM 185, 188 (2009); see also WILLIAMS, *supra* note 17, at 52-63.

provided exclusively by parents in nuclear families is contested both as an historical matter and a contemporary, normative one.<sup>148</sup>

Finally, I don't pretend to answer the ultimate, existential question: What exactly, are we outsourcing? What is the essence of parenting, of mothering or fathering? The answer to that question is intimate, individual, and disputed.<sup>149</sup>

Even accepting these caveats, the parallels between business outsourcing and childcare decisions are striking. Outsourcing childcare can have many of the same benefits as business outsourcing, providing both economic advantages and a renewed focus on the goals and priorities of particular families. Childcare allows parents to work and to work more effectively, thereby enhancing productivity.<sup>150</sup> Outsourcing also creates jobs, and childcare positions are part of the burgeoning service sector in the American economy.

But like business outsourcing, outsourcing childcare can have drawbacks. Although outsourcing childcare does not implicate job loss in the same way business outsourcing does,<sup>151</sup> a related concern exists: Opponents of outsourced childcare worry that parents are abdicating their role as parents.<sup>152</sup> As a result, many parents feel deep conflict about whether and how much to outsource. Outsourcing childcare also can raise many of the same concerns we have about outsourced workers more generally: exploitation, low pay, long

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148. Exclusive, parental care has not been the norm for families in which parents have worked. History is very different for poor families and African-American families for whom work outside the home was a necessity. See Snyder-Hall, *supra* note 25, at 259; Williams, *supra* note 19, at 1489. "Historically, black women have had high levels of employment and less acceptance of ideas associated with the 'cult of domesticity' which discouraged women's paid work outside the home." Christine Percheski, *Maternal Employment After a Birth: Examining Variations by Family Structure* 28 (Princeton Univ. Woodrow Wilson Sch. of Pub. & Int'l Affairs Ctr. for Research on Child Wellbeing, Working Paper No. 1130, 2008). I don't assume that the locus of childcare should be the mother. In fact, there was a time when children were considered to be charges of their fathers, not their mothers. It was only later that the sex-gender system associated with the "cult of domesticity" channeled childcare to women and gendered it as feminine. See Williams, *supra* note 19, at 1444.

149. See Dorothy E. Roberts, *Spiritual and Mental Housework*, 9 YALE J.L. & FEMINISM 51 (1997); cf. Roberts, *supra* note 35, at 1056 (describing a study in which welfare-to-work staff tried to convince mothers that "caring for children meant providing financial support rather than spending time with them").

150. THE CHALLENGES OF CHILD CARE: EMOTIONAL DECISIONS AND A CONSTANT JUGGLING ACT (NPR radio broadcast Aug. 8, 2011), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=139004597>.

151. When the family outsources childcare, the parent loses the childcare "job." In contrast to displaced workers in the business-outsourcing context, however, parents typically replace unpaid family-care work with paid jobs in the marketplace and they continue to parent their children. That is to say, parents don't lose their "jobs" as parents, and they certainly are not losing a paid position.

152. It seems fairly straightforward to assume that time spent at work is necessarily time that a parent isn't devoting to his or her children. See Acs, *supra* note 71, at 491. Yet here, the numbers are actually pretty heartening. According to the Bureau of Labor Statistic's Annual Time Use Survey, women with children under six and who are employed spend less than six fewer hours per work week caring for children than do women who are not employed. This suggests that despite working outside the home, working parents nevertheless retain significant time to continue applying their core competencies as parents. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE: AMERICAN TIME USE SURVEY – 2011 RESULTS tbl. 8 (2012) (finding that employed women with a household child under six spent an average of 1.82 hours a day caring for and helping household children; unemployed women with a household child under six spent an average of 2.59 hours a day doing the same).

hours, and lack of a safety net.<sup>153</sup> Finally, childcare outsourcing also raises the potential for agency costs. Transferring childcare to others means that parents are less able to monitor care and guard against abuse. Consequently, outsourcing can create incentives for childcare providers to act out of self-interest, leading to poor decisions and lower quality care.<sup>154</sup>

Like business outsourcing, then, childcare outsourcing is culturally and politically fraught. Just as conventional outsourcing pits those who see the globalization of markets as inevitable and desirable against those who would prefer to see clearer boundaries and protections for American workers, outsourcing childcare pits family “globalists” against family “protectionists.” One family’s “efficiency” is seen by others as a distortion of traditional family roles. In fact, one perspective on the Mommy Wars is that it represents a debate about whether families are actually outsourcing motherhood itself, rather than childcare.<sup>155</sup>

Given these similarities, one might focus on any number of parallels the metaphor raises, e.g. cultural debates over insourcing versus outsourcing, implications of outsourcing for those losing their jobs, potential exploitation of outsourcing workers, or effects of outsourcing on the overall quality of care. For now, I set these other parallels aside and instead focus on the feature that speaks directly to the childcare debates I explored in Part I and, indeed, is the genesis of all related concerns: the decision whether to outsource itself.

### *B. Outsourcing’s Insights: A Model for Childcare Decisionmaking*

Viewing childcare decisions through the outsourcing lens provides several insights that inform and expand the childcare debates explored in Part I. First, outsourcing provides a more accurate account of the diverse motivations and

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153. A number of scholars recently have focused on a variety of reforms to ensure more equitable and safe working conditions for domestic care workers. See, e.g., Peggy R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, EMP. RTS. & EMP. POL’Y J. 159, 177-94. Family law scholars have also argued that caregivers’ relationships with children may entitle them to continuing relationships with the children as psychological parents. See, e.g., Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 94-100 (2009). Relatively unexplored, however, is the relationship between parents and caregivers, *not* as an employment relationship, but as an intimate one. The emotional dimensions of this work defy rigid boundaries between “local” and “outsourced” care. Especially in the context of in-home care, these relationships often take on quasi-familial characteristics. We might consider, for instance, what the implications would be if we treated these caregivers like family members rather than employees.

154. See Geis, *supra* note 6, at 973-79.

155. More specifically, the concern is that by outsourcing childcare, women have abdicated their essential roles as mothers or have allowed someone else to become the mother, at least temporarily. See HAYS, *supra* note 20, at 144-45. It is this context that best reveals the gendered nature of the outsourcing issue. Although, writ large, the question is whether the *family* should choose to outsource childcare or keep it “in-house,” from a cultural and political standpoint it is all about the *moms*. The maternal care norm and sentimentality surrounding this norm loom large in the national consciousness. And questions about the desirability of outsourcing motherhood tap into the existential.

decisions parents make regarding childcare. Second, outsourcing uncovers the centrality and normative value of this diversity, rejecting the one-size-fits-all approach in our existing childcare discourse. Third, this normative value of diversity serves as a benchmark by which to evaluate our law and policy, focusing our inquiry on the centrality of choice and neutrality, as opposed to limitations and preferences.

*1. Descriptive Childcare Diversity.* Outsourcing provides a framework for understanding why parents make particular childcare choices. In contrast to the one-dimensional views explored in Part I, the outsourcing model helps us see why different families, like different businesses, will make different decisions about whether and what to outsource.

As in business outsourcing, economics feature prominently in decisions about childcare outsourcing. Parents consider their families' financial needs and then evaluate the cost of providing parent-care versus the expense of outside childcare. But like businesses, not all parents are focused simply on the financial bottom line. The theory of core competencies also helps to explain why different families make different decisions. Like businesses, families make outsourcing decisions based on their overall needs, values, and goals. They consider their unique circumstances and preferences in making these decisions. Like businesses, then, two otherwise similarly situated families may make very different decisions about whether to outsource childcare.<sup>156</sup>

Outsourcing childcare also recognizes that high-quality childcare is a skill, and that many third-party vendors offer their own core competencies in childcare. Outsourcing can enable families to access "best practices" and expertise in childcare, giving children opportunities for enhanced development and enrichment they might not otherwise receive at home.<sup>157</sup> In sum, the outsourcing lens explains that families consider outsourcing for the same reasons that businesses do: economic gains, core competencies, and best practices.<sup>158</sup>

*2. Normative Childcare Diversity.* The outsourcing frame not only explains diverse childcare choices, but also values this diversity as a normative matter. The outsourcing model rejects a monolithic position on whether childcare is best insourced or outsourced. Because best practices in making outsourcing

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156. See *supra* notes 53-75 and accompanying text. For example, one family might put a high priority on having a parent as a full-time caregiver, because under its value system there is no substitute for parental childcare. Another family might decide that having both parents work is most valuable, because that approach provides personal fulfillment for parents, generates economic resources that further childraising goals, and sets a positive example for children about gender roles. The permutations are as numerous as opinions are different.

157. See *supra* note 75 and accompanying text.

158. Outsourcing cannot, of course, offer an explanation of domesticity's continued effect on whether parents outsource and which parent provides in-house care. See *supra* notes 80-92 and accompanying text.

decisions focus on a highly-detailed and firm-specific analysis<sup>159</sup> requiring a clearly defined sense of needs and goals, there is no universal answer to the outsourcing question.<sup>160</sup> Likewise, according to the outsourcing model, there is no single “right” answer to who should care for children. Instead, different families can and should make different, inherently personal childcare decisions according to their own views and values. Simply put, the answer to “should I outsource?” is “it depends.”

Parents, like businesses, should be able to consider both the economic impact of outsourcing and its implications for their mission-critical “core competencies.” Is exclusive parent care one of the family’s core competencies, providing unique value and best practices? Or, is at least some portion of childcare “non-core”—something that could be done as well as or better by outside care providers? Are there other parental core competencies,<sup>161</sup> such as maternal employment, the family can leverage to the family’s economic (or other) advantage? How would outsourcing childcare impact the family’s bottom line, not only in terms of economics, but also in terms of maximizing the family’s unique strengths and overall happiness?

