Separating from Children

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SEPARATING FROM CHILDREN

Carol Sanger*

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I. INTRODUCTION

On September 1, 1939, in anticipation of the imminent German bombing of British cities, 150,000 children were assembled at the railway stations of London and sent throughout the day to "‘destinations unknown’ " in the English countryside.1 Mothers and children under five were evacuated together but school-age children were shipped out to rural billets in school groups, accompanied only by their teachers and civil defense volunteers.2 Forty years later, an observer remembered the day vividly:

[T]he mothers [were] trying to hold back their tears as they marched these little boys and girls in their gas masks into the centre . . . . The children were wild with excitement but most mums were pale and drawn, no doubt wondering when they’d see their sons and daughters again. It was certainly the first time the mothers had been parted from their schoolchildren.3 By the end of the week, the Times described London as a “Childless City.”4 By the end of the month, over half a million children were boarding with foster families.

The evacuations during the Blitz—bands of children marching away from sobbing mothers—establish a baseline of sorts for how we think generally about separations between mothers and children. Separating from one’s child is understood as an extraordi

ary measure, not lightly undertaken. It represents the greatest of maternal sacrifices: this is the very lesson of the two harlots before King Solomon.5 Little short of a child’s anticipated death could compel a loving mother to part from her child, though if his life or welfare were on the line no good mother would fail to do so.6 Thus in the days following the initial wartime evacuations, mothers who refused to separate from their children were socially censured: “My neighbors blame me for keeping him; one woman this morning said I was wicked. . . . ‘Downright wicked,’ she said, ‘making him wait to be murdered. Didn’t you see the Spanish pictures?’ ”7

thank River Ginchild, Jessica Schaetzl, and Sarah Wolman for their excellent research assistance.


2. See Wicks, supra note 1, at 11–28.

3. Inglis, supra note 1, at 13–14.


7. Storm Jameson, City Without Children, 164 Atlantic Monthly 585, 587 (1939) (the memory of the horrifying pictures of civilian bombing casualties in the Spanish Civil War was still vivid). The plans for the evacuations were drawn up in the early 1930s by British
The notion of separation as maternal sacrifice and as a decision of last resort remains vigorous today. Mothers who fail to separate when conditions call for it—or, the more common occurrence in present times, mothers who separate when conditions do not—are regarded as misguided, selfish, unnatural. As a result of John Bowlby’s wartime research on mother-child separations, the harms of maternal deprivation, to use Bowlby’s phrase, have since been generalized to more ordinary peacetime separations, such as those brought about by maternal employment. Separating from one’s child—even temporarily, even for sensible reasons—is now often viewed as the worst thing a mother can do. It is often taken as proof that she is not a good mother at all and should not be allowed to resume the status she has abandoned. Thus mothers who voluntarily place children in foster care often find it difficult to retrieve them and mothers who put children in day care while they work or study may lose custody of them in a subsequent divorce.

In this Article I want to challenge the existing rules of maternal engagement and reconsider how we think about separations between mothers and their children as a matter of cultural inquiry and as a matter of law. Specifically, I examine the ways in which law regulates this complex but not uncommon aspect of motherhood and compare legal assessments about maternal decisions to separate from children with the judgments of mothers themselves. My argument is that the present scheme of regulation sustains social understandings regarding mother-child separations with little attention to the circumstances of mothers’ lives that prompt their decisions to separate in the first place. Instead, maternal separations are quickly marked as evidence of self-interest and assumed antithetical to the welfare of children.

I start from a more neutral premise: one that assumes mothers are no more selfish or selfless than other adults and that regards separating from children as a reasonable maternal practice. Envisioning this revised
framework of analysis may not be easy. As we shall see, the laws of heaven and nature, of science and the state, have been invoked over the last hundred years to create an ideal form of motherhood in which maternal presence has become the essence of good mothering.\textsuperscript{10} Yet before we summon the power of the state to deter (or to encourage or to require) maternal separations from children, the legal system should secure an accurate understanding of both the mother's behavior and the reasons for regulating it.

As a preliminary matter, this undertaking requires us to acknowledge that decisions to separate from children constitute a common but largely unrecognized category of maternal behavior. I use the phrase "maternal separation decisions" to refer to deliberate decisions by mothers to part physically from their children under circumstances that require substitute care.\textsuperscript{11} I limit the discussion to physical separations, whether temporary, permanent, or both.

\textsuperscript{10} This has been at least the dominant view within American society. At other times, and in other cultures, exclusive maternal caregiving has not been regarded as necessary or even optimal for a child's developmental needs. See, e.g., Stanley N. Kurtz, All the Mothers Are One: Hindu India and the Cultural Shaping of Psychoanalysis 264 (1992) (comparing the conflict of American working mothers with traditional Hindu mothers for whom "multiple mothering" through collective child rearing reduces the child's dependency on one mother and removes maternal guilt). Within African-American communities in the United States, there are similar traditions of "other mothering" where grandmothers, "auntes," and in-laws participate in raising children. See Patricia Hill Collins, Black Feminist Thought 119-23 (1991); Carol B. Stack, All Our Kin: Strategies for Survival in a Black Community 90-107 (1974); Linda M. Burton & Carol B. Stack, Conscripting Kin: Reflections on Family, Generation, and Culture, in The Politics of Pregnancy: Adolescent Sexuality and Public Policy, 174, 175-78 (Annette Lawson & Deborah L. Rhode eds., 1993).

\textsuperscript{11} I want to clarify three points about my use of the term "mothers." First, I deliberately focus on decisions made by mothers, and not by fathers or by parents jointly. I recognize that fathers too part from children and that their decisions may also be influenced by law. See David Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem (1995). Nonetheless, an increasing number of children are born to and raised by single mothers, some never married, others divorced. This massive reconfiguration of family structure means that decisions about child rearing—and so child-leaving—are often solely or primarily in the hands of mothers. See Robert Pear, Larger Number Of New Mothers Are Unmarried, N.Y. Times, Dec. 4, 1991, at A20 (reporting Census Bureau statistics). In addition to the force of numbers, a mother's leaving her children arrests attention and provokes concern in ways that most paternal departures do not. We rarely hear statistics on what percentage of men with children under six work outside the home. Male nominees for cabinet offices are not questioned on the number of hours per week they spend with their children. See Anthony Lewis, If It Were Mr. Baird, N.Y. Times, Jan. 25, 1993, at A17. To the extent paternal absence is noted, the concern most often focuses on the resulting lack of financial support. See Home Sweet Home, The Economist, Sept. 9, 1995, at 25-29; see also Blankenhorn, supra, at 124; Tamar Lewin, Father's Vanishing Act Called Common Drama, N.Y. Times, June 4, 1990, at A18. The main exception has been the attention to African-American fathers generated by the controversial Moynihan report. See Office of Policy Planning and Research, U.S. Dep't of Labor, The Negro Family: The Case for National Action 30-37 (1965).

Second, I limit the discussion to decisions made by women who are already mothers. This limitation excludes other usefully considered circumstances in which women distance
long-term, or permanent, and thereby omit direct consideration of emotional or psychological distance between mothers and their children. This is not because the law (or perhaps many readers) fails to recognize this more subtle form of separation. Rather I focus on physical separations because of their evidentiary appeal. In contrast to the contested definitions and applications of emotional distance, we can be reasonably certain when physical separation has occurred. One further clarification is in order. Under the definition set out above, the mother will have arranged the substitute care herself. The forms of substitute care may differ depending on the child's age or abilities or on the length of the separation. The important point is that the mother has considered and accounted for the requirements of her absence. This distinguishes the separations under discussion here from cases of neglect or abandonment.

themselves from motherhood, such as deciding not to become mothers in the first place. Certainly decisions about contraception and abortion are decisions about motherhood, as women decide when and whether and with whom and how often maternity is to play a role in their lives. Considerations in this Article about why women sometimes separate from children may well be useful in thinking about such prior decisions.

Yet I want to distinguish between a woman's decision not to have children at all and a decision to separate from those who are already around. However strong the desire to become a mother and however painful the disappointment in postponing or foregoing that status may be, there is something necessarily and relentlessly concrete about deciding to leave the boy or girl who stands before you. This is not to say that women may not feel intimately connected to a developing fetus or even to the idea of one. Still, I have omitted abortion from the discussion here because however sacred, in Ronald Dworkin's term, one may regard the life that a fetus represents, an abortion is still not a separation from a child and a pregnant woman is not (yet) a mother. See Ronald Dworkin, Life's Dominion 73–74 (1993). The distinction may be especially important now when the political rhetoric of reproduction urges the equating of children with fetuses, zygotes, and eggs. See Federal Panel Urges U.S. to Drop Its Ban on Financing of Human Embryo Research, N.Y. Times, Sept. 28, 1994, at B7.

Finally, I recognize that there are many kinds of mothers these days—birth mothers, adoptive mothers, stepmothers, foster mothers, surrogate mothers, gestational mothers, and so on. In this Article I do not attempt to resolve relative claims about who is really the mother; my interest is in how mothers (of all sorts) make separation decisions. The law favors certain categories of mothers, often biological ones. In consequence, separation decisions are treated differently from one another—one privileged, others discounted. In addition, present notions of exclusivity about motherhood (everyone gets one) mean that separation decisions taken by one category of mothers are sometimes pitted against those made by mothers in another category. In analyzing how any particular separation decision is evaluated legally, we will therefore want to keep in mind where a particular mother fits in the legal hierarchy of motherhood.


13. I discuss the differences between separation and abandonment more fully in Part IIIA.
With this definition in mind, it is clear that mothers separate from children all the time, as readers with children (or with mothers) will quickly confirm. Mothers shop, they work, they (every now and then) relax, and at times they do these things without their children. Moving to more sustained forms of separation, mothers also place children in foster care, send them to live with dad, and surrender them for adoption. As these examples suggest, separations from children exist on a vast continuum marked by differences in duration, motivation, and consequence. Distinctions among mothers and children based on race and class further complicate judgments about separations. By plotting the variety of separation practices on a continuum we can begin to figure out how much maternal presence the legal system now deems desirable, excessive, and harmful, and for which mothers and for which children. That is the task of Part III. What matters for now is simply to recognize that almost all mothers land somewhere on the continuum at some time during their maternal tours of duty. Separating from children, in one form or another, is simply something mothers do.

Despite its ubiquity, separating often goes unnoticed as an articulated category of maternal conduct. One reason may be that maternal separations cover such a sweep of circumstances. Our familiarity with the everyday forms of the practice—a mother running to the corner store—and our fascination (disapproval, horror, fear) with the more extreme versions—relinquishing a child under the terms of a surrogacy agreement—may obscure the commonalities between the two. Yet both activities embody a mother's deliberate decision to part physically from her child. A mother gardening while a child naps indoors may not seem like much of a separation or much of a decision—too dull and uneventful. But even separations that because of their ordinariness may seem predetermined result from considered calculations by mothers regarding their desirability, costs, and consequences.14

There is understandable resistance to thinking about these varied practices—running an errand, gardening, giving one's child to someone else to raise forever—as having much to do with one another, even though each objectively falls within the definition set out above. Mothers leaving children has become a kind of signal or shorthand for bad character in general.15 No one wants to be on or near (or related to someone

14. There may also be a psychological explanation for the failure to acknowledge separating as an ordinary aspect of maternal practice. If, as psychoanalytic theorists suggest, the infantile fear of abandonment extends into adulthood, then any form of maternal separation may trigger subconscious anxiety. I develop this point later. See infra notes 190–194 and accompanying text. For discussions of the psychoanalytical connections between separations and other areas of law, see Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 4 (1991); Barbara Stack, Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities, 38 UCLA L. Rev. 1483, 1498–1514 (1991).

15. Consider a recent mystery novel, Mark Coovelis's *Gloria*, in which a California serial killer murders his girlfriend, an ordinary woman who some now think was in on the
on or near) a spectrum of activity whose dominant characteristic is wickedness. Being on the "good end" of the separations continuum provides little solace to mothers in a society where tremendous energies have gone into making absence alone a marker for domestic malpractice.

Law contributes to the invisibility of separations as a category of behavior by treating various separations differently. Unless a mother running to the corner store fails to return or leaves her small children unattended (behavior which pulls her out of the definition at work here altogether), the legal system has little to say about her absence. This may be because she is performing some domestic task we expect from her as a matter of course. That is, she is leaving the domestic sphere for domestic reasons. When, however, a mother separates from children by leaving the domestic sphere altogether—whether by entering the public area of work or by giving up her child so that she is no longer considered a mother—her absence becomes more pronounced, a matter of intense attention and regulation.

The legal regulation takes many forms. Separations are generally permitted in adoption, restricted in surrogacy, and encouraged in workfare. I shall later argue that these distinctions reflect disapproval for separation decisions taken (or assumed taken) for nondomestic purposes and approval for separations that reflect (or are packaged to reflect) traditional maternal sensibilities. For now, however, I want simply to recognize law's range. The term separation may not always be in statutory play, yet judgments about mother-child separations—the ideology of separation if not the vocabulary—underlie the regulation of separations in such other areas as child care policies, custody determinations, foster care, immigration, institutionalization, maternity and family leaves, and respite care. We may not be used to thinking about these as separation decisions. In each case, however, the law facilitates, conditions, rewards or penalizes the decision to separate, whether the mother is entering the United States (may her child follow?), putting a child in foster care (can she get him back?), or taking time off work because her child is sick (can she get the job back?).

Beyond simply presenting the existing scheme of legal regulation, I want to suggest how the present system might be improved. On examining the range of laws that now govern separation decisions it becomes quickly apparent that they fail to take into account the interests, preferences, and concerns of mothers themselves. A peculiar oversight! As a general matter we put immense faith in maternal abilities and judgment with regard to raising children. Yet there has been a pronounced lack of interest in what mothers have to say about separating from children by those who make and apply the law.

early murders. Gloria a murderer? Maybe. An investigation reveals that before coming to California, Gloria left a child behind in another state and, as everyone knows, "a woman who could do that could do anything." Mark Coovelis, Gloria 37 (1993).
Remedying this deliberative defect—the prescriptive aspect of my project—requires investigating how mothers themselves (without question a complex and varied group) experience and evaluate the circumstances that give rise to their decisions to separate. Securing insights or even information on the subjective experience of mothers who leave children is no easy matter. Few mothers are willing to talk about their preferences or practices with regard to separating: the implications (for self-regard, for personal relationships, for employment) are too risky.  

Ascertaining a maternal perspective is even more complicated in that maternal separation decisions are themselves powerfully influenced by law. As historian Dirk Hartog has observed in his study of eighteenth-century coverture in New England, the fact that women’s everyday lives “did not conform to the art of the legal imagination does not mean that the art of the legal imagination did not shape those lives.” Mothers are increasingly aware that separating from children puts at risk the benefits—such status, authority, and support as sometimes exists—that the proper exercise of motherhood can otherwise secure. But while this understanding may capture prevailing legal and social judgments about mothers who separate from children, it is otherwise inadequate. Decisions to separate sometimes represent fiercely maternal concerns, as when a mother works in order to support her children.

My claim is not that all women who leave children are really good mothers under the skin. Sometimes decisions to leave children represent preferences quite unconnected to parenting—the kind of self-affirming choices that are no big deal, respected and encouraged when made by other adults. So similarly, I shall argue, even when mothers separate from children for some self-interested reason, like job satisfaction, intellectual stimulation, or even for a respite from the demands of motherhood, the claims against them should not hold. Women, like army recruits, may also aspire to “Be All They Can Be.” In the trajectory of a woman’s life, separating from children is an important, often crucial way

16. As one mother who gave up her four-year-old son explained, “There are many people from whom I have hidden the fact of my motherhood: bosses, co-workers, neighbors, the families of my friends, and any casual acquaintance. I feel the power of the institution of motherhood too clearly to take the revelation of my status lightly.” Shirley Glubka, Out of the Stream: An Essay on Unconventional Motherhood, 9 Feminist Stud. 223, 233 (1983). Birth mother Jan Waldron describes how after giving up her baby daughter for adoption, years passed before she was able to tell anyone about the mere fact of her motherhood. Waldron notes that “[t]here are millions of birthmothers in this country, yet most people will tell you they’ve never met one.” Jan L. Waldron, Giving Away Simone at xvii (1995).


of figuring out, even attaining, whatever conception of flourishing we take that popular phrase to mean.\textsuperscript{19}

Understanding why women choose to end or suspend motherhood by separating from their children is essential to any sensible rethinking of its legal regulation and the inquiry is especially important now. Separations between mothers and children are increasingly common. More mothers, whether divorced or never married, now raise children alone.\textsuperscript{20} In addition, as census data and participant-observers all around us make clear, mothers in two-parent families regularly work outside the home and they do so long before their children enter kindergarten.\textsuperscript{21} These social facts increase the likelihood of mother-child separations, prompted as they often are by circumstances of financial need. These same facts also intensify the longing for the kind of security we often associate with maternal presence.

Compounding the press of demographics is the influence of recent scholarship derived from the work of Carol Gilligan and other relational feminists.\textsuperscript{22} Much of this work stresses the importance of relationships and the harms of separation for women. Feminist legal scholars similarly

\begin{itemize}
  \item \textsuperscript{19} Tillie Olsen quotes W.E.B. Dubois: "\textit{[O]nly at the sacrifice of the chance to do their best work can women bear and rear children.}" Tillie Olsen, One Out of Twelve: Women Who Are Writers in Our Century, \textit{in} Working It Out 323, 330 (Sara Ruddick & Pamela Daniels eds., 1977). Men have long understood the relation between children and work. In defending his decisions to place all five of his illegitimate children in foundling homes, Jean-Jacques Rousseau explained,
  \begin{quote}
    You know my situation: I earn my living from one day to the next with some difficulty; so how could I feed a family as well? And if I were compelled to resort to the trade of a writer, how could I find the peace of mind necessary to do profitable work in an attic disturbed by domestic cares and the noise of children?
  \end{quote}
  \item \textsuperscript{20} See Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1995, at 61, 62 (1995) (reporting that the number of single parents with children increased from 3.8 million in 1970 to 11.4 million in 1994, of which over 9.8 million, or 86%, were women); Lynn Smith, Taking the Solo Road to Motherhood, L.A. Times, June 12, 1992, at A1 (National Center for Health Statistics reports "number of single women giving birth rose from 665,746 in 1980 to 1.1 million in 1989").
  \item \textsuperscript{21} See Sheila B. Kamerman & Alfred J. Kahn, Starting Right: How America Neglects its Youngest Children and What We Can Do About It 8 (1995). Kindergarten facilitates a mother's entry into the labor force in two ways. First, the state has decided through compulsory school-age laws that the child must separate from its mother. Because the separation is required under compulsory school laws, mothers may feel less guilty about it. Second, school provides a form of child care, for at least part of a mother's work day. There is now an entire category of school-age children, commonly called "latch-key children," defined by the fact of maternal absence. See Susan Chira, Parent and Child, Left Alone at Home: OK or a Danger?, N.Y. Times, Oct. 6, 1994, at C1 (according to a National Child Care Survey conducted in 1990 "44 percent of school-age children with working parents had no supervision after school").
  \item \textsuperscript{22} The starting point is Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1989). See generally Mapping the Moral Terrain (Carol Gilligan et al. eds., 1988) (collecting recent scholarship on relational psychology).
\end{itemize}
argue that law itself, drawing from the liberal tradition of individual rights, fosters separation at the price of connection and insularity to the detriment of more cooperative values and strategies. This work has been crucial in rethinking, sometimes dislodging, restrictions across disciplines on women as practitioners, theorists, and subjects of inquiry.

Yet I join the concern that the uncritical celebration and extension of Gilligan’s work risks linking women’s worth to skills and attributes too exclusively tied to mothering. In a variety of settings law has regulated women’s decisions about maintaining their connections with children. Thus restrictions on the employment of pregnant women, of women who might become pregnant, or of women with children already, have been perfectly legal for most of this century. These discriminatory laws and practices were justified in terms of the needs of children and the natural abilities of mothers to meet those needs. Such explanations are not wholly pretextual. Experts assure us that small children, especially infants, thrive under the care of a constant, loving adult: in our society she is most often the mother. Indeed, legal scholars have forcefully urged that law should directly reward the bonds between mother and child in such areas as custody and public support. Yet tethering mothers to children by discouraging separations (to redescribe for the moment the effect of laws that demand rather than reward bonds) also serves less felicitous functions, such as keeping women out of the labor force, securing their services for free at home, and sustaining a comforting set of social


27. See, e.g., Martha A. Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 226–36 (1995) (urging that the enduring relation between mothers and children should replace the sexual connection between men and women as the focus of legal attention); Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. Cal. Rev. L. & Women’s Stud. 133 (1992) (proposing a custody standard that vests decisional authority in the mother).
relationships. To the extent that laws continue to insist on the mainte-
nance of connections between mothers and children, even when the
mothers may have sound reasons to disconnect, lawmakers will find re-
newed support and justification in current relational theories affirming
women's nurturing natures.  

The politics of family values, a theme which both major political par-
ties now endorse, ups the separation ante still further. It now appears
that at least for the remainder of the century, working mothers, many of
whom will be financially unable to stay home, will nonetheless be made
aware of what a really good mother would somehow manage to do. Yet
as the current policy debate on workfare demonstrates, the general belief
that mothers should not separate from their children is challenged by a
competing view that some mothers certainly should, and not in virtue of
any misconduct on their part, but on account of their poverty. "Electing"

30. The political meaning of good motherhood is further bolstered by the social
rhetoric of "new familism," a kind of applied communitarianism. To staunch what he calls
"the parenting deficit," spokesman Amitai Etzioni calls for both parents to give up their
materialism and careerist goals to stay home and raise the kids. See Amitai Etzioni, The
Spirit of Community: The Reinvention of American Society 55-57 (1993). However, other
new familists are more candid about exactly which parent is more likely to do this. Thus
Barbara Dafoe Whitehead explains that "both parents give up something in their work
lives in order to foster their family lives. The woman makes the larger concession, but it is
one she actively elects and clearly sees as temporary." Barbara Dafoe Whitehead, A New
Commitment to the American Family (David Blankenhorn et al. eds., 1990).

31. The original version of the Personal Responsibility Act in the Contract with
America included authorization for states "to use federal funds to establish orphanages if
they chose." Tom Morganthau et al., The Orphanage, Newsweek, Dec. 12, 1994, at 28, 30.
The issue may have played itself out, as Republicans backed away from the idea following
the public debate in early 1995, and were urged by their pollsters not to mention the word
"orphanage." See Ann Devroy, House Republicans Get Talking Points, Wash. Post, Feb. 2,
Children are variously older and younger, healthy and sick, adorable and impossible. Mothers too are situated differently from one another. Not all mothers want to stay home with their children; not all mothers can afford to. Separation practices are often grounded in the traditions and constraints of a mother's race, class, and culture.

But it is less uniformity than integrity that we want from the legal system as it moves forward in its longstanding project of regulating women's lives. Differences in legal treatment must reflect significant differences among those regulated. Thus, if we are serious about what we take to be the harmful effects of mother-child separations, we must ask just as seriously why that concern is sometimes suspended for certain mothers or certain children, as in recent workfare proposals. And if we learn that maternal absence does not always correlate with negative outcomes for the child, as the more nuanced post-Bowlby literature suggests, then we must ask why the idea of separation as intrinsically harmful remains so appealing and robust, especially when raised by legislators to oppose surrogacy or state support for child care or by judges to deny custody to working mothers.

This Article now proceeds in four parts. Part II responds to the claim that separating from children is in some ahistoric sense unnatural. Mother-child togetherness may now seem a normative state of familial affairs but, as Part II.A demonstrates, the arrangement is of relatively modern design. Only during the mid-nineteenth century were separations transformed from an ordinary aspect of mothering to a condemning one. Part II.B examines how this transformation—a collision of social, economic, and religious forces—came about. Part II.C then explores the fierce hold that this nineteenth-century conception of motherhood has on women today.

After describing motherhood's grip on modern women, I attempt to break the hold by turning a critical eye on the assumptions that inform the regulation of separations. Part III contests three conventions that have embedded themselves deeply into the discourse of motherhood:

32. Indeed, I shall later argue our concern about separating should be disproportionately directed to poor and middle-class mothers for whom separations are often less a matter of personal fulfillment than of familial obligation.

33. As Patricia Hill Collins has insisted, any theorizing about mothers must recognize that not all mothers can afford "to see themselves primarily as individuals in search of personal autonomy." Patricia Hill Collins, Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood, in Mothering: Ideology, Experience, and Agency 45, 48 (Evelyn Nakano Glenn et al. eds., 1994).

34. Michigan Governor John Engler has proposed legislation requiring mothers on welfare to return to work six weeks after the birth of a child or lose their benefits. See Peter Kilborn, Steps Taken on Welfare in Michigan, N.Y. Times, Nov. 1, 1995, at A14. But see Carol Joffe, Letter to the Editor, N.Y. Times, Nov. 5, 1995, § 4, at 14 ("Even among the staunchest defenders of child care programs for older children, there is considerable doubt about the wisdom of placing newborns in out-of-home programs.").

35. See infra Part IV.C.2.
the casual conflation of "separation" with "abandonment"; the view that most mothers who separate from children are selfish and ill-motivated; and the belief that children are necessarily harmed by maternal absence.

Part IV then moves from the social history of maternal presence to its current regulation at law. It focuses on three specific separation practices: adoption, surrogacy, and maternal employment. Each has in common a mother's decision to part physically from her child, yet for purposes of this analysis, the three also differ usefully from one another in terms of maternal motivation, expectations of harm, duration, and public favor. In each area I set out the existing scheme of legal regulation followed by what we know about why mothers themselves participate in it. I conclude that the actual practice of separating—what mothers really do, how they confront the pressures and circumstances before them—is far more complex than the idealized version, now incorporated into law, of how mothers are supposed or imagined to behave.

Part V therefore discusses how law might look if maternal perspectives were added to the mix. The failure of policymakers to acknowledge and include maternal knowledge has led to missteps, suffering, and lost opportunities in many areas. Only by investigating more complete accounts of the causes and consequences of separating can its legal regulation be sensibly examined or reformed. Part V explores how the regulation of adoption, surrogacy, and maternal employment might be informed by the insights and experiences of mothers themselves. My purpose is to provide a glimpse into law's potential for reshaping cultural attitudes toward mother-child separations.

I recognize that mothers who separate from children confound societal expectations about what motherhood means and how mothers are supposed to behave. Acknowledging separations as a sensible, let alone desirable, aspect of mothering may be profoundly destabilizing at personal, practical, and policy levels. Separating from children, however briefly, necessarily defies the order and comfort inherent in the habits and ideology of separate spheres.

Yet I resist the social prophecy that if women could separate from children as freely as others do the culture would crumble (although this is not to say that some adjustments would not be necessary). Many, perhaps most, women will choose to mother away with the same devotion and intensity as they do today. Having, caring for, and loving children is

for many a source of incomparable satisfaction. Yet others may find a noncompulsory maternal regime liberating and choose to postpone or even forgo the consuming experience of maternity. Some may choose to modify the traditional terms of motherhood and engage in part-time or partial mothering. What matters under the revised scheme is less which way women decide than the relocation of motherhood and its practices from the fixed category of imposition to something closer to choice.\textsuperscript{37}

II. THE SOCIAL HISTORY OF MATERNAL PRESENCE

Our present maternal moral world derives from a nineteenth-century romantic-religious image of (at least) white motherhood as distinctively pure, and from a twentieth-century Freudian culture that made the all-powerful mother determinative of her children's every attribute and outcome. Against that backdrop, a mother who deliberately separates from her children appears negligent if not reckless in her willingness to risk her child's well-being. Separating from children also threatens the welfare of those for whom the institution of motherhood provides an important sense of identity (many mothers) and an important source of comfort (everyone else).

This Part seeks to replace—for the moment—the familiar backdrop against which separation decisions and their regulation now play out with scenery that is more antique but no less authentic. My aim is to show that for most of human history, separating from children has been an ordinary feature of maternal experience. Part II.A explains that most separations were viewed neither as unmotherly nor unnatural, and that regulation sought less to punish separations than to prevent harmful versions of the practice. Part II.B then focuses on the nineteenth century's creation of maternal presence as the measure of maternal virtue. Part II.C discusses how this conception of good mothering continues to operate with sustained force at levels both personal and political today. These sections reveal that attitudes toward maternal absence are highly contingent on the physical requirements of family life as well as on contemporary beliefs about such things as the value of children, the nature of women, and communal versus private responsibility for child rearing. Distinctions among mothers within the same period further highlight the contingent character of maternal absence, as the general hostility (in modern times) toward mothers who separate is often waived—indeed repudiated—for

\textsuperscript{37} I therefore appreciate but reject Simone de Beauvoir's position that women should not be given the choice to stay home and raise children "precisely because if there is such a choice, too many women will make that one." Sex, Society, and the Female Dilemma: A Dialogue Between Simone de Beauvoir and Betty Friedan, Saturday Rev., June 14, 1975, at 14, 18 (Comment of Simone de Beauvoir).
poor and minority women, who have always been expected to leave their children.38

A. Regulating Separations: An Historical Overview

Juxtaposing present views about separations with historical ones reveals that there is nothing inevitable or innate about the role that maternal presence now plays in our political and personal economies. Studies of Western separation practices reveal that mother-child separations were generally understood as unavoidable. Thus from antiquity until the mid-nineteenth century, children were variously exposed in forests and market places, sold into slavery or servitude, given to monasteries, left with churches, deposited in foundling homes, sent to wet nurses, and placed out as apprentices.39 It may be difficult for the modern reader to regard such practices as separations. Many are now illegal or outmoded and those likely to kill or injure the child would certainly seem to fall outside my earlier definitional requirement of "providing substitute care."40 Yet within their own time—periods of little or no contraceptive


40. I recognize that it is particularly unsettling to conceptualize infanticide as a separation or to imagine a mother so constructing her decision. I argue more fully elsewhere that under certain circumstances—when, for example, a mother believes it is in her child's best interest—even killing a child may be located on the continuum of maternal separation decisions. I have in mind the rare and heightened cases in which a mother determines that her child is better off dead than living under conditions of extreme deprivation or that deny the child its humanity. See Carol Sanger, Mother from Child: Separations in Law, Literature, and Life (forthcoming 1997). Consider the fictional example from Toni Morrison's novel Beloved in which an escaped slave mother kills her daughter to prevent the child's return to slavery. See Toni Morrison, Beloved (1987). Happily, few Western mothers face such decisions today, although we know that infanticide was practiced during the 1980s by impoverished Romanian mothers during the Ceausescu regime. See B. Meredith Burke, Ceausescu's Main Victims: Women and Children, N.Y. Times, Jan. 10, 1990, at A27. Yet similar concerns about a child's welfare lie behind the difficult decisions of mothers to withhold treatment from severely disabled newborns. For a mother's account of such deliberations, see Deborah G. Alecson, Lost Lullaby 90 (1995). A mother who withholds life-saving treatment may not be "providing for substitute care" in any sense the law is likely to credit. For some mothers, there is no contradiction: their decisions are eased by or based upon the belief that the child will be
knowledge, of risky abortion, of high infant mortality, and with a different devotional commitment to children—these forms of separation were ordinary social practices.

While the separations themselves may now seem strange, they were motivated by concerns that are not wholly unfamiliar. These included the relief of poverty (whether because there were too many children or they were the wrong sex or they were born during periods of general deprivation); shame (increasingly a factor as the Christian idea of sin took hold); and concern for the child’s physical, economic, or occupational well-being. Yet similarities in motivation then and now are unmatched by parallel contemporary social responses. In contrast to present views, separating from children—even in forms that would now be unacceptable—was understood as part of life. I demonstrate this by looking more closely at official responses to three common forms of separation: child abandonment in ancient Rome and in nineteenth-century western Europe, wet-nursing in nineteenth-century France, and apprenticeships in colonial America.

1. Exposure, Oblation, and Abandonment. — In studying the extent of child abandonment in ancient Rome, historian John Boswell discovered that children were regularly exposed, that is, “plac[ed] . . . outside the home, usually in a public place, where [they] would be noticed.” While exact numbers of expositi are unknown, “[i]t is beyond question that abandonment was a familiar part of Roman life, affecting every class of

in God’s care. See Robert Stinson & Peggy Stinson, The Long Dying of Baby Andrew 300 (1983); see also Nancy Scheper-Hughes, Death Without Weeping: The Violence of Everyday Life in Brazil 364–93 (1992) (describing the belief by impoverished Brazilian mothers that infants who are in fact dying of malnutrition are simply being called back to heaven by God); Nancy Schrom Dye & Daniel B. Smith, Mother Love and Infant Death, 1750–1920, 73 J. Am. Hist. 329, 332 (1986) (noting that “[t]he belief that the ultimate responsibility for a child’s welfare lay in the hands of God” is one of the cultural norms that shaped the experience of mothers in the early republic). For those for whom such considerations fall outside a legal response, the absence of substitute care, as conventionally conceived, remains problematic. I would suggest only that if the purpose of requiring substitute care is to secure that the mother has provided for her child’s welfare, in the case of infanticide, the act of separation itself is the mother’s attempt to do so.

We might also keep in mind that within some cultures mother-child separation is so impermissable that if the mother is going to kill herself, part of her duty to her child is to kill him too. See State v. Wu, 286 Cal. Rptr. 868, 885 (Cal. Ct. App. 1991) (permitting evidence of role of child murder in Chinese culture for purposes of proving defendant mother’s mental state); Taimie L. Bryant, Oya-Ko Shinju: Death at the Center of the Heart, 8 UCLA Pac. Basin L.J. 1, 5–6 (1990) (explaining that the ego-extension between mother and child obliterates the distinction between murder and suicide); Yuko Kawanishi, Japanese Mother-Child Suicide: The Psychological and Sociological Implications of the Kimura Case, 8 UCLA Pac. Basin L.J. 32, 46 (1990) (noting that obsessive identification by mother with child leads to mother’s conviction that the child cannot be happy in the mother’s absence).

41. Boswell, supra note 39, at 25.
person." Boswell reports that while Roman parents may have regretted exposing a particular child, "none seems to have felt he or she had done something wicked. Nor did their contemporaries, or the law."

The practice of abandoning children continued into the early Middle Ages with an important innovation in form. By 400 A.D., parents began donating surplus children to Christian monasteries in a practice known as oblation. Oblation reveals the beginnings of the Roman Catholic Church's involvement in offering alternatives to such traditional forms of abandonment as exposure. Parents could donate any child under the age of ten to a monastery for life. The arrangement benefitted the child, who, in contrast to expositi, was assured a measure of physical security. Parents benefitted from the peace of mind achieved by their child's safe placement and from the "spiritual benefits of the sacrifice itself and the oblate's lifelong prayers." A less happy consequence for the child was his irrevocable consignment "to a life of poverty, obedience, and celibacy."

In addition to the new form of separation, the Church also provided a new reason for disposing of children: maternal shame, which led to an increase in an unacceptable method of disposition, infanticide. The turn to infanticide resulted from an intensified campaign by the Church to

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42. Id. at 134. Boswell defines abandonment as "the voluntary relinquishing of control over children by their natal parents or guardians, whether by leaving them somewhere, selling them, or legally consigning authority to some other person or institution." Id. at 24. His definition leaves open the extent to which abandoned children were not taken in by kind strangers but died of exposure instead. Boswell argues that "[t]he overwhelming belief in the ancient world was that abandoned children were picked up and reared by someone else," and that this, in fact, happened more often than not. Id. at 131. Yet other historians have criticized Boswell's conclusion as too cheerful. See Child Abandonment in European History: A Symposium, 17 J. Fam. Hist. 1, 19 (1992) [hereinafter Child Abandonment Symposium] (comment of David Ransel) (noting that Boswell's "transparent moral and political purpose . . . is to convince us that the conventional family models based upon blood or marital relations are recent impositions"). Yet historians generally agree that ancient abandonment served as "a social mechanism to redistribute 'surplus' children." Child Abandonment Symposium, supra, at 3 (comment of Louise A. Tilly). Tilly concludes from Boswell's evidence that Roman abandonment was "a socially developed and sanctioned mechanism for balancing out surplus and deficit household economies, but it also provided unfree or bound labor for distasteful occupations [such as] . . . slavery [and] prostitution." Id. at 5.

43. Boswell, supra note 39, at 136. There was, however, one disquieting aspect of the general practice: the possibility that a freeborn child might be abandoned, found, and raised as a slave. Because slavery irrevocably transformed free persons into property, this outcome would result "not simply [in] a change of guardianship but of personhood." Id. at 67. In order to avoid such a result, by the second century, Roman law had clarified that natal status (free or slave) was irrevocable and survived the consequences of a child's abandonment. See id. at 65-68. To increase stability and the balance of social classes in the Roman Empire, this law was reversed in the fourth century and abandoned children were permanently given the status of their adoptive parents. See id. at 69-73.

44. See id. at 228-55.
45. Id. at 240.
46. Id. at 242.
confine sex to marriage. 47 Throughout the Middle Ages, social and legal distinctions between married unions and others (and so between legitimate and illegitimate children) were murky. 48 However, in 1543, the Council of Trent attempted to clear up the confusion (and to extend Roman Catholic authority) by declaring that only marriages performed by a priest were valid and only sex within marriage was permissible.49 What followed was a crusade against nonprocreative sex within marriage and all sex outside of it.

The predicament for unmarried mothers was now drawn. The birth of an illegitimate child was proof of her illicit sexual behavior.50 On this account killing the infant and disposing of its body made sense; indeed, the fact that infanticide destroyed the primary evidence of fornication was often a more serious aspect of the offense than the murder of the child.51 To be sure, infanticide as a method of population control was nothing new; even the early Christian church "showed some tolerance for this practice, so long as it was not an excuse for unlicensed sexual pleasure."52 Yet after the sixteenth-century allegations of sexual impurity became increasingly dire for single women and their families, particularly in countries such as Sicily and Italy, that were marked by masculine codes of honor.53 Criminal records of the time reveal that mothers who killed their newborns were often assisted by other family members.54 By the eighteenth century "the sight of infant corpses lying in ditches, on garbage heaps, and in sewer drains was familiar throughout Europe."55

47. See Ransel, supra note 39, at 13-14.
48. See Jean Meyer, Illegitimates and Foundlings in Pre-Industrial France, in Bastardy and its Comparative History 249, 249 (Peter Laslett et al. eds., 1980); see also Dominique Barthélémy, Kinship, in 2 A History of Private Life: Revelations of the Medieval World 136 (Georges Duby ed. & Arthur Goldhammer trans., 1988) ("[P]rior to the thirteenth century the Church's attempts to influence the marriage practices of the [French] aristocracy appear to have been superficial and ambiguous.").
49. Ransel places the campaign as early as the eleventh-century Council of Rome. See Ransel, supra note 39, at 13-14.
50. Other forms of evidence also satisfied. The presence of breast milk in unmarried women or unattended labor followed by the infant's death were presumptive proof of infanticide under the criminal laws of the Holy Roman Empire. See id. at 14 (noting that servant girls were regularly examined for signs of lactation). For a discussion of other forms of surveillance over pregnant women, see Kertzer, supra note 39, at 38-56.
51. In sixteenth-century Russia, for example, the criminal code provided the same punishment for unmarried mothers who killed their babies as for unmarried mothers who did not. Ransel convincingly argues that these statutes were aimed primarily at fornication and not infanticide. See Ransel, supra note 39, at 10-11.
52. Id. at 4. Infanticide was seen as a more sensible form of birth control than abortion, which risked the mother's life and killed a child before knowing if it was healthy or was a boy or would be desired by the time of birth. See Peter C. Hoffer & N.E.H. Hull, Murdering Mothers: Infanticide in England and New England, 1558-1803, at 154-56 (1981) (arguing that infanticide is a "deliberate form of delayed abortion"); Ransel, supra note 39, at 11.
53. See Kertzer, supra note 39, at 26.
54. See id. at 33-36.
55. Ransel, supra note 39, at 6.
But infanticide only compounded the mother's wrongdoing. Unbaptized infants were condemned to hell, and this was the Church's central concern.\textsuperscript{56} To prevent the damnation of innocents, the Church introduced an alternative to infanticide—the foundling home. Beginning in the fourteenth century, a revolving cradle (the \textit{tour} in France, \textit{ruota} in Italy and Sicily, and \textit{roda} in Portugal) was set into the side of churches and hospices as "an antidote to infanticide."\textsuperscript{57} Mothers could deposit their babies, spin the cradle inward, and leave undetected.\textsuperscript{58} Enlightenment theories of state responsibility and children's vulnerability contributed to the establishment of state homes in France, Spain, and Russia.\textsuperscript{59} New municipalities like Florence participated in building foundling homes as a matter of civic pride and Christian devotion: "Children left to die were not just a sanitation problem but lopped off limbs of the communal body and unbaptized souls lost to God."\textsuperscript{60}

Abandonment scholars agree, however, that even more than shame, poverty brought about the huge numbers of children abandoned throughout western and eastern Europe in the eighteenth and nineteenth centuries. We see this in the correlation between increases in the admissions to foundling homes and increases in the price of wheat,\textsuperscript{61} and in the large number of children abandoned by married women for whom the stigma of illegitimacy would have had no bearing.\textsuperscript{62} Needy parents, suffering repeated crises of invasions, plagues, and famines, used the foundling homes "as a welfare system to tide families over hard times."\textsuperscript{63} For single

\textsuperscript{56} To assure that all children were baptized before their deaths, eighteenth-century Italian midwives were required to pass a clerical examination on their baptismal skills and priests were authorized to order cesarean operations on dead pregnant women in order to baptize the fetus. See Kertzer, supra note 39, at 20.

\textsuperscript{57} Id. at 104.

\textsuperscript{58} See id. Ransel explains that "[c]onservative Catholic authorities defended the turning cradle as much for its role in protecting the honor and sanctity of the family as in preventing desperate women from killing their infants. By concealing the identity of unwed mothers, the device shielded families from scandal and from the property claims of illegitimate offspring." Ransel, supra note 39, at 63. The foundling system did not prevent all infanticides; some women lived too far from a \textit{tour} to surrender the child before its discovery by townsfolk. See Kertzer, supra note 39, at 33. However, mothers convicted of infanticide were given harsher sentences if abandonment was possible. See id. at 32.

\textsuperscript{59} See Fuchs, Poor and Pregnant, supra note 39, at 126–27; Ransel, supra note 39, at 59–60; Sherwood, supra note 39, at 100–02.

\textsuperscript{60} Ransel, supra note 39, at 5.

\textsuperscript{61} See Child Abandonment Symposium, supra note 42, at 10 (comment of Rachel G. Fuchs).

\textsuperscript{62} Nearly half of the abandoning mothers in Milan and Spain and between one-third to one-half of abandoning mothers in Russia were married. See id. at 8 (comment of Rachel G. Fuchs). Legitimate children were more often abandoned at older ages than illegitimate ones and in cities such as Madrid and Milan they were frequently reclaimed when parental circumstances improved. See id. (comment of Rachel G. Fuchs).

\textsuperscript{63} Id. at 6 (comment of Louise A Tilly); see also id. at 11 (comment of Rachel G. Fuchs) ("Widespread child abandonment, especially among the married, indicated the inexistence or failure of other forms of poor relief.").
mothers too, "[s]hame was secondary to... survival as a motive for abandonment in Paris, Madrid, and the Russian cities." By the mid-nineteenth century, over 100,000 babies a year were being abandoned throughout western Europe and Russia.

At this point, critics began to argue that the availability of the homes themselves were driving up the numbers of children produced and abandoned. Critics also focused on the huge mortality rates among foundlings, for in the crowded homes infant's souls were saved more frequently than their lives. Tours throughout much of Catholic Europe were closed and states began to experiment with other ways to prevent infanticide and abandonment: private or local charity, public stipends, and sometimes attention to the circumstances that caused mothers, married and single, to abandon their children in the first place.

My purpose here is not to evaluate the various attempts to reform the foundling system (although versions of these strategies reappear in Part V's discussion of modern reforms). Rather, I offer two observations about the abandonment of children in earlier times. The first simply underscores that separations between mothers and their children were a regular feature of social life. From antiquity until the end of the nineteenth century, the fact of maternal separation alone was rarely cause for legal condemnation. Instead, European authorities sought primarily to prevent the child's damnation, which necessarily meant regulating the heightened practice of infanticide.

Second, social responses to historical separations reveal a greater sense of communal responsibility for children than exists at present. In

64. Id. at 9 (comment of Rachel G. Fuchs). Two-thirds of the unwed abandoning mothers in Paris and Moscow worked as domestic servants for which childlessness was a condition of service. See id.; see also Ransel, supra note 39, at 173.
65. See Kertzer, supra note 39, at 10 ("In Madrid, Dublin, and Warsaw, up to a fifth of all babies were being abandoned, while Milan had reached a third, Prague two-fifths, and Vienna a half."); id. at 13 tbl. I.I.
66. See Ransel, supra note 39, at 85–89.
67. See Sherwood, supra note 39, at 174–75 (noting that "the foundling hospitals of Paris, Dublin, Lyon, and Limoges funnelled infants to the graveyards"). In Madrid's Inclusa the mortality rate in 1844 was 85%. See id. at 205.
68. See Ransel, supra note 39, at 64–69 (discussing closing of tours in Denmark, England, France, and Belgium). For a discussion of the process and politics of closing the tours in France, see Potash, supra note 39, at 70–77.
69. In France, small stipends were paid to poor, married mothers so that they could care for their children themselves. See Fuchs, Poor and Pregnant, supra note 39, at 127–29, 133–34.
70. For example, in tsarist Russia soldiers were conscripted for life. Because they were unlikely ever to return or contribute to their villages, the wives of soldiers (soldatki) were cast out. Many migrated to the cities, became prostitutes, and surrendered their children to state foundling homes. Indeed, 25% of mothers who placed their children were soldiers' wives. See Ransel, supra note 39, at 155–60. When, during the 1870s, lifetime conscription of recruits was replaced by shorter terms of service and increased benefits for dependents, soldatki "disappeared from the population of abandoning mothers." Id. at 160.
Roman times abandoned children were often taken in by strangers, and raised as alumni, a cross between a foster child and a favored servant. Under Christian influence, care for surplus children was rerouted from private households to monasteries and then foundling homes. I recognize that these forms of care were not uniformly successful nor were they always exercises in altruism. Expositi may have been favored servants, but they were servants nonetheless; the Church sought first to save souls, not lives through the foundling system; and the tsars identified Russian foundlings as an excellent source of appropriately trained clerks and laborers. Nonetheless, the children of the poor were assigned value by the larger community which sought through various, if flawed, forms of substitute care to protect them.

2. Wet-Nursing. — Until the invention of pasteurization in the 1880s, most infants required breast milk in order to survive. This presented a particular predicament for the working-class mothers, married and single, of Europe’s developing cities. The response was to send babies out of town to rural wet nurses. Wet-nursing was most often a matter of family economy: the costs of transportation and wet-nursing were less than the wages lost by the mother during the two years of unemployment nursing required. By the mid-nineteenth century, nearly twenty thousand infants were sent each year from Paris alone to rural wet nurses. Wet-nursing had become a major industry complete with commercial placement offices, transportation networks, and both fee and baby collectors. Local municipalities attempted to regulate the trade but the regulation was haphazard, and in consequence, the care that nurslings received was frequently indifferent and often fatal. Many newborns failed to survive the trip to the country and others died of malnutrition, poor hy-

71. See Boswell, supra note 39, at 116–21.
72. See Ransel, supra note 39, at 91 (noting that Catherine II “went far beyond her predecessors’ concern with saving lives for use in the military and on construction projects”). Her social architect, Ivanovich Betskoi, sorted the foundlings into three groups: those talented in arts and science, artisans, and the “dullards” who were to become unskilled laborers. See id. at 35. Similarly, in late eighteenth-century Spain, foundling homes were seen as an aspect of state building; the foundlings themselves promised “soldiers for the king, farmers for the soil, and artisans for an economic expansion that would bring Spain apace with her rival France and Britain.” Sherwood, supra note 39, at 102; see also Potash, supra note 39, at 301 (noting that the increased concern for the well-being of French foundlings resulted from public recognition of “the folly of wasting foundling lives that could be channeled into agricultural pursuits”).
74. See id at 9–10. On married mothers, see Fuchs, Poor and Pregnant, supra note 39, at 154.
75. See Fuchs, Poor and Pregnant, supra note 39, at 152.
76. See Sussman, supra note 73, at 101–08, 118. An 1842 Parisian ordinance required wet nurses to show a certificate of proof attesting to the nurse’s good morals, her possession of a cradle and fire screen, the age of her youngest child, and her promise to nurse no more than one infant. The requirements made sense—e.g., the age of her child ensured that the nurse was still lactating—but were rarely enforced. See id. at 118.
giene, or in accidents while in the care of nurses who were indifferent, overburdened, or awaiting payment from parents. In the eighteenth century one in three babies sent out from Paris failed to return home.

In response to the staggering mortality rates of nurslings, in 1874 the French government enacted the Rousel Law requiring parents and nurses to register all children under the age of two placed out for a fee. Registration was intended to facilitate police surveillance of nurses and their charges. While the Rousel Law created extensive records, enabling twentieth-century historians to assemble the demographics of wet-nursing, it offered somewhat less to late nineteenth-century infants. It appears that a quarter of all nurslings failed to survive the experience. Nonetheless, until the end of the century when various technologies made bottle feeding possible and safe, urban working-class mothers regularly and necessarily sent their babies away.

As in the case of foundlings, separations on account of wet-nursing were understood as inevitable. They differed from the earlier delivery of infants into foundling homes in that nursing mothers required only temporary, though sustained, separations. The demands of urban existence structured their choices and no social censure attached to the decisions of these early working mothers to part from their nursing infants. To modern sensibilities the developmental consequences of this lengthy separation on the surviving child might seem irreparable. Yet historian George Sussman carefully historicizes the problem:

Our present-day psychological theories concerning the impact of maternal deprivation on infantile development may not be applicable to these circumstances, where wet-nursing was so normal a part of the life cycle that it required an independent mind, a strong will, and even courage on the part of a mother to keep her newborn baby and nurse it herself.

As we shall see, that notion of maternal fortitude has since been thrown into reverse. Today, it is a mother's decision to leave her children that requires an independent mind, strong will, and courage.

3. Apprenticeships. — A third form of separation was the colonial practice of parents placing children out as apprentices. In the seven-

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77. See id. at 53–59. A contemporary book exposing the abuses of wet-nursing called the wagons of meneurs "[p]urgatories," because the babies they carried were about to enter heaven." Id. at 124.
78. See id. at 67.
79. See Fuchs, Poor and Pregnant, supra note 39, at 153–54; Sussman, supra note 73, at 128–29.
80. Sussman, supra note 73, at 143 (noting that higher mortality rates still adhered in regions further from Paris).
81. Id. at 67.
82. See generally Apprenticeship and Child Labor, in 1 Children and Youth in America 103 (Robert H. Bremner ed., 1970). In addition to apprenticeships, children in late eighteenth-century New England seem to have spent considerable periods of time living with relatives for other reasons. See Dye & Smith, supra note 40, at 334 (suggesting
teenth-century Plymouth colony, children were commonly contracted out between the ages of six and eight for a period of years.\textsuperscript{83} The terms of apprenticeship contracts or voluntary indentures were straightforward: the master promised to train and support the child in exchange for the parent’s promise of the child’s personal service.\textsuperscript{84} Despite their contractual nature, the contracts were nonetheless based on relations of great trust between parents and master.\textsuperscript{85} Apprenticeships “created a familylike legal tie in which apprentices assumed the role of family members and masters held the title of surrogate parents.”\textsuperscript{86} 

Children were contracted out for a variety of reasons. Parents commonly sought vocational training for their child, though in a period of scant formal education, they often bargained for general schooling as well.\textsuperscript{87} Many apprenticed their children for reasons of economic need. As the indenture of seven-year-old Zachariah Eddy stated, his parents placed him into a wealthier household because they had “many children, & by reason of many wants lying upon them, so as they are not able to bring them up as they desire.”\textsuperscript{88} Yet wealthier parents too, particularly in New England, placed their children out in order to instill in them the virtues and discipline of work.\textsuperscript{89} Compared to wet-nursing and classical
abandonment, which occurred on a vaster scale for a period of centuries, apprenticements prompted few social or legal problems. The legal system policed apprenticeships through judicial enforcement of the contract’s terms. Actions were brought by apprentices against masters for failing to teach the promised craft, and by masters against parents for harboring runaway apprentices.

There was, however, one problem that required more systemic resolution. When a master declared bankruptcy, he often listed his apprentices among the assets available for distribution to creditors. A second transfer by master to creditor would replace the careful parental choice of guardian with that of a magistrate whose job was to organize assets, not conduct a colonial home study. Beginning in the early 1800s, judges refused to enforce the assignment of an apprentice’s contract without the agreement of the child’s father or widowed mother. As an 1811 Massachusetts court explained, “a wise and prudent parent will be as anxious about the moral qualities of the man, to whom he delegates his authority . . . But all his attention in this regard would be useless, if the master might immediately transfer or assign his authority to another.” The example shows that as with abandonment and wet-nursing, the purpose of legal intervention in apprenticeships was not to thwart or condemn this form of separation but rather to remedy an undesirable outcome.

Within a few decades after the Revolution, voluntary apprenticeships dwindled in favor and practice. The introduction of public schools and the replacement of artisans by factory labor explained the decline in part. But as important was the change in domestic ideology: “[a]s the parental home became enshrined as the irreplaceable locus of child nurture, apprenticeship no longer seemed an appropriate means for socializing the young.” The transformation of apprenticeships from evidence of parental solicitude into something “inappropriate” resulted from the increasing importance of maternal instruction and care. Linda Gordon foreshadows the shift:

In the nineteenth century a mother’s attempt to place out her children [as apprentices] was often encouraged and even applauded as evidence of an appropriate and rational commitment to the child’s good. By mid-twentieth century, a mother making such a request would almost certainly be viewed as un-

90. See Demos, supra note 83, at 71 (noting colonial courts’ finding for apprentices who have not been taught a trade); Apprenticeship and Child Labor, supra note 82, at 109 (colonial courts’ decisions on apprentices complaining of not being taught a trade).

91. The Plymouth Court threatened the parents of a five-year-old apprentice who kept wandering home “without . . . lycense” from his master with time in the stocks if they continued to take him in. See Mason, supra note 89, at 39.

92. Grossberg, supra note 84, at 263.

93. See id. at 259–60.

94. Id. at 261.
loving, unmotherly, forfeiting her future credibility as a mother.  

How this dramatic change in the meaning and practice of motherhood came about is the subject of the next section. There we shall see how during the course of a hundred years, maternal presence became the essence of good mothering and how raising children increasingly became a matter for mothers to handle by themselves.

B. Inventing the Virtue: The Nineteenth Century

Mothers have as powerful an influence over the welfare of future generations as all other earthly causes combined.

— J.S.C. Abbott, The Mother at Home (1833)

During the nineteenth century significant changes in the structure of labor, religion, scientific knowledge, the developing professions, and philosophical views about the nature of children combined with purposeful enthusiasm to create the ideal of the ever-present mother. This section looks at how these various factors entwined so that by the end of the century maternal presence had become the mark of good mothering, reflected in part by the emerging laws of custody. To be sure, the ideal was never universally applied or encouraged: expectations of domestic presence were never wholly extended to black or immigrant mothers. Yet, as we shall see, by the end of the century, the aspiration for at least some poor mothers to stay home became embodied in the movement for mothers' pensions.

The process began in the late eighteenth century as the notion of wife as her husband's "help-meet" gave way to the notion of wife as primarily mother. The transition followed the decline of the domestic system of production. As industrialization took hold, fathers, once solely responsible for the spiritual and moral training of children, more often worked away from home. As historian Mary Ryan notes, "the traffic around the American household went in two directions; as production exited, social reproduction entered in its place." Women assisted men less in economic labors and men in turn participated less in household duties as the sexes separated into the now familiar and distinct spheres of

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97. See infra notes 152–158 and accompanying text.
public and private.\textsuperscript{100} At day's end the working man could expect to return home to "soothe his harassed spirit and breathe fresh life into his benumbed faculties."\textsuperscript{101} This reclassification of roles had been somewhat abrupt for the now soothing wife.

Republican virtue, once vested in the notion that women's economic contribution inside and outside the family would enhance the freedom of the nation, had utterly reversed itself. Women who had been told in 1820 that their economic independence would sustain the family discovered by 1840 that they could sustain the republic only by raising virtuous children.\textsuperscript{102}

By the antebellum period, raising virtuous children had become the exclusive calling for middle- and upper-class women.

The task required above all a mother's enlightened presence. Presence was assured by mothers refraining from wage labor, an arrangement that benefitted children and working men, who resisted the competition and suppressed wages women workers brought about.\textsuperscript{103} Enlightenment was understood to be partly innate and partly acquired. Formerly disqualifying feminine characteristics, such as emotionalism, were recast from a lack of reason to an instinctive moral superiority with unique application to child rearing.\textsuperscript{104} Maternal traits and the office of motherhood itself were valorized. As the \textit{Woman's Handbook of Health: A Guide for the Wife, Mother and Nurse} proclaimed in 1866:

> The reproduction of the species—their nurture in the womb, and their support and culture during infancy and childhood—is the grand prerogative of woman. It is a noble and a holy office, to which she is appointed by God; and the duty is both pure and sacred.\textsuperscript{105}

The proclamation tied together several strands of the developing ideology of motherhood. Motherhood was both a natural and noble state for women. Raising children was now assigned exclusively to mothers and God himself had issued the order.

\textsuperscript{100} See Kessler-Harris, supra note 26, at 20–22 (on women's post-revolutionary labor participation); Bloch, supra note 98, at 114–15.

\textsuperscript{101} Kessler-Harris, supra note 26, at 50. The wife was understood to benefit from the arrangement as well: "the woman's partner toils for his stormy portion of power and glory from which it is her privilege to be sheltered." Id.

\textsuperscript{102} Id. at 71.

\textsuperscript{103} See id. at 154. The complement of assigning child rearing to women was assigning income production to men. Labor politics throughout the century (and into the present) affirmed this division of domestic and wage labor, in part through the concept of the family wage. See generally Martha May, The Historical Problem of the Family Wage: The Ford Motor Company and the Five Dollar Day, in Unequal Sisters 275 (Ellen C. DuBois & Vicki L. Ruiz eds., 1990).

\textsuperscript{104} See Bloch, supra note 98, at 116.

Yet as the nineteenth century progressed, women's natural child rearing instincts were increasingly informed if not overshadowed by the seemingly superior information offered by a new manner of advice-givers. During the antebellum period traditional instructional missives to parents in the form of "little volumes prepared by pastors, teachers, and respected citizens" were replaced by the "more florid style" of the new ladies' magazines, which now regularly included poems and stories often written by women. These magazines provided their primarily women readers with the latest thinking on marriage, love, and domesticity. In her study of this literature in the antebellum period, Mary Ryan concludes that popular domestic writing—like the cult of domesticity itself—was designed to "provide a familial refuge from the frenetic movement of the American people, to shore up at least one small set of human relations against the forces of change, movement, and discontinuity." Mothet bore the weight of this exhausting assignment. The project required them to "maintain a constant moral vigilance over their progeny from infancy until that critical period when, in early adulthood, they left the parental home." Moreover, maternal satisfaction in the enterprise was not part of the calculation. As Lydia Child informed her readers, "The care of children requires a great many sacrifices, and a great deal of self-denial, but the woman who is not willing to sacrifice a good deal in such a cause, does not deserve to be a mother."