Thus, by rejecting a zero-sum approach, outsourcing turns our attention away from the normative *content* of particular choices that dominates our current discourse and instead to the *quality* and *nature* of childcare decisionmaking. As explored above, the outsourcing model does not concern itself with the ultimate decision to insource or outsource, but instead focuses on whether parents are free to make careful decisions based on their own estimation of goals and competencies. Ultimately, the question is whether families, like businesses, “experience significant improvements in quality, efficiency, and cost-effectiveness,”<sup>162</sup> and are better positioned to achieve their mission-critical goals. These are questions each family must answer for itself. This approach offers an aspirational model of childcare decisionmaking: individualized, and responsive to the goals and desires of particular parents and families.

3. *Childcare Diversity and State Neutrality.* The normative value in diverse outsourcing choices implies a particular role for the state. Outsourcing takes place in the broader context of a market and state that generally accommodate diverse decisions. Businesses are free to organize themselves as they see fit—to buy, sell, hire, and fire—and outsourcing is a natural extension of the (relatively) free market. Firms generally are free to outsource because

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159. See BAILY, *supra* note 5, at 5-8; Barthélemy, *supra* note 122, at 87; Eden & Ackermann, *supra* note 133, at 13; Insinga & Werle, *supra* note 5, at 59-66.

160. See BAILY, *supra* note 5, at 8. Outsourcing experts direct firms to “review their present status, contemplate the environment around them, assess their internal structure and capabilities, and decide what makes sense for their organization to outsource or not to outsource.” Eliot, *supra* note 142, at 15.

161. This idea of parents having multiple core competencies dovetails with an important feminist value: Women can have, and should be empowered to deploy, the full range of human capacities.

162. BAILY, *supra* note 5, at 8.

the law does not direct them to do otherwise.<sup>163</sup> The market responds to both good and bad outsourcing decisions, but the law generally remains neutral absent fraud or unsafe practices. Implicit in this ordering is the assumption that these individualized choices lead to the best market outcomes in the aggregate.<sup>164</sup> Consequently, the state's role typically is limited to defining and enforcing property rights and contract law, prohibiting and punishing fraud and unsafe conditions, and counteracting "market failures."<sup>165</sup>

The outsourcing frame suggests that the law similarly should accommodate family decisions concerning childcare. Parents should have the freedom to decide what their priorities and core competencies are, what aspects of childcare are mission critical, what they uniquely have to offer as caregivers, what values they want to impart to their children, and how to do so. The law should support these various choices, just as it accommodates and supports varied decisions about business insourcing and outsourcing.<sup>166</sup>

In summary, lessons from business outsourcing illuminate existing childcare debates. When practiced effectively, outsourcing can offer a renewed focus on core competencies, quality upgrades for work, productivity, efficiency, and innovation. In fact, many business leaders use the term "transformative outsourcing" to represent its full potential.<sup>167</sup> Understanding childcare decisions as outsourcing decisions provides a more complete descriptive account of childcare decisionmaking and provides a theoretical justification for rejecting a single position in the childcare debates. Outsourcing

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163. That's not to say there have not been attempts to regulate outsourcing. Outsourcing is politically controversial. See LEVI, *supra* note 6, § 1:5.2 (describing the risks associated with outsourcing); Earle, Madek & Madek, *supra* note 115, at 93-94 (describing presidential hopeful Senator John Kerry's criticism of "Benedict Arnold" CEOs); *id.* at 98 (citing allegations that current legislative measures are intended to "pander to public outrage over the loss of American jobs"); *id.* at 117 ("[T]he current spate of anti-outsourcing legislation seems largely fueled by politics rather than sound jurisprudence."); Robert Trumble et al., *International Outsourcing of Knowledge Based Jobs*, 14 INT'L HR J. 2 (2005); *The Great Hollowing-Out Myth*, THE ECONOMIST, Feb. 19, 2004 (characterizing outsourcing as a "hot political issue in America"). The desire to protect American workers and consumers, and to promote American-made products, has resulted in increasing calls to penalize businesses that outsource out-of-state or overseas. Lawmakers have proposed numerous measures to stem the outsourcing of American jobs, including both outright bans and limitations on outsourcing. See generally Earle, Madek & Madek, *supra* note 115, at 94-117 (describing state and federal attempts to restrict business outsourcing); see also Trumble et al., *supra*, at 5. It is unclear whether these legislative attempts to discourage business outsourcing would be constitutional. See generally Earle, Madek & Madek, *supra* note 115, at 94-117 (analyzing the legality of various legislative initiatives).

164. Classical economic theory predicts that well functioning markets tend to produce goods as efficiently as possible. ROBERT H. FRANK & BEN S. BERNANKE, *PRINCIPLES OF MICROECONOMICS* 176 (4th ed. 2009). This prediction is based on Adam Smith's theory of the "invisible hand." in an ideal marketplace, the self-interested actions of individuals or firms will lead to socially efficient outcomes. *Id.* at 298.

165. See *id.* at 305-06, 408-09.

166. I don't mean to suggest that the law should take an entirely *laissez-faire* approach, more generally, to children and childrearing. To the contrary, the state's *parens patriae* interest justifies overriding parental prerogatives in a number of contexts, including compulsory education, child abuse and neglect, and child custody matters.

167. See, e.g., BAILY, *supra* note 5, at 2.

also suggests a specific role for the state in the context of childcare decisionmaking: deference and neutrality.

### III. TRANSFORMATIVE OUTSOURCING: EMBRACING CHOICE AND THE ROLE FOR LAW

As a matter of law and policy, successful business outsourcing relies on a state that generally accepts a variety of outsourcing decisions rather than taking a position on which choices are “right” and “wrong.” The realities of modern American families suggest a similar approach to outsourcing childcare, embracing a diversity of choices. Instead of promoting choice in childcare, however, our current legal system takes sides and constrains choice.

In this Part, I examine how the law interacts with childcare decisions and what it might do better. I begin by making the case for a law and policy approach that prioritizes neutrality for families making childcare decisions. I then critically survey federal laws that impact childcare outsourcing and uncover considerable pro- and anti-outsourcing biases in our current legal framework. Finally, I consider how the law might evolve to better support families’ personal childcare decisions.

#### *A. The Normative Case for Authentic Choice*

As I explored in Part II, a transformative outsourcing approach relies on a state that generally leaves outsourcing decisions to individuals based on their own estimation of goals, core competencies, and values. But of course, it isn’t enough simply to say that because choice is a value in business outsourcing, it should also be a priority in our childcare policy. The question becomes: Why is choice better than childcare policies that give preference to insourcing or outsourcing childcare?

The state inevitably scaffolds and structures the choices we make.<sup>168</sup> And because people make cognitive errors that affect their ability to choose rationally,<sup>169</sup> it seems sensible to argue that the state can—and ought to—“nudge” its citizens in order to channel them toward decisions that would be in their best interests.<sup>170</sup> Despite the appeal of this argument, it can be both difficult and problematic for the state and its “planners” to decide what,

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168. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1165 (2003).

169. See *id.* at 1161.

170. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* 6 (2008) (defining “nudge” as any aspect of choice architecture that alters people’s behaviors in a predictable way without forbidding any options or significantly changing economic incentives); see also Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 913 (2010); Sunstein & Thaler, *supra* note 168, at 1162.

exactly, would improve people's welfare.<sup>171</sup> This is especially true in a context like childcare decisionmaking in which conflicting values and norms are implicated, and in which opposing interests exist.<sup>172</sup>

Instead, embracing choice and neutrality in the childcare context is normatively appealing for several reasons. First, the availability of choice promotes family autonomy<sup>173</sup> and responds to the statistically documented desires of parents. Some want to work outside the home; others don't.<sup>174</sup> Some would like to work less and others more.<sup>175</sup> Giving families greater command over these decisions better enables them to pursue their own goals.<sup>176</sup> Respecting choice recognizes that different parents and families will have differing core competencies,<sup>177</sup> and enables families to maximize efficiencies and utilities in diverse ways. These choices promote overall societal benefits, whether the competencies are represented by paid work or nonmarket work.<sup>178</sup>

171. See Gregory Mitchell, *Review Essay: Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1260-69 (2005); Schlag, *supra* note 170, at 917. This may be less problematic in contexts in which people's preferences are unclear, unstable, or not well-ordered, but, as explored in Part I, *supra*, parental preferences regarding childcare appear to be quite well-defined. See Sunstein & Thaler, *supra* note 168, at 1161.

172. See Schlag, *supra* note 170, at 918, 921. Even advocates of "libertarian paternalism" concede that "for government, the risks of mistake and overreaching are real and sometimes serious." Sunstein & Thaler, *supra* note 168, at 1165.

173. See, e.g., Roberts, *supra* note 35, at 1040 ("There is room for feminists of both persuasions [those advocating for equal participation in paid workforce and those advocating for greater support for caregiving] to work simultaneously on compensating mothers' caregiving while removing barriers to women's equal participation in the market.").

174. See Cahn, *supra* note 87, at 544 (emphasizing that many women and men would like to provide care for children at home).

175. See PEW RESEARCH CTR., FROM 1997 TO 2007 FEWER MOTHERS PREFER FULL-TIME WORK 1 (2007) (saying that six in ten working mothers say part-time work would be ideal; one in five would prefer not to work at all); Parker, *supra* note 16 (stating that 62% of working mothers would prefer to work part-time while 21% of working fathers would prefer to work part-time). In addition, data indicate that TANF's paid-employment emphasis is at odds with many recipients' conception of motherhood. See Roberts, *supra* note 35, at 1056.

176. This position is also consistent with that of "choice" or "third wave" feminism, which exhibits a "deep respect for pluralism and self-determination." Snyder-Hall, *supra* note 25, at 255; see generally *supra* note 25 (summarizing definitions of choice feminism).