Significant theological developments regarding the nature of children intensified the importance of maternal presence. In eighteenth- and early nineteenth-century America children were regarded as intrinsically wicked ("not too little to die . . . not too little to go to hell"); strict and early paternal discipline was therefore the order of the day. However, by the 1850s, the possibility that children's souls were susceptible to salvation had replaced Calvinistic convictions of infant depravity. Earlier conceptions of children as short adults gave way to the view that

106. See Ryan, supra note 99, at 19. Biographies of "mothers of the wise and good" were also popular; George Washington's mother was a favorite subject. See Cott, supra note 96, at 94. Three leading authors of the period were Lydia Child, Lydia Sigourney, and Catharine Sedgewick. See Bernard Wishy, The Child and the Republic: The Dawn of Modern American Child Nurture 11–33 (1968); see also Stephanie A. Smith, Conceived by Liberty: Maternal Figures and Nineteenth-Century American Literature 33–68 (1994) (discussing Lydia Child's contributions to the literature of "sequestered motherhood").
107. See Ryan, supra note 99, at 19.
108. Id. at 45.
109. Id. at 46.
110. Cott, supra note 96, at 91 (quoting Lydia M. Child, The Mother's Book 15–16 (Boston, 2d ed. 1883)).
111. Wishy, supra note 106, at 11–12 (quoting James Janeway, A Token for Children (Boston 1729)).
112. See id. at 23. Accordingly, mothers were now instructed not to "tell children they are sinners; it creates an unbridgeable gulf between them and ministers." Id. at 99 (quoting Jacob Abbott, Gentle Measures in the Management and Training of the Young (1871)).
children were malleable in personality and character. The stakes were high. In her popular *Letters to Mothers*, Mrs. Lydia Sigourney ("the poet laureate of domesticity") explained that "[e]very trace made on 'the soul of the babe . . . will stand forth at the judgement."\(^\text{113}\)

Beyond the discovery of children's souls, childhood itself had been discovered as a valued, precious, and suddenly crucial period of life. No longer just a waiting period, childhood was now understood to set the stage for all future development.\(^\text{114}\) The theological reassessment of children's nature coincided with Enlightenment notions that vested responsibility for children's development in mothers. Changes in domestic labor patterns were partly responsible. Like their mothers, middle-class working children were also displaced when production left the household.\(^\text{115}\) In a sense both now had time on their hands that a rigorous scheme of child rearing could fill.\(^\text{116}\)

The discovery of children's essential plasticity had crucial implications for the obligations of child rearing. If children were capable of moral growth and development, if "'bad habits of action' were not inevitable consequences of a partial spiritual corruption, but came from improper training,"\(^\text{117}\) then everything a mother did (or did not do) was critical. Mothers were bombarded with advice and instruction on the method, style, and content of their domestic lesson plans.\(^\text{118}\) Maternal presence became doubly freighted: mothers had to be around to set good examples and to ensure their impressionable children did not pick up bad ones from anyone else.\(^\text{119}\) Mrs. Sigourney fretted that "mothers

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113. Id. at 22 (quoting Lydia H. Sigourney). Children's civic education was also charged to the mother, whose own allegiance hung in the balance: "The degree of her diligence in preparing her children to be good subjects of a just government will be the true measure of her patriotism." Id. at 31 n.28 (quoting Lydia H. Sigourney).


115. As we have seen, apprenticeships became less common as the trades themselves moved out of the home. See supra note 99 and accompanying text.


117. Wishy, supra note 106, at 96.

118. See id. at 24–25. The attention mothers were now expected to devote to their children differed dramatically from earlier practices. In her history of motherhood in France, Elisabeth Badinter argues that until the last third of the eighteenth century, mothers were massively indifferent to their children. See Elisabeth Badinter, Mother Love: Myth and Reality 58–72 (1980).

119. See Wishy, supra note 106, at 28 (noting that by mid-1800s child nurture writers' "principal emphasis" was for "mothers to reform themselves in order to accept new and portentous responsibilities" of child rearing; "[h]er own states of mind, body, and soul were of utmost importance"); id. at 40 (stating that nineteenth-century child nurture writers "warned constantly against the dangers of nurses" whose "characters and 'habits'... might expose the child to corrupting influences"). For an account of the sort of bad example to which ill-attended children could be exposed, see Christine Stansell, Women, Children, and the Uses of the Streets: Class and Gender Conflict in New York City,

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are not sufficiently careful with regard to the conversation of domestics or other uneducated persons who, in their absence, may undertake to amuse their children."\textsuperscript{120}

The legal system contributed to the metamorphosis of modern motherhood, largely through the emerging laws of custody. Until mid-century, fathers were awarded children upon divorce or separation as a matter of course.\textsuperscript{121} However, as courts absorbed the cultural view that children's characters could be shaped and that mothers were specially qualified for the task, mothers gradually obtained significant custodial rights in their children, especially young children of "tender years." Drawing upon the era's maternalistic ideology, the rule created a new legal fiction: the responsible mother.\textsuperscript{122} In recounting a celebrated mid-century custody case, Michael Grossberg explains how the mother prevailed by shifting "the focus of the trial from patriarchal rights to child nurture."\textsuperscript{123} A leading legal treatise summarized the view: "The love of the mother for her child . . . has been proven by the history of the ages, and while her devotion can be counted upon unfailingly, it is sad to say that sometimes the tie between father and child is a different matter."\textsuperscript{124} By century's end the assignment of custody to good mothers reflected not simply social understandings but biological imperatives as well. "[M]other love," explained a Washington state court, "is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring."\textsuperscript{125}

As judicial notice of evolutionary traits suggests, science lent the final influential flourish to the elaboration of childhood as a special province and mothers as the natural guardians. By the end of the nineteenth century, the authority of science had prompted rethinking in every field of knowledge and behavior, including child rearing. Science now infused formerly religious or social concepts, such as the nature of children. Child rearing was no longer the domain of ministers, mothers, and magazine writers but an academic discipline.\textsuperscript{126} Children were now proper

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\textsuperscript{121} See Mason, supra note 89, at 54–64.
\textsuperscript{123} Id.
\textsuperscript{124} Grossberg, supra note 84, at 252–53 (quoting early twentieth-century revision of 2 James Schouler, Domestic Relations 2034–35 (6th ed. 1921)).
\textsuperscript{125} Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916).
\end{flushleft}
subjects for systematic study by educators (such as John Dewey),\textsuperscript{127} psychologists (like G. Stanley Hall),\textsuperscript{128} anthropologists, nutritionists, natural historians, and pediatricians.\textsuperscript{129} The American public, including American mothers, eagerly awaited their insights.

To understand the nature of these insights, it is important to remember that it was not just any science but Darwinism that held sway. Some of its precepts were problematic for existing theories of child rearing. If evolution was charted and traits inherited, what difference could a mother's example or instruction make? Lamarckian evolutionary doctrine provided the answer, adding an interesting (and selectively applied) twist to children's malleability. In such child nurture texts as \textit{Gentle Measures in the Management and Training of the Young}, Jacob Abbott linked evolutionary theory to a child's moral development.\textsuperscript{130} The belief was that good habits instilled by mothers could become hard-wired as instincts and passed on to future generations as permanent improvements.\textsuperscript{131} Environments carefully orchestrated by mothers (and their handlers) in accordance with scientific precepts would produce a better, more moral child.

This scientifically driven instruction was not extended to all children. It was not that nonwhite children were \textit{outside} the boundaries of evolutionary theory; they were simply part of the proof regarding racial hierarchies. To account for "the generally accepted fact that Negro children learned as readily as did white," a leading professor of natural history explained that the mental progress of black children ceased at puberty; at that moment the cranial sutures of inferior races began to close "depriving their brains of further space for growth."\textsuperscript{132} The implications of such facts for child rearing were clear. Maternal presence was unnecessary for children whose very craniums denied them the benefits that enlightened caretaking might otherwise produce.

Science turned its attention to motherhood with equal assurance and equal racial selectivity. Drawing on mid-century advances in physics, physicians and other scientists applied the law of conservation of energy to the human body and determined that all bodily functions competed

\begin{thebibliography}{99}
\bibitem{128} For a good summary of the theories and influence (and personality shortcomings) of G. Stanley Hall, see \textit{id.} at 67–71.
\bibitem{129} See Wishy, supra note 106, at 107.
\bibitem{130} See \textit{id.} at 95–96 (citing Jacob Abbott, \textit{Gentle Measures in the Management and Training of the Young} (1871)).
\bibitem{132} Cynthia Eagle Russett, \textit{Sexual Science: The Victorian Construction of Womanhood} 53 (1989) (quoting Carl Vogt, \textit{Lectures on Man} 191–92 (London, Longman, Green, Longman & Roberts 1864)). Thus anthropologists studied black adults to gain insight into white children, their levels of development regarded as equivalent. See \textit{id.}.
\end{thebibliography}
for the finite amount of energy stored within the body's closed system.\textsuperscript{133} The implications of this for women were great. Because reproduction was understood to take a great deal of energy, activity of any other sort could fatally deplete the store.\textsuperscript{134} Reproductive thermodynamics dictated the removal of mothers to the home even before the arrival of children: "The ovaries began their dictatorship of woman's life at puberty."\textsuperscript{135} Doctors instructed girls to remain particularly still while menstruating, and their mothers were assigned the task of assuring they did. The predicted outcome for women who risked depletion (most commonly by attending college) was infertility and in extreme cases, mannishness.\textsuperscript{136}

Yet education, employment, and exercise were out of bounds only for the women for whom these rules applied and they did not apply to all women. In \textit{A Popular Treatise on the Functions and Diseases of Woman}, Dr. Lucien Warner summarized the prevailing medical view:

> The African negress, who toils beside her husband in the fields of the south, and Bridget, who washes, and scrubs and toils in our homes at the north, enjoy for the most part good health, with comparative immunity from uterine diseases.\textsuperscript{137}

Jacqueline Jones reminds us that "[s]laveholders had little use for sentimental platitudes about the delicacy of the female constitution when it came to grading their 'hands' according to physical strength and endurance."\textsuperscript{138} The physical labor so debilitating for white women of the mid-
Middle class was considered "conducive to health" in the case of southern slaves.\textsuperscript{139}

The fashionability and authority of science led to a mode of organized maternity known as "scientific motherhood."\textsuperscript{140} Middle-class mothers looked with newly intellectualized faith to experts in such developing fields as psychology, education, and pediatrics for answers to their child rearing concerns.\textsuperscript{141} They established networks of child-study groups, such as the National Congress of Mothers (which later became the Parent-Teacher Association (PTA)) to study the latest information on child rearing.\textsuperscript{142} The Congress was greatly influenced by G. Stanley Hall, who cleverly brought mothers into the scientific fold by deputizing them as researchers in the laboratory of the home.\textsuperscript{143} Yet for all its modernity, as Molly Ladd-Taylor points out, scientific motherhood "resembled and perpetuated Republican Motherhood and the Victorian cult of domesticity in three ways: it considered motherhood women's chief duty and function; it assumed that children should be raised in their own homes; and it emphasized women's need for instruction on their domestic responsibilities."\textsuperscript{144}

The conception of motherhood as a duty extended earlier republican notions of maternal patriotism to a new responsibility to the white race. By the end of the nineteenth century, demographic concerns regarding the increasing immigration from southern and eastern Europe, high fertility rates of black women and their migration north, and the decreasing fertility (and rising education) rates of Anglo-American mothers coalesced into concern about "race suicide."\textsuperscript{145} Producing and raising proper children had become a distinctively white imperative. Despite its outreach efforts, the preoccupation of the Congress of Mothers with maternal presence "implicitly reproached many African American

\begin{footnotes}
\item[139] Id. at 19 (quoting Mississippi slaveowner). Jones notes that slaveowners "faced a real dilemma when it came to making use of the physical strength of women as field workers and at the same time protecting their investment in women as childbearers." Id.
\item[140] Ehrenreich & English, supra note 137, at 199–200.
\item[141] See id. at 69–71, 196.
\item[142] See id. at 64–65; see also Molly Ladd-Taylor, Mother-Work: Women, Child Welfare, and the State: 1890–1930, at 65 (1994); Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States 333–40 (1992). Ladd-Taylor notes that "[t]he decision to drop 'mothers' from the name of the National Congress of Mothers and Parent-Teacher Associations in 1924 acknowledged the growing influence of experts and teachers in the organization—and indicated the end of sentimental maternalism." Id. at 64–65.
\item[143] See Ladd-Taylor, supra note 142, at 47. Under an invented (and soon discredited) evolutionary theory of "recapitulation," Hall urged mothers to record their child's every action in "life books." Id.
\item[144] Id. at 4.
\item[145] See id. at 49–50. Securing the well-being of the race justified much of the protective labor legislation of the Progressive period. See infra notes 450–454 and accompanying text.
\end{footnotes}
wives, who were five times as likely as married whites to work outside the home.\textsuperscript{146} Nonetheless, black women organized as mothers in their own clubs and associations, often using the same images and same language as white mothers. Thus the Georgia A and M Women’s Mutual Improvement Circle recognized “(as true women all over the land are doing) that without a better home life, the future of our race is indeed precarious.”\textsuperscript{147} For black mothers, the language was not metaphoric; the infant mortality rate for black children was substantially higher than that of white children.\textsuperscript{148} Black mothers sought to establish clinics, day nurseries, and kindergartens, and to share information on nutrition and education as part of the movement towards “race betterment.”\textsuperscript{149} But as historian Eileen Boris has observed, although late nineteenth-century women’s organizations “relied on the same central image—the altruistic, protective, and nurturing mother[,] . . . . [w]ithin the word ‘mother,’ as used by many reformers and makers of public policy, lurked the referent ‘white.’”\textsuperscript{150} In consequence, black mothers, unlike white mothers of the time, were unable to convert their maternal status to political use. Their efforts to obtain assistance remained private, local endeavors as they were excluded from emerging public programs aimed at ensuring maternal domestic presence even within poor families.\textsuperscript{151}

The program that most clearly affirmed the primacy of maternal presence was mothers’ pensions—stipends or allowances paid to poor mothers to obviate the need for them to separate from children due to the requirements of at least full-time work. Pressure for legislatures to assist poor mothers in raising their children properly developed as mothers converted the spiritual superiority vested in them by virtue of their status as mothers to political use. As Theda Skocpol explains, “[w]omen had so long been regarded as guardians of morality that when they spoke with apparently unanimous conviction about the lofty purposes to be served by the new social policies, their demands were hard for legislators to ignore.”\textsuperscript{152}

The voices were not \textit{completely} unanimous. Some reformers supported nurseries, as child care was then called, in preference to sti-

\textsuperscript{146} Ladd-Taylor, supra note 142, at 56.
\textsuperscript{147} Eileen Boris, The Power of Motherhood: Black and White Activist Women Redefine the “Political”,\textit{ in} Mothers of a New World 216, 217 (Seth Koven \& Sonya Michel\textsc{Eds.}, 1993).
\textsuperscript{148} See id. at 216.
\textsuperscript{149} See Paula Giddings, \textit{When and Where I Enter: The Impact of Black Women on Race and Sex in America} 95–102 (1984) (documenting efforts of Black Women’s Club Movement to create opportunities and resources for Black women and children).
\textsuperscript{150} Boris, supra note 147, at 214–15.
\textsuperscript{151} See id. at 215.
\textsuperscript{152} Skocpol, supra note 142, at 368.
pend.' But nurseries disrupted maternal ideology: "[b]ly providing a substitute for a mother's care of her children while she worked for wages, child care threatened to undermine the notion of motherhood as women's naturally ordained and most important role." Support for mothers' pensions was therefore a less risky proposition for those who believed that "family life in the home is sapped in its foundations when the mothers of young children work for wages." In consequence, Progressive Era political energies focused on the "ideologically comfortable" position favoring pensions and the movement for day care fizzled.

By 1920, over forty states had enacted maternal pensions. While hardly solving the problem of poor mothers—the stipends were small, underfunded, heavily conditioned on "decent" maternal behavior by the mother (which under local standards removed all women of color), and aimed at widows—the pensions nonetheless recognized the work of

153. Even those who favored nurseries, such as the National Federation of Day Nurseries, saw them as a short-term, stop-gap solution to temporary family emergencies. There was also concern that if nurseries became easily available, mothers might work when it was not completely necessary for them to do so. Finally, even supporters doubted that mothers could both work and be competent mothers. Hull House reformer Jane Addams posed the issue: "How far the wife can be both wife and mother and supporter of the family raises the question of whether the day nursery should tempt her to attempt the impossible." Sonya Michel, The Limits of Maternalism, in Mothers of a New World, supra note 147, at 277, 291 (quoting Jane Addams).

154. Id. at 279.


156. See Skocpol, supra note 142, at 448.

157. For a thorough discussion of the politics of enactment, see id. at 424–79. I focus here on maternal pensions from a "separations" perspective, viewing them as a contemporary political statement about the social importance of maternal presence. Mothers' pensions have also been analyzed from a number of other perspectives. These include the centrality of women in creating the modern welfare state, see Kathryn Kish Sklar, Florence Kelly and the Nation's Work: The Rise of Women's Political Culture, 1850–1900 (1995); Kathryn Kish Sklar, The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1880–1930, in Mothers of a New World, supra note 147, at 43; the patriarchal suppression of women into the domestic sphere, see Mimi Abramovitz, Regulating the Lives of Women: Social Welfare Policy from Colonial Times to the Present (1988); Eileen Boris & Peter Bardaglio, The Transformation of Patriarchy: The Historic Role of the State, in Families, Politics, and Public Policy: A Feminist Dialogue on Women and the State 70, 85–88 (Irene Diamond ed., 1983); the incorporation of racial distinctions among mothers into social policy, see Boris, supra note 151, at 290–31; and gender-based differences between women's maternal pensions and men's unemployment compensation, see Barbara J. Nelson, The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid, in Women, the State, and Welfare, supra note 155, at 123. A comprehensive understanding of the origins and legacies of maternal pensions necessarily draws upon each of these.

158. See Joanne L. Goodwin, An American Experiment in Paid Motherhood: The Implementation of Mothers' Pensions in Early Twentieth-Century Chicago, 4 Gender & Hist. 328, 330–31 (1992) (noting that "local fiscal revenues frequently fell short of the budgetary needs of pensioned families' and mothers' wages made up the difference").
mothering and extended social sentiments regarding maternal presence into social policy.

C. The Grand Prerogative Today

By the end of the last century, the relationship between motherhood and successful adult status for women was well established. The point is nicely made by an index entry in a book on fin-de-siècle art: "Motherhood, as only justification of feminine existence."\(^{159}\) As the next fin-de-siècle approaches, this conception of motherhood has proven remarkably durable. In 1992, Marilyn Quayle proudly told the Republican National Convention that "most women do not wish to be liberated from their essential natures as women. Most of us love being mothers and wives."\(^{160}\) In 1995, Danielle Crittenden published an op-ed piece in the New York Times declaring that

despite two decades of policies and social pressure urging them to do otherwise, the majority of women still need and want to mother their children. No amount of government aid . . . will offset biological fact: the cry of a baby is more compelling than the call of the office. . . . [H]aving a child . . . affects us differently from our husbands.\(^ {161}\)

These statements sort mothers neatly into two categories: the good natural ones who stay home with their children and the selfish feminist ones who don’t. At the presidential level, the drama played out in 1992 with Hillary Clinton cast as the ogre and Marilyn Quayle and Barbara Bush as the mothers.\(^{162}\) Motherhood as a measure of character also plays out with great intensity, if less publicity, in the lives of women unattached to presidents. Thus a working mother’s response to Crittenden: “When my husband and I walk out the door in the morning and hear a child cry, the reason I want to turn back and he does not is that society tells me I am a bad mother if I work outside the home.”\(^{163}\)

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161. Danielle Crittenden, Yes, Motherhood Lowers Pay, N.Y. Times, Aug. 22, 1995, at A15. I recognize that the piece was published on the opinion page, not in the Science Times. Nonetheless, the opinion that women are meant to mother and mothers are meant to stay home is an opinion fiercely held by many today. See Kristin Luker, Abortion and the Politics of Motherhood 160–61 (1984) (explaining that most pro-life activists believe “women should be wives and mothers first”).


In this section I want to investigate how the Quayle and Crittenden remarks, which would have been cheered by the National Congress of Mothers in the 1890s, remain a vibrant rallying call one hundred years later. The investigation reprises several nineteenth-century themes: the importance of motherhood in women’s lives, the role of science (now animated less by thermodynamics than by psychology), labor interests, differences among mothers, and the incorporation of cultural views about separating into law.

I begin with the centrality of motherhood, as powerfully revealed through the experiences of women without children, whether through infertility, personal preference, or judicial decision. We know that many women diagnosed as infertile commonly regard the diagnosis as both a profound personal failure and a stigmatized social status.\(^1\) There is, however, one group of women more stigmatized than those who cannot bear children: those who are childless by choice.\(^2\) Involuntarily childless women, generally reluctant to reveal their infertility, will do so “to avoid the more negative connotations of being falsely accused of voluntary childlessness.”\(^3\) The dominant connotation of that status is selfish-

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1. See Charlene E. Miall, The Stigma of Involuntary Childlessness, 33 Soc. Probs. 268, 271 (1986). As reproductive technologies have solved the problem of childlessness for some women, they have drawn them out for others. Women (with insurance or savings) who might once have either accepted the diagnosis and perhaps have adopted now spend years and fortunes to achieve biological motherhood. Harvard law professor Elizabeth Bartholet describes her rugged, ten-year hout with reproductive technologies:

    Now I look back and see a woman driven by the forces that had told her since birth that she should go forth and multiply, that her ability to bear a child was central to her meaning as a human being, and that “real” parenting involved raising a biologically linked child.

Elizabeth Bartholet, Family Bonds: Adoption and the Politics of Parenting 29 (1993); see also Anne Taylor Fleming, Motherhood Deferred 18 (1994) (“I will persevere in this pregnancy quest... If the insemination doesn’t work this time, there is always the next and the next, and out beyond that, those amazing high-tech procedures...”).

2. As Margarete Sandelowski points out, the notion that “[b]iological dysfunctions in the involuntary domain are the results of actions in the voluntary domain” continues to thrive in medical literature. See Margarete J. Sandelowski, Failures of Volition: Female Agency and Infertility in Historical Perspective, 15 Signs 475, 478 (1990). This argument reprises the nineteenth-century theme that “expanded education and women’s ambitions perverted their biological destiny.” Id. at 485; see also supra text accompanying notes 133-136. Sandelowski contends that not much has changed. Biological infertility is attributed to deliberate choices women have made: establishing careers, postponing or terminating pregnancy, and too much sex. See Sandelowski, supra, at 476.

3. Miall, supra note 164, at 277 (“The subfecund may be considered unfortunate and hence deserving of sympathy, but the voluntarily childless are considered immoral and hence deserving of censure.”) (quoting Jean Veevers, Voluntary Childlessness: A Review of Issues and Evidence, 2 Marriage & Fam. 1, 4–5 (1979)). There is, however, at least the beginning of a countermovement. See Jeanne Safer, Childless by Choice, N.Y. Times, Jan. 17, 1996, at A19 (“Contrary to popular assumptions, most women I’ve talked to who have made conscious decisions not to reproduce for personal or professional reasons are approaching their milestone [50th] birthdays with few regrets and with a lot of relief and excitement about the future.”). For a stronger version see Charlotte Parker, Married Without Children: Is It Normal Not to Feel Maternal?, Cosmopolitan, Dec. 1994, at 84, 84
ness. Thus upon discovering that voters in the 1992 presidential election thought Hillary Clinton had no children, campaign managers interrupted daughter Chelsea's parentally imposed privacy in order to rehabilitate her too-professional mother. It appears that even before we get to mothers who separate from children, women without children to separate from are already suspect. Mothers without custody following a divorce experience manifest social condemnation; everyone knows that they were either too bad to win their children, or even worse for not wanting to.

There are, however, exceptions. For mothers disfavored within the dominant culture, separating from children is expected, not condemned. Official policies towards mothers who are poor, of color, unmar-

(“As I soaked luxuriously in the hot tub, I thought, Right now, you could be Sarah, who is probably coaxing little Claire out of a temper tantrum at the A & P. And I definitely wanted to be me.”); see also Martha E. Gimenez, Feminism, Pronatalism, and Motherhood, in Mothering: Essays in Feminist Theory 287, 299–300 (Joyce Trebilcot ed., 1983) (critiquing feminism for “not clearly posit[ing] a childfree status as real and legitimate option for women”).

167. See Jamieson, supra note 162, at 40. Similarly, Los Angeles County prosecutor Marcia Clark was urged by her spin doctors to mention her children (and groceries) more often as part of her “make over and motherization.” David Margolick, Remaking of the Simpson Prosecutor, N.Y. Times, Oct. 3, 1994, at A10. The strategic practice of “motherizing” professional women, or just domesticating them through marriage or romance has a sturdy history; suffragists such as Susan B. Anthony invented tales of romantic courtship to soften their public images. See Kathleen Barry, Susan B. Anthony: A Biography of a Singular Feminist 359–60 (1988). Of course, for most women (including, I suspect, Hillary Clinton), affection for their children is not a matter of image but a preference, whether or not they sometimes separate from them.

168. See Geoffrey L. Greif & Mary S. Pabst, Mothers Without Custody 1 (1988). One study on societal attitudes toward ten different “childfree lifestyles” (involuntarily childless, empty nest, preparental, etc.) found that “the harshest judgments fell on homosexual couples and noncustody mothers.” Judith L. Fischer, Mothers Living Apart From Their Children, 32 Fam. Rel. 351, 352 (1983); see also Phyllis Chesler, Mothers on Trial: The Battle for Children and Custody 190–207 (1986) (noting that “a custodial father is heroized but a custodial mother is taken for granted; and a . . . non-custodial father is viewed sympathetically [while] a non-custodial mother is condemned”).


ried,\textsuperscript{171} undocumented,\textsuperscript{172} developmentally disabled,\textsuperscript{173} young,\textsuperscript{174} lesbian,\textsuperscript{175} and mothers in whom these traits conspire make clear that the legal standards supporting mother-child bonds are more elastic than they first appear. Such mothers experience much less concern about their separations from children and find it more difficult to win custody cases. In addition, public benefits are often conditioned on their agreement to separate from their children.\textsuperscript{176}

Still, for mainstream mothers, the view that children’s welfare is staked to maternal presence is vigorously reinforced by popular psycholo-

\begin{itemize}
  \item \textsuperscript{171} See Regina Austin, Sapphire Bound!, 1989 Wis. L. Rev. 539, 555 (contesting the assumption implicit in the \textit{Chambers} decision that “the actual cultural practices and articulated moral positions of the black females who know the struggles of early and single motherhood firsthand are both misguided and destructive”).
  \item \textsuperscript{172} See Carol Sanger, Immigration Reform and Control of the Undocumented Family, 2 Geo. Immigr. L.J. 295, 319–22 (noting that under the Immigration Reform and Control Act of 1986, because the dependents of legalized aliens did not receive derivative status from their head of household, undocumented workers had to choose between legalized status and family separation).
  \item \textsuperscript{174} See Diana M. Pearce, Children Having Children: Teenage Pregnancy and Public Policy from the Woman’s Perspective, in The Politics of Pregnancy, supra note 10, at 46, 49–52 (describing how welfare policies have made it difficult for teenage parents to set up their own households).
  \item \textsuperscript{175} See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 459, 468–470 (1990), (discussing how the law requires one father and one mother).
  \item \textsuperscript{176} Undocumented mothers could accept legalization for themselves but not their children, see Sanger, supra note 172, at 317, secondary schools for Native American children were provided only off reservations, see Margaret Connell Szasz, Federal Boarding Schools and the Indian Child: 1920–1960, in Growing Up in America: The Child in Historical Perspective 209, 209 (N. Ray Hiner & Joseph M. Hawes eds., 1985), and current welfare proposals are premised on maternal employment, see infra Part IV.C.1.c.
\end{itemize}
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177. A leading child development specialist writes, "I firmly believe that most children will get off to a better start in life when they spend the majority of their waking hours being cared for by their parents and other family members rather than in any form of substitute care." Burton L. White, Should You Stay Home With Your Baby?, in The Psychology of Women: Ongoing Debates 858, 858 (Mary Roth Walsh ed., 1987). White explains that no one else can match the enthusiasm and excitement expressed by parents at their child's first steps, and that this kind of regular and authentic enthusiasm is central to the child's growing sense of security and self-worth. See id. at 860-61; see also Ehrenreich & English, supra note 137, at 225-65 (reviewing the experts' changing theories of what mothers were doing (consistently) wrong throughout the 1950s and 1960s); Selma Fraiberg, Every Child's Birthright: In Defense of Mothering 80-89 (1977) (advocating the primacy of mothering for the welfare of children).


179. Television programming of the early 1990s retrieved the motherless sitcom family with a vengeance. As one television critic explained:

[T]he current rash of shows without mothers can be traced to a confluence of psychological, sociological and economic factors, including the exploitation of every working mother's most basic guilt about deserting her children and the flip side of that—a child's fear of abandonment caused by women's changing roles in society.


180. See infra notes 481-498 and accompanying text. Consider also the strange case of a South Carolina mother tethered to her teenage daughter by order of a state family court judge. See Tethered to Daughter, 15, A Mother Pays, N.Y. Times, Dec. 22, 1995, at A26 (reporting that county's tethering program designed to force a greater degree of parental supervision of delinquent children); see also Woman Tied to Daughter Is Admitted for Overdose, N.Y. Times, Jan. 12, 1996, at A16 ("'Let's face it, she's tethered to a 15-year old,' [the family lawyer] said. 'That may have caused her anxiety.'").


the plot: "[A]s the son grows from toddlerhood to manhood, no matter what he wears or how loudly he plays his music, the mother crawls to his bed every night to hold him and sing [the] refrain": "‘I’ll love you forever . . . /As long as I’m living/my baby you’ll be’".186 She crawls in singing every night, even after the son has moved across town into his own house.187

David Elkin, a well-known child psychologist, explains the book’s power: ‘‘In a changing world where so much is discontinuous—jobs, homes, family arrangements—there is a yearning for continuity . . . . This is a wish-fulfillment kind of fantasy.’”188 The source of continuity is the devoted mother. Elkin’s analysis reprises by some 150 years the work performed by popular antebellum domestic writing: “to shore up at least one small set of human relations against the forces of change, movement, and discontinuity.”189

If this kind of wish fulfillment enacted itself only at the level of bedtime stories, mothers would still have a difficult time meeting social expectations. But the situation is more serious. As in the late 1800s when theories of reproductive energy conservation were used to keep women indoors, the authority of science has again stepped in to convert social desires into biological facts. The science applied to motherhood was now more psychoanalytical in flavor. Freud set the stage by “making the mother the central character in the family.”190 His theories posited that “personality is shaped primarily by the emotional relationship we have with our parents, especially the mother.”191 Separating from her became the focus of much subsequent theoretical work: “if the process of separation is depicted differently by Freud than by more recent theorists, it does not follow that the theme is given less weight.”192 Thus as Diane Eyer explains, early ego psychologists such as Anna Freud “blamed a child’s ego deficiencies on inadequate mothering,” while object relations theorists “focused on the formation of the self in infancy through specific emotional relations with family members, especially the mother.”193 The withdrawal of maternal love (or the fear of that withdrawal) is now a central factor in the formation of infant personality: “[s]eparation from [the

186. Dunleavey, supra note 185, at 48 (quoting Munsch, supra note 183).
187. See id.
188. Id. at 49 (quoting David Elkin). Booksellers report many adults say they are buying the book for other adults. See id.
189. Ryan, supra note 99, at 45.
190. Badinter, supra note 118, at 260. Badinter observes that Freudian theory served to “medicalize” bad mothering: the inadequate mother was not so much immoral as sick. See id. at 260–62.
193. Eyer, supra note 191, at 56.
mother] . . . brings anxiety that she will not return, and with it a fundamental threat to the infant's still precarious sense of self."

Maternal presence as a social norm and psychological imperative came into full bloom in the early 1950s with the development of the suburbs and a psychological theory to match. Pulling no punches, the influential John Bowlby equated full-time maternal employment with "'[d]eath of a parent,' 'i[m]prisonment of a parent,' [and] 's[ocial calamity—war, famine,' etc." in explaining why families fail. Psychological theories of maternal influence accompanied, perhaps fronted for, a complex of other reasons—economic, social, and political—why women were encouraged to stay home. Women who rejected the assignment or women who embraced it too enthusiastically were pathologized as either unnatural or overprotective.

By the 1970s, theories of maternal separation and contact had become somewhat more refined. The mechanism was now mother-infant bonding: the theory that sustained interaction between mother and child in the first few days after the birth is essential to the child's subsequent successful development. Initial research in the early 1970s claimed that mothers who had sixteen extra hours of contact with their newborns demonstrated superior mothering skills for years thereafter and that the babies of these "extra-contact mothers" scored higher on various developmental tests.

Bonding theory combines biology—the postpartum mother is hormonally primed to accept her infant—with psychological theories of attachment and deprivation. Timing is everything. If the child is deprived of (or rejected by) his mother during the sensitive postpartum period, the moment is lost. Predicted outcomes for unbonded mothers and children included the tendency for child abuse in the mother and delinquency in the child. Because of the simplicity of the technique (keep mother and babies together) and the gravity of its nonuse (child abuse or

196. Ehrenreich & English, supra note 137, at 230 (quoting John Bowlby).
197. During the 1940s, the phenomenon took on a pathological veneer with Philip Wylie's invention of "momism." Wylie's cure for the too-enthusiastic mother was not that mothers should get out of the house but that they should learn to vent their domestic frustrations by overdevotion to their children. See Philip Wylie, Generation of Vipers 185 (1943).
199. See Eyer, supra note 191, at 4 (child abuse); id. at 32 (delinquency).
bonding quickly became the darling of nurses, pediatricians, and parents. The picture was not quite so simple in that official bonding turned out to be something more than just contact. Mothers were instructed and measured on such things as "skin-to-skin postpartum contact, en face looking, and a certain sequence of touching behaviors." In effect, bonding provided still another activity at which mothers could fail and for which they could be faulted. It served as a scientific first call for maternal presence, as mothers were made aware early on that their child's future hinged on where they were and what they did in the very moments after childbirth. As one attachment expert explained, "The struggle to understand the infant-mother bond ranks as one of the great quests of modern psychology, one that touches us deeply because it holds so many clues as to how we become who we are."

Despite the fact that subsequent research revealed methodological inadequacies (the base research was done on goats) and overstatements in the early claims for mother-infant bonding, "bonding" caught on as a general description for almost any positive social relationship and as a general solution for almost any social problem. Everybody now "bonds" with someone—teachers and students, salesmen and clients, owners and pets—or thinks they ought to. Yet the core concept remains maternal connection, and Eyer argues persuasively that the mother-focused bonding fervor of the late 1970s and 1980s was no coincidence:

"The widespread social need for people to be connected, to maintain a continuity of relations in the face of high divorce rates, lawsuits, frequent geographic moves, sudden changes in social status, interactions with anonymous institutions, have all contributed to the necessity of bonding—a social epoxy for constantly breaking social relations. As so often happens in avoiding a complex cultural problem, it is projected onto women, who are then required by the tenets of their sex to perform a symbolic redress."

The redress is symbolic in this sense: at the theoretical level, maternal presence may be considered vital to the well-being of children, but the burden of finding and paying for the time is the mother's alone. If she fails in this regard, the main contribution of bonding theory is to clarify where society can point the blame. It is increasingly difficult for mothers to engage in mother-infant bonding or even mother-child time

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200. "'Animal studies of the effects of short periods of separation of mother and offspring have shown disastrous consequences—rejection and even killing of the baby.'" Id. at 43 (quoting British pediatrician Hugh Jolly, The Importance of "Bonding" for Newborn Baby, Mother and Father, Nursing Mirror, Aug. 31, 1978, at 19-21).

201. Id. at 44.

202. See id. at 13.


204. See Eyer, supra note 191, at 14.

205. Id.
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together. Support for contact in the crucial postpartum period is collapsing, as insurance companies have begun to limit mothers to a maximum of twenty-four hours of in-patient hospital care after birth. After the immediate birth period, things do not improve. The hard-fought battle for the Family and Medical Leave Act of 1993 secured only twelve weeks of unpaid leave. The state of Michigan is considering legislation that requires mothers who receive public benefits to return to work when their babies are just six weeks old. Few mothers with preschool children stay home full-time, and social support to enable them to do so seems unlikely.

The satisfying assumption that mothers require no compensation to spend time with their children stems from the nineteenth-century vision of motherhood as nurturing and sacrificial. The assumption that a good mother would give up much in order not to separate from her child has worked its way into law, as seen in a growing number of “move away” custody cases. In In re Marriage of Fingert, a mother lived with her son in Northern California for three years following the couple’s divorce. When the boy was about to enter first grade, the mother requested a custody schedule that would permit him to attend one school. (The existing order had him flying to Southern California for one week of kindergarten every month). The trial court denied the mother’s request and instead ordered her to move to Southern California to facilitate the father’s visitation rights. The court expressly acknowledged that the de-

206. See Kamerman & Kahn, supra note 21, at 69–72.

207. See Jon Nordheimer, New Mothers Gain 2nd Day in Hospital, N.Y. Times, June 29, 1995, at B1 (New Jersey Governor Christine Whitman signed legislation requiring insurers to pay for a second day of hospital care, making New Jersey “the second in the nation to regulate what critics have called ‘drive-through deliveries.’”). Governor Whitman added that the bill for two-day coverage uses “common sense to give women a chance to recover and babies a chance to get a good head start.” Id. As it turns out, the legislation does not cover insurance policies written outside New Jersey or employees in companies that are self-insured. Thus the two-day maternity coverage does not extend to the 3,400,000 New Yorkers who fall within these exceptions. See Jennifer Preston, A 48-Hour Maternity Law Has Exceptions, N.Y. Times, Dec. 31, 1995, § 1 (Metro Section), at 30.


209. See supra note 34.

210. An exception has emerged in the application of the Federal Sentencing Guidelines, where judges and magistrates have used a convicted defendant’s maternal responsibilities as a basis for lowering an otherwise mandatory sentence. See Deborah Pines, Status as Mother Mitigating Factor in Sentencing, N.Y. L.J., Jan. 30, 1992, at 1, 7 (In reducing the sentence of Bonnie Gerard for mail fraud, Judge Robert Sweet noted that although “family ties and responsibilities ... are not ordinarily relevant,” the fact that Gerard was the “sole care provider” for her two teenage children took her case “out of the ordinary.”). See generally Kathleen Daly, Gender, Crime, and Punishment 9–10 (1994) (noting that concern of court officials to keep families together and not to punish “innocent children” results in greater leniency toward “familied” defendants, most of whom are women).

cree would "force [the mother] to move to Ventura County or else give up custody of her child." As Christine Littleton has pointed out, the court's rationale that its order was the only way the boy would spend time with both parents assumed that the mother alone would sacrifice her economic and social interests to maintain her relationship with her son. Nonetheless, the issue arises in an increasing number of "move away" custody cases in which mothers seeking a better job or proximity to family after a divorce are disadvantaged by the threat of injunction against leaving the jurisdiction with their children.

Expectations about what a good mother would do are also central to the political use mothers can make of their maternal status. As in the last century, only certain mothers—mostly white, middle-class ones—are able to deploy maternal status with sustained political effectiveness and even they must tightly frame issues as a mother's cause motivated by the welfare of her children. Preventing the separation of mother and child, whether from the vicissitudes of war, crime, or the environment, establishes the cause as especially worthy. Modern examples include the 1960s anti-nuclear Women's Strike for Peace and Mothers Against Drunk Driving.

212. Fingert, 271 Cal. Rptr. at 391 (quoting trial court). There is much else to dispute in the trial court's opinion, such as the judge's complete reliance on a mediator's recommendation. See Penelope E. Bryan, Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation, 28 Fam. L.Q. 177, 189 & n.9 (1994).

213. See Littleton, supra note 211, at 48-49.

214. See Fingert, 271 Cal. Rptr. at 392 ("[A mother] cannot be ordered to choose between her right to resettle, find new employment, start a new life and retain custody of her child.").


216. For an historical view, see generally Paula Baker, The Domestication of Politics: Women and American Political Society, 1780-1920, in Women, the State and Welfare, supra note 155, at 55, 65 ("Motherhood' and 'womanhood' were powerful integrating forces that . . . carried moral and political clout."). American abolitionists of the last century made perhaps the most powerful political use of maternal status, exactly by focusing on the forced separations between slave mothers and children. Mary Ryan describes the technique used by abolitionist writer Elizabeth Chandler, "the anti-slavery analogue to Lydia Sigourney," Ryan, supra note 99, at 132. Chandler assumed that the American mother was bound to her child by the most exhaustive expenditure of affection [so that when the child] set out on his own, the mother might well fear the breach of maternal ties. . . . Chandler displaced this anxiety onto the slave child. This was the sentimental anti-slavery formula: the conversion of mundane apprehensions of domestic disruption into sympathy for the slave.

Driving (which got nowhere under its first acronym, RID—Remove Intoxicated Drivers).218 At local levels, mothers have organized successful campaigns against child abductors in Chicago,219 police harassment in Seattle,220 gang violence in New Jersey,221 and environmental pollution in East Los Angeles and Love Canal.222 There is also the stunning example of Las Madres de Plaza de Mayo, the brave mothers and grandmothers of Argentina who refused to accept the disappearances their children by the government.223

In each of these movements, whether grassroots or national, the interests, if not the lives, of children were presented as the paramount concern. In contrast, the opinions of mothers on issues that affect them alone (to the extent that is ever possible), or that are perceived as unnatural and unmotherly because their goal appears to distance mothers from children, are highly suspect.224 Thus political advocacy in support of abortion or child care or the Equal Rights Amendment, once it became marked as an assault on traditional domesticity, has been largely unsuccessful.225

King eds., 1989) (noting that organizers understood traditional middle-class image of mothers was critical to media’s acceptance of protest).


220. See Don Williamson, Task is Much Greater Than Simply Hiring a New Chief, Seattle Times, Aug. 22, 1993 at B5 (reporting on Mothers Against Police Harassment, whose founder Harriet Walden is the “only certified ‘grassroots butt kicker’ ” challenging police department treatment of citizens).

221. See Robert Hanley, In Tranquil Town Beset By Drugs, Mothers on Patrol Put Dealers on Notice, N.Y. Times, Oct. 18, 1994, at B7 (reporting on “mothers’ crime patrol” to wipe out drug dealing in Morristown, New Jersey neighborhood); Alfred Lubrano, The Pain Remains; Moms Who’ve Lost Sons to Violence Form a Group, Newsday, May 10, 1993, at 8 (City Edition).

222. See 81-Year Old Latino Woman From East Los Angeles One of Six Heroes to Receive Sixth Annual Goldman Environmental Prize, PR Newswire, News Library, Apr. 17, 1995, available in Westlaw, PRWIREPLUS Database (reporting work of Mothers of East Los Angeles to keep new prison, toxic waste incinerator, and garbage dump out of their neighborhood); see also Mark Dovie, Losing Ground: American Environmentalism at the Close of the Twentieth Century 129 (1995) (reporting that discovery of high levels of pollution in poor areas like Love Canal created a “new class of activist—the angry mother”).


224. Even Las Madres de Plaza de Mayo were unable to sustain their movement once broader and nonmaternal political issues (often those supported by their missing children) were included as objectives. See Ann Snitow, A Gender Diary, in Conflicts in Feminism 9, 20–24 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

225. See Jane J. Mansbridge, Why We Lost the ERA 90–117 (1986) (noting that opponents of the Equal Rights Amendment focused their attacks partially on the destructive effects of the ERA on homemakers); Jill Quadagno, The Color of Welfare
III. RECONSIDERING SEPARATIONS

In this section I want to reconsider the legacy of the nineteenth (and much of the twentieth) century regarding mothers who separate from children. This requires looking anew at the nineteenth-century creation of the ever-present mother and poking somewhat more ferociously at the linguistic and empirical underpinnings that sustain the model. We may no longer quite believe that educated women cannot reproduce or that good table manners are passed down genetically, yet the heritage of presence as the measure of maternal virtue continues to obscure an objective approach to thinking about—and regulating—maternal separation decisions. I start from the assumption that the practice of separating from children, without more, does not merit immediate condemnation. I begin by untangling the (perhaps) careless merging in public discourse of “separation” with “abandonment” to describe any separation between mothers and children. I then compare cultural assumptions about why mothers separate from children with the actual motivations of mothers themselves. I argue that traditional diagnoses of maternal motivation (negligent, rejecting, selfish) are rarely indicated by the facts. Finally, I investigate the assumptions about harm to children that underlie much of the reasoning and regulation of separations by comparing earlier Bowlby-based conclusions regarding maternal absence with recent data that suggest a more complicated set of variables (background poverty levels, age of child, quality of substitute care) determine developmental outcomes for children. The three comparisons serve to shake loose what is known about maternal separation decisions from what is assumed or ascribed, however useful or reassuring those assumptions have been.

A. Separation Versus Abandonment

In lecturing on maternal separation decisions in recent years, I discovered that colleagues would subsequently ask how my work on abandonment was coming along, even though in earlier stages of this project I never mentioned the word. The inquiries suggested with some force that any discussion of maternal separations triggers a suspicion that abandonment must be skulking somewhere nearby. But while the two terms are often used interchangeably, abandonment and separation are not the same thing. In this section, I want to differentiate between the two behaviors and suggest why they are sometimes confused.

At law, abandonment is defined generally as “the established intention to give up all parental rights and to avoid all parental obligations.” A judicial finding of abandonment is extremely serious. It provides a

185-86 (1994) (arguing that federal support for child care during the Nixon years was defeated “both because of its connection to welfare reform... and because of its implied validation of the right of all mothers to work”).

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ground for terminating the legal relationship between parent and child, and frees the child for adoption by another family. Courts find abandonment only when a parent has "consistently fail[ed], over a substantial period of time, to communicate with the child, to support him, or to take any real interest in him." States often specify exactly what period counts as substantial. In New York, for example, the failure to contact or support one's child for over six months without good cause constitutes an abandonment. In most cases, however, absences are more severe: "DURING the five-and-a-half years of Jennifer's life her mother never made any effort to contact or visit Jennifer. . . . No presents, cards or communications were ever sent from mother to child and no visits were ever made." In contrast, mothers often separate from children but continue to demonstrate and provide care and support, often by arranging substitute care. Thus the children of mothers who are in prison or in hospitals or out flying the friendly skies are not abandoned by virtue of their mother's location alone. That is because physical separation does not necessarily relieve a mother from the obligations (or satisfactions) of motherhood. The law sometimes recognizes this distinction, although "separation," unlike "abandonment," is not a term with a determinate legal meaning. For example, in states where the primary caretaker standard is used to determine custody upon divorce, "arranging for alternative care" (babysitting, day care, etc.) is one of the enumerated criteria, along with

227. See id. For example, Connecticut probate courts may terminate parental rights if a child is abandoned for at least one year. See Verna Lillburn, Abandonment as Grounds for the Termination of Parental Rights, 5 Conn. Prob. L.J. 263, 273 (1991).

228. Clark, supra note 226, at 896. Subjective intent to abandon is not, however, a requirement for a finding of abandonment. See In re Vanessa F, 351 N.Y.S.2d 337, 343 (Sur. Ct. 1974) ("[A]bandonment is not defined in terms of intention, but rather in terms of conduct such as the failure to visit a child for more than six months without good reason.") (citation omitted).


231. See, e.g., Ann M. Stanton, When Mothers Go To Jail 3 (1980) ("Although incarceration per se is not always deemed sufficient to constitute abandonment, the fact of imprisonment may combine with other factors such as parental neglect and withholding of parental affection to lend support to a finding of abandonment."). Thus advocates for prisoners with children encourage them to write, telephone, and ask for visits with their children. See Women's Prison Association, Don't Forget About Your Children! Protect Your Rights as Parents! (urging mothers to "[w]rite letters, send cards, send holiday and birthday presents . . . Keep writing even if you don't get an answer.") (on file with the Columbia Law Review).

232. Consider Doris Lessing's story describing the domestic activities of two hospitalized mothers who, from their beds on the ward, "demanded the movable telephones several times a day to organize dentists' and doctors' appointments, to remind their families of this or that, or to ring up grocers' or greengrocers' shops to order food the happy-go-lucky ones at home were bound to forget." Doris Lessing, The Real Thing 55 (1992).
such other activities as grooming, bathing, and making medical appointments, for determining which parent has acted as the child's primary caretaker. The standard explicitly recognizes that separating from a child and simultaneously caring for him is a regular aspect of parenting.

Providing substitute care has distinguished even decisions to separate permanently from being characterized legally as abandonment. In Swinney v. Mosher, birth mother Christina Swinney agreed to place her baby for adoption with Steven and Deborah Mosher. The day the baby was born, Swinney signed an affidavit relinquishing her parental rights and handed the baby over to the Moshers. The next day she decided she had made a huge mistake and wanted the baby back. The Moshers argued that Swinney's consent or approval was no longer necessary; that by "voluntarily [leaving it] in the possession of another [with] an intent not to return," Swinney had abandoned the baby. The trial court agreed and terminated Swinney's parental rights. The case was reversed on appeal. In turning the child over to the Moshers in an open adoption, the appellate court held that Swinney was not "disregarding her parental obligations, as contemplated by [the Texas abandonment statute], but instead was attempting to affirmatively provide for [the baby's] welfare through others."

The decision recognized that while abandonment connotes a kind of disregard, other forms of separation do not. Mothers who separate from children often think through their decisions with great care. Care attaches to the timing of the separation (waiting for the child to enter kindergarten) and to the quality of substitute care (whether the mother is choosing a babysitter or adoptive parents for her child). It attaches with perhaps greatest deliberation to the underlying decision of whether to separate at all.

Even so, the distinction between providing alternate care for one's child and disregarding the child altogether is often overlooked. In consequence, abandonment is still used to describe almost any separation between a mother and her child. One reason may be that we currently have no neutral, non-pejorative word to describe maternal separations. Another is the tremendous cultural currency of the term "abandonment" to describe almost any experience of loss. Patients feel abandoned by psychiatrists during the month of August, fans felt abandoned by players during the baseball strike, and parents anticipate feelings of abandonment in their first child upon the arrival of a second. In an age where terms like "bonding" and "abandonment" are tossed around on playgrounds, physical separations between mothers and their children may

\[234. \text{830 S.W.2d 187 (Tx. Ct. App. 1992)}\]
\[235. \text{See id. at 190.}\]
\[236. \text{See id. at 191.}\]
\[237. \text{Id.}\]
well be experienced as abandonment. Thus I do not doubt the feelings of patient, fan, or oldest child.

Yet as sympathetic as the child’s experience of loss may be (or adult apprehensions about the child’s experience), the law must reckon with the mother’s actual conduct and not its characterization by those she has left behind. This difference is particularly important when they have not really been left behind, as in the case of subsequent siblings. Family size is not yet grounds for a verdict of abandonment.

Distinguishing between abandonment and separation is crucial to the sensible regulation of both behaviors. The law properly penalizes mothers who abandon children. Too often, however, a mother’s absence alone is penalized. We see this in custody cases involving working mothers, where separating from a child is almost always held more stringently against mothers than against fathers, for whom there has been little expectation of a caretaking presence. Expectations about maternal presence also explain judicial characterization of decisions by mothers to decline life-saving treatment on religious grounds as abandonment. Until recently, such decisions have been enjoined on the grounds that by dying the mother would be legally abandoning her children. However, in a 1993 Florida case, the court upheld a mother’s decision to decline a blood transfusion, acknowledging that her four children would not be legally abandoned if she died: their father could take care of them.

238. Sometimes the collapsing of categories is more promiscuous. Consider the popular self-help book *Motherless Daughters* in which the author equates physical separation with death:

*Mother loss* as represented in this book includes several types of absence, including premature death, physical separation, mental illness, emotional abandonment, and neglect. Because most of the women interviewed were children or adolescents when their mothers died, for matters of economy I occasionally use death and its corresponding verb forms in place of death, abandonment, and other forms of loss.


239. Doris Lessing describes her vivid early memory of the arrival of her newborn baby brother:

The [baby’s] cot was well above my head, and [my mother] was bending past it and saying persuasively, ‘It is your baby, Doris, and you must love it.’... I was in a flame of rage and resentment. It was not my baby. It was their baby.... Probably Truby King or even Montessori had prescribed that the older dispossessed child must be tricked into love, thus cleverly outwitting jealousy. I hated my mother for it. I hated her absolutely....[although I] love the baby I did.


240. Ehrenreich and English note how quickly experts of varying sorts have accepted the child’s perspective as controlling. See Ehrenreich & English, supra note 137, at 196–210.

241. See discussion of the treatment of working mothers in recent custody cases infra notes 464–476 and accompanying text.


243. See In re Dubreuil, 629 So. 2d 819, 825 (Fla. 1993).
While the law has begun to distinguish between separation and abandonment, many mothers seem to have internalized the view that leaving a child is wrong. For some, separating from children, even temporarily, has become a paralyzing, guilt-inducing event. The mother of two toddlers describes trying to unload groceries from a car:

I can't carry the groceries and Emily and hold Jeremy's hand while he clambers up the stairs. Now, if I leave Emily in her infant seat in the car while I take Jeremy and the groceries upstairs, even if I lock the car so she won't be kidnapped, she might feel abandoned. But if I leave Jeremy in his seatbelt while I take the baby and the groceries upstairs, then Jeremy might feel abandoned . . . .

The example may sound extreme or it may sound familiar. Either way it suggests the power of the phrase and the obligation of law not to play upon such constructed vulnerabilities.

B. Maternal Motivations and Assumptions of Selfishness

In their study of noncustodial mothers, Geoffrey Greif and Mary Pabst report the most common response to their research: "How could a mother do that? I'll never understand how a mother could give up her children." The reaction is not surprising. Immense energy has gone into establishing maternal presence as a social norm and maternal absence as proof of deviance. Many mothers have internalized the view. As birth mother Jan Waldron explains, "There is still an almost Victorian pathos about a birth mother's secretive history; she is guilty of sins so extreme even she begins to question her blackened soul." Guilt lurks around the edges of lesser separations; even working mothers know, or at least suspect, that their choice to separate does not go unnoticed by grandparents, colleagues, or day care staff.

244. Paula J. Caplan, Don't Blame Mother: Mending the Mother-Daughter Relationship 80 (1989). Years later Caplan (the mother) realized that "this is an insane way to have to live . . . and I wasn't selfish and inadequate for finding the total responsibility for everyday life with the children so difficult." Id. Maternal guilt about separating expresses itself in many ways. A study of elementary school teachers indicates that despite the desire of many for adult conversation ("more complex language structures"), teachers/mothers "rarely spend any of their time at home away from their families, because they felt guilty about leaving their children with babysitters." Dee A. Spencer, Public Schoolteaching: A Suitable Job for a Woman?, in The Worth of Women's Work 167, 180 (Anne Statham et al. eds. 1988).


246. Waldron, supra note 16, at xvii. Recently some birth mothers have decided to acknowledge and commemorate their earlier decisions to place a child for adoption. See Once-Silent Mothers Raise Voices, N.Y. Times, May 8, 1994, § 1, at 26 (reporting celebration by support group for birth mothers).

247. "We have some kids here who are practically orphans," says one Upper West Side preschool teacher. 'I had a little two-year-old who said he had a picture of Mommy and Daddy stuck at eye level in his room. It seemed so odd that he would need the
In this section I take a more objective look at why mothers separate from children. Of course, ascertaining maternal motives does not determine the content of regulation; the argument has never been that leaving children is fine so long as we understand why a mother does it. Still a more accurate view of why mothers distance themselves from children crucially informs a range of regulations that have up to now considered separations either inexplicable ("How could she?") or wicked ("the blackened soul").

Before examining why mothers choose to separate from children, two preliminary observations are in order. The first is that mothers' decisions to remain with or separate from children are almost always located within specific cultural and historical contexts. Sharon Harley offers the example of married black women in Washington, D.C. early in the century: "[f]or a group of people one generation out of slavery, gender-defined work and domestic responsibilities were symbolic of their new status."248 It was a point of race pride for a wife to be able to stay at home, whatever her individual preference may have been.249 Consider also the 1950s, a period when many middle-class women chose to stay home. This hearthside retrenchment did not happen by accident. Elaine Tyler May explains that "Americans were well-poised to embrace domesticity in the midst of the terrors of the atomic age."250 "Domestic containment," like its political analogue, provided security: "[a] home filled with children would create a feeling of warmth and security against the cold forces of disruption and alienation."251

Maternal decisions to come in from the cold were genuine but at the same time were powerfully influenced by political, marketing, and psychological prompts aimed straight at mothers. Indeed, as Nancy Cott has observed, what distinguished the domesticity of the 1950s from that of earlier periods was "the way in which women's household status...[was] now defended—even aggressively marketed—in terms of women's

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249. See id. at 169. This created particular tensions for those black women who wanted to participate in public life. One example is Mary Church Terrell, who had long dreamed of "promot[ing] the welfare of [her] race," and became a teacher despite her father's (but not her husband's) insistence that she stay home in leisure. See id. at 167. The example illustrates the competing demands made on mothers who may be daughters and wives at the same time. Presence with one relative may mean a separation from another. In The Golden Bowl, Maggie Verver must decide whether to grant her father's request to join him in Paris at the expense of being away from her baby; Henry James describes the dilemma of having to "choose between being an unnatural daughter or an unnatural mother." Henry James, The Golden Bowl 150 (Alfred A. Knopf, 1992) (1904).

250. May, supra note 195, at 25. May notes that "[t]he context of the cold war points to previously unrecognized connections between political and familial values." Id. at 10.

251. Id. at 23.
choice, freedom, and rationality."\textsuperscript{252} We need to understand this background in order to understand how decisions about presence and separation present themselves to mothers at particular moments in time.

Thus the second preliminary observation: what does it mean for a mother to \textit{decide} or to \textit{choose} to separate from children? As with any other decision for which an actor is held accountable, we want to know that a mother's decision to separate is both voluntary and intentional. Decisions by suburban mothers in the 1950s may have been influenced but few would dispute their characterization as "chosen." But maternal decisions to stay with or separate from children are sometimes made in response to social or historical circumstances that more directly challenge traditional legal understandings of voluntariness or intentionality. This is powerfully illustrated by the fictional case of \textit{Sophie's Choice} in which a mother on the tracks at Auschwitz is told that she can save the life of one of her two children; all she must do is choose. She then chooses her son over her daughter.\textsuperscript{253} Holocaust historian Lawrence Langer uses the phrase "choiceless choice[ ]"\textsuperscript{254} as the ethical designation for such decisions in relating accounts of real mothers who confronted actual versions of this upon arrival at concentration camps.\textsuperscript{255}

While something less than a gun to the head of mother or child, there may be circumstances today that still might cause us to hesitate before invoking the label "choice." It is not always clear, for example,

\textsuperscript{252}Cott, supra note 160, at 174.
\textsuperscript{253}See William Styron, Sophie's Choice (1979).
\textsuperscript{255}See Lawrence L. Langer, Holocaust Testimonies: The Ruins of Memory 12 (1991). During the trackside medical selections mothers could either go "to the right" without their children, and survive, or go "to the left" with their children, and die. Some mothers accompanied their children; others did not. Still other mothers, alerted by inmates that \textit{all} children were doomed, edged away from their own in the hopes of saving themselves. (Guards would then lift up stray children and tell them to point out their mothers.) For an important discussion of the inadequacies of Styron's novel to capture the experience of women who left their children, see Lawrence L. Langer, Fictional Facts and Factual Fictions: History in Holocaust Literature, in Admitting the Holocaust, supra note 254, at 75, 82-84.