177. I don't mean to say that mothers and fathers—men and women—will have generalizable, stereotypically gendered core competencies. See generally GARY BECKER, A TREATISE ON THE FAMILY (1981); JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 4-7 (2000) (critiquing Becker's model of specialization and exchange); Schultz, *supra* note 38, at 1896-98 (same). Nonetheless, it is important to recognize that a focus on choice will mean that some women will elect care work over paid market work. Yet even this choice can be seen as "transgressive" rather than regressive. For example, when African-American women, gay and lesbian parents, and men engage in care-work rather than market-work, providing care for children "can constitute an affirmative political practice of resistance to a host of discriminatory institutions and ideologies, including the family, workplace, and state, as well as patriarchy, racism, and homophobia." Kessler, *supra* note 35, at 3. Even for white women, care work may constitute a form of resistance to our dominant, market-based society. See Cahn, *supra* note 87, at 536.

178. Unencumbered decisions tailor-made by families based on their own unique needs, competencies, and desires maximizes utility, one of the central animating principles of economic analysis. See Anne Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 555 (1995); see also Margaret Ryznar, *To Work or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921, 939 (2009) ("[A]

Second, and relatedly, respecting choice echoes the deep ambivalence felt both individually and at a societal level about these issues. As discussed in Part I, issues of childcare are hotly contested. As such, we might think about childcare decisions as occurring in the context of a market that concerns not only childcare, but also values.<sup>179</sup> Absent harm and in the context of an issue over which there are so many individual and conflicting beliefs, the best position for the state is to facilitate choice rather than to exhibit a preference for one value over another.<sup>180</sup>

Finally, a one-size-fits-all approach disregards the robust diversity of family forms that exist in twenty-first century America—a diversity that is constitutionally sanctioned. The family historically has been considered a locus of pluralism in American society.<sup>181</sup> The law's investment in this pluralism—especially in the context of child-rearing—is manifest in countless family liberty cases. Our constitutional history and norms are explicit in their rejection of the state's substitution of its judgment for that of fit parents on issues of childrearing. The family liberty doctrine accords deep respect and deference to parental decisions about families and children, and especially to decisions about how children are raised and educated,<sup>182</sup> with whom they live,<sup>183</sup> and who has rights to visit those children.<sup>184</sup> As the Supreme Court has consistently affirmed, “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder.”<sup>185</sup> Respecting choice, rather than assuming a universal, normative answer to the childcare question, is not only a worthy policy goal, but also consistent with our longstanding constitutional traditions.

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neutral legal framework would allow married women to allot their time such that their households' utility would be maximized.”)

179. Cf. Robert K. Vischer, *Conscience in Context: Pharmacist Rights & the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83, 85 (2006) (arguing for recognition of “moral marketplace” in which religiously-shaped norms and values are allowed to operate and compete without state interference).

180. Scholars have made similar arguments in the context of pharmacist conscience provisions. *Id.* at 86. That is certainly not to say that there is no role for the state. State intervention often is justified in the face of market failure. Indeed, the childcare market is dysfunctional in a number of ways that may ultimately justify state involvement. See *infra* note 291; see also Meredith Johnson Harbach, *Childcare Market Failures* (work-in-progress) (on file with author).

181. See Claire Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1158 (2010) (explaining that “[f]amilies have long been understood as a site for cultivating pluralism”).

182. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

183. *Moore v. City of East Cleveland*, 431 U.S. 484 (1977).

184. *Troxel v. Granville*, 530 U.S. 57 (2000).

185. *Prince*, 321 U.S. at 166; cf. Franke, *supra* note 39, at 191-92 (“We have delegated to private parties the task of producing and raising the next generation, and we have done so in the absence of any public accountability for what kinds of people this public service produces.”).

*B. Existing “Choices” and the Law*

In contrast to this ideal of neutrality, however, our law and policy on childcare decisionmaking are far from agnostic. Instead, a variety of federal laws influence how we allocate childcare work inside and outside families, as we will see in examining examples from tax, welfare, and family leave law. These policies act to significantly curtail individual choice regarding whether to outsource childcare.

1. *Tax Policy.* Tax policy influences decisions about whether to outsource childcare in several ways. Through existing rules on marital tax filing, the payment of Social Security benefits, and the tax treatment of childcare expenses, existing tax policies reward and encourage single-earner households, especially for wealthy, married families.<sup>186</sup> Although the Internal Revenue Code (the Code)<sup>187</sup> also provides modest benefits to offset some childcare costs for working families, these benefits are not in general sufficient to overcome insourcing bias.

First, marital tax filing rules influence outsourcing decisions. The Code creates joint filing for married couples,<sup>188</sup> by which spouses are taxed as a unit rather than as two individual workers and pay taxes under one marginal rate schedule.<sup>189</sup> Joint filing encourages spouses to think in terms of primary and secondary workers because it “stacks” the lower-earning spouse’s income on top of the higher-earner’s income to determine their taxable income.<sup>190</sup> In effect, then, the first earner is taxed at an initial, lower marginal tax rate, and the second earner is taxed the higher rate triggered as income increases.<sup>191</sup> This

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186. See EDWARD MCCAFFERY, *TAXING WOMEN 2* (1997) (“The tax system, in itself and when combined with the rest of our social, political, and economic life, can have dramatic effects on fundamental decisions such as whether to marry or stay married, to work or not, to work part time or full.”); see also *id.* at 1, 3.

187. 26 U.S.C. (2006).

188. Although “Married, filing separately” is an option, virtually all couples would pay more if they elected it over joint filing. MCCAFFERY, *supra* note 186, at 16, 67.

189. The current income tax framework uses a system of progressive marginal rates, by which the tax rate increases incrementally based on the amount of income earned. In other words, our schedule of tax rates is graduated so that an individual’s tax liability increases at a greater rate as her income increases. MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION 4* (10th ed. 2005). For example, the first \$10,000 earned might not be taxed at all, the next \$20,000 might be taxed at 15%, the next \$30,000 at 30%, and so on. See MCCAFFERY, *supra* note 186, at 14-15. Prior to 1948, the tax code had a system of separate filing for married couples, and couples in which both partners earned relatively equal salaries paid less tax than “traditional” couples in which the man worked and the woman did not. The 1948 change was a result of Congress “coming to the rescue” to create tax neutrality among all married couples. *Id.* at 34. That is, today all married couples pay equal amounts of tax on equal amounts of income, regardless of who earns the income. *Id.* at 23-26 (describing the theory of taxing “equal earning couples equally”).

190. MCCAFFERY, *supra* note 186, at 19-20.

191. See RICHARD SCHMALBECK & LAWRENCE ZELENAK, *FEDERAL INCOME TAXATION 784-85* (2d ed. 2007) (describing “stacking effect”).

higher rate for the second worker leads to “secondary-earner bias” and acts as a disincentive for secondary earners to work outside the home.<sup>192</sup>

Second, the Social Security tax system also exhibits a significant secondary-earner bias and therefore privileges single-earner households. In the current system, spouses of wage earners receive Social Security benefits regardless of whether they themselves have earned income.<sup>193</sup> For example, a spouse receives credit for her own “potential insurance amount” (if she works outside the home) or 50% of her partner’s potential insurance amount, whichever is greater.<sup>194</sup> While alive, the working spouse also receives credit for his benefits, resulting in a combined credit of 150% of the worker’s Social Security benefits.<sup>195</sup> Thus, the couple receives this benefit regardless of whether both spouses are working outside the home.

In contrast, couples in which both spouses work outside the home see a marked increase in their Social Security tax liability, accompanied by only trivial increases in actual benefits.<sup>196</sup> Under this system, there is no marginal return for secondary earners (although they are paying social security taxes), until their income equals or exceeds 50% of the primary earner’s income, and does so consistently over time.<sup>197</sup> To the extent one worker earns less than the other, the couple’s overall Social Security benefits will be the same as a couple with only one earner: 150% of the higher-earner’s benefits. Unlike the single-earner couple, however, both the husband and wife in a two-earner couple will have been paying into the Social Security system. Thus, while both couples receive the same benefits in terms of *payout*, the two-worker couple’s benefit is offset by both the husband’s *and* wife’s payment *into* the system, reducing their net receipt of benefits. For many couples, the secondary earner’s Social Security contributions will be all tax, no benefit.<sup>198</sup>

The combined effects of secondary earner bias within the income and Social Security tax systems affect decisions about work and childcare. Families sit down and do the math: After factoring in lower salaries, taxes, and

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192. MCCAFFERY, *supra* note 186, at 65 (describing increasing tax burdens for secondary earners); see also Shari Motro, *A New “I Do”: Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1534 (2006). Single parents, of course, don’t face secondary-earner bias and the consequent channeling that accompanies it.

193. The literal language of the initial statute was phrased in these gendered terms of “husband” and “wife,” presuming the wife to be either a secondary worker, or to not work at all. MCCAFFERY, *supra* note 186, at 99.

194. *Id.* at 95.

195. Upon the husband’s death, the wife receives the greater of her own benefits or 100% of her husband’s benefits. *Id.* at 95.

196. *Id.* at 96-97, tbl.10.

197. *Id.* at 95.

198. “[U]nless a woman is to earn a significant proportion of her husband’s salary and persistently stay in the paid workforce, her social security contributions are a pure tax.” *Id.* at 98. In fact, the structure of the Social Security system results in distributive transfers from two-earner families to one-earner families. *Id.* at 100 (discussing work by Puffert and Steuerle & Bakija).

additional expenses such as childcare costs, the choice to work outside the home results in a net loss for many families.<sup>199</sup>

Finally, the tax system's treatment of childcare expenses also exhibits a preference for insourced childcare in married families. When a married parent elects to stay home and care for children rather than work outside the home, that parent "earns" whatever amount the family otherwise would have spent on childcare. This self-employment creates a noncash benefit called "imputed income," which isn't taxed and thus essentially is treated as a deduction.<sup>200</sup> Married couples with a full-time homemaker have significantly more imputed (and therefore, untaxed) income than other taxpayers.<sup>201</sup>

Now imagine, instead, that the same parent works outside the home and pays someone else for childcare. There is no deduction for childcare expenses. The amount of the parent's salary spent on childcare is taxed like all other income.<sup>202</sup> Rather than a deduction, the family would receive a tax credit for childcare, offsetting only a fraction of childcare expenses.<sup>203</sup>

In sum, when considering secondary-earner bias and the tax treatment of childcare, two married couples with the same income can have vastly different available resources, depending on whether one spouse works outside the

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199. Moreover, when combined with the Earned Income Tax Credit ("EITC"), secondary-earner bias has especially stark consequences for low-income families. *See id.* at 81-84. In contrast to effects on middle- and upper-income families, secondary-earner bias works to discourage marriage itself among the relative poor. *Id.* at 83-84.