The example of a mother choosing one child's life at the expense of another raises the question of whether a father would behave differently. The question is prompted by an actual event from the Second World War, as told by Professor David Daube. Two sons of a Frenchman were arrested by the Germans and about to be shot. The father, a public official, implored the commandant to spare his sons. The commandant granted the father the life of one son; he had only to choose. However, the father refused to participate in this "inhumane selection" and both sons were executed. See David Daube, Appeasement of Resistance and Other Essays on New Testament Judaism 76-77 (1987). In hearing this story, Mrs. Daube was sure that, however principled the father's motivation, "'a mother would have taken one home with her.'" Id. at 77. Anthropologist Nancy Scheper-Hughes presents the story as a possible application of Carol Gilligan's gendered theory of moral reasoning: the father resorts to abstract notions of fairness; the mother (through Mrs. Daube) draws from her relational connections with her children. See Scheper-Hughes, supra note 40, at 407.
that a homeless mother has voluntarily decided to separate when she places her daughter in foster care after a social worker tells her that neglect proceedings may start if she doesn’t, or to say this of a mother who excludes her drug-using son from their public housing apartment because to do otherwise will result in the eviction of the entire family. Poor mothers so regularly confront circumstances that risk the loss of a child (should she move the sofa away from the window or change her child’s route to school to avoid gunfire?) that we sometimes forget duress is not just a legal category but a description of daily life as well.

Intention as an aspect of voluntariness is also a problem. Sometimes the separation itself is desired, as when a mother just wants a break. A separation may also be the intended means to an end embraced by the mother, as when the mothers of London sent their children away during the Blitz. But mothers also make decisions that bring about separation even though the separation itself is neither the primary purpose nor the means intended to achieve that purpose. A mother who commits a crime knows that if arrested or convicted, she may go to prison. A mother who has a love affair should know she may lose custody of her children in consequence. A mother who declines life-saving medical treatment for herself risks separation in the form of death. In none of these cases does the mother intend to separate, yet in each, a separation may inevitably follow. Should the law credit the mothers in these cases with having intentionally brought about the separation?

Cases on incarcerated fathers and avoidance of child support provide a possible framework of analysis. In most states child support obligations are suspended if the obligated parent becomes “involuntarily impoverished.” But is impoverishment because one is in prison voluntary or...
involuntary? In *Ohler v. Ohler*, the Nebraska Supreme Court held that because "incarceration is certainly a foreseeable result of criminal activity[,] ... no sound reasons [exist] to relieve one of a child support obligation by virtue of the fact that he or she engaged in criminal conduct." In contrast, Maryland courts hold that where "the action leading to the incarceration was not taken for the primary purpose of avoiding the support obligation," incarceration alone does not constitute voluntary impoverishment.

The problem of intentionality arises with particular force in regard to maternal employment. Have women who work out of economic necessity *chosen* to separate from their children so that characterizing their decisions as voluntary makes sense? Some mothers refuse to separate when they work, either by working at home, scheduling work around children, or by bringing the child to work with them. Certainly much public debate views all the decisions of working mothers as voluntary.

263. For example, mothers may choose work like house cleaning that offers greater control over their schedules so that they can be home when their children get out of school. See Mary Romero, Day Work in the Suburbs: The Work Experience of Chicana Private House Keepers, in The Worth of Women's Work, supra note 244, at 77, 83–84.
264. See Louis Uchitelle, Lacking Child Care, Parents Take Their Children to Work, *N.Y. Times*, Dec. 23, 1994, at A1 (reporting that most parents bring children to work not because they cannot bear to separate from them but because they have no other safe place to leave them). Of course, the workplace is not always safe for children. See, e.g., Lemmerman v. A.T. Williams Oil Co., 350 S.E.2d 83 (N.C. 1986) (eight-year-old who accompanied his mother to work at a gas station and who was paid a dollar by employer to do odd-jobs considered an employee for purposes of the Worker's Compensation Act when he was injured "on the job").
265. See Barbara Kantrowitz et al., A Mother's Choice, *Newsweek*, Mar. 31, 1986, at 46, 46 (describing the increasing number of women choosing to "juggl[e] the demands of jobs and children"); see also National Research Council, *Who Cares for America's Children?: Child Care Policy for the 1990s*, at 31 (Cheryl D. Hayes et al. eds., 1990) ("As dramatically increasing numbers of mothers of infants and toddlers have chosen to work outside the home, the care of their very young children has become a special concern.") (emphasis added).
266. For a discussion of choice in the context of abortion and employment, see Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 65 N.Y.U. L. Rev. 1559, 1561 (1991) (arguing that despite "liberal imagery of autonomous individuals making choices in their own self-interest as the proper motivation for all adults, the ideology of conventional femininity condemns mothers who pursue self-interest over their children's needs as 'selfish' ").
The characterization has tremendous regulatory significance. If separating from children is bad and separating deliberately worse, policies that discourage at least the latter—no mandated leaves, no public support for child care, penalizing working mothers in custody disputes—make sense.

In raising this issue my aim is not to resolve questions of voluntariness and intention across all separations. I want simply to caution against too quickly characterizing (or accepting the characterization of) any particular separation decision as voluntary. Maternal motivation most usefully informs regulatory deliberations when the mother’s underlying decision is freely and deliberately made. I recognize that even when a decision is something less than voluntary, it is likely that the mother has anticipated and evaluated its consequences; we can therefore learn something about what factors matter to her in making the decision even under imperfect circumstances. Too often, however, the legal system ignores this distinction and simply assumes facts not in evidence regarding the circumstances that surround a mother’s “choice.” But discerning when a decision is voluntary choice is no easy matter; the exact line between influence and constraint is often difficult for mothers or the legal system to identify.

In this discussion, I link the term choice to a conception of maternal agency. By agency I mean simply that it was, all in all, up to the mother whether or not to separate. Even in the most difficult circumstances, she (and we) would recognize that her authority, her participation, her say-so, brought it about. This subjective sense of agency may differ from a strict legal notion of an intentional choice. But there is at least deliberation, followed by decision, followed by action—that is the process under investigation here.

Circumstances of constraint do not necessarily prevent the exercise of agency. Nor do they remove responsibility for what follows from any particular decision. Indeed, mothers are quick to hold themselves responsible for whatever happens to their children. It is important, however, to distinguish between private accountabilities and public ones. Recognizing the existence and nature of constraint might help shape an appropriate legal response. More importantly, it might prompt action to remedy the underlying causes of constraint. If, for example, we were to learn that mothers separate from children in order to improve the quality of their children’s lives, we might concentrate less on punishing mothers and more on inventing policies to remove the causes of impoverished lives for children. With these considerations in mind, I turn now to an overview of maternal motives for separating.

Motivations for separating generally encompass a mother’s highly contextualized judgment concerning her particular child at a particular time. Thus maternal separation decisions are included in what Sara Ruddick has identified as “maternal thinking,” an aspect of mothering that "responds to the historical reality of a biological child in a particular so-
cial world." As we have seen, mothers sometimes separate from children to promote national interests, as in the wartime evacuations during the Blitz. Mothers also separate to advance communal goals, as in a kibbutz. There is even the occasional separation due to a child's elevation to a spiritual leader. More often maternal decisions are prompted by private or familial assessments about what is best for her child. Thus, mothers hospitalize children, put them in playgroups, and send them to summer camp. As children grow older, mothers also separate to facilitate the process of adolescent individuation.

There are, of course, more dramatic examples. Homeless mothers surrender their children to foster care to spare them the roughness of life on the street or in shelters. African-American mothers send their children to relatives or, as family funds allow, to boarding schools in order to escape the escalating dangers of urban existence. Working-class immigrant parents without access to child care (or summer camps) send their children away to distant grandparents to prevent otherwise long and unsupervised summers. There is now also a network of divorced mothers who, following the example of Dr. Elizabeth Morgan, send their children

266. Sara Ruddick, Maternal Thinking, in Mothering, supra note 166, at 213, 214 (describing "mother's thought—the intellectual capacities she develops, the judgment she makes, the metaphysical attitudes, the values she affirms"—as a discipline).

267. See Seattle Boy, 4, Enthroned as a Lama in Nepal, N.Y. Times, Jan. 29, 1996, at A4 (reporting ascension of four-year-old boy as the reincarnation of a high Buddhist lama). His mother "trusted the monks with her son but did not look forward to leaving him in Nepal." Id.


269. See Hempbill, supra note 256, at 6.

270. See Peter Applebome, Boarding Schools for Blacks are Having a Resurgence in Popularity, N.Y. Times, Sept. 21, 1994, at B12. The mother of a son on his way to such a school qualified her relief at his acceptance with "[a]nger that my son, at 15, counted every day he survived, [and] wistfulness at missing times in his adolescence I would not be there to see." Marita Golden, Why I Sent Him Away, Washingtonian, Dec. 1993, at 31, 33. Another mother marked the trade-off with sad clarity: "I missed a lot, but he's alive." Id. There are other aspects to the trade-off as mothers balance the benefits of schooling outside the neighborhood with the effects on the child of being "cut...off from his black peers at a time when peers usually become very important." Joyce E. King & Carolyn A. Mitchell, Black Mothers to Sons: Juxtaposing African American Literature with Social Practice 21 (1990) (discussion by black mothers of "dilemma as choice" as a constant feature of raising sons).

271. See Joe Sexton, Poor Parents' Summertime Blues; Choices for Children: Enforced Boredom or Street Roulette, N.Y. Times, June 25, 1995, § 1, at 27, 30 ("I sent my children back to Jamaica and many mothers here still do. With family back home, there can be structure and safety. I always missed my children, but I always said goodbye gladly.").
underground to prevent visitation with a father the mother believes has abused the child.\textsuperscript{272}

Separation decisions made to benefit the child are rarely those that trouble social and legal judgments. Concern more often arises when the mother's decision is based on her own free-standing desires and preferences. A mother may, for example, separate because she chooses to study, to advance in her career, or even to relax—all activities accomplished more easily without children in tow. Depending on the rules of the workplace or school, sometimes these activities cannot be accomplished at all if children are present.\textsuperscript{273}

And some mothers separate from their children simply because they do not like being mothers. George Eliot's \textit{Daniel Deronda} illustrates this point. At their brief reunion Daniel's mother explains to him that:

"When you are as old as I am, it will not seem so simple a question—'Why did you do this?' People talk of their motives in a cut and dried way. Every woman is supposed to have the same set of motives, or else to be a monster. I am not a monster, but I have not felt exactly what other women feel—or say they feel, for fear of being thought unlike others. When you reproach me

\begin{itemize}
\item \textsuperscript{273} Consider Alice Walker's novel \textit{Meridian}, in which teenage Meridian is expelled from high school for her pregnancy but manages nonetheless to win a scholarship to college. She can accept it \textit{if} she presents herself as a proper freshmen student, that is, virginal and childless. Her mother is horrified that Meridian can even consider the possibility of giving up her son: "'It's just selfishness. You ought to hang your head in shame.'" Alice Walker, \textit{Meridian} 90 (1976). But Meridian grasps that "'this is the only chance [she has]," and gives her son away and goes to college. See id. at 87. Meridian's decision illuminates the centrality of community in how mothers are judged. Barbara Christian observes that in giving her son away, Meridian feels "'condemned, consigned to penitence for life,' for she has committed the ultimate sin against Black motherhood. She knows that freedom for Black women had meant that they could keep their own children, while she has given hers away, and she therefore feels unworthy of her maternal history.” Barbara Christian, An Angle of Seeing: Motherhood in Buchi Emecheta's \textit{Joys of Motherhood} and Alice Walker's \textit{Meridian}, in Mothering: Ideology, Experience, and Agency, supra note 33, at 95, 109.

Motherhood has continued to interpose itself between young women and their education. Until the 1970s, pregnancy was a common ground for school expulsion. See Ann M. DeRose, Identifying Needs, Gaining Support For, and Establishing an Innovative School-Based Program for Pregnant Adolescents, in \textit{Pregnancy in Adolescence: Needs, Problems, and Management} 337, 338-39 (Irving R. Stuart & Carl F. Wells eds., 1982) ("In 1972, the pregnant teen was no problem to either the school system or the community because she was invisible. Her invisibility was fostered by subtle and sometimes overt pressure to leave school."); See \textit{Houston v. Prosser}, 361 F. Supp. 295, 298-99 (1979) (requiring pregnant student to attend night school not a denial of equal protection because "students who marry or who become parents are normally more precocious than other students . . . [and] it is conceivable that their presence in a regular daytime school could result in the disruption thereof"); \textit{Perry v. Grenada Mun. Separate Sch. Dist.}, 300 F. Supp. 748, 753 (1969) ("If the board is convinced that a [pregnant] girl's presence will taint the education of other students, then [her] exclusion is justified.").
in your heart for sending you away from me, you mean that I ought to say I felt about you as other women say they feel about their children. I did not feel that. I was glad to be freed from you."

The clarity of her explanation is striking. Women are either mothers or monsters. Yet there is something more portentous in her reply: the possibility that some mothers may only be passing ("say they feel") and might, if braver, reveal different desires.

In a powerful 1983 essay, a real mother, Shirley Glubka, offers just such an account of her decision to give up her two-year-old son:

I did not like the mother role. As long as I continued in it, I was doing something that aroused in me boredom, anxiety, depression, anger, and at times a fear I would lose my sanity; it aroused in me also a deep fear that I would do violence to my child; at its best it turned me into a highly responsible, joyless, rather rigid person. Out of such things, great relationships are not made. I am not the best person to raise my child; only a powerful myth can make me think that I am.

At first glance, Glubka's confession seems to confirm the diagnosis that women who don't want their children are monsters; Glubka feared "doing violence" to her child. Yet it was motherhood itself that created Glubka's troubled state. Her careful and agonized decision to separate was taken with her son’s best interest at heart and with a clear understanding of the grave reputational consequences that she might incur.


275. The disinclination of mothers to reveal that they might, on occasion, like to be separated from their children may affect empirical investigations of separations. For example, in their important study of custody settlements, Robert Mnookin and Eleanor Maccoby compare the amount of custody divorcing parents say they want with the type they actually request from the court. The authors found that "nearly 80 percent of those mothers who said they wanted sole physical custody requested this arrangement, whereas fewer than 40 percent of the fathers who said they wanted sole physical custody filed such a request." Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody 100 (1992). The authors note that one reason fathers may not request custody is because they think they are unlikely to prevail. See id. at 101–02. But just as expectations influence fathers to under-ask for custody, I suspect that mothers may over-ask. Telling an interviewer that one does not want sole custody is something no good mother would do.


277. In her study of authors driven mad by domesticity, Marilyn Yalom suggests that mothers more often kill themselves than their children. See Marilyn Yalom, Maternity, Mortality and the Literature of Madness 100 (1985) (discussing Sylvia Plath and Anne Sexton, among others).

278. Author and early feminist Charlotte Perkins Gilman gave her beloved daughter to the child's father to raise and explained her decision and its consequences:

Since her second mother [the father's new wife] was fully as good as the first, better in some ways perhaps; since the father longed for his child and a right to some of her society; and since the child has a right to know and love her father . . . this seemed the right thing to do. No one suffered from it but myself. This,
Her decision reveals that separations are not always bad for children and suggests that if separating were not such a terrible thing to desire, mention, or bring about, mothers might not have to edge quite so close to the brink before deciding it was all right to separate. Indeed, if separating itself were not so freighted, mothers might avoid making a complete break and instead organize versions of motherhood at levels below the all-consuming.

It may be a mistake to think that it is always clear whose interests, mother's or child's, are motivating a separation. The distinction between the interests of the mother and the "best interests of the child" have become familiar in law, as in custody disputes. But litigation aside, there is often no point to such individualistic distinctions. A mother's self-interested reason for separating may also be in the child's best interests.

For most mothers, I suspect that decisions to separate are less a clear-cut choice between their own discrete interests and their children's than a resolution or mix of competing interests within the family. Consider, for example, a mother's decision to institutionalize one child so that she can more thoroughly care for the other children in the family. Or the more common example of mothers who separate in order to work.

When maternal motivation is used to differentiate among practices on the separations continuum, it is clear that maternal self-interest is regarded, culturally and legally, as the least acceptable reason. But, as we shall see, the story is not quite so straightforward. Depending on context and period, maternal decisions not to separate have also been criticized as selfish or self-interested. Recall the evacuations from wartime London. In this country too, the relationship between selfishness and motherhood was adjusted during the Second World War. A well-organized campaign by the Office of War Management successfully coaxed middle-class mothers out of their homes and into vacancies in offices and factories, leaving the tending of children to somebody else. Government propaganda presented traditional homemaking as selfish and wage labor as the proper, patriotic choice. The manipulation of motive in adoption, discussed below, provides another example of periodic shifts in the defin-

however, was entirely overlooked in the furious condemnation which followed. I had "given up my child."

To hear what was said and read what was printed one would think I had handed over a baby in a basket. In the years that followed she divided her time fairly equally between us, but in companionship with her beloved father she grew up to be the artist that she is, with advantages I could never have given her. I lived without her, temporarily, but why did they think I liked it? She was all I had.


279. For the complexities of such decisions, see generally Helen Featherstone, A Difference In The Family (1985). For a chilling fictional account, see Doris Lessing, The Fifth Child (1988).

tion of selfishness in relation to a mother’s decision to leave her child. We should therefore keep in mind that while official assumptions about the nature of maternal motivation shape regulation, official policies themselves may shape the maternal motivation in the first place.281

C. Maternal Absence and Harm to Children

Since the early 1800s, the principal justification for maternal presence at home has been the physical, spiritual and developmental needs of children. Many others have also benefitted from the arrangement: husbands, male workers, employers, the professions of medicine and social work, and by the mid-twentieth century, manufacturers of appliances, houses, and cars.282 Yet harm to children, not consumerism, labor competition, or domestic comfort, has been the central explanation for why mothers must stay home. We may on occasion think mothers and children should be apart, but aside from leave-takings that are either normative (school entry) or aberrational (neglect), the preference for maternal presence is clear. The society has come to expect damage to the child in consequence of a good mother’s absence.

In this section I investigate the relation between maternal absence and children’s well-being as understood in late twentieth-century America. From a comparative perspective, the insistence on maternal presence is unusual. Sociologist Faye Crosby points out that American society is one of the few in the world that “thinks it normal and natural for an individual adult to spend more than three hours a day solely in charge of children.”283 In some societies, extended families or communities raise children; still others delegate child rearing to an unrelated paid adult, like the British (or Caribbean) nanny. There are few places where the mother alone is expected to manage the task and take responsibility for the outcome.

281. At times mothers themselves have manipulated a fact or circumstance into a more advantageous category. For example, married mothers in the military reserves who volunteered for service during the Persian Gulf War softened the blow at home by telling their husbands they had been called up involuntarily. See Jane Gross, Confrontation in the Gulf: New Home Front Developing as Women Hear Call to Arms, N.Y. Times, Sept. 18, 1990, at A1 (“Mr. Laver said he has been wrestling with feelings of ‘How could you do this to me?’ since he realized that Carmen had volunteered. ‘It’s my selfish heart, but inside it hurts to know she had a choice,’ he said.”). By removing their decisions from the category of choice, these mothers suppressed overt self-interest in order to make their departures more acceptable.


The fact that others raise children differently is probably insufficient to challenge the prevailing American view. But caution is warranted on other grounds. I have in mind the continued viability of the data, although not the sentiments underlying the connection between maternal absence and harm to children. We have already seen how earlier irrefutable accounts of the importance of maternal care have over time been soundly refuted. Late nineteenth-century quasi-Darwinian assurances that moral traits can be genetically encoded is no longer good science. More modern theories, such as mother-infant bonding, have also passed through phases of acceptance, reappraisal, and rejection within the scientific community. Historians of science and of women have attended not only to the theories themselves but to the reasons certain ones were introduced and the circumstances that caused them to flourish. Early evolutionary theories were used to advance the reputations and power of mostly white, mostly male eager-to-be experts. Diane Eyer has made a similar case regarding bonding fervor among hospital staff in the late 1970s.

This section argues that the relationship between maternal absence and children's well-being suffers from similar infirmities. The line of research which grew out of John Bowlby's maternal deprivation theory has sustained its presence as social fact long after its reevaluation by the scientific community. While this will not be news to those familiar with child development research of the last twenty years, a review of current literature may demonstrate to those who find maternal deprivation intuitively appealing and historically familiar that the theory no longer provides a respectable basis for the formation of public policies or law.

The starting point is John Bowlby. Drawing from his studies of juvenile delinquents and institutionalized children, Bowlby explained that a mother's sustained absence is devastating to her child's emotional development. The claim gained popularity in the field, as social workers

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284. See Eyer, supra note 191, at 35-41.
285. See, e.g., Russett, supra note 192, at 191 ("Science . . . can be seen as a weapon used by men to rationalize the perpetuation of traditional sex roles and men's continued domination of women."); see also Ehrenreich & English, supra note 137, at 116-20; Stephen J. Gould, The Mismeasure of Man 30-31 (1981).
286. See Eyer, supra note 191, at 14. She puts the case bluntly: "[S]cience is socially constructed. Researchers have their own professional agenda and unquestioned assumptions that distort the interpretation of data . . . ." Id. Consider also the late nineteenth-century transfer of the control of childbirth from midwives to obstetricians, who were competing against both midwives and general practitioners. See Richard W. Wertz & Dorothy C. Wertz, Lying In: A History of Childbirth in America 44-46, 56-63 (1977).
287. See John Bowlby, Maternal Care and Mental Health 46 (2d ed. 1952) ("It is submitted that the evidence is now such that it leaves no room for doubt regarding the general proposition—that the prolonged deprivation of the young child of maternal care may have grave and far-reaching effects on his character and so on the whole of his future life."); John Bowlby, Forty-Four Juvenile Thieves: Their Characters and Home Life 37 (1946).
applied deprivation theory to their delinquent clients, and within the academic community. Maternal deprivation theory powerfully oriented the research agenda for developmental psychologists so that maternal absence quickly became a given instead of an hypothesis to explain children's problems. Maternal absence of any kind or duration, including employment, substituted in for the lengthier absences on which the original work was based.

The influential work of Bowlby's colleague, Mary Ainsworth, illustrates how deprivation theory permeated research strategies. To test the quality of children's attachment to their mothers, Ainsworth developed a laboratory test known as the "Strange Situation Procedure." In this test, a year-old child is left in a room with a stranger for a few moments. The child's emotional security is measured by the child's response when his mother first leaves and then re-enters the room. If the child ignores his mother's return and keeps on playing, he is graded as insecurely attached. The inattention is taken as ambivalence, if not anger toward his mother—a kind of toddler shunning. In contrast, securely attached children protest their mother's departure and welcome her return.

The test and its conclusions have been challenged on a number of grounds: children have different temperaments which might explain their varied reactions; babies in child care also protest their mothers' departures; and children form meaningful attachments with persons other than their mothers. Nonetheless, the methodology and assumptions of the Strange Situation Procedure influenced decades of research that sought primarily to compare the attachment of children in child care with that of home-reared children.

Beginning in the mid-1970s, a number of psychologists began to reevaluate the premises of Bowlby's work. In looking at Bowlby's original data, Michael Rutter argued that the emotional disorders of Bowlby's sub-

288. See J.E. Hall Williams, Criminology and Criminal Justice 60 (1982) (noting that Bowlby's work and other studies on maternal deprivation "had a profound influence on standards of care of children and attitudes of social workers and hospital staff and those working in other institutions for children, in the direction of . . . preventing harmful deprivation experiences").

289. See id. at 63-64.


293. See Rudolph Schaffer, Mothering 100 (1977).

ject group of institutionalized children were caused by the disruption of the child’s total life circumstances, not simply the mother’s absence. Sandra Scarr similarly challenged attachment theories for their lack of empirical support. Others have investigated the specific relation between working mothers and developmental outcomes and study after study has shown “no consistent effects of maternal employment on child development.”

As I develop more fully in Part IV below, more sophisticated psychological research now attributes children’s developmental outcomes to factors other than maternal separation alone. Researchers have identified other important variables such as the quality of substitute care and background conditions of poverty and privilege. By the mid-1980s, the overwhelming findings of longitudinal studies on the effects of maternal employment revealed not only that “maternal employment status per se was not significantly related to children’s development” but that

[w]ith regard to contemporaneous findings, children whose mothers are employed or nonemployed develop equivalently in the following areas: infant developmental status; security of attachment in infancy, toddlerhood and kindergarten years; cognitive, language, and intellectual development in the preschool through schoolage years; problem solving in toddlerhood; social reasoning during preschool and social maturity during the school years; emotional expressiveness during kindergarten; behavioral adjustment from ages 4 through 7, academic performance in the early school years; school motivation; and sex role development in adolescence.

If children are not damaged by substitute care per se, what explains the deep and continued attachment to attachment theory? The “psychodynamic preoccupation with maternal responsibility” is part of the answer. Others argue that the preoccupation is itself linked to the social and economic utilities of keeping mothers home. Thus Sandra Scarr observes that “[c]losely linked to the politics of what women ought to be is

295. See Michael Rutter, Maternal Deprivation Reassessed 48 (1975). Rutter pointed out that many of the children in Bowlby’s sample were also separated from their fathers, siblings, and home environments, not just their mothers. Thus even conclusions drawn from the original data may have alternative explanations. See id.
296. See Sandra Scarr, Mother Care/Other Care 96–97 (1984).
298. See infra Part IV.C.2.
the psychology of what children are supposed to need." And as we have seen, the conception of what women ought to be is often a matter of where they ought to be, which is to say, at home with the kids. The needs of children (while a more sophisticated set of needs than in the last century) still serve much the same function in restricting the occupational, geographical, and intellectual possibilities for women.

This is not to say that children are never harmed by their mothers' absences. Some separations harm children. Despite their general resiliency, young children especially may suffer. During the first three years of life, children are "more vulnerable to . . . social and emotional deprivation than they are at any other time in childhood." There will also be cases where children are harmed less by the separation itself than by the settings into which they are brought, such as rotating foster care placements or poor quality child care. But before we assign injury to children from the mere fact of maternal absence alone, we might ask if the mother's decision to separate was reasonable in light of the options before her. If the answer is yes, then the investigation must turn to why her options regarding substitute care, or regarding separating in the first place, were so circumscribed.

IV. Legal Regulation of Separation

By determining the conditions for and the consequences of separations, law powerfully influences how women think about and act upon their decisions to leave children. In this Part, I explore the legal regulation of separation decisions through a close examination of three specific practices: adoption, surrogacy, and maternal employment. I have chosen these three forms of maternal separation for several reasons. First, each meets the definitional criteria established earlier: a mother's decision to part physically from her child under circumstances that require substitute care. At the same time, the practices differ in ways that illuminate patterns of legal regulation. Depending on the variable selected to mark the endpoints of the spectrum (duration, motivation, public response, frequency, and so on), adoption, surrogacy, and maternal employment are plotted at different (and sometimes unexpected) points on the separation continuum.

Looking just at duration, we know that adoption and surrogacy are permanent while separations on account of work are usually temporary. Because adoption and surrogacy are both permanent, one might anticipate similar legal treatment for both. Because permanent separa-
tions are more severe than those that are temporary, one might anticipate some support for mothers who separate to work and less for birth mothers who put up children for adoption. Yet these predictions fail. Adoption is now the darling of state legislatures; surrogacy is increasingly disfavored; and there is little public support for working mothers. The inability to predict regulatory outcomes by applying first level rules reveals the complexities of public response to these personal decisions. Only by comparing the mix and weight of different variables can we begin to figure out why certain separations are discouraged while others are not, and what social, political, and economic values such discouragement or endorsement represents.

In addition to the analytical workout the three separation practices force upon us, adoption, surrogacy, and maternal employment highlight the problematic assumptions that mark current thinking about separations. Adoption reveals the complexities of maternal motive; opposition to surrogacy often centers on the difference between separation and abandonment; and the regulation of maternal employment is commonly hinged to perceptions of harm to children. Finally, we shall see that the three modern examples emerge as shadows of earlier forms of separation. Adoption may serve much the same social purpose of redistributing children as ancient abandonment; surrogacy and apprenticeship both involve the contractual transfer of children’s custody; and modern working mothers, while no longer burdened by the physical requirements of nursing like their eighteenth-century predecessors, still face the problem of what to do with their unattended children so that they may work. The matches are not exact, yet the social responses to earlier forms of separation may inform current thinking about parallel practices today, if only by directing us to the origins of their differences.

In considering the legal regulation of separation, three factors weave in and out of official calculations. Two have already been introduced: maternal motivation and perceptions of harm to children. Thus we know that mothers separate from children for reasons that are varied, complex, and not equally well-received, and that harm has long been accepted as a consequence of maternal absence, even if the nature of harm has shifted from nineteenth-century concerns about moral character to the psychological dysfunctions expected today.

who separate from their children in the more familiar form of daily absence. The head of a New York employment agency for domestics explained,

We get a lot of homesickness. Women leave their children in their countries to come here to work because there’s no work where they live. . . . I had a person work for me once that cried and cried. . . . I did everything to pacify her, but she wasn’t satisfied until I brought her son here—one of her children, just one. Robert Hamburger, A Stranger in the House 46 (1978); see also Shellee Colen, “Just a Little Respect”: West Indian Domestic Workers in New York City, in Muchachas No More 171, 172 (Elsa M. Chaney & Mary Garcia Castro eds., 1989) (mothers “cite responsibility for their children as the primary motivation for migration”). For a fictional account from the daughter’s perspective, see Edwidge Danticat, Breath, Eyes, Memory (1994).
The third factor concerns the characteristics of the child. Historically, such traits as age, sex, deformity, or place in the birth order played an important role in familial determinations about whether or not to keep a particular child. Today a somewhat different list adheres. Modern parents may institutionalize children who are mentally ill, rescind the adoption of those who are developmentally disabled, place incorrigible ones under juvenile court supervision, and emancipate those who are sufficiently mature. Children's characteristics play a more subtle role in the three practices under investigation in that the authorizing legislation in each case is silent with regard to characteristics or traits. Any kind of child can be the subject of adoption or surrogacy, though as a private matter the relevance of characteristics remains powerful. Twice as many girls as boys were surrendered for adoption in 1991 in the United States, and a child's genetic composition is central to parental decisions to engage in surrogacy.