200. *See id.* at 26; SCHMALBECK & ZELENAK, *supra* note 191, at 121-24. Our tax system permits deductions from gross income for business expenses to get to net, taxable income. *Id.* at 107. Deductions are outlays and expenditures that the Internal Revenue Code permits to be subtracted from gross income before arriving at an individual's taxable income. CHIRELSTEIN, *supra* note 189, at 1-2. Deductions thus decrease overall tax liability by lowering the amount of money that is taxed. *Id.* at 2. Deductions thus affect tax liability *ex ante*, and their dollar value depends on the applicable tax rate. *Id.*

201. MCCAFFERY, *supra* note 186, at 26; SCHMALBECK & ZELENAK, *supra* note 191, at 122-24.

202. In general, no deductions are permitted for personal, living, or family expenses (expenditures are not deductible unless they represent the costs of producing income). *See* 26 U.S.C. § 262(a) (2006). Because services like housekeeping and in-home childcare are considered "personal expenses" rather than related to the costs of acquiring income, childcare expenses are not deductible. *See* Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 677 (2011). Commuting expenses are treated in the same way. SCHMALBECK & ZELENAK, *supra* note 191, at 725-26. Put another way, childcare and housekeeping expenses, like commuting expenses, are part of a category of additional expenses that are incurred by working for a living—part of the "everyday expenses of being employed," and that Congress has never intended to include these types of "universal" expenses to be included as deductions. CHIRELSTEIN, *supra* note 189, at 109. "The underlying principle seems to be: If we can imagine another taxpayer with the same job, but with a different personal life (no child in one case, a home across the street from work, in the other) who would not incur the expense, then the expense is not treated as a business expense." SCHMALBECK & ZELENAK, *supra* note 191, at 726.

203. CHIRELSTEIN, *supra* note 189, at 109 n.2. A two-earner couple grossing \$80,000 (\$40,000 each) will have to outsource the work that would otherwise be done by a stay-at-home spouse. If they purchase replacement services, their net disposable income will be less than that of a couple in which one spouse provides the services herself. The replacement services will not be deductible and both couples will have the same taxable income, despite the two-earner couple being less well off financially. SCHMALBECK & ZELENAK, *supra* note 191, at 123.

home.<sup>204</sup> The impact of this differential treatment is to encourage married couples to insource childcare.

Despite these significant disincentives to outsourcing, the Code does provide some modest benefits to families that outsource childcare.<sup>205</sup> First, the Child and Dependent Care Credit provides taxpayers who work or who are looking for work a tax credit for a percentage (20-35%)<sup>206</sup> of qualifying childcare expenses (\$3,000 for one qualifying individual; \$6,000 for two or more).<sup>207</sup> This credit is then subtracted from overall tax liability.<sup>208</sup> This credit is a muted benefit—the maximum potential credit is \$2,100—and is much less valuable for many than the de facto deduction created by tax-free imputed income.<sup>209</sup>

The Code's second childcare benefit is the "Dependent Care Assistance Program" (DCAP).<sup>210</sup> DCAP applies to both on-site childcare facilities provided by employers and to cash reimbursements of an employee's childcare expenses.<sup>211</sup> In the reimbursement scenario, employees elect to have a certain amount (up to the statutory cap) withheld from their paychecks. The employer then reimburses these expenses, up to the amount of the salary reduction. These

204. SCHMALBECK & ZELENAK, *supra* note 191, at 122-23.

205. The Code also provides another type of tax benefit for married parents with dependent children. They include the dependency exemption (I.R.C. § 151), the child credit (§ 24), and "head of household" filing status (§ 2(b)). MCCAFFERY, *supra* note 186, at 725, 729-35. These three benefits are triggered simply by virtue of being the parent of a dependent child, without reference to whether a family incurs childcare expenses as a result. *Id.* at 725.

206. 26 U.S.C. § 21(a)(2) (2006).

207. 26 U.S.C. § 21(c) (2006). Tax credits, like deductions, function to decrease overall tax liability, but in a different way. Rather than decreasing the overall taxable income on which tax liability is calculated, tax credits are applied *ex post*—after the tax liability on taxable income has been calculated. CHIRELSTEIN, *supra* note 189, at 2.

208. See CHIRELSTEIN, *supra* note 189, at 2. The expenses eligible for the credit are capped based on whether the taxpayer is securing care for one or more "qualifying individuals," generally children under age 13 or another who is unable to care for herself or himself. For most middle-class workers, the applicable credit percentage will be 20% of the capped eligible amount, but it can reach as high as 35% of the eligible expenses. SCHMALBECK & ZELENAK, *supra* note 191, at 726-27. If, however, either spouse earns less than the allowable childcare expenses under the statute (\$3,000 for one qualifying individual; \$6,000 for two), the couple does not receive the full benefit of the credit. The credit is instead limited to a percentage of what the lower-earner actually earned, rather than the statutory cap for allowable expenses. 26 U.S.C. § 21(d)(1)(B) (2006); see also Ryznar, *supra* note 178, at 931.

209. SCHMALBECK & ZELENAK, *supra* note 191, at 726-27. This will frequently be the case because the credit percentage is lower than would be the marginal tax rate implicated by a business deduction and because the childcare credit's eligible expenses are capped. Schmalbeck and Zelenak provide this example: "Consider . . . a taxpayer with a marginal rate of 28 percent who spends \$10,000 on work-related childcare for her only child. If she were allowed a \$10,000 business expense deduction, her tax savings would be \$2,800. By contrast, her [childcare] credit is only \$600 (20% of [the capped eligible amount] \$3000." Thus, the childcare credit is perhaps more accurately viewed as a congressional effort to subsidize childcare costs for working families, albeit not by very much. *Id.* at 727. The use of a credit rather than a deduction and the capping of eligible expenses can be justified as ensuring some vertical equity—that is, making sure that the largest benefits don't go to higher earners. Yet another goal of these sorts of tax policies might instead be horizontal equity: equal treatment among taxpayers with the same income, but with different family responsibilities. *Id.* at 730.

210. 26 U.S.C. § 129 (2006). The exclusion is capped at \$5000. *Id.* § 129(a)(2)(A).

211. SCHMALBECK & ZELENAK, *supra* note 191, at 728.

reimbursement dollars under DCAP are tax-free. Because the net result is equivalent to a limited deduction for childcare expenses the exclusion has the potential to be more beneficial for many working families than the childcare credit.<sup>212</sup> Unfortunately, the exclusion has only a limited impact because employers must *elect* to participate in the DCAP, which is logistically complicated and expensive to administer.<sup>213</sup>

Considered as a whole, then, our tax policies express a preference for insourced, parental childcare in marital families.<sup>214</sup> Their practical effect is to constrain—rather than accommodate—individual family decisions about childcare.<sup>215</sup>

2. *Public Assistance Policy.* Like tax policy, our welfare laws have demonstrable effects on decisions whether to outsource childcare. Here, I explore the impact of three policies in particular: the Earned Income Tax Credit (“EITC”),<sup>216</sup> Temporary Assistance to Needy Families (“TANF”),<sup>217</sup> and the Child Care and Development Fund (“CCDF”).<sup>218</sup>

The EITC is an antipoverty wage subsidy<sup>219</sup> for poor, working families with children.<sup>220</sup> Unlike most tax credits, the EITC is refundable,<sup>221</sup> and

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212. 26 U.S.C. § 129(e) (2006).

213. SCHMALBECK & ZELENAK, *supra* note 191, at 728.

214. *Id.* at 124. Of course, for family protectionists who view full-time parental childcare as the ideal, this antioutsourcing bias is salutary. See Ryznar, *supra* note 178, at 936 (“[T]he flip side of the tax code’s disincentives for the secondary earner to work is that it incentivizes her to remain at home with children by lowering her spouse’s tax bill if she abstains from paid work. In this way, the current tax code offers a subsidy for one parent to remain at home.”).

215. In addition to constraints on childcare decisions, efficiency costs are also a concern. For some parents facing the decision whether to stay at home or work outside the home, the value of a paid salary will exceed the value of imputed income—providing homemaking and childcare services for the family. From an economic, market perspective on the value of potential wage, society as a whole would benefit if the parent took the market job because it is more valuable. But because of secondary-earner bias, the lack of deductions for childcare, and the cost to replace imputed income, many families would ultimately lose money even though the salary’s dollar value would exceed that of imputed income for homemaking and childcare. Thus, the disparate tax treatment for secondary earners of working at home versus working outside the home will frequently channel parents toward insourced work and care, even when society as a whole (not to mention the parent, the family, and others) might derive more overall benefit from their paid work outside the home. See SCHMALBECK & ZELENAK, *supra* note 191, at 123.

216. 26 U.S.C. § 32 (2010).

217. 42 U.S.C. §§ 601-19 (2012).

218. 45 C.F.R. §§ 98.1-98.102 (2007). The CCDF was established under the Child Care and Development Block Grant Act of 1990, 42 U.S.C. § 9858 et seq. (1996).

219. Although administered through the federal income tax system as a refundable tax credit, the EITC is broadly recognized as a species of welfare program. See, e.g., Alstott, *supra* note 178, at 534 (1995) (characterizing EITC as a kind of welfare program that uses the rules and procedures of the federal income tax system to make income transfers to low-income workers); Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1177 (2006) (EITC’s “history, structure, and purpose always have been intertwined tightly with the relationship between work and welfare). The EITC is described as the “most significant federally administered anti-poverty program.” SCHMALBECK & ZELENAK, *supra* note 191, at 761. The EITC provides more money in subsidies than either TANF or the federal food stamps program. Jennifer Bird-Pollan, *Who’s Afraid of Redistribution? An Analysis of the Earned Income Tax Credit*, 74 MO. L. REV. 251, 261 (2009).

220. SCHMALBECK & ZELENAK, *supra* note 191, at 759. A small credit is provided for childless workers, but the amount is increased depending on the number of “qualifying children,” and is phased out as AGI (adjusted gross income) increases. 26 U.S.C. §§ 32(a)(2)(B) & (b)(1)(A) (2006);

generally is received as a cash transfer rather than a reduction in tax owed.<sup>222</sup> Because the EITC is only available to taxpayers who have earned income,<sup>223</sup> an eligible individual, or at least one eligible spouse in a married couple,<sup>224</sup> must work to be eligible for the EITC.<sup>225</sup>

Like the income tax and Social Security systems, the EITC affects the market work participation of parents and therefore decisions about whether to outsource childcare. The EITC's impact on outsourcing decision depends on marital status. Because of its earned income requirement, the EITC encourages the employment of unmarried parents with children.<sup>226</sup> But the EITC works differently for married families, largely mirroring the effects of the income and social security tax systems. The EITC typically creates negative incentives for secondary earners to work because stacking secondary income can move a couple's income out of the EITC credit range.<sup>227</sup>

The Temporary Assistance for Needy Families Program ("TANF"), a federal block grant program that provides states, territories, and tribes with federal funds to provide benefits targeted at needy families,<sup>228</sup> also constrains

SCHMALBECK & ZELENAK, *supra* note 191, at 760-61. Recent changes were made to the EITC in the American Recovery and Reinvestment Act of 2009, increasing eligible income ceilings and credit amounts, and creating new benefits eligibility for taxpayers with three or more children rather than the original two. 26 U.S.C. § 32(b)(3); Bird-Pollan, *supra* note 219, at 254.

221. By contrast, most tax credits are nonrefundable, meaning that they have value only if the taxpayer has tax liability from which the credit can be subtracted, and cannot be used to receive a net transfer from the government. SCHMALBECK & ZELENAK, *supra* note 191, at 732, 759.

222. *Id.* at 760. Less than 20 percent of program monies take the form of true credits, i.e., reductions in existing tax liability. The remainder of the funds take the form of cash transfers. *Id.* at 761.

223. 26 U.S.C. § 32(a); Alstott, *supra* note 178, at 556 (EITC recipients cannot cease working altogether and continue to receive EITC benefits); Bird-Pollan, *supra* note 219, at 260.

224. The EITC is calculated based on family, rather than individual, income. Nada Eissa & Hilary Williamson Hoynes, *Taxes & the Labor Market Participation of Married Couples: The Earned Income Tax Credit*, 88 J. PUB. ECON. 1931, 1935 (2004).

225. See CHIRELSTEIN, *supra* note 189, at 204 ("[T]he subsidy is directed and largely confined to low-wage people who do hold jobs and do earn taxable income, and who also have parental responsibilities."). Despite this requirement, critics charge that the EITC, like other public assistance programs, creates disincentives to work. Bird-Pollan, *supra* note 219, at 262-66.

226. Eissa & Hoynes, *supra* note 224, at 1932, 1937. Perhaps ironically, then, the EITC has been politically packaged as a childcare program. Alstott, *supra* note 178, at 540 & n.30 (noting that in the 1980s and 1990s, the first Bush administration characterized the EITC as a way to fund childcare for poor workers).

227. Once the secondary earner's income is "stacked" on top of the primary earner's, the family's overall income frequently moves out of the EITC credit range and into the EITC's phase-out range. Eissa & Hoynes, *supra* note 224, at 1936. The family's tax status moves from refundable tax credit eligibility to having taxable income. When the resulting non-EITC-eligible income is also subjected to social security tax, as well as federal and state income tax, marginal tax rates can exceed 50%. *Id.* Eissa and Hoynes estimate that approximately three-quarters of EITC recipient and eligible families have income in the phase-out range, where they are subject to the highest marginal rates. *Id.* at 1937.

228. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF FAMILY ASSISTANCE, TANF FACTSHEET 1 (2009), available at [http://www.acf.hhs.gov/opa/fact\\_sheets/tanf\\_factsheet.pdf](http://www.acf.hhs.gov/opa/fact_sheets/tanf_factsheet.pdf) [hereinafter TANF FACTSHEET]. TANF replaced and revolutionized the older welfare programs of Aid to Families with Dependent Children (AFDC), the Job Opportunities and Basic Skills Training (JOBS), and the Emergency Assistance program. *Id.*; Zatz, *supra* note 219, at 1131. This fulfilled President Clinton's promise to "end welfare as we know it." LIZ SCHOTT, AN INTRODUCTION TO TANF 1 (2011), available at <http://www.cbpp.org/files/7-22-10tanf2.pdf> [hereinafter INTRODUCTION TO TANF]. TANF ended an

childcare decisions. States vary in how they implement TANF's work requirements.<sup>229</sup>

TANF is specifically targeted at parents<sup>230</sup> and requires them to work in exchange for benefits.<sup>231</sup> Failure to satisfy TANF's work requirements can result in reduction or termination of benefits.<sup>232</sup> Work activities, as defined by the statute, do not include providing childcare for one's own healthy children,<sup>233</sup> although providing childcare for *another* individual who is engaged in TANF's definition of community service does constitute "work."<sup>234</sup> Thus, although TANF purports to "provide assistance to needy families so that

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entitlement to federal assistance, *see* 42 U.S.C. § 601(b), and instead transformed welfare into a program of temporary assistance conditioned on work. TANF FACTSHEET, *supra*, at 2-3; Zatz, *supra* note 219, at 1138-39.

229. TANF is a block grant program that leaves implementation to the states. *See generally* Zatz, *supra* note 219, at 1143-66 (detailing variation among state approaches to TANF's work requirements). States receive block grants from the TANF program conditioned on compliance with statutory requirements. 79 AM. JUR. 2D *Welfare* § 8 (2010); 81 C.J.S. *Social Security and Public Welfare* § 210 (2010). TANF's requirements are enforced at the state level through the statute's participation requirements, which specify that a particular percentage of states' TANF caseloads must be "engaged in work." 42 U.S.C. §§ 607(b)-(c); Zatz, *supra* note 219, at 1140. Within TANF's framework, however, participating states have broad discretion in how they implement TANF's policies and use the funds. INTRODUCTION TO TANF, *supra* note 228, at 2; 81 C.J.S. *Social Security and Public Welfare* § 210, *supra*.

230. Funds are available only for families with minor children or that include a pregnant woman. 42 U.S.C. § 608 (a)(1).

231. In order to receive TANF funds, recipients must engage in work as soon as they are "job ready," or no later than two years after they begin receiving assistance. TANF FACTSHEET, *supra* note 228, at 2. Indeed, Dorothy Roberts characterizes the primary goal of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 as "mov[ing] mothers from welfare to the paid workforce." Roberts, *supra* note 35, at 1029-30. To be clear, however, TANF does not require that 100% of a state's welfare recipients be "working" under federal law. Zatz, *supra* note 219, at 1144. A significant number of states don't exempt pregnant mothers or parents of young children from the general work requirement. DAVID KASSABIAN ET AL., WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2010, 36-38, 106-09, (2011), *available at* <http://anfdata.urban.org/databooks/Databook%202010%20FINAL.pdf> [hereinafter WELFARE RULES DATABOOK]. By contrast, some states have declined to mandate work from single custodial parents of children younger than one year old. *Id.* at 106-09; *see also* 42 U.S.C. § 607(b)(5). Some states also decline to require parents of very young children to perform a mandatory job search upon initial application for TANF benefits. WELFARE RULES DATABOOK, *supra*, at 36-38 (New Jersey exempts women in at least their fourth month of pregnancy; South Carolina exempts women during or after the seventh month of pregnancy; Missouri exempts women in their third trimester of pregnancy; Minnesota exempts individuals caring for a child under twelve weeks old; Alaska, Georgia, Louisiana, Maryland, and Missouri exempt individuals caring for a child under twelve months old; New Jersey exempts individuals caring for children under two years; Hawaii exempts individuals caring for children under six years).

232. 42 U.S.C. § 607(e).

233. Zatz, *supra* note 219, at 1161-62. "Work activities" include: unsubsidized or subsidized employment; work experience; on-the-job training; job search/job readiness assistance; community service; vocational educational training; job skills training directly related to work; education directly related to employment; satisfactory secondary school attendance; and providing childcare services to individuals who are participating in community service. 42 U.S.C. § 607(d). Since 2006, Congress has directed the DHH to issue regulations defining work. *See* 45 C.F.R. § 261.30 (2012).

234. 42 U.S.C. § 607(d)(12). As of 2006, most states had excluded this as a separate work activity. Zatz, *supra* note 219, at 1148-49; *see also id.* at 1150 tbl.1 (listing states that permit care for other TANF recipient children as exclusion from work activities).

children may be cared for in their own homes,<sup>235</sup> the work requirements will undercut that goal for many low-income families.<sup>236</sup>

Like tax policy, TANF approaches single-parent households and “two-parent families” differently.<sup>237</sup> Single parents, most of whom are mothers,<sup>238</sup> must work for an average of thirty hours a week or an average of twenty hours if they have a child younger than six.<sup>239</sup> Two-parent families must participate in work activities for an average of either thirty-five hours a week or, if they receive federal childcare assistance, fifty-five hours a week.<sup>240</sup> But some states implement TANF’s requirements for two-parent families in such a way that only one parent is required to work.<sup>241</sup> Consequently, one parent is available to provide full-time care for children, if the parents so desire. Other states require both parents in a two-parent family to engage in work activities, but include exemptions that enable full-time parental caretaking under specified circumstances.<sup>242</sup>

Overall, then, TANF signals a preference for outsourcing childcare, as distinct from much of the tax policy explored above. But TANF’s preference is

235. 42 U.S.C. § 601(a). Other purposes include: to end low-income parents’ dependence on government benefits by promoting job preparation, work, and marriage; to prevent and reduce childbirth outside of marriage; and to encourage two-parent families. *Id.* § 601.