In the case of separations based on maternal employment, the relevant characteristics shift from physical traits to social ones, as a child's economic status (acquired derivatively through his mother) is often central to her decision to work. We might consider such decisions private, much like separation decisions based on a child's sex or genetic make-up. However, unlike its regulation of adoption and surrogacy, the state has not been wholly neutral with regard to children's characteristics in the case of maternal employment. Poor children were the target of the New Deal's Aid to Dependent Children (and later Aid to Families with Dependent Children), which until the 1970s was intended to reduce the need for maternal employment. I therefore want to keep tabs on characteristics as a category influencing regulation, for it appears that Congress still attends to the characteristic of need, though now as a basis for demanding that mothers work.

304. See Boswell, supra note 39, at 100–09.
307. In New York, for example, a person in need of supervision (PINS) is defined as a "male less than sixteen years of age and a female less than eighteen years of age" who is generally "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." N.Y. Fam. Ct. Act § 712(a) (McKinney 1995). A parent may file a petition against her child alleging him to be a PINS, but neither she nor her attorney has a statutory right to participate in the dispositional hearing and may be properly excluded. See In re Kenneth J., 423 N.Y.S.2d 821, 826 (1980).
310. See infra Part IV.C.1.c.
I turn now to the legal regulation of adoption, surrogacy, and maternal employment. In each area I set out the current state of the law supplemented by an account of why the regulation has been so structured. The answer is revealed in part by analyzing the content of regulation at different historical points. Attitudes toward mother-child separations change over time (sometimes overnight). Changes in social attitudes towards illegitimate children—considered defective in the 1920s, but the perfect answer for childless marriages in the 1950s—dramatically influenced adoption law and practice. Similarly, separations on account of maternal employment were tolerated in the 1920s, discouraged in the 1930s, urged in the 1940s, and pathologized in the 1950s. Here, too, law has played a facilitating hand. Despite the steady rhetorical primacy of maternal presence, the legal system reveals unexpected elasticity as facts and conditions are reassessed to bring about one or another desired result.

A. Adoption

Adoption is the legal process by which a child acquires parents other than his natural parents. Because our legal system permits a parent-child relationship to exist between a child and only one set of parents at a time, adoption requires a separation between the child and his natural parents. Historically adoption was intended to benefit the adopting male parent by providing the necessary heirs to mourn, inherit, or carry on the family line. In contrast, the American states were among the first to "distinguish[ ] the adoptee as the prime beneficiary." Modern adoption law is premised on the now-familiar concept of the "best interests of the child."

The language of "best interests" serves at least two functions in the regulation of adoption decisions. First, the label satisfies accepted notions of maternal sacrifice and works to overcome or obscure any hint of maternal self-interest feared lurking around the birth mother's decision to separate. That is, the actual motivation of birth mothers has mattered less than its conversion into a child-centered motive through social convention and well-chosen legal vocabulary. In discussing the legal regulation of adoption, I shall focus on how the law attempts to ensure that the mother's decision to separate benefits the child.

Second, the "best interests" standard homogenizes adoption decisions over time. It gives the appearance of a long-standing attitude toward separation as a wrong. However, the history of adoption in twentieth-century America reveals an unexpected fragility in our seemingly unshakable cultural commitment to maternal caretaking. Depending on

311. See Clark, supra note 226, at 850.
313. Id. at 1042–43 (emphasis added).
the decade, birth mothers were made to understand that giving up—or, alternatively, keeping—their babies was in the child’s best interests. In both cases the mother’s decision was characterized as the normal, natural, motherly move for her to make. Divining “motherliness” at any particular time period seems to have had more to do with cultural attitudes towards illegitimacy, unwed motherhood, and the market demand for adoptable children than with any authentic reading of what was best for a child in some objective sense. In short, there has been no universal or long-standing rule regarding separations between birth mothers and their babies. Instead, as I discuss in Part IV.A.2., “best interests” have depended very much on what theories of rehabilitation, punishment, or fecundity were in fashion or of use at the time.

1. Legal Regulation. — The rights and obligations of the natural parents must be terminated before those same rights can vest in adoptive parents. Nearly every state now requires that the transfer of custody between natural and adoptive parents be in the “best interests of the child.” That concept is most commonly associated with a child’s prospective placement; home studies are undertaken to ensure that the adopting parents are sufficiently wealthy, young, and (in most cases) married to satisfy prevailing standards of parental fitness.

Yet the law seeks to ensure that the child’s interests are paramount from the very start. This is accomplished by regulating two other separation-related aspects of the adoption process: consent and confidentiality. The law first requires that the birth mother’s decision to relinquish her child be voluntary. Consent that has been pressured or coerced—i.e., giving a baby away when the mother wants to keep it—is understood as contrary to a child’s interest. Under those circumstances the child would be deprived of his natural mother. Prudence at this early stage is espe-

314. See Clark, supra note 226, at 850. In cases of abuse and neglect, the termination of parental rights is usually involuntary; these separations fall outside the scope of this inquiry. I recognize that under certain circumstances natural fathers must also consent to their child’s adoption. See Mary L. Shanley, Unwed Fathers’ Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy, 95 Colum. L. Rev. 60, 70–75 (1995). In the discussion that follows, I take as a premise that the natural father has either given or waived his consent. This enables us to focus on the mother’s decision.


316. The massive infirmities in the voluntariness of maternal consent in the post-war period were brought to public light in the 1950s after outrageous adoption practices in Tennessee were revealed. For a journalistic account of the Tennessee scandal, see Linda Tollet Austin, Babies for Sale: The Tennessee Children’s Home Adoption Scandal (1993). Unwed birth mothers were told their babies had died so that no consent was necessary; illegitimate children were made wards of the court and adopted out to select young couples; the same was true for children placed in temporary foster care by destitute parents; and all with the collusion of local family law judges. See Ricki Solinger, Wake Up Little Susie: Single Pregnancy and Race Before Roe v. Wade 168–77 (1990).

317. The requirement reflects the longstanding view that natural parents have a special claim to their children. As the Child Welfare League of America has urged, the
cially important, because correcting the mistake would require yet another separation for the child, now yanked away from his adoptive parents only because of an (unnecessary) infirmity in the birth mother's consent.\(^{318}\)

To ensure that the birth mother's consent is valid—freely and knowingly given—states have instituted safeguards in the areas of counseling, timing, and compensation. In states that require or offer counseling, birth mothers are informed about such things as the legal consequences of adoption, their procedural rights, and the legal status of mother and child should the birth mother decide against surrendering her child.\(^{319}\) Timing procedures are intended to protect the natural parents from hurried decisions to give up a child. Recognizing that the period immediately surrounding the birth may be tiring or stressful, states regularly provide that consent is valid only after the child's birth or, in a number of states, only several days thereafter.\(^{320}\) "Cooling off periods" are also common, providing birth mothers a specified period in which they may revoke their consent.\(^{321}\)

Another mechanism to ensure voluntary consent has been to remove any financial incentive from the mother's decision. A mother who surrenders her child and receives money from the adoptive parents may have been influenced by financial considerations. The assumption is that if she has benefitted financially, her interests may have trumped those of the child. Financial gain directly conflicts with the language surrounding

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birth family "should . . . be fostered and preserved whenever possible." Child Welfare League of America, Standards for Adoption Service § 0.4 (rev. ed. 1988).

318. Influenced by the work of Goldstein, Freud, and Solnit, the legal system has come to accept that a child's interests are not served when existing bonds with a psychological parent are disrupted. See Joseph Goldstein et al., Beyond the Best Interests of the Child 31–37, 105–11 (1973).

319. See, e.g., D.C. Code Ann. § 32-1007(b) (1981) ("Prior to any relinquishment any corporation, association, or public agency that conducts a licensed child-placing agency shall provide counseling, by a professional social worker, to the relinquishing parent regarding the alternative services available in addition to psychological and emotional counseling to both the parent and the child."); Tenn. Code Ann. § 36-1-111(k)(2)(E) (1995) (requiring judge to ask whether surrendering parent "desires counseling . . . concerning the decision to surrender or give parental consent to the adoption of the child and if the person has been made aware of any assistance which might be available to the person should the person decide not to place the child for adoption").

320. See, e.g., Ariz. Rev. Stat. Ann. § 8-107(B) (1989) (consent valid only 72 hours after birth); Mass. Ann. Laws ch. 210, § 2 (Law Co-op 1994) (consent valid no sooner than the fourth day after birth). See generally 1 Hollinger, supra note 315, § 2.11[1][a] (noting that the "hormonal and other physiological changes that occur . . . may render the biological mother unusually susceptible to external pressures to give up, or to retain her child").

321. See Alaska Stat. § 25.23.070 (1995) (valid consent may be withdrawn before the entry of the adoption decree for any reason within 10 days after consent given, or if revocation is in the child's best interests anytime thereafter); D.C. Code Ann. § 32-1007(c) (1993) (revocation valid within 10 days of consent); Minn. Stat. Ann. § 259.24(6a) (West Supp. 1996) (consent may be withdrawn for any reason within 10 days after it is given; after 10 days consent is irrevocable unless obtained by fraud).
adoption in which "bestow[ing]" a gift, "donative in nature," and "gratuitous transfer" are the operative phrases.\textsuperscript{322} To prevent out and out profit, most states restrict payment to the birth mother's medical and birth-related expenses.\textsuperscript{323} Such services are understood to directly benefit the child. On the theory that only the child can be benefitted, the Pennsylvania Supreme Court denied payments to the birth mother for counseling and for Lamaze classes.\textsuperscript{324} The case highlights the law's stubbornness in refusing to acknowledge a joint consumption model of benefits between mother and child even during childbirth.

In addition to protections placed around the birth mother's consent, the requirement of confidentiality is further intended to advance the child's interests. Protecting the privacy of the adoptive family is understood to facilitate the integration of the child into his new home. To ensure this privacy and to remove the stigma of both illegitimacy and adoption, an amended birth certificate in the name of the adoptive parents is issued at the time the adoption becomes final.\textsuperscript{325} The new family

\begin{itemize}
\item \textsuperscript{322} See 1 Hollinger, supra note 315, §§ 1.01[2][f], 1.03[6].
\item \textsuperscript{323} Of course, even with statutory prohibitions in place, large amounts of money regularly change hands, particularly in states that permit independent or private adoptions handled by attorneys, rather than licensed adoption agencies. The difference is simply that the birth mother does not receive much of it. See Maggie Jackson, Aspiring Adoptive Parents Face Greed, Competition, Exploitation Society, L.A. Times, Apr. 23, 1995, at A1 (Bulldog Edition), available in Westlaw, NPMJ Database ("We hear attorneys routinely charging $15,000 to $20,000, although . . . there's not much legal work involved," said Rich Hemstreet, chief of adoption policy for California."). In the past, adoption agencies and maternity homes also benefitted as adopting couples were encouraged to make "donations" to the agencies. See Solinger, supra note 316, at 169. The current policy of the Child Welfare League, clearly meant to redress past practices, prohibits agencies from conditioning an adoption on financial contribution from parents. See Child Welfare League of America, supra note 317, §§ 6.41–6.45.
\item \textsuperscript{324} See In re Baby Girl D., 517 A.2d 925, 927–29 (Pa. 1986). Alabama and Kentucky have adopted payment provisions that sensibly permit parents to pay for the mother's travel, living, and medical expenses. See Ala. Code § 26-10A-34(a) (1992) (allowing payments to birth mother for "maternity-connected medical or hospital and necessary living expenses . . . as an act of charity" but prohibiting any other payments as an inducement for the adoption); Ky. Rev. Stat. Ann. § 199.590(6) (Michie/Bobbs-Merrill 1994) (expenses paid by prospective adoptive parents to biological parent or parents for purposes related to the adoption must be submitted to the court for approval or modification).
\item \textsuperscript{325} See Burton Z. Sokoloff, Antecedents of American Adoption, Future of Children, Spring 1993, at 17, 22. Confidentiality also works to protect the adoptive parents from intrusion by the birth mother securing their right to normal, uninterrupted family life. See People ex rel. Scarpetta v. Spence-Chapin Adoption Serv., 269 N.E.2d 787, 793 (N.Y. 1971) (noting role of agency "as an insulating intermediary, ensuring . . . the secrecy necessary to prevent the strife and harassment that could be caused by a [natural] parent who institutes a proceeding merely to learn the identity of the prospective adoptive parents"). Indeed, the interests of the adoptive parents are often central to adoption reform. Shortening the period in which a birth mother can change her mind, for example, not only conforms to child-centered theories emphasizing the need for continuity of caregiver, but provides increased security to the adopting parents, who are often viewed with great sympathy when matched against birth parents in the public eye.
\end{itemize}
is legally constituted and the birth mother is legally invisible. The arrangement is intended to benefit the birth mother as well. Relieved of the consequences of public knowledge of both her initial mistake and its resolution, she is free to start anew. Yet the procedure locks into place the notion that relinquishing one's child needs to be hidden in order for the mother to move on and in this way sustains the view that the separation itself was inherently bad.

2. The Manipulation of Motive. — Many birth mothers have internalized this view. Elizabeth Bartholet observes that birth parents "are conditioned to think they should feel lifelong pain as the result of their 'unnatural' act of giving up their 'own' child for another to raise." Never mind that the decision may be in the best interest of the child, as the adoption decree announces; many birth mothers seem unable to overcome the view, seemingly hard-wired into feminine consciousness, that separating from the child was wrong, something even the new birth certificate cannot erase.

In this section I want to investigate Bartholet's observation by looking at the decisions of birth mothers at two earlier points in time, the 1930s and the 1950s. The examination shows that the cultural insistence on separating as unnatural was sometimes suspended. However, in order not to disrupt the ideology of domesticity, the suspension was framed in terms of maternal solitude. This suggests that using maternal motivation as conventionally expressed or determined to sift good from bad separation decisions may be a convenient, but unreliable test indeed.

Until the late 1930s, unwed white mothers were encouraged by social welfare agencies to keep their babies. The encouragement verged on the compulsory. Maternity homes regularly required pregnant women to touch, nurse, and room with their infants as a condition of admission. Such intimacies were intended to create a bond too wrenching for the mother to break. Tactics were blunt. Throughout the 1930s and 1940s, the Florence Crittenton Homes gave their residents a letter signed

326. The argument has much in common with Enlightenment support for foundling homes: "It seems that a system allowing an unmarried mother to turn her baby over to public care, conceal her identity, and resume a normal life provided the most effective protection for her and her child." Ransel, supra note 39, at 60.

327. Bartholet, supra note 164, at 182 (emphasis omitted).


329. Minnesota enacted the Three Months Nursing Regulation requiring mothers in state homes to nurse accordingly. The Florence Crittenton Mission and the Salvation Army similarly required mothers in their facilities to care for their babies for several months. See Solinger, supra note 316, at 150. For a chilling discussion of practices in Canadian religious maternity homes, see Andrée Lévesque, Deviants Anonymous: Single Mothers at the Hôpital de la Miséricorde in Montreal, 1929-1939, in Delivering Motherhood: Maternal Ideologies and Practices in the 19th and 20th Centuries 108 (Katherine Arnup et al. eds., 1990).
by "The Baby You Didn’t Want" which asked, "Whose arms will pick me up from my coop tomorrow? Into what home shall I be consigned...?"

Urging, shaming, and requiring unwed mothers to keep their babies was a function of market demand shaped in part by beliefs about inherited traits. Despite the growing acceptability of adoption as a means of acquiring children, orphans, not bastards (to use the contemporary term) were the preferred candidates. According to the prescriptive literature before World War II, "the biology of illegitimacy stamped the baby permanently with mental and moral marks of deficiency." Constance Nathanson explains that the mother was also "stamped":

[The compelled motherhood of [unwed mothers] was defined both as redemptive—fostering responsibility and decreasing the likelihood of subsequent illegitimacy—and as retributive—preventing immoral young women from living "a lie before the world."]

After the Second World War, however, policies for unwed mothers were thrown into reverse. The good and loving unwed mother was now supposed to relinquish her child and was urged to do so by methods exactly opposite to those used in the 1930s. No longer were mothers encouraged to breast-feed, cuddle, and care for their babies. Instead they were discouraged from any contact at all. Birth mothers who insisted on it were indicted for a kind of maternal hedonism:

Repeated experience has shown that the more dependent, immature women whom we know to be inadequate mothers practically always choose to keep their babies once they have seen and

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330. Solinger, supra note 316, at 151. These tactics notwithstanding, lack of family support, prospective loss of jobs, and diminished marital prospects caused many white mothers during this period to surrender their children to orphanages. Unwed mothers in Canada faced similar dilemmas. Many surrendered their children out of sheer economic necessity even knowing that "[a]n institutionalized illegitimate child had a minimal chance of being adopted during these years of Depression when adoption rates were dwindling." Lévesque, supra note 329, at 120. See generally Eileen Simpson, Orphans: Real and Imaginary 135-57 (1987) (providing historical examples of orphanhood). Married mothers during the Depression also gave up children for adoption, although the plight of some was eased by the passage of the Social Security Act in 1935. See Mary R. Colby, U.S. Dep’t of Labor, Bureau Pub. No. 262, Problems and Procedures in Adoption 10 (1941).

331. Solinger, supra note 316, at 151 (footnote omitted). Solinger quotes a New York City Children’s Court judge: “In those [pre-war] days, the unmarried mother[s]... child was regarded as a child of sin, therefore unfit to be adopted into a decent home. Adoption was a rare and unusual thing, risked only with a brand new, beautiful and perfect baby known to have an excellent family history.” Id. at 149.

332. Nathanson, supra note 328, at 113 (citations omitted). She locates the treatment of unwed mothers within an ongoing strategy for managing "sexually unorthodox" young women. See id. at 109-16.

333. See generally Elizabeth I. Lynch & Alice E. Mertz, Adoption Placement of Infants Directly From the Hospital, 36 Soc. Casework 450, 456 (1955) (concluding that placing infants directly from the hospital, immediately after birth, is best for all parties).
handled them. This choice grows, not out of an ability to care for the child, but out of the wish for pleasure for herself.\textsuperscript{334}

The charge captures the conceptual shift regarding both the causes and cures of unwed motherhood. Unwed motherhood was no longer understood as criminal or genetically determined in origin. The "governing imperative [moved] from the body (biology) to the mind (psychology)."\textsuperscript{335} This recharacterization of unwed motherhood from genetic deviance to adolescent maladjustment removed the taint from the child: it was safe now to adopt the babies of unwed white mothers. In contrast, "[t]he black illegitimate infant was [regarded as] proof of its mother's moral incapacities and, for many, of its own probable tendencies toward depravity. Because of the eager market for white babies, these 'desirable' infants were cleared of the charge of inherited, genetic moral taint long before black babies."\textsuperscript{336}

If psychology provided the theory for legitimization of both mother and baby, schools of social work provided the foot soldiers.\textsuperscript{337} Their goal was now to rehabilitate the mother not by immersing her in motherhood, but by denying it altogether. Part of the denial was done by erasing the mother herself: girls were sent to (hidden in) maternity homes in other states where only first names were used.\textsuperscript{338} Social workers were charged with replacing the unwed mother's sick need for an illegitimate child with the healthy need for legitimate ones. To accomplish this, carefully tailored self-interest was allowed to creep into the mother's calculation. An instructional case study from a social work text demonstrated how this worked:

The caseworker helped Miss A to realize that she did not love the baby for itself [and to picture] the life of the mother and child in the future, the difficulties of working and caring for a child without a father, the community's disapproval, Miss A's lack of training for an adequate job. At the same time the caseworker held out to Miss A the possibility of training for work, of a happy marriage, with children who would be wanted for themselves . . . . Although Miss A wavered at times, the

\textsuperscript{335} Solinger, supra note 316, at 152.
\textsuperscript{336} Id. at 188.
\textsuperscript{337} This abrupt about-face was not easy for social workers trained to encourage mothers to keep their babies; some workers reported having "a great deal of guilt" when mothers relinquished their infants. See id. at 156-57.
\textsuperscript{338} See Solinger, supra note 316, at 120; Prudence M. Rains, Moral Reinstatement: The Characteristics of Maternity Homes, 14 Am. Behavioral Scientist 219, 226-27 (1970); see also Lévesque, supra note 329, at 110 (describing practice in Canadian maternity home where each girl upon registration received "an 'imposed name' from an existing bank of names. The names were not ordinary names but highly unusual ones, sometimes conveying an intended meaning such as Humiliane or Fructueuse."). In contrast, black unwed mothers more often lived in maternity homes near their own communities (when one was available at all). They went for care rather than secrecy, as most would bring their babies back with them. See Solinger, supra note 316, at 67.
caseworker consistently pointed out that Miss A was doing the best thing for herself and her child.\(^\text{339}\)

And here confidentiality made its comeback by surrounding the placement of the child with secrecy: no one would ever know. The birth mother could marry, move to the suburbs, and have her own proper children. In her study of 1950s British policies for unwed mothers, which were heavily influenced by American social work theories, Martine Spensky explains how adoption legitimated everyone:

The baby would be legitimised through adoption, the childless couple would acquire more legitimacy by having a child, and the mother would come out—apparently—as if nothing had happened...\(^\text{340}\)

3. The Present Story. — Understanding why birth mothers decide to place children for adoption has become a harder task in recent years as fewer young women than ever before now put their babies up for adoption. Before 1973, the year abortion became legal, nineteen percent of white unmarried mothers placed their babies for adoption; by 1988, the percentage had dropped to three percent; for black mothers the percentage before and after 1973 has remained at two percent.\(^\text{341}\) There are many reasons for this decline. Unmarried women experience less stigma in raising a child;\(^\text{342}\) unwed pregnancies are not always unwanted or unplanned;\(^\text{343}\) and many pregnant women now abort. Some argue additionally that the availability of public benefits enables unwed mothers to keep their children.\(^\text{344}\)

What then motivates the small group of mothers who still decide to place their children for adoption? We know that women who surrender their babies for adoption are more often white, better educated, older, from suburban and/or rural areas, and live in intact families from higher...

\(^{339}\) Francis H. Scherz, "Taking Sides" in the Unmarried Mother's Conflict, in Understanding the Psychology of the Unmarried Mother (Family Services Ass'n of America 1945-1947). It is heartening to note that "[f]ollowing placement of the baby, Miss A successfully completed a course in beauty culture." Id.

\(^{340}\) Martine Spensky, Producers of Legitimacy: Homes for Unmarried Mothers in the 1950s, in Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality 100, 112 (Carol Smart ed., 1992).

\(^{341}\) See Lewin, supra note 309, at A15 (citing study by Alan Guttmacher Institute).

\(^{342}\) While there may be less stigma within the woman's own family or community, Martha Fineman points out that unmarried mothers remain highly stigmatized in public policy formation. See Fineman, supra note 27, at 115-18.

\(^{343}\) In a recent study of unwed mothers, 20% reported that they had planned to become pregnant and 52% (this figure includes the 20%) "had reasons" for getting pregnant. These included wanting a baby (48%), they and their boyfriend wanting a baby (24%), holding on to the boyfriend (21%), thinking it would be fun to have a baby (10%), spiting their parents (7%), and wanting to be loved by the baby (7%). See Michael D. Resnick et al., Characteristics of Unmarried Adolescent Mothers: Determinants of Child Rearing Versus Adoption, 60 Am. J. Orthopsychiatry 577, 582 (1990).

\(^{344}\) See, e.g., Charles Murray, Stop Favoring Unwed Mothers, N.Y. Times, Jan. 16, 1992, at A23.
socioeconomic levels. They are also more likely to attend church, less likely to have lived at home during the pregnancy, and less likely to have told the baby's father about the pregnancy than young women who keep their babies.\footnote{345} Perhaps most important, researchers conclude that a "high level of maternal education as well as factors associated with the opportunity costs of becoming a parent are associated with a higher probability of placing a child for adoption."\footnote{346} In a study of fifty-nine young white women who had placed their babies, three-fourths of the mothers explained that "their main reason for choosing adoption was their view of themselves as not yet able or ready to be a parent and provide the kind of home environment they thought a baby should have."\footnote{347} Over half of the fifty-nine described adoption as in the child's best interest.\footnote{348}

Yet these expressions of altruism stand alongside more self-interested explanations. Over a third of the mothers reported that parenting would "drastically interfere with their educational aspirations."\footnote{349} When the fifty-nine placing mothers ("placers") were matched with fifty-nine "parents" (mothers who kept their babies), nearly fifty percent of the placers planned to graduate from college, compared with the plans of twelve percent of the "parents."\footnote{350} The researchers concluded that the young women who place "present the language of altruism and the best interest of the child as a way of accounting for their pregnancy resolution decision."\footnote{351} The women acknowledge rather clearly that their interests also make adoption the more sensible choice.

Their concerns for the child are not disingenuous. Their intuitive sense that a "stable, more financially secure, dual-parent family"\footnote{352} matters to a child's well-being is right. A child's developmental well-being correlates directly with the income level of her parents.\footnote{353} But as the

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\footnote{345} This summary of characteristics is taken from the following studies: Lucille J. Grow, Today's Unmarried Mothers: The Choices Have Changed, 58 Child Welfare 363, 367-68 (1979) (study of 210 white unmarried mothers who delivered their babies in Milwaukee); Steven D. McLaughlin et al., Do Adolescents Who Relinquish Their Children Fare Better or Worse Than Those Who Raise Them?, 20 Fam. Plan. Persp. 25, 32 (1988). Both young women who raise their children and those who relinquish them are less well off than young women who never become pregnant. See id.


\footnote{347} Resnick et al., supra note 343, at 582.

\footnote{348} See id.

\footnote{349} Id.

\footnote{350} See id. at 581.

\footnote{351} Id. at 583.

\footnote{352} Id. at 582.

\footnote{353} The National Commission on Children explains that "for children to develop fully, their fundamental needs must be met: care and attention from loving parents and caregivers, an adequate family income, good nutrition and basic health care, a quality education, adequate housing, and a safe neighborhood." National Commission on Children, Beyond Rhetoric: A New American Agenda for Children and Families 64 (1991). Each of these needs is more easily met in wealthier families.
birth mothers also recognize, motherhood would severely compromise their own well-being, at least for the time being. Single teenage mothers are less likely to finish high school, more likely to be and remain poor, and more likely to receive welfare for a sustained period of time.\textsuperscript{354} Birth mothers who give up their children are responding rationally to the relation between motherhood and accomplishment in any nonmaternal field. The two are not incompatible but the former unquestionably impedes the latter.

Yet mothers who \textit{keep} their babies are also acting rationally, if, as some might argue, unwisely. For young women with little expectation of accomplishment in school, a job, or marriage, a baby is something real and immediate, an achievement which the culture has long urged upon women. Motherhood remains a powerful symbol of adult status. It provides the expectation of an aura, however fleeting its actual glow.\textsuperscript{355} As Regina Austin has observed, teenage pregnancy is "a product of the teens' contradictory pursuits of romance, security, status, freedom, and responsibility within the confines of their immediate surroundings."\textsuperscript{356}

Decisions to keep children are still heavily influenced by dominant cultural views about the importance of children to women's identity. Motherhood as icon intensifies the force of separating as aberration, and the consequence for adoption is that even mothers who might want to give up a child sometimes decide not to. For while birth mothers may no longer be subject to institutional pressures or hasty consent procedures, they are still keenly aware of the cultural meaning of separating. Mothers who place their children fear "peer reaction which views their behavior as selfish, unloving, and even incomprehensible."\textsuperscript{357} In the comparison study of placers and parents, more than half of the "parent" group explained that "they could not emotionally handle the thought of placing their child for adoption."\textsuperscript{358} To the extent that mothers keep children because they anticipate reproach for giving them up, maternal motive remains constrained. The mechanism of constraint now takes the form of pervasive maternal ideology, and it is therefore more subtle than the plaintive letters from needy infants distributed in maternity homes sixty years ago. Its effect may be every bit as powerful.

B. Surrogacy

Casting maternal motivation as child-centered is a much harder task when we move from adoption to surrogacy. As the New Jersey Supreme Court observed in holding surrogacy contracts unenforceable as a matter of public policy, "worst of all . . . is the contract's total disregard of the

\textsuperscript{354} See Frank F. Furstenberg et al., Adolescent Mothers in Later Life 47 (1987).
\textsuperscript{356} Austin, supra note 171, at 560–61 (noting that "[p]arenthood does not always produce the results the teenagers hoped for prior to the birth of the child").
\textsuperscript{357} Resnick, supra note 343, at 583.
\textsuperscript{358} Id. at 582.
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best interests of the child." Total disregard" would seem a grand, but not surprising, misdescription of the birth mother’s decision. In choosing one another, the natural parents have, to some extent, approved the other as a good, if unconventional, mother or father.

In this section I explain and contest the New Jersey court’s assessment. I shall argue that because surrogacy represents maternal separation decisions in their most unrelenting form, opposition to the practice derives as much from the symbolic threat that surrogacy hurls at the institution of motherhood as from concerns, however sincere and however speculative, about the welfare of children. I develop this by examining two of the factors at play generally in regulatory deliberations—harm to the child and maternal motivation. The two merge with a vengeance in the case of surrogacy as the mother’s deliberate decision to separate, rather than the separation itself, is the heart of her offense.

1. Legal Regulation. — Surrogacy, as used in this discussion, refers to the contractual agreement between a woman, a married man, and his wife. The woman or surrogate mother agrees to bear, deliver, and transfer custody of the child to the couple. In most cases she is paid for the transaction. Separating permanently from one’s child is the very point of surrogacy.