236. The second central feature of TANF is that states are not permitted to use the federal grants to extend benefits to any particular recipient for more than five years. 42 U.S.C. § 608(a)(7).

237. The program is explicit about its goals to promote two-parent, married families and discourage procreation outside of marriage. *See* 42 U.S.C. § 601(a)(3)-(4).

238. *See* U.S. DEP’T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): EIGHTH ANNUAL REPORT TO CONGRESS, CHARACTERISTICS & FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS, ch. 10 at x-9, available at <http://archive.acf.hhs.gov/programs/ofa/data-reports/annualreport8/ar8index.htm> (finding that 90% of adult TANF recipients are women; almost 95% are heads of households; and 89% are unmarried).

239. 42 U.S.C. § 607(c)(2)(B). States cannot, however, penalize single parents with children under six for failure to satisfy work requirements if they cannot secure adequate childcare. 42 U.S.C. § 607(c)(2). As documented by Dorothy Roberts, TANF’s push toward paid employment for mothers was a radical departure from earlier welfare policies that encouraged low-income mothers to care for their children at home rather than work. Roberts, *supra* note 35, at 1032-35.

240. 42 U.S.C. § 607(c)(1)(B).

241. States vary in their implementation of the work requirement for two-earner families. Some states impose these hour requirements on the family as a *unit*, meaning that an individual in a two-person family will receive benefits as long as at least one parent is working and fulfilling the hours requirements. *See, e.g.*, DEL. DEP’T OF LABOR, TANF POLICY 19 – TWO PARENT FAMILIES (2010), available at <http://det.delawareworks.com/rfp-contract-services/documents/TANFPolicy19-TwoParentFamiliesREV12222010.doc> (clarifying that a family must meet requirements as a unit and that the family is entitled to one payment if one parent opts to do all hours); Choices: Program Overview, TEX. WORKFORCE COMM’N (Feb. 17, 2012), <http://www.twc.state.tx.us/welref/choices-program-overview.html> (stating that one or both adults in a two-parent household are responsible for meeting the family’s mandatory work requirement); *see also* Zatz, *supra* note 219, at 1142 n.50 (“[F]or married couples receiving TANF, one parent need not work at all so long as child-care is not being provided by someone else.”).

242. *See, e.g.*, ARIZ. SENATE RESEARCH STAFF, ARIZ. SENATE ISSUE BRIEF, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES 3 (Sept. 19, 2012), available at [http://www.azleg.gov/briefs/Senate/TEMPORARY%20ASSISTANCE%20FOR%20NEEDY%20FAMILIES\\_UPDATE.pdf](http://www.azleg.gov/briefs/Senate/TEMPORARY%20ASSISTANCE%20FOR%20NEEDY%20FAMILIES_UPDATE.pdf) (“Individuals exempt from participating in work activities include an adult single parent or caregiver caring for a child under the age of 12 months, an unmarried minor caring for a child under the age of 12 weeks, disabled persons or caregivers of disabled persons, and dependent children.”).

far more overt, and it does far more than simply channel or influence decisions about whether to work outside the home and outsource childcare. In fact, it is constrictive.<sup>243</sup> For single parents, TANF *requires* at least some outsourcing of childcare. And data indicate that in the wake of this new program the number of single parents who are working has increased significantly.<sup>244</sup> By contrast, married and two-parent families have more options regarding whether to outsource childcare. Thus, like tax preferences, TANF requires single parents to work and therefore outsource, while making it easier for two-parent families to avoid outsourcing by combining efforts to provide parental childcare at home.

The federal government also provides childcare assistance for low-income families. The Child Care and Development Fund works in conjunction with TANF to “[p]rovide low-income families with the financial resources to find and afford quality child care for their children.”<sup>245</sup> Consistent with TANF’s focus on work, the Fund focuses on childcare assistance because it enables low-income parents to work. The Department of Health and Human Services characterizes the Fund as enabling “low income parents and parents receiving . . . [TANF] to work or to participate in the educational or training programs they need in order to work.”<sup>246</sup> This policy at least recognizes something that the income and Social Security tax systems arguably don’t: For parents, reliable childcare is a precondition for work and therefore an inevitable need for working parents. Unfortunately, the resources allocated cannot address the childcare needs of all low-income parents.<sup>247</sup>

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243. See Roberts, *supra* note 35, at 1030. This lack of choice regarding paid work or childcare is consistent with TANF’s more general approach. Recipients are not free to pursue work requirements as they see appropriate. Instead, they must choose from the federal/state “menu” of legally sanctioned work activities. Zatz, *supra* note 219, at 1147.

244. INTRODUCTION TO TANF, *supra* note 229, at 3-4.

245. 45 C.F.R. § 98.1(b)(1); see also Roberts, *supra* note 35, at 1046-52. A portion of the Fund also goes toward improving childcare quality. U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF CHILDCARE, CHILD CARE & DEVELOPMENT FUND FACT SHEET (2010), available at <http://www.acf.hhs.gov/programs/occ/ccdf/facsheet.htm>. [hereinafter, FUND FACT SHEET]. As with TANF, states have discretion over how to use funds they receive; for example, states determine income eligibility for day care assistance. ANDREW W. DOBELSTEIN, UNDERSTANDING THE SOCIAL SECURITY ACT: THE FOUNDATION OF SOCIAL WELFARE FOR AMERICA IN THE TWENTY-FIRST CENTURY 192 (2009).

246. U.S. DEP’T OF HEALTH & HUMAN SERVS., RECOVERY PROGRAMS, CHILD CARE & DEVELOPMENT FUND (2012), available at <http://www.hhs.gov/recovery/programs/acf/childcare.html>. TANF’s purpose is to “[a]ssist States to provide child care to parents trying to achieve independence from public assistance.” 45 C.F.R. § 98.1(a)(4). In keeping with TANF’s dramatic shift in welfare policy, the focus on childcare assistance for low-income families has shifted from an emphasis on supporting children in trouble to supporting working mothers. DOBELSTEIN, *supra* note 245, at 192-93.

247. The number of children whose families receive CCDF subsidies is on the decline. See U.S. GOV’T ACCOUNTABILITY OFFICE (GAO), CHILD CARE: MULTIPLE FACTORS COULD HAVE CONTRIBUTED TO THE RECENT DECLINE IN THE NUMBER OF CHILDREN WHOSE FAMILIES RECEIVE SUBSIDIES (2010). Recent studies estimate that about one-third or fewer of eligible children are receiving CCDF subsidies. *Id.*

Viewed in the aggregate, our welfare policies are less averse to outsourced childcare than is our tax policy. TANF actually requires parents to outsource in order to receive assistance. The CCDF provides subsidized childcare for low-income families, supporting TANF's work requirements and accommodating other parents' decisions to work. Yet even these policies manifest different preferences for different families, requiring outsourcing for single-parent families, but accommodating a greater range of options for two-parent families. As with tax policy, we see a system of preferences and incentives that tends to channel childcare decisions in a particular direction, rather than accommodating and supporting individual preferences.

*c. Family Leave Policy.* The Family and Medical Leave Act (FMLA) requires employers to accommodate workers who are caregivers.<sup>248</sup> Specifically, the FMLA entitles qualified workers to take twelve weeks of unpaid leave per year to care for a newborn, newly adopted, or newly fostered child, or to care for a child with a serious health condition.<sup>249</sup>

Although conceived of and characterized as a work-life balance statute, viewed through the outsourcing lens, the FMLA gives parents an opportunity to insource some childcare for a limited duration without the risk of losing employment. Congress explicitly recognized the value of parental childcare in the FMLA context: “[I]t is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members.”<sup>250</sup> This acknowledgment suggests at the very least a solicitude, if not a preference, for insourced childcare.

Yet the FMLA's actual benefit is a meager one.<sup>251</sup> First, the FMLA only applies to a subset of childcare situations. It is limited to discrete triggers relating to childcare: childbirth and newborn care, or caring for a child with a serious health condition.<sup>252</sup> These limited triggering events fail to address the more quotidian parenting disruptions that arise when caring for children, like

248. 29 U.S.C.A. § 2612(a)(1) (2006).

249. *Id.* § 2612(a)(1)(A)-(E).

250. *Id.* § 2601(a)(1). Congress also explicitly recognized the gendered nature of childcare responsibilities, finding that “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.” *Id.* Moreover, Congress observed, “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.” *Id.*

251. Congress originally contemplated a broader scope. The first bill would have required eighteen weeks of unpaid parental leave and would have applied to all employers with five or more employees. *See generally* Parental and Disability Leave Act, H.R. 2020, 99th Cong. (1985); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39 (1994).

252. 29 U.S.C. § 2612(a)(1)(A)-(E) (2006). A “serious health condition” is an “illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a care provider.” 29 U.S.C. § 2611 (2006).

childhood illnesses, school conferences, and childcare failures<sup>253</sup>—other activities that we might consider elements of parents’ “core competencies.”

Second, the FMLA applies only to a subset of businesses and employees. It exempts small businesses, applying only to employers who have at least fifty employees working daily within seventy-five miles of a worksite<sup>254</sup> for at least twenty work-weeks per calendar year.<sup>255</sup> Additionally, employees must log at least twelve months with the employer, and must have worked at least 1,250 hours during that year, to invoke the FMLA’s protections.<sup>256</sup> Thus, because most private businesses are relatively small, and because employees must complete at least one year of work to qualify, the FMLA fails to protect a significant number of parents.<sup>257</sup> These exemptions disproportionately impact low-income parents.<sup>258</sup> Over half of all low-wage workers work for small businesses, which are less likely to be covered by the FMLA.<sup>259</sup> Likewise, the probationary work requirement disproportionately impacts low-wage workers whose work history tends to be short and sporadic, especially those currently and previously receiving public assistance.<sup>260</sup>

Finally, and most starkly, only a subset of eligible employees can afford to take FMLA leave because the law does not require that the leave be paid.<sup>261</sup> Consequently, of those using FMLA leave, 34% received no compensation.<sup>262</sup> Lack of wage replacement is especially significant for single parents and low-income workers.<sup>263</sup> In the most recent U.S. Department of Labor Survey, the inability to afford unpaid leave was by far the most significant reason eligible

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253. See Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 J. L. & POL’Y 193, 194-95, 216-17 (2004).