At least eleven state legislatures now regulate surrogacy. Four make it a crime to enter into a surrogacy contract. Other states simply hold the contracts unenforceable. The remaining states permit surrogacy agreements subject to various restrictions and safeguards. In Florida, contracts are enforceable so long as there is no payment of “valuable consideration” to the birth mother. New Hampshire permits payments but limits them to pregnancy-related expenses, lost wages due to the pregnancy, and reasonable counseling and legal fees. In the states that permit surrogacy, the laws of adoption sometimes apply, such as required

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360. An alternative practice is gestational surrogacy or the implantation of a zygote into the uterus of a biologically unrelated woman who then carries the baby to term. In such cases the birth mother has contributed no genetic material, but has been the mother during gestation. See Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (holding that the gestational mother is not the legal mother of the child).
cooling-off periods after the child's birth in which the mother may rescind.\textsuperscript{366}

In states still contemplating legislation, courts have clarified the legality of the practice. As we have seen, New Jersey has banned the practice entirely. In contrast, Kentucky refused to follow New Jersey's lead and found that the anti-babyselling provisions of the state's adoption laws had not been enacted with surrogacy in mind and were therefore inapplicable.\textsuperscript{367} California, has also upheld a paid gestational surrogacy agreement as a permissible form of intentional parenting.\textsuperscript{368}

As these varied approaches indicate, the regulation of surrogacy has generated extraordinary debate and reflection. The commodification of children, the exploitation of women, and the commercialization of reproduction are now debated within legislatures,\textsuperscript{369} courts and commissions at the federal and state levels,\textsuperscript{370} the feminist community,\textsuperscript{371} and by ethicists,\textsuperscript{372} and economists.\textsuperscript{373} Without diminishing the importance of these often well-taken concerns, I focus here on surrogacy as a maternal separation decision—a decision to part physically from one's child under

\textsuperscript{367} See Surrogate Parenting Assocs., Inc. v. Kentucky, 704 S.W.2d 209, 211 (Ky. 1986).
\textsuperscript{368} See Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
\textsuperscript{373} See Richard A. Posner, The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood, 5 J. Contemp. Health L. & Pol'y 21, 22–29 (1989) (applying "simple economic analysis" to problem of surrogacy makes clear that "the case for allowing people to make legally enforceable contracts of surrogate motherhood is straightforward"); Louis M. Seidman, Baby M and the Problem of Unstable Preferences, 76 Geo. L.J. 1829, 1829 (1988) (arguing that what is "ultimately unsettling and consequential about Baby M is that it brings into question fundamental postulates about neutral dispute resolution and the reconciliation of conflicting preferences").
circumstances that require substitute care, which the mother has arranged. Analyzing surrogacy through that lens reveals how concerns about separation, and its confusion with abandonment, are sometimes embedded in other more familiar objections.

In looking at surrogacy as a form of separation I am not discounting objections about commodification or exploitation as mere diversions, masking an unconscious national insecurity about mother-child separations. But as a culture, we have come to accept maternal absence as a maternal wrong and a mother’s deliberate absence as particularly searing.\textsuperscript{374} Having a child in order to separate from it presents a form of calculation and control that we are deeply reluctant to associate with motherhood. Surrogacy converts maternal selflessness into profit and transforms maternal devotion into a time-dated offer. Motherhood becomes stunningly self-contained: no sex, no father, no baby shower, no nurturing the newborn. More troubling, legalized surrogacy cannot be cordoned off as an isolated, if misguided case of maternal altruism. It augurs an institutionalized practice, a regulated industry. To permit paid surrogacy is to endorse and regularize maternal conduct which for many provokes a great and deep-seated unease.

Nor do I contend that the bases of opposition to surrogacy are solely psychoanalytic. Abandonment is understood as a moral failing as well as a psychological threat, and this too explains the background hostility to surrogacy.\textsuperscript{375} Consider George Fletcher’s explanation that “the evil of the surrogacy contract is aptly formulated in the language of loyalty. The contract to bear a child for another family requires a mother to act disloyally toward her own offspring.”\textsuperscript{376} Fletcher’s characterization ignores the fact that the mother has agreed to bear a child for another family and that she regards her act as a form of kindness, a form of fidelity to an undertaking she has given, and not a form of domestic treason.\textsuperscript{377}

2. Surrogacy and Spiraling Harm to Children. — Opponents argue that surrogacy harms children by virtue of the intentional and permanent sep-

\textsuperscript{374} Thus the particular devastation to a child of a mother’s suicide. See generally Signe Hammer, By Her Own Hand (1992). I am grateful to Marion Abbott Bundy for this reference.

\textsuperscript{375} The force of an ethical analysis is suggested by Ronald Garet, who uses the language of abandonment and betrayal to discuss the parental obligation of a transsexual. See Ronald R. Garet, Self-Transformability, 65 S. Cal. L. Rev. 121, 144–45 (1991). Garet suggests that to the extent fatherhood includes an undertaking of paternal faithfulness to one’s children, a father’s subsequent adoption of a cross-gender identity may be morally analogous to abandonment. Garet acknowledges that, in general, an ethics of abandonment for fathers is not “widely entertained, [nonetheless] there is still a sense that a man who fathers children and then turns away from them for light or selfish reasons has done something bad.” Id.


\textsuperscript{377} See infra text accompanying notes 418–421.
The argument is striking in that none of the traditional concerns associated with developmental harm in consequence of maternal absence—that the child has been left in inadequate circumstances or that the separation occurs after the formation of an intense mother-child bond—seem to apply in the case of surrogacy. The child is raised by his natural father and stepmother in a setting the birth mother herself has approved; the infant is surrendered before any postnatal bond with its biological mother has formed; and unlike placements to foster care, life with dad is intended to be permanent. If none of the traditional factors is in play, how then does surrogacy harm children?

The common answer is that the fact of surrogacy, rather than the circumstances of any particular case, creates the problem. Harm derives from the set of relationships that surrogacy sets up and then demolishes; the arrangement itself puts children at risk. On this account, surrogacy damages not only children born as the issue of the contract, but spirals into a widening source of injury to other children: siblings, unadopted children, and finally, all children who live in a society that tolerates the practice.

I begin with the harms (real, potential, or imagined) to the siblings of the "surrogate child." The concern is that having witnessed and experienced their mother's pregnancy, the half-siblings of the child will now fear that they too are at risk of being given away. Thus surrogate mother Elizabeth Kane attributes the learning disabilities and nightmares of her older son to the "disappearance" of the child she carried pursuant to her surrogacy contract. Many state and national commissions evaluating surrogacy have noted the possibility of psychological insecurity in the surrogate mother's other children.

However, as the commissions themselves note, there is at present little evidence to confirm this possibility. Moreover, such harm may be preventable. Lori Andrews suggests that because "[c]hildren take their cues about things from the people around them," if siblings are told "from the beginning that this is the contracting couple's child—not a part of their


379. The leading exception is a case where the surrogate mother gave birth to a seriously disabled child whom the adopting father refused to take. See Iver Peterson, Legal Snarl Developing Around Case of a Baby Born to Surrogate Mother, N.Y. Times, Feb. 7, 1983, at A10. Subsequent genetic tests showed the child was not the man's natural child; the surrogate mother had conceived the child with her own husband. See id.


381. See New York State Task Force on Life and the Law, supra note 370, at 77 (noting that "the knowledge [that one's mother is acting as a surrogate] may undermine children's sense of security and exacerbate fears of abandonment that may haunt children").
own family—they will realize that they themselves are not in danger of being relinquished." Anecdotal evidence suggests that the method works.

Harm to the second category of children is somewhat more remote. The argument is that surrogacy condemns unadopted children to foster care because so long as childless couples have the option of genetically related children, they will not adopt. It is, however, uncertain whether childless couples for whom a genetic link is crucial would turn to adoption if surrogacy were unavailable. As Elizabeth Bartholet observes, biological parenting, even when achieved by only one partner to the marriage, has become privileged—indeed sacrosanct—within the current hierarchy of reproduction. If there is a threat to potential adoptees, it comes from the general obsession in the culture with genetic parenting, not from surrogacy, which is, at worst, only a symptom of that. Apart from genetic preferences, couples report that surrogacy offers them greater certainty in that a surrogate mother who intends to part from her child from the beginning is less likely than an unintentionally pregnant woman to change her mind.

Even if banning surrogacy might not improve the likelihood of adoption for existing children, opponents contend that its harms remain profound at a more general level: "surrogacy arrangements threaten traditional ideas about family and reproduction... [so that s]trangers to the contract may simply not want to live in a society where such arrangements are common." Under this view, surrogacy puts the entire culture at risk:

382. Andrews, supra note 371, at 77. Andrews further points out the dangers for feminists of "embrac[ing] the argument that certain activities might inherently lead their children to fear abandonment" because therapeutic abortions could be opposed on the basis of similar anecdotal evidence that "when the woman aborts, her other children will feel that, they too, might be 'sent to heaven.'" Id.

383. Two-time surrogate mother Donna Regan and her husband told their own son that "'we loved him very much and... wanted Sherrill and Bob [the contracting couple] to have a child they could love, too.'" They reported that the child suffered no ill effects. See Iver Peterson, Surrogate Mothers Vent Feelings of Doubt and Joy, N.Y. Times, Mar. 2, 1987, at B1, B4.

384. See Bartholet, supra note 164, at 224–25; Field, supra note 371, at 55–58; Seidman, supra note 373, at 1833.

385. See Helena Ragoné, Surrogate Motherhood: Conception in the Heart 93 (1994).

386. See Bartholet, supra note 164, at 218. Like anonymous artificial insemination, surrogacy is pursued in large part to give husband-wife couples as much as possible of the procreation experience. See id. at 221.

387. See Ragoné, supra note 385, at 93–95. Couples further report they also chose surrogacy after ruling out adoption because of long waiting periods, costs, and upper-age limitations on adopting couples. See id.

388. Seidman, supra note 373, at 1833 (noting that "the transaction costs required for individuals having such a preference to 'buy out' the participants in surrogacy contracts are surely prohibitively high").
[E]pidemics of divorced, illegitimate conceptions, and parental irresponsibility and failures are [already] straining the family bonds necessary for successful childrearing. If we legitimate the isolation of genetic, gestational, and social parentage and govern reproduction by contract and purchase, our culture will become even more fragmented, rootless and alienated.

This argument is yet another version of the concerns that have regularly surfaced at moments of social discontinuity and for which the maternal presence is once again offered up as the leading antidote. The enthusiastic inclusion of a child into the home of his natural parent would seem to reinforce, not strain, the concept of family bonds, and unlike the fragmentation of divorce, here the mother and father agree with whom the child should live.

Most troubling to many is the impact of surrogacy on the individual child. Opponents often insist that at least paid versions of the practice necessarily damage the child born as a result of his mother's contract. The bargained-for nature of conception is fatally inimical to his psychological well-being. In his testimony before a California Senate Committee, law professor Herbert Krimmel posed the predicament as follows:

The child will come to learn that it was only because his mother had the assurance of a binding contract that she could give him up for the money for which she conceived him in the first place. That is, this child came into existence on order, as a custom-made commodity for a guaranteed purchaser. Can any child be expected to understand, much less forgive, that?

The New Jersey Supreme Court endorsed a variation of this view in including among the long-term effects of surrogacy contracts "the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money."

A comparison is often made on this score with adopted children. They too know that their mother (and their father) have given them up. Yet despite efforts by some adoptees to discover their birth parents, not all adopted children are haunted by parental rejection. Even so, critics of surrogacy maintain that whatever the problems with adop-

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389. New York State Task Force on Life and the Law, supra note 370, at 81 (statement of Sidney Callahan); see also Herbert T. Krimmel, The Case Against Surrogate Parenting, Hastings Center Rep., Oct. 1983, at 35, 38 ("Legalizing surrogate mother arrangements will ... put more stress on our society's shared moral values.").

390. See Krimmel, supra note 378, at 102.


392. See, e.g., Nancy Verrier, The Primal Wound: A Preliminary Investigation into the Effects of Separation from the Birth Mother on Adopted Children, 2 Pre- and Perinatal Psychol. 75 (1987) (examining psychological problems faced by adoptees, including fear of abandonment and rejection).

393. Bartholet argues that adoption research assumes adoption is an abnormal state and proceeds from there. She argues further that much research fails to differentiate among adoptees, disregarding such factors as age and placement history. See Bartholet, supra note 164, at 177.
tions, surrogacy is worse. Society necessarily tolerates adoption as an emergency response to unplanned pregnancy. Surrogacy, by contrast, is "premeditated [" from start to finish.\footnote{Krimmel, supra note 378, at 105. One might respond that the child's birth might well be explained (and perhaps experienced) as something more like a special commission than an abandonment. In contrast, many adopted children might rather be spared information about the casual or even coerced circumstance of their conceptions. For one family's approach, see Catherine Gewertz, Parents of Child Born to Surrogate Face Final Challenge, L.A. Times, Apr. 17, 1992, at A3 ("We'll explain it all to him when he gets older," Mark Calvert said. 'He has a right to know. But now he should get the chance to just be a normal kid.'"). The Calvert case was one of gestational surrogacy.} The intentionality of the child's conception prevents the mother's relinquishment from ever qualifying as forgivable in the child's eyes.\footnote{Id. at 105.} On this account it will always generate harm: "The children born from these surrogate mother arrangements are going to hurt for the same reasons you and I would hurt."\footnote{Id. at 105.} The adopting couple would of course dispute the diagnosis and argue that the child's conception demonstrates instead a mother's love as embodied in the sacrificial gesture of giving up the child. Moreover, the child is with its natural, loving father and he too was part of the intentional conception. This aspect of the premeditation, supporters explain, ensures the child a loving parent.

However, the father's link to the child is often thrown back as further evidence of harm. It is argued that such attention to genetic characteristics distorts the unconditional nature of parenthood; the "quality" of one's child is not generally subject to prior negotiation or guarantee. However, in this regard the natural father and mother in surrogacy may not be so different from other parents. Spouses often choose one another on the basis of desired traits. Amniocentesis and prenatal tests now provide parents with detailed information on their child's genetic makeup. As additional markers are discovered, the incidence of characteristic-based reproductive selection is likely to increase. My point here is not to endorse the idea of reproduction as beauty pageant but simply to clarify that acting on the genetic preferences of parents is not unique to surrogacy.

It would appear that harms to children on account of surrogacy are not sufficiently real or certain to justify prohibiting the practice. Rather, opposition rests to some degree on an ideal conception of motherhood in which separation is so taboo that harm to children is expected automatically. This idea of surrogacy as motherhood gone wrong intensifies when we examine maternal motive where maternal self-interest compounds the verdict.

3. Maternal Motivations. — Opposition to surrogacy based on maternal motive takes two forms. The first is a kind of contractual incapacity: mothers who enter surrogacy contracts do so out of either duress (and so their consent is invalid) or false consciousness (in which case it is mean-
The false consciousness argument posits that however much surrogate mothers may say they benefit from the arrangement, surrogacy is not an advantage but a folly. On this view, the claim made by surrogates that they are asserting control over reproduction is pure delusion. The non-delusional position is that surrogacy reinforces the very oppression that motherhood has always wrought in the market, at home, and in social life. Without question, male control over women's reproduction has always been key to the subordination of women. Yet choosing to reproduce, especially through the conditional version of motherhood that surrogacy presents, is not necessarily complicitous with patriarchal domination. If we mean to take seriously the charge of feminism to listen to what women say and respect their choices, we cannot disregard out of hand decisions women make in the direction of motherhood. Surrogacy may seem a strange display of motherhood, yet the fact that women choose to experience only the finite version that surrogacy provides may reinforce rather than remove the decision as an exercise of agency.

Surrogate mothers engage in partial mothering limited only to pregnancy and childbirth on their own terms.

The economic coercion argument is that pregnancy contracts result primarily from the financial necessity of the would-be birth mother. We know that with the exception of surrogacy agreements among family members, the surrogate mother and the adopting couple are usually distinguished by class—the surrogate always the poorer. Although the potential for economic duress exists, at present birth mothers do not appear to be coerced into the arrangements. Most have held other jobs, often in helping professions such as nursing. Indeed, because surro-


398. See Gimenez, supra note 166, at 287.


400. Kathryn Abrams has argued that surrogacy may serve as a test ground for the exercise of agency through "subversive repetition" or the strategy appropriating aspects of the dominant culture—here pregnancy—in explicitly non-submissive ways. See Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 Colum. L. Rev. 304, 357-59 (1995).


402. See generally Ragoné, supra note 385, at 52-68 (discussing why women become surrogate mothers). In a 1988 sample of 334 surrogate mothers, 53% had a household income between $15,000 and $30,000; an additional 30% had a household income between $30,000 and $50,000. See U.S. Congress, supra note 370, at 273.

403. See Ragoné, supra note 385, at 55 tbl. 2.1.
gate mothers are generally older, more financially independent, and have raised other children, their decisions may be influenced by fewer pressures than the poorer, younger, less experienced women who have traditionally surrendered children for adoption. In a recent study of twenty-eight surrogates, the mothers reported no sense of class inequity in relation to the adopting couple. On the contrary, they viewed "their fertility to some extent as a resource that provide[d] them with a decisive handicap or advantage in their relationship with the couple." 405

If we then bracket claims of economic duress and false consciousness and accept surrogate mothers' expressions of motive as valid, how exactly does the self-interest so commonly ascribed to surrogate mothers manifest itself? The three most common motives reported by surrogates are money, altruism, and a desire to experience pregnancy. 406 While not a bad threesome in America in general, they are soundly discredited within the context of motherhood. Money destabilizes the usual guarantee of mothering as unpaid; any so-called altruism is improperly directed at adult beneficiaries; and enjoying pregnancy introduces a suspiciously hedonistic aspect into what is supposed to be a rugged experience.

Let us look first at profit. Studies of both applicants to agencies and surrogate mothers make clear that money is a necessary condition in the decision to become a surrogate. 407 Payment is often cited as the factor which distinguishes bad surrogacy from good adoption, where the birth mother may receive reimbursement only for reasonable, birth-related expenses. 408 In contrast, profit is understood as an anathema. Thus a New York court refused to approve a surrogate birth mother's consent to the adoption of her son by the child's natural father until the mother swore under oath before this Court that she has not and will not request, accept or receive the $10,000 promised to her in exchange for the surrender of her child . . . . Only if she is free of . . . the inducement of a $10,000 gain, can Elizabeth's surrender of her parental rights be truly voluntary and motivated exclusively by [the child's] best interests. 409

404. See Philip J. Parker, Motivation of Surrogate Mothers: Initial Findings, 140 Am. J. Psychiatry 117-18 (1983) (reporting that of the women interviewed, the median age was 25, 80% had a high school degree or higher, and 81% had delivered at least one child).

405. Ragon6, supra note 385, at 91-92.

406. See Parker, supra note 404, at 118.

407. See id. (reporting that in 1983, eighty-nine percent of a sample of 122 women applying to be surrogates said a fee was a necessary condition for their participation; most required at least $5,000).

408. Indeed, while most states limit payments to the birth mother in adoption to "reasonable and necessary expenses incurred in connection with the adoption," see, e.g., Ariz. Rev. Stat. Ann. § 8-114(A) (Supp. 1995) (including costs for medical and hospital care for the mother and baby, counseling fees, legal fees, agency fees), reimbursement for lost wages has been permitted. See In re Adoption of Baby Boy, 552 N.Y.S.2d 1005, 1007 (Fam. Ct. 1990).

Yet the distinction between payment in adoption and payment in surrogacy is an unconvincing one. In private adoptions $25,000 is an ordinary, perhaps minimum price, for a healthy white infant. The main difference is that most of the sum is paid to the middleman attorney, whereas in surrogacy the mother also receives a substantial payment.410

Looking not only at the amount, but also at what the money is purchasing further sustains the adoption/surrogacy distinction. Surrogacy contracts have added value because the natural father is securing specific characteristics (his genes) in the child. In adoption, other valued characteristics contribute to price and availability—age, race (usually white), and condition (healthy).411 Thus it would seem that paying for particular traits does not satisfactorily distinguish the two practices. Rather, it is paying for the intentional pregnancy that distinguishes surrogacy from adoption. In adoption, payment is "reimbursement" for expenses incurred; in surrogacy, the money is compensation for work that has been commissioned.

Labelling surrogacy as remunerated work is often used to denigrate the practice: the fact of payment moves surrogacy from the realm of good works into that of commerce. Yet this characterization may serve to clarify, not condemn, this category of separation decisions. If, for a moment, we demystify both motherhood and women's reproductive labor, women who enter contract pregnancies for money are rather like other women who separate from children in order to work. Deborah Satz has suggested that the traditional objections to women selling their reproductive labor—the insult to the magical mother-child bond, the unique relation between women's identity and reproduction, and the incommensurability in market terms of cash and child—do not hold up in the context of surrogacy. Not all women form these bonds, identity is found in other permissible forms of labor, and while there may be financial motivation for conceiving a child, the child himself cannot subsequently be treated as a commodity.412 Moreover, concern over the commodification of chil-

410. Margaret Radin dismantles the payment distinction this way:
[T]here seems to be no substantive difference between paying a woman for carrying a child she then delivers to the employers, who have found her through a brokerage mechanism, and paying her for an already "produced" child whose buyer is found through a brokerage mechanism (perhaps called an "adoption agency") after she has paid her own costs of "production."
Radin, supra note 371, at 1929.

411. See Patricia J. Williams, Spare Parts, Family Values, Old Children, Cheap, 28 New Eng. L. Rev. 913, 918 (1994) ("'What age, what sex,' asked the social worker. 'Doesn't matter,' I said, 'though I'd like to miss out on as little as possible.' 'If you're willing to take a boy, you'll get younger,' she replied. 'There's a run on girls.'").

412. See Debra Satz, Markets in Women's Reproductive Labor, 21 Phil. & Pub. Aff. 107, 114-21 (1992). For example, while reproductive labor may be uniquely related to women's identity, it is not always part of their identity: some women choose not to have children. Conversely, as Satz points out, other kinds of women's labor—teaching, writing a book, selling one's image—may also be quite tightly tied to identity and yet not objectionable on that ground. See id. at 114-15. Nonetheless, Satz opposes contract
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dren in surrogacy seems somewhat selective. Children are regularly assigned cash value and often on the basis of physical traits, as damages in wrongful birth suits or price lists for adopted children make clear. If women’s reproductive labor is not so easily distinguishable from other labor markets, we might fairly consider surrogacy as a job. Indeed, surrogates share much in common with other women who do wage work at home. Though there is no question that surrogacy differs in kind from other homework such as knitting or telecommunications, still the reasons for choosing homework of one kind or another are similar. Like other working mothers, paid surrogates want to improve the lives of their families. Mary Beth Whitehead contracted with the Stems to finance private school tuition for her children. A recent study of twenty-eight surrogate mothers revealed that none spent the money earned on herself; the majority spent it on college education funds, home improvements, gifts to their husbands, family vacations, or paying off family debts. Like other forms of homework, surrogacy enables women to earn income while caring for their other children. Thus the irony, however deliberate: separating from the child who is the subject of the contract enables the mother to stay home with her other children.

The second articulated motive is altruism. Almost all surrogate birth mothers place altruism “at the top of their list” as a reason for entering into the contract. As one mother explained, “it was a terrific way to pregnancy, locating the problem not in the market itself but rather in the control and context of the market relations: “in our society such contracts will turn women’s labor into something that is used and controlled by others and will reinforce gender stereotypes that have been used to justify the unequal treatment of women.” Id. at 123–24 (footnote omitted). But see Abrams, supra note 400, at 358–59 (arguing that although surrogacy has the potential to reinforce negative images of women, it also has the potential to challenge conventional notions of motherhood).

For some, the work to which surrogacy is best analogized is prostitution: in both cases women are selling the use of their bodies. But unlike prostitution, surrogacy is not performed for someone else’s immediate sexual gratification. See Carole Pateman, The Sexual Contract 214 (1988). And although she deals briefly with the biological father at the beginning and the end of the process, the surrogate mother performs her work largely free of his immediate or daily domination. She is, however, limited in her activities to the extent of particular contract restrictions, usually relating to fetal and maternal health.

In a wrongful birth suit parents recover for the birth of a child born with defects, which if they had known existed, would have caused them to abort the fetus or not to have conceived it in the first place. See, e.g., Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (permitting recovery for child born deaf).

See Williams, supra note 411, at 918 (explaining that two price lists govern agency adoptions, the standard price list and the “special,” a half-price fee for “older, black, and other handicapped children”).

Field, supra note 371, at 21.

See Ragoné, supra note 385, at 58. Ragoné concludes that one of the primary reasons surrogate mothers spend the money on others is that it “serves as a buffer against and/or reward to their families, particularly to the husband, who must make compromises as a result of the surrogate arrangement.” Id.

See infra note 495 and accompanying text.

help a childless couple.' "419 Another explained, "I wanted to do the ultimate thing for somebody, to give them the ultimate gift. Nobody can beat that, nobody can do anything nicer for them."420 Altruism is so fundamental to the participation of surrogate mothers that surrogacy centers use it as a marketing device: a program deliberately changed its advertising copy from "Help an Infertile Couple" to "Give the Gift of Life" and received a much larger response from prospective applicants.421

And what if this kind of altruism were the only thing on the list? If the birth mother's financial interests did not predominate, would generosity alone transform surrogacy into a more acceptable social and legal practice? I suspect the answer is no. To start, there would likely be very little surrogacy around to regulate; the cases of gratuitously serving sisters-in-law422 or implanted grandmothers are rare.423 One might also challenge whether altruism is entirely devoid of self-interest; the giver feels good. Yet this alone does not disqualify the motive. We do not in general transform gifts into bargains because the donor receives psychological satisfaction.424

The main reason that altruistic motivation is insufficient to overcome criticism is that the altruism in surrogacy, unlike the altruism in adoption, is directed at the wrong target. The intended beneficiary, as many surrogates explain, is not the child, but the infertile couple. The New Jersey Supreme Court noted this in Baby M, where it described the interests of the adopting couple as "realistically the only interest[s] served."425 Yet intentional pregnancies to benefit third parties are not universally condemned. A California couple was lauded for their decision to have a child specifically to harvest its bone marrow to save the life of its dying

419. David Behrens, Surrogate's Stories, Newsday, Oct. 15, 1990, pt. II, at 5, 8; see also Ragoné, supra note 385, at 60–61 (describing how surrogates are often motivated by "altruism, specifically, a feeling of empathy for couples who are infertile").
420. Ragoné, supra note 385, at 59.
421. See id.
422. See Joan Ryan, Righetti's Wife's Sister Delivers Triplets as a Surrogate Mother, Star Trib., May 17, 1992, at 11C (reporting that the San Francisco Giant relief pitcher missed a game to attend the birth).
423. Curiously, there might be less paid surrogacy as well. A psychologist who screens applicants rejects women who have histories of only wanting to help others and who lack an accompanying sense of themselves. See Overvold, supra note 418, at 135.
424. Even if the mother finds great pleasure in her unpaid undertaking, bearing a child is not without various physical costs to her, such as reduced mobility and fatigue. Many surrogates also describe the disapproval of their parents, boyfriends, employers, and neighbors. In counseling applicants, psychologists alert women to the frequency of social disapproval. See id. at 136.
425. In re Baby M, 537 A.2d 1227, 1248 (N.J. 1988). Surrogacy opponent Herbert Krimmel develops the arguments further: The child may be a source of income, therapy, self-esteem, or good feelings for the mother, but "[w]hat is clearly absent from this list... is the motive of wanting the child [for himself]." This is what distinguishes the surrogate mother from all others: surrogate mother arrangements can never be "a selfless act of love." Krimmel, supra note 378, at 101.
A more common version are parents who have a second child so that the first will not be an only child. The objection in surrogacy may therefore be not that the child serves the needs of others but that the child’s mother privileges the needs of others over the child’s rightful place with her. It may also be that surrogacy benefits adults. In contrast, in the bone marrow/only child cases, the reproductive decision is at least taken on behalf of other children. The fear is that if adult interests are served, then altruism becomes a way in which grown-ups might conspire to make anything they want out of the reproductive relation.

The third motive identified by surrogate birth mothers is the desire to experience pregnancy. Many surrogate mothers report that they enjoy the social respect that the status of pregnancy accords them. According to the staff psychologist at the Center for Surrogate Parenting in Los Angeles, “much of the sadness experienced [at the time of relinquishment] revolves around the surrogate having to say good-bye . . . to all the excitement and attention that are a potential part of the role.”

Surrogate mothers also report that desire for the physical experience of pregnancy motivates their decision. This motive might sound promising, even to traditionalists. If maternity inheres in women’s essential nature, then surrogates might be viewed as enthusiastic practitioners, perhaps a cultural antidote to women who abort. But surrogacy is pregnancy with a disturbing twist: women are ordering up bodily pleasures for themselves. Wanting to be pregnant full stop is something quite different from pregnancy as simply a prelude to pastel motherhood.

Moreover, the physical pleasure here is in connection with motherhood, not with sex. This brand of hedonism, an enjoyment of pregnancy without traditional male participation, is particularly subversive. It links the maternal with the sensual, a suspect combination under any circumstances and all the more heightened by the absence of a man. As Iris Marion Young explains, “The [traditional] separation between motherhood and sexuality within a woman’s own existence seems to ensure her


427. The flavor of this respect is captured by a letter to the editor of the New York Times entitled “A Mother’s Thanks”: “I wanted to thank each of the many men and women who gave me a seat on the subway on my way to and from work when I was pregnant during the heat wave last summer . . . . There has not been one day when someone has not given me a seat.” Rose Auslander, Letter to the Editor, N.Y. Times, Mar. 31, 1994, at A20.

428. Overvold, supra note 418, at 199.

429. See id.; Ragoné, supra note 385, at 61 (“I love being pregnant . . . .”; “I really love being pregnant; I’m healthier. Normally I feel fat, [but when] I am pregnant there’s a reason for it.”). It is worth noting, however, that surrogate pregnancies can also be difficult. One surrogate mother explained, “I had a rough delivery . . . and my lung collapsed . . . but it was worth every minute of it. If I were to die from childbirth, that’s the best way to die. You died for a cause, a good one.” Id. at 62.
dependence on the man for pleasure." By linking maternity with sensuality, surrogacy operates in much the same way. Traditional understandings about pain and sacrifice slide into a dangerous zone of hedonism.

A review of motives clarifies the ways in which surrogacy inverts the traditional features of maternity: priceless gifts command a price; the child's interests are knocked out of first place (a different issue, let us insist, than the child being harmed); and pregnancy is identified as both pleasurable and under maternal control. Even where legislatures act to curb such gains, as by prohibiting payment, opposition remains. This suggests that something more fundamental weighs into regulatory restrictions. I suggest it is the separation itself. The argument refines more familiar objections, such as commodification in which commercializing children is the wrong. The separation objection focuses not on the child as commodity but on the identity of the "seller." The transfer of this particular child by this particular woman—his mother—is the wrong. Without regard to market exchange, surrogacy is understood as a violation of a maternal oath of office, notwithstanding that the oath has always been implied. As a matter of contract the surrogate mother implicitly undermines the array of forces that were assembled during the nineteenth century and fortified in the twentieth and that established motherhood as natural, sacred, and necessarily long-term.