254. 29 C.F.R. § 825.110(a)(3) (2010).

255. 29 U.S.C. § 2611(4)(A)(i) (2006)

256. *Id.* § 2611(2)(A).

257. Among parents with children eighteen months or younger, 74.8% work at FMLA-covered workplaces, and 62.2% of parents with young children working at these businesses were eligible for FMLA leave. See DAVID CANTOR, ET AL., *BALANCING THE NEEDS OF FAMILIES & EMPLOYERS: FAMILY & MEDICAL LEAVE SURVEYS 4-15* (2001), available at <http://www.dol.gov/whd/fmla/toc.htm>.

258. Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERK. J. EMP. & LAB. L. 1, 39 (2007).

259. *Id.* at 42-43.

260. *Id.* at 43-44.

261. 29 U.S.C. § 2612(c) (2006).

262. WORKPLACE FLEXIBILITY 2010, GEORGETOWN UNIVERSITY LAW CENTER, FAMILY & MEDICAL LEAVE: SELECTIVE BACKGROUND INFORMATION 2-3 (2010), available at <http://scholarship.law.georgetown.edu/legal/31> [hereinafter WORKPLACE FLEXIBILITY 2010].

263. The pay concession came despite congressional understanding of the special needs of these two demographics. The FMLA was intended in part to respond to the continuing growth of single-parent households. See S. REP. NO. 103-3, at 3, 6-7 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 8-9. The Senate also recognized the special vulnerability of low-wage workers, concluding that this demographic was most in need of family leave protections. *Id.* at 15-16, reprinted in 1993 U.S.C.C.A.N. at 17-18.

employees did not use FMLA leave,<sup>264</sup> and among those leave-takers who took leave with less than full pay, 9% had to go on public assistance.<sup>265</sup>

The intersection of FMLA's exemptions and TANF can lead to especially problematic outcomes. In many instances, *neither* TANF *nor* the FMLA will enable low-income parents to insource childcare. As explored above, TANF generally will not support parents unless they work outside the home. The FMLA frequently will not apply to low-income parents who work in order to receive TANF benefits because the jobs most TANF recipients hold are exempt from the FMLA. Even when the FMLA applies, few TANF recipients would be able to afford unpaid leave.<sup>266</sup> As in other contexts, we see the ability to provide parent-care for children impacted significantly by class, and by marital status.<sup>267</sup>

In summary, the law's approach to who should provide care for children is anything but hands-off.<sup>268</sup> Instead, federal laws and policies ration childcare work according to marital status and class, channeling some parents into the home and homemaking, and others into the market. The law prefers insourcing for two-person families and married couples, while forcefully pushing single parents to outsource childcare.<sup>269</sup> In other words, the current system tends to

264. Of the 3.2% of employees at covered employers who did not take leave, 77.6% stated they could not afford to take leave. WORKPLACE FLEXIBILITY 2010, *supra* note 262, at 3.

265. NICOLE CASTA, NAT'L P'SHIP FOR WOMEN & FAMILIES, HIGHLIGHTS OF THE 2000 U.S. DEP'T OF LABOR REPORT: BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 5 (2000).

266. Although Congress considered the FMLA and welfare reform serially in the 1990s, TANF was passed without recognition of the FMLA's limitations, and the FMLA was passed on the assumption that workers not covered by the FMLA would nevertheless be able to leave work with the aid of public assistance. *See* O'Leary, *supra* note 258, at 51-53.

267. Recall that TANF may make it possible for at least one parent in a two-partner family to provide insourced care for children. *See supra* notes 237-41 and accompanying text.

268. There is another context in which the system is far from neutral: the gender of those affected by insourcing and outsourcing preferences. Consistent with the Mommy Wars' preoccupation with mothers, existing policies most significantly impact women's decisions about whether to outsource childcare. As documented by critical tax scholars, tax policy has historically been shaped by gendered assumptions and gendered views of the ideal normative family. *See, e.g.,* MCCAFFERY, *supra* note 186, at 102. Likewise, the Social Security system of burdens and benefits discourages married women from working outside the home, and is in fact even more skewed against working wives than the income tax. *See id.* at 99-100. Because of the gendered effects of these policies, there is a strong tax bias favoring fulltime childcare by married mothers. Like tax policy, the EITC's effects are gendered, a disincentive to married women's work outside the home. These disincentives contrast sharply with the EITC's robust incentives for single mothers to work outside the home. *See* Eissa & Hoynes, *supra* note 224, at 1937. TANF's work requirements, too, disproportionately impact women, who are most frequently single parents. As Dorothy Roberts observes: "The central message of welfare reform is that recipient mothers are deviant for staying home and would better serve their children by finding jobs." Roberts, *supra* note 35, at 1030. Finally, the use of FMLA has been gendered. Although explicitly gender-neutral on its face, lawmakers assumed that it would primarily enable caregiving by mothers. *See* Joanna L. Grossman, *Job Security Without Equality: The Family & Medical Leave Act of 1993*, 15 J.L. & POL'Y, 17, 36-51 (2004). And that assumption has been borne out: Department of Labor studies indicate that, among parents with young children, 75.8% of women take leave, but only 45.1% of men do. *See* CASTA, *supra* note 265, at 4-16.

269. Given the law's preference for private, rather than public, dependency, and family law's more general role as social insurance, perhaps this result isn't surprising.

prefer insourced childcare (typically by mothers) unless that preference requires the law to subsidize in-home childcare, in which case the system embraces outsourcing.<sup>270</sup> This system of preferences and biases is especially problematic, putting the most pressure on the demographic that in general has the least secure safety net and smallest number of resources to outsource childcare,<sup>271</sup> and encouraging families with relatively greater resources to insource.<sup>272</sup> Yet the former group—because of fewer support resources—may benefit most by having *more* time, not less, for insourced care.<sup>273</sup>

### C. Toward More Authentic Childcare Choices

Instead of neutrality, the state's current approach to childcare prefers parental care in some contexts and outside childcare in others. If we instead took a transformative outsourcing approach and embraced choice as a worthy policy goal, how might the legal landscape change? In this Section, I sketch out a number of approaches with the potential to make transformative outsourcing a reality for more families.

1. *Less Constrained Choices.* A necessary first step toward more authentic childcare decisionmaking requires minimizing legal biases that coercively channel childcare decisions in one direction or another. Changes in tax, welfare, and family leave law could lead yield a more neutral state stance on childcare outsourcing.

First, a number of changes could generate a tax policy more neutral to these choices. Eliminating joint filing and instead implementing separate filing for married couples would reduce the existing secondary-earner bias.<sup>274</sup> The tax code could permit a deduction for the cost of replacing imputed income relating to homemaking and childcare,<sup>275</sup> or more radically, it could tax housework.<sup>276</sup> The childcare credit could be made much more generous by

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270. See Selmi & Cahn, *supra* note 16, at 297.

271. Moreover, the jobs to which TANF directs low-income women are the least likely to be compatible with caregiving and the most likely to create work/life conflict. Roberts, *supra* note 35, at 1045-46.

272. Much of the progress in work/life balance and family accommodations has occurred in higher-income, professional contexts in which women and families have superior childcare and other resources. *Id.* at 1046.

273. Roberts, *supra* note 35 at 1058 (“These women are the most disadvantaged by unjust social policies and structures and have the least resources to care for their children.”). See also *id.* at 1055 (“Forcing low-skilled mothers into the workforce regardless of the type or conditions of employment available to them assumes that any job is more beneficial to their families than the care they provide at home.”).

274. SCHMALBECK & ZELENAK, *supra* note 191, at 124; James Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409, 1434 (2010). Alternatively, Margaret Ryznar advocates changing the progressive rates on the married tax schedule to double those on the single tax schedule for two-earner couples earning roughly the same amount. Ryznar, *supra* note 178, at 943.

275. SCHMALBECK & ZELENAK, *supra* note 191, at 124.

276. See Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1577 (1996).

increasing the percentage of eligible expenses, the dollar ceiling on eligible expenses, or both.<sup>277</sup>

Second, in the context of public assistance, the EITC program could be adjusted so as to calculate the credit based on individual earnings rather than family earnings, which would counteract secondary-earner bias.<sup>278</sup> In the context of TANF, Dorothy Roberts argues for a guaranteed income which would provide economic recognition for childcare work,<sup>279</sup> greater facilitation of higher education opportunities for women, and increased spending on childcare to make it available for all who need it.<sup>280</sup> Alternatively, Noah Zatz observes that current trends in some states' implementation of TANF suggest a growing trend in recognizing childcare for one's own children as "work" for purposes of the program.<sup>281</sup>

Finally, FMLA reforms could also enhance choice. First, Congress could broaden the scope of life events the FMLA covers to include leave for more mundane—but equally important, and much more frequent—parental caregiving needs.<sup>282</sup> Second, Congress could expand the reach of the FMLA by reducing exemptions based on the size of the business and work history of the employee, thereby expanding the class of employees to whom the mandate applies.<sup>283</sup> Even more ambitiously, Congress could extend the duration of leave and/or provide for paid leave, consistent with many other liberal welfare states.<sup>284</sup> More modestly, and specifically to address disparities for low-wage workers, Congress could provide incentives for employers to give leave to low-

277. SCHMALBECK & ZELENAK, *supra* note 191, at 124.

278. Eissa & Hoynes, *supra* note 224, at 1956.

279. Roberts advocates returning to an entitlement to public assistance, increasing income, and abolishing TANF's current time limits. Roberts, *supra* note 35, at 1059-60. She also urges expanding the EITC, paid family leave, and removing penalties for part-time work. *Id.* at 1060; *see also* Cahn, *Power*, *supra* note 87, at 223 ("[T]he expectations that women on public welfare should and will work need to be reexamined, not just because of the discriminatory assumptions about welfare mothers, but also because of the critical role that mothering plays in women's and children's lives.').

280. Roberts, *supra* note 35, at 1059-62.

281. Zatz, *supra* note 219, at 1162 (recognizing that caring for special needs family members suggests "the beginnings of a transformation . . . in which meeting needs for family caretaking starts to be treated as a form of work rather than as an excuse from it, and as a form of 'doing something'").

282. *See* Silbaugh, *supra* note 253, at 216-17. For example, in 1996, President Clinton proposed requiring an additional three days per year of leave to attend to children's educational needs or routine family medical needs. The House of Representatives would have extended an additional twenty-four hours a year for parents to volunteer at school or attend teacher conferences and school events. *Id.* at 196.

283. *See* O'Leary, *supra* note 258, at 60-61; *see generally* Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GEN. 1, 3-5 (2005) (advocating paid parental leave as a means of enhancing women's workforce participation).

284. Along with Australia, the United States is the only liberal welfare state that has no paid parental leave program. White, *supra* note 147, at 223. In contrast to the United States, however, Australia guarantees twelve months of leave. *See id.* at 228. Other liberal welfare states—Canada, New Zealand, and the United Kingdom—offer long guaranteed parental leave arrangements and partial wage replacement during leave. *See id.* at 200-03.

income and TANF recipients, or guarantee parental leave protection for all workers.<sup>285</sup>

Of course, by removing constraints, these reforms may lead some parents to decisions they otherwise would not have made.<sup>286</sup> And that is precisely the point. To the greatest extent possible, the state should, at a minimum, *get out of the way* so as to allow parents to pursue more authentic choices.

2. *Careful Choices.* In addition to highlighting the centrality of individual decisions, the outsourcing lens foregrounds the importance of making careful decisions about what to outsource because of the failures that can result from poor outsourcing decisions. As I explain above, poor outsourcing decisions—outsourcing core competency work—can cause serious damage to the overall mission.<sup>287</sup>

These lessons have special importance in the childcare context. Certainly, we want to enable parents to make good, individualized decisions about what works best for their families. While we might recognize that some aspects of childcare are not “mission critical” for all families, however, it’s clear that there is a difference between childcare on the one hand and parenting on the other. Especially in the childcare context, outsourcing cannot be interpreted as a license to abdicate.<sup>288</sup> The line-drawing between core and non-core childcare competencies can be blurry, and outsourcing can risk a gradual loss of expertise in the outsourced work.<sup>289</sup> The state could put in place a number of supports aimed at empowering parents to make wise outsourcing decisions, and to enrich the development of core competencies in childcare, both in-house and outside the family.

3. *The State’s Role in Facilitating Choice.* The outsourcing lens also has broader implications for the state’s orientation toward childcare decisionmaking: The particular question of who should provide care for children should be one answered by individual families, not the state.

Still, the outsourcing approach has limitations. State neutrality can only go so far toward achieving genuine choice for more families. Neutrality means, as a minimum, that the state refrains from preferring one childcare outcome over others for particular families. This neutrality certainly would make a difference for those families who otherwise have the financial wherewithal to choose whether to care for children or work in the paid market. But there is a

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285. See O’Leary, *supra* note 258, at 58-62.

286. See Lester, *supra* note 283, at 6.

287. See *supra* note 143 and accompanying text.

288. Cf. Barthélemy, *supra* note 122, at 92 (discussing problems associated with viewing outsourcing as license to abdicate responsibility in business context).

289. What would happen, for example, if the distinction between core and non-core childcare began to blur, and parents outsourced what we would generally consider parental core competencies, like emotional nurture, guidance, and love? As Joan Williams observes, “[w]hile daycare can be commodified, most of the other forms of care cannot: you cannot simply hire someone to strategize with your teenager, or to comfort your mother, or to build up a reservoir of goodwill so that you have a friend or neighbor available for emergency backup childcare.” Williams, *supra* note 19, at 1466.

difference between neutrality and social justice.<sup>290</sup> Unless we address the economic realities that influence childcare decisions, state “neutrality,” without more, will do little to empower many parents to make more authentic choices. If we value true childcare choice for all families, regardless of economic means, we will need increased government subsidies for some stay-at-home parents and increased government supports for parents who are both working and caring for children.

Moreover, straightforward neutrality may not be enough to address the other complex challenges embedded within the childcare context. State neutrality, without more, may not be the ideal government role vis-à-vis a childcare market that is demonstrably broken.<sup>291</sup> It may not be sufficient to confront the continuing gendered divisions of labor inside and outside the home,<sup>292</sup> nor the continued struggles of parents to strike the right balance between market work and family life.<sup>293</sup> To address these deeply entrenched challenges, more government intervention—rather than less—may ultimately be necessary.<sup>294</sup>

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290. In an ideal world, all parents, regardless of sex, gender, race, or class, would have the “time and resources and liberty to pursue their freely chosen life projects unconstrained.” Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1786 (2001).

291. Outsourced childcare in the United States is failing many families. The quality of childcare is wide-ranging, but generally agreed to be substandard. Regulation of childcare varies across states, but is far from robust or consistent. As the National Association of Child Care and Referral Agencies (NACCRA) explained, “[i]n every state, child care can be hard to find, difficult to afford, and is likely to be of mediocre quality. State licensing standards vary greatly, with few states meeting the most basic standards to ensure that children are safe and learning while in childcare.” NAT’L ASS’N OF CHILD CARE RES. & REFERRAL AGENCIES, *CHILD CARE IN AMERICA: 2011 STATE FACT SHEETS 5* (2011), available at [http://www.naccra.org/sites/default/files/default\\_site\\_pages/2011/childcareinamericafacts\\_2011\\_final.pdf](http://www.naccra.org/sites/default/files/default_site_pages/2011/childcareinamericafacts_2011_final.pdf).

292. The state could evolve to be agnostic as to whether parents or others care for children. But neutrality alone cannot address the continued gendering of childcare as “female,” whether provided by mothers inside the home or other women outside of it. See generally *supra* notes 70-92 and accompanying text (explaining “domesticity,” a configuration of market and family work that perpetuates arrangements in which men are “ideal workers” and women are caregivers).

293. We should recognize that many parents would like to choose *both* market work *and* parental childcare, rather than choosing one over the other. For example, a recent Pew Research Center study found that most working mothers would like to continue working, but would prefer to work less. See Parker, *supra* note 16. We must be mindful of making room for mission-critical core work to remain inside the family, which is why work/life balance scholarship is so critical for American families. As I explored in Part I, *supra*, a number of structural workplace constraints limit authentic choice and the menu of available options. Restructuring the workplace and workplace norms so as to better accommodate work and family will enhance choice and expand the menu of options parents have when deciding who will care for their children and how care will be provided. It might also mitigate some of the potential negative consequences of outsourcing, particularly for low-income families, who tend to have less flexible jobs and fewer workplace benefits than moderate-income families. See Acs, *supra* note 71, at 496-99.

294. We could imagine a world, for example, that included both universal childcare options and subsidies for parent-care. Or even more provocatively, consider the implications if we flipped the stakeholders, so that we presumed that the *state* had responsibility for providing quality care for all children, and privatization/outsourcing occurred when the *state* sought to outsource care to private families. Could we make a case that providing for America’s children should be a “core competency” of

In the end, absent increased state intervention, economic, social, and practical constraints will continue to influence parental childcare decisions. The policy changes I discuss here, then, are not a panacea. This Article takes a first step by uncovering state preferences concerning who provides care for children and suggesting a more neutral approach. This is a necessary first step toward greater respect for and accommodation of family choices. It's certainly not the last.

#### CONCLUSION

The outsourcing lens enriches our discourse about childcare decisionmaking by bridging the gap between childcare debates and childcare realities, enabling us to better understand the diversity of childcare decisions and the reasons underlying them. Outsourcing also uncovers the centrality and normative value in these diverse choices, rejecting the one-size-fits-all prescription often present in existing childcare debates. Recognizing the value in childcare choice ultimately can lead us to a more coherent legal policy toward childcare decisionmaking: one oriented toward neutrality and accommodation rather than preferred outcomes and limitations.

As should be apparent by now, childcare is far from the only family work we outsource.<sup>295</sup> One of the larger lessons of this project is that family roles and functions are far from immutable, and that we should be wary of essentializing them.<sup>296</sup> The outsourcing lens reveals that family composition and job descriptions are varied and that many families—like many American firms—are globalized,<sup>297</sup> disrupting old assumptions about what it means to be a family and what sorts of roles and work family members do or should do. Domestic outsourcing destabilizes what we might otherwise think of as the “natural” family, whether that reconceptualizes parent-child, partner, or other family relationships.

There is no typical modern American family. What emerges instead, as the outsourcing lens so powerfully illustrates, is a set of relationships and

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the state? We know that businesses risk serious damage to their overall mission and goals when they make strategic mistakes about what to outsource. Perhaps the state does, as well.

295. We also outsource much of the work that spouses (mostly women) historically have done in the home: housekeeping, cooking, and other domestic chores, as well as what is now known as “personal lifestyle assistance” (someone to plan your social calendar, pick up your dry cleaning, run your errands, pay your bills). We also outsource sex and reproduction. In addition to outsourcing sexual intimacy, we can now look to others to provide eggs, sperm, gestation, and breast milk.

296. Cf. Williams, *supra* note 19, at 1465 (“[D]isaggregating ‘care’ can help overcome the unthinking assurance that no care work is delegable outside the family: after all, the commodification of cooking is fairly far advanced. (It’s called take-out.)”).

297. See generally Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008) (describing how a narrow legal conception of caregivers as parents fails to recognize the proliferation of nontraditional caregiving).

understandings personal to the people constituting them, as individual and varied as the constellation of families that exist in contemporary America.