C. Maternal Employment

In the last thirty years, there have been dramatic changes in the patterns of workforce participation for wage-earning mothers. While poor mothers have always worked, more mothers of all income levels now do so and they begin long before their children start kindergarten, the traditional moment middle-class mothers often entered or re-entered the labor market. By 1988, 56.1% of mothers with children under six and

430. Iris M. Young, Breastfed Experience, in Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory 189, 198 (1990) (arguing that women should reclaim their breasts and the pleasures they bring from being the objects of male desire or asexual nurturance).

431. Id. at 199. Furthermore, "[i]f motherhood is sexual, the mother and child can be a circuit of pleasure for the mother, [and] then the man may lose her allegiance and attachment." Id. at 198. The pleasures of a surrogate mother's pregnancy may not have the same erotic potential as breastfeeding, yet the same logic attaches to explain the anxiety produced by the mother's desire for and control over her own physical pleasure.

432. See generally Kessler-Harris, supra note 26, at viii ("Poverty frequently led ... women to reject stay-at-home lives in traditional nuclear families . . . .").

433. See May, supra note 195, at 84, 223; Kamerman & Kahn, supra note 21, at 70.
52.5% of mothers with children under three were employed. With the exception of homework—such jobs as telemarketing or running a family day care—work necessarily separates mothers from their children.

The sheer number of working mothers puts immense pressure on the well-maintained ideology of separate spheres. For nearly two centuries, lodging mothers safely, productively, and nonthreateningly at hearthside was a matter of scientific fact, religious dictate, legal regulation, and social imperative. Researchers in the 1930s summed up the dominant view toward mothers who had somehow missed the message: "The gainfully employed married woman continues to be regarded by no small group of persons as an 'enemy' of society . . . ." The issue has now shifted, however, from how to keep mothers out of the workforce to what the culture, particularly the legal system, intends to make of the fact that they are in it.

Today the mother has replaced the married woman as the focus of concern although there is now increasing confusion about exactly what makes her the enemy: is it gainful employment or its absence? As we shall see, (upper) middle-class, married women are often condemned for pursuing careers and separating from children when they do not have to, while poor, single mothers are faulted for their failure to earn incomes for their families.

In looking at the current regulation of work-related separation decisions, we can take some cheer: most of the blanket prohibitions against maternal employment are gone. Yet the preference for mother-child togetherness continues, if in more subtle forms. I have in mind the heavy lifting that harm to children performs in the modern regulatory scheme. Harm remains a frequent, familiar ground of opposition to (at least some) mothers working. It is then crucial to know exactly how and under what conditions maternal absence on account of work is bad for children, especially as policies regarding child care, workfare, personal responsibility, and family values take center stage in social and political debate.

1. Legal Regulation. — Unlike adoption or surrogacy where one body of law covers the field, the regulation of work-related separation must be pieced together from rules, incentives, and restrictions from such otherwise unconnected areas as labor law, family law, employment discrimination, and child welfare. For purposes of this analysis, I have organized this body of regulation into three categories: prohibitions and disincentives to work; policies that support mothers in decisions not to work; and policies that condition public benefits on maternal employment or welfare. In each section I briefly review historical forms of regulation that have led to the present state of affairs.

a. Prohibitions, Restrictions and Disincentives. — While women were often denied employment by virtue of their sex alone, the greater emphasis has been on keeping married women, and especially mothers, out of the work force. Exclusionary policies and practices were justified by a variety of concerns: support for the family wage, the protection of maternal reproductive health, and solicitude for feminine sensibilities and vulnerabilities. These explanations were further bolstered by the understanding that children are better off when their mothers are at home.

For middle-class mothers, official prohibitions on work were generally unnecessary. Marriage was understood to displace employment. The two were alternatives, not combinations. The law reinforced this social rule: husbands were required to provide for their wives, but provision in reverse was unseemly and illegal. It was accepted as a tenet of middle-class life that when a woman married—or certainly no later than her first pregnancy—she would quit her job. Employers could count on it.

Wives and mothers who refused to be counted on could be fired. In the 1920s, school boards routinely refused to hire married women and terminated the contracts of single women who later married. Because most college-educated women were trained as teachers, such policies

436. Prohibitions against married women in the form of anti-nepotism rules are still around. See McCabe v. Sharrett, 12 F.3d 1558, 1574 (11th Cir. 1994).
437. Working mothers faced fierce opposition by organized labor. Women's workforce participation was seen as taking men's jobs and undercutting men's wages. See Kessler-Harris, supra note 26, at 142, 154–55.
438. See infra notes 450–452 and accompanying text.
439. Women were prohibited from working in bars, operating elevators, delivering the mail, and all activities that put them in touch with strangers. See Kessler-Harris, supra note 26, at 185–86.
440. Thus mid-nineteenth-century women who were jilted were compensated for their life-long injury by high awards from sympathetic juries. See Grossberg, supra note 84, at 34–51; see also Lee V. Chambers-Schiller, Liberty, A Better Husband: Single Women in America: The Generations of 1780–1840, at 2 (1984) (discussing eighteenth-century "spinsters" who chose not to marry because they "felt called to a vocation that could not be realized within the structure and duties of marriage or motherhood").
442. See Lynn Y. Weiner, From Working Girl to Working Mother: The Female Labor Force in the United States, 1820–1980, at 98–99 (1985). In the case of married schoolteachers, the concern was less maternal health than moral harm to school children of seeing pregnant bodies. See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974) (observing that although the school board did not raise it as a defense, several of its members justified the rule "in order to insulate schoolchildren from the sight of conspicuously pregnant women"). In the modern version of such cases, pregnancy without marriage has been grounds for termination. See Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986). In Chambers, a young mother was fired as a crafts counselor in a girls' club because her unmarried status provided a bad role model for her students. The court upheld the club's rule as a bona fide occupation qualification. See id. at 947. For a discussion of the case, see Austin, supra note 171, at 550–57.
"amounted to a class-based proscription against gainful employment for middle-class wives." Again, women's marital or maternal status was never a universal concern: poor mothers were regularly hired as unskilled labor. That these mothers would have to leave their children was of no matter to employers (though their absence from home was of immense concern to budding social welfare agencies).

Not only school boards, but federal, state, and municipal governments, unions, railroads, airlines, the postal system, and most private employers also refused to hire married women and mothers. These practices became more intense during times of economic distress, as during the Great Depression. Not until the Civil Rights Act of 1964 was employment discrimination on the basis of sex prohibited; only by 1972 had the states taken similar action. Of course, even absent formal barriers, women are still hired, assigned, paid, and promoted at lower levels than men, and the explanation remains their child rearing responsibilities.

Regulation of maternal employment has also taken the form of protective labor legislation. (I include protective labor legislation under the category of restriction, recognizing that the purpose of these restrictions was to benefit working mothers.) Such legislation, as first enacted during the Progressive Era, limited the number of hours and conditions under which women worked. Having lost the fight to obtain hour restrictions for male workers, the decision was made to argue the case on behalf of

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443. Cott, supra note 160, at 191. As a result of such policies, many married women passed as single at work. The prevalence of the practice was revealed with the advent of Social Security; women working under their maiden names were afraid they would have to reveal their marital status in order to register. See id. at 210.

444. See id. at 210. Cott points out that women were paid substantially less for these unskilled jobs (chambermaids, factory operatives, office cleaners, and so on) than unskilled male workers. She concludes that "[t]he economic function of hostility and discrimination against married women's employment . . . was not to prevent women from entering the labor market entirely but to keep them in its least lucrative or desirable sectors." Id.

445. See infra notes 458-459 and accompanying text.

446. See Kessler-Harris, supra note 26, at 256-58.

447. See id. at 257. The Dean of Barnard College suggested to the class of 1931, "'Is it necessary for you to be gainfully employed? If not, perhaps the greatest service that you can render to the community . . . is to have the courage to refuse to work for gain.'" Id. at 258.

448. Id. at 315.

449. See Victor R. Fuchs, Women's Quest for Economic Equality 60-64 (1988). The cultural practices that explain mothers' inferior job status have begun to merge with law. In EEOC v. Sears, Roebuck & Co., 899 F.2d 302 (7th Cir. 1988), the Sears company successfully defended against the EEOC charge of discrimination by arguing that mothers are not given but choose lower paying sales positions in order to secure less pressured work schedules that would not interfere with household duties and maternal peace of mind. The court accepted that maternal preference, not employer discrimination, justified the disproportionate number of men in higher paying commission sales positions. See id. at 320-22.

women, many of whom used their "liberty" to contract for the same fifteen-hour days as men.\textsuperscript{451} The strategy worked. In \textit{Muller v. Oregon}, the Supreme Court upheld hour restrictions on maternal grounds: "[W]oman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . . [A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."\textsuperscript{452} "Race" in this instance referred to those in the group committing race suicide—very white people.\textsuperscript{453} Accordingly, legislative solicitude did not extend to agricultural and domestic work, both the most arduous forms of labor and those most often performed by immigrant and minority women.\textsuperscript{454}

The impact of protective legislation on women of the period is unclear. Mothers did have more time to spend at home, despite employer maneuvers to extend the workday through clock stoppages and double shifts. Many working women, like those surveyed by the Connecticut Consumers League, favored the reduction in hours. As a mother of four explained, "I would like nine hours. I get up at 5:30 when I wash. I have to stay up till one or two o'clock."\textsuperscript{455} For other mothers, prohibitions on night work increased the difficulties of finding someone to watch their children during the day and lowered their wages, as night work was often paid at a higher rate.\textsuperscript{456} Moreover, the legislation reinforced the notion of women as mothers first and as workers a poor second. In a curious process of cross-class fertilization, "[b]y denying that women were full-fledged, equal wage earners, [the] legislation institutionalized social reproduction as women's primary role. It thus extended a version of the ideology of domesticity to working-class people."\textsuperscript{457}

The problem of finding adequate supervision for one's children while working introduces an important but indirect source of regulation of maternal employment: the application of abuse and neglect statutes. Poverty demands that poor mothers work. In her study of single mothers in late nineteenth-century Boston, Linda Gordon posed the resulting predicament: "Doing home work led to overworking children, depriving

\textsuperscript{451} See Kessler-Harris, supra note 26, at 184; Strum, supra note 137, at 114–31; see also Skocpol, supra note 142, at 407–12 (discussing the politics of Progressive Era minimum wage legislation for women).
\textsuperscript{452} Muller v. Oregon, 208 U.S. 412, 421 (1908).
\textsuperscript{453} The importance of "race suicide" as a factor in much protectionist legislation is discussed in Ladd-Taylor, supra note 142, at 49–50.
\textsuperscript{454} See Kessler-Harris, supra note 26, at 188; Boris, supra note 147, at 216, 230–31.
\textsuperscript{455} Kessler-Harris, supra note 26, at 189.
\textsuperscript{456} See id. at 193.
\textsuperscript{457} Id. at 212. Kessler-Harris concludes that although protective legislation came at the price of further isolating women from the mainstream of labor, it was also "the most plausible solution to problems of overwork." Id.
them of attention and supervision, and overcrowding the apartment . . . .
Going out to work might require leaving children alone and vulnerable, or placing them with unloving and irresponsible babysitters." The dilemma was patent. Poor mothers could remain at home and risk losing their children on grounds of the kind of neglect poverty often engenders, or they could improve family circumstances by working and lose the children for their failure to supervise. To make things worse, the kinds of work poor women could perform were considered particularly suspect: boarders were regarded with suspicion, piecework contaminated the home, and night work was either prohibited or immoral.459

The dilemma of finding suitable child care is not just an historical phenomenon. In 1995, cut-backs for summer programs and summer school left thousands of working parents in New York City alone without placements for their children:

Some parents . . . leave their children alone in apartments, choosing to monitor them by telephoning from work. Others equip their children with beepers so they can reach them if they violate their orders and go out. Some parents quit their jobs.

Many children are sent to the local playground, kissed and left to fend for themselves. In other cases, 12-year old siblings or 80-year-old grandparents become the informal camp counselors of the streets . . . .460

As the mother of seven- and twelve-year-old daughters explained: "I thought I would have to lock my children up. And then who knows what could happen. People could call the Bureau of Child Welfare and report me."461

Nor is the problem seasonal. Working mothers have trouble finding adequate substitute care all year round. Consider a 1992 New York case in which the "respondent-mother, Laverne F., came to the attention of the authorities for having left her three children . . . for 'extended periods of time,' while she worked two jobs in a valiant, if losing, struggle to provide them with support and proper housing."462 Laverne's children were then put in foster care, and the Family Court terminated Laverne's parental rights on the grounds of permanent neglect. In this case, however, the appellate court reversed, stating,

It cannot be too strongly emphasized that, to the extent that respondent fell short of ideal standards for parenting, it was largely due to her economic condition and the despair to which she plummets because of it. Indeed, it is to respondent's

458. Gordon, supra note 95, at 98.
459. See id. at 97–98.
460. Sexton, supra note 271, at 27 (reporting the elimination of 30,000 summer school positions for children).
461. Id. at 30.
credit that, despite enormous difficulties, she has persisted in her attempts to regain the custody of her children.\

Working also puts married mothers at risk of losing their children, not to the state but to their husbands upon divorce. In this way, traditional middle-class family law provides its own disincentives to maternal employment. Maternal employment has been creeping into an increasing number of divorce cases as a factor in determining the best interests of the child. While fathers have always worked or trained to work outside the home, courts seem increasingly attentive to maternal absence on this account. While these cases are sometimes reversed on appeal, they have tremendous practical importance: children's actual custody may change after a trial court decision, regardless of what happens on appeal, however many years later. Moreover, mothers aware of local judicial practices bargain under a very dark shadow indeed.

A recent example was the much publicized case of Ireland v. Smith. In 1994, college freshman Jennifer Ireland put her three-year-old daughter in a licensed family day care in order to attend daily classes at the University of Michigan and lost custody of the child as a consequence. The child had lived with her mother since birth in what the court acknowledged as "an established custodial environment." In awarding custody to the child's father, also a college student, the court held that there is "no way that a single parent attending an academic program at an institution as prestigious as the University of Michigan can do justice to their studies and the raising of an infant child."

I suspect the case hinged less on University of Michigan outdistancing Macomb Community College (the father's alma mater) for academic rigor, than on the judge's view that a mother should be doing justice to her child, not her studies. Both parents were students; both had arranged for someone else to watch their daughter while they were at school. The father intended to use his mother and private day care, a fact noted by the court. Nonetheless, it is not the grandmother who was awarded custody, but the father, and his daily contact with the child would have been no more than the mother's. Yet with regard to child

463. Id. at 14.
464. See In re Marriage of Estelle, 592 S.W.2d 277, 277 (Mo. Ct. App. 1979) (affirming trial court's custody award to father, which was based partly on characterization of mother's employment outside home as negative parental attribute); Masek v. Masek, 228 N.W.2d 334, 337 (S.D. 1975) (part-time music teacher mother loses to full-time working father partially because mother's "primary interests are in her musical career and outside of the home and family"); see also Susan Chira, Custody Fight in Capital: A Working Mother Loses, N.Y. Times, Sept. 20, 1994, at Al.
466. Id. at *1–*2. The burden of proof required to transfer custody to the father was the more demanding "clear and convincing" standard and not the normal preponderance test. See id. at *1.
467. Id. at *4.
468. See id. (noting trial court's conclusion that father's plan to have his own mother babysit "was better for child because she was a 'blood relative' rather than a 'stranger' ").
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rearing, a mother's absence, even when it exhibits no indicia of abandon-
ment, is always more pronounced.

In *Burchard v. Garay*, the trial court awarded custody to the remar-
mied father on the grounds that he was richer and that his new wife would
care for the child while the child's working mother would have to rely on
babysitters and day care centers. The case was especially revealing in
that the mother had been the child's primary caretaker from birth; the
father had lived with the two-year-old child for only six weeks prior to the
litigation. Similarly, in *Linda R. v. Richard E.*, the trial court noted
that it was "fully cognizant of the role of the working mother in today's
society, [and that] '[t]here is no question, on the other hand, that the
mother, because of her needs in relation to her employment, does not
devote full time to her son, but in this day and age, a woman is entitled to
her own career so long as such pursuits do not result in neglect of the
child.' " The court then granted custody to the working father.

It is important to keep in mind that children are not neglected in a
legal sense by virtue of their temporary, week-day placement in day care
centers. Nonetheless, these decisions cling to the view that mothers
should be with their children no matter what, and should be penalized if
they leave.

The whiff of impermissible self-interest appears again in *In re Mar-
riage of Tresnak*, in which the lower court denied custody to a law student-
mother on the grounds that "[a]lthough [attending law school] is com-
mandable insofar as [the mother's] ambition for a career is concerned
... it is not necessarily for the best interest and welfare of her minor
children." While *Burchard, Linda R.*, and *Tresnak* were reversed on
appeal, other mothers have lost custody permanently by virtue of taking a
job, even when the decision is necessitated by the economics of divorce.
Thus in *Dempsey v. Dempsey*, a mother who had taken sole care of the child
for years lost the benefit of West Virginia's primary caretaker presump-

469. 724 P.2d 486 (Cal. 1986).
470. See id. at 492 (reversing trial court's decision as an abuse of discretion).
471. See id.
473. Id. at 33.
474. The case was reversed on appeal, due to the trial court's failure to apply the test
in a gender-neutral fashion. The appellate court also found that the evidence did not
support the trial court's conclusion that "the wife's alleged relationship with another man
... reflected the wife's 'misplaced priorities and her somewhat less than selfless devotion
[to the children]." Id. at 51.
475. In re Marriage of Tresnak, 297 N.W.2d 109, 111 (Iowa 1980) (reversing trial
court award of custody to working father from law student mother). The trial judge noted
that "although the Petitioner, during her undergraduate work, was able to care for the
children while attending the Northeast Missouri University at Kirksville by studying after
the children were placed in bed, the study of law is somewhat different in that it usually
requires library study." Id. at 111.
tion when she was finally forced to take a job only because of the father’s total failure to support his children.476

b. Policies Supporting Domestic Presence. — Prohibiting wage labor was one way to keep mothers at home. Another was to remove or reduce mothers’ financial need to work. As we have seen, maternal pensions were part of the campaign early in the century to recognize and dignify the work of motherhood,477 even if the idea of maternal service was more enthusiastically received than its implementation. Localities expected able-bodied mothers to work at least part-time as a condition of receiving any support. Thus even under a “pension regime,” most poor mothers worked. In this section, I present three current forms of regulation, perhaps less aspirational than Progressive Era mother’s pensions but which similarly aim at assisting working mothers in their double endeavor. They are unemployment compensation, the Family and Medical Leave Act, and homework.

Workers are generally entitled to unemployment compensation if they quit their job or refuse proffered employment for “good cause.”478 In some states, the inability to arrange suitable child care has qualified as good cause: “a claimant who is a parent or guardian of a minor has ‘good cause’ for refusing employment which conflicts with parental activities reasonably necessary for the care or education of the minor if there exist no reasonable alternative means of discharging those responsibilities.”479 This comes about most often when the employer modifies the worker’s hours, often by requiring her to work nights when she has previously worked days (and has arranged child care accordingly) or requiring rotating hours (so that stable child care is difficult to put in place).480

477. See supra notes 155–158 and accompanying text.
478. See Cal. Unemp. Ins. Code § 1256 (West Supp. 1996) (“An individual is disqualified for unemployment compensation benefits if the director finds that he or she left his or her most recent work voluntarily without good cause . . . .”); Mont. Code Ann. § 39-51-2302(1) (1993) (“An individual shall be disqualified for benefits if he has left work without good cause attributable to his employment.”); N.D. Cent. Code § 52-04-07(2)(b) (Supp. 1995) (an employer’s account may not be charged with benefits if the employee left the employment of the employer voluntarily without good cause or with good cause not involving fault on the part of the employer”).
480. It is important to remember that the difficulties of arranging child care for mothers with limited resources and little job flexibility are concrete and unending:

I’d waitress in the restaurant and then go to work in the bar until two in the morning. So I would need somebody from four thirty in the afternoon till two in the morning and you just can’t get sitters for those hours, there’s no way . . . . You try to prearrange it y’know as early as you can in the week to get a sitter . . . . But the majority of people I knew worked days, so they didn’t want to be tied down to my kid in the evenings—so you get down to four o’clock in the afternoon . . . and you still haven’t found a sitter! [My employer] offered me suggestions like—well,
In a few cases, changes in child care, as opposed to changes in the job, have justified the employee's decision to quit. Thus in *Truitt v. Commonwealth,* the mother worked both night and day shifts as a waitress, her schedule changing weekly, while her own mother cared for her two children. When the grandmother became incapacitated, the mother requested day hours, as no other relatives could watch the children after 6:00 p.m. Her request was refused and she quit. The court reversed the denial of her unemployment compensation claim, noting that the "sudden physical disability of a trusted babysitter and the unavailing search for a replacement within two days [had] produced 'real and substantial pressure' " on the mother to quit.

On rare occasions, the cost of day care may also justify a mother's decision to quit. In *In Re Claim of McEvoy,* the mother had worked the "evening shift" so that she could watch her children during the day while her husband watched them at night. After being transferred to a shift where night work was not guaranteed, the mother quit. She qualified for unemployment compensation because although she had attempted to find suitable day care, "the programs available were cost prohibitive." These cases suggest a realistic appraisal of the lives of working mothers by regulators. Yet unemployment compensation is decided on a state by state basis and many states fail to recognize child care difficulties

maybe you can have so and so watch your kid on her off days—well, I don't know so and so, and . . . I didn't want to leave my kid with anybody I didn't know.


482. See id. at 209.
483. Id. at 210. It is a different matter, however, when the trusted babysitter's hours are changed. See *Biggerstaff v. Review Bd.,* 611 N.E.2d 184, 187 (Ind. Ct. App. 1993) (grandmother who babysat for her grandchildren not entitled to unemployment compensation when she refused to accept a shift that interfered with her babysitting obligations because her "child care responsibilities are not related to her own minor children [and she] has voluntarily taken on the responsibility of babysitting for her grandchildren").

The impact of compulsory shift changes on workers are detailed in *Jane C. Hood, The Caretakers: Keeping the Area Up and the Family Together, in The Worth of Women's Work,* supra note 244, at 93. Hood explains that for custodial worker Millie Jones, transfer to the day shift meant she would not be able to take care of her grandchildren or watch soap operas: "Working days not only removed some of the pride from Mrs. Jones's work [students would throw papers down as soon as she cleaned them up] but also forced her to recognize [the extent of] her relationship to her household of five children and two grandchildren." Id. at 95.

485. Id. But see *Richardson v. Review Bd. of the Ind. Employment Sec. Div.*, 467 N.E.2d 770, 776 (Ind. Ct. App. 1984) (payments denied to mother who argued that her new position would cause her economic injury because her new wages, after deductions for taxes, transportation, and child care, would be less than what she had collected on unemployment).
as good cause for refusing work. Nonetheless, unemployment compensation demonstrates the law's potential for recognizing and subsidizing the relation between employment and family responsibilities.

The Family and Medical Leave Act (FMLA) provides another form of aid to working mothers. The Act, signed by President Clinton in 1993 following years of Republican presidential vetoes, authorizes employees to take up to twelve weeks of unpaid leave to care for a seriously sick child or parent. The Act acknowledges that finding substitute care for sick children is extremely difficult and that working mothers who want to care for their sick children should not have to forfeit their jobs in order to do so. Many mothers will benefit from this form of job protection. However, the Act keeps in place one traditional aspect of maternal care: that it be provided for free. FMLA leaves are unpaid and therefore most useful to employees with second or substantial incomes. The Act thus offers little relief to those who need it most, the working poor.

The third type of legislation is a hybrid in that it facilitates both maternal employment and domestic presence. This is the regulation of homework-wage labor performed in one's home. Historian Eileen Boris summarizes the historical origins of homework as both a practice and a subject for regulation: "[A mother's] need to labor while caring for children encouraged employers to send manufacturing into the home and spurred reformers to protect mothers from such a practice." Mothers engaged in homework less out of current notions of "quality time" than because there was no other way to work. Child care was largely unavailable. Thus in the first decades of this century homework, or "sweated labor" commonly involved children working—rather than

486. In these states parental obligations are considered "personal" and not caused by the employer. See, e.g., Bennett v. Administrator, 642 A.2d 743 (Conn. App. Ct. 1994) (mother who quits job to care for seriously ill child not eligible for unemployment benefits). A claimant who leaves employment for "personal reasons" will be denied benefits. See In Re Claim for Job Ins. Benefits, 379 N.W.2d 281, 284 (N.D. 1985). In that case the employer changed the mother's shift from 8 am to 4:30 pm to 10 am to 6:30 pm and 3 pm to 11:30 pm every third weekend. This required her to hire a babysitter, which she had not previously had to do. The court found that while the mother may have been "inconvenienced" in having to find a sitter, parental obligations are not causes attributable to the employer, even if they do constitute "good personal reasons." Id. The court seems to disregard that the mother may have accepted the job not to avoid inconvenience but because she preferred to be home with the child herself. See also Conlon v. Director of Div. Employment Sec., 413 N.E.2d 727 (Mass. 1980) (remanding case to board for determination of whether mother of six whose husband was a fireman required to work nights and had herself refused a night shift constituted "good cause").


491. Boris, Home to Work, supra note 262, at 1.
playing—near their mothers in crowded, unhealthy, unregulated industrial environments recreated at home. 492

Thwarted for decades by judicial decisions upholding the right of workers to choose such miserable conditions of employment, Congress finally included homework within the practices regulated under the 1938 Fair Labor Standards Act (FLSA). 493 The Act failed to ban industrial homework outright, as many advocates had urged, but instead extended labor standards to employees without regard to work site. Much subsequent litigation has therefore focused on which homeworkers count as “employees” and which are “independent contractors,” a category that excludes them from the hours, safety, and wage protections of the FLSA. 494

In recent years the regulation of homework has become more complicated as telemarketing and word processing have begun to replace grimy cigar and garment manufacture of the early 1900s. In addition, the motive for engaging in homework has changed from sheer financial necessity to achieving a balance of work and domesticity. Many homeworkers now attempt to satisfy their own sense of motherly obligation—changing diapers, fixing lunch, talking things over, the sorts of hourly activities that make up mothering—and their desire to contribute to the family’s financial well-being. The view is captured by a Massachusetts homeworker in 1984: “There are many women like me. We want to be productive not just reproductive. Many of us do not want to be on welfare and foodstamps and Medicaid. Some of us don’t want full time careers and ‘latch-key’ children.” 495 Mothers of the 1980s, in a kind of do-

492. See Gordon, supra note 95, at 96–97 (noting further that “home work produced lower earnings, longer hours, more stress, and more damage to health” than work outside the home).


494. See, e.g., Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1386 (3d Cir.) (revising district court’s holding that home researchers were not “employees” under FLSA), cert. denied, 474 U.S. 919 (1985); see also Boris, Home to Work, supra note 262, at 279–82.

495. Boris, Home to Work, supra note 262, at 352–53 (quoting Letter from Mrs. Ellen Z. Lampner, Randolph, Mass. (May 3, 1984)). I want to emphasize that homework is only one model for combining mothering with waged work. In other cultures, the distinction between staying at home and going to work as an expression of maternal obligation blurs. Work itself is understood as caring for one’s children. Sociologist Denise Segura observes this in her comparison of Chicana (native born women of Mexican descent) and Mexicana (resident immigrants) mothers. Segura explains:

Mexicanas, raised in a world where economic and household work often merged, do not dichotomize social life into public and private spheres, but appear to view employment as one workable domain of motherhood. . . . Chicanas, on the other hand, raised in a society that celebrates the expressive functions of the family and obscures its productive economic functions, express higher adherence to the ideology of stay-at-home motherhood, and correspondingly more ambivalence toward full-time employment—even when they work.
Domestic feminism, have urged deregulation of the practice. I shall return to the reform of homework in Part V.

c. Workfare. — To "change welfare as we know it," President Clinton and the Congress have proposed that poor mothers engage in paid labor in order to qualify for public assistance. The exact criteria will be left to the individual states as part of their block grant authority, and many have begun to experiment with family caps, exemptions for mothers with children below a certain age, and support for children, transportation, and training. Despite these variations, the programs share the ideological premise that it is better for poor mothers to work than to remain at home on public assistance.

Workfare proposals solidify the official change in attitudes toward mother-child separations. Concern about welfare dependency has supplanted long-standing views regarding the benefit to children of maternal upbringing. Mothers' pensions of the 1920s and Aid to Dependent Children in the mid-1930s were to enable even poor mothers to raise their children themselves or at least reduce the number of hours of paid employment. But as others have documented, commitment to this ideal sharply receded in the 1960s as restrictions on who could receive public benefits were lifted and many minority and unmarried mothers became eligible. Formal work requirements were soon introduced under the Work Incentive Program and again under the provisions of the Family Support Act. Whatever developmental benefits were once thought to accrue from a mother's presence at home have been superseded by hopes of fostering a wage-labor work ethic in the children of the poor. The mother's relationship to work becomes the explanation for why chil-

Denise A. Segura, Working at Motherhood: Chicana and Mexican Immigrant Mothers and Employment, in Mothering, supra note 33, at 211, 212.

The irreconcilability of motherhood and employment for Segura's Chicana subjects results in higher levels of guilt when they do work and the belief by some—particularly important in the present workfare debates—that "motherhood means staying home with children—even if it means going on welfare (AFDC)." Id. at 218.

496. See Boris, Home to Work, supra note 262, at 337–65.


498. See supra note 34.

499. See Jason DeParle, Aid from an Enemy of the Welfare State, N.Y. Times, Jan. 28, 1996, § 4, at 4 (reporting on Michigan proposal to provide childcare and transportation for workfare mothers); Sam Howe Verhoek, Welfare in Transition: The National Picture, N.Y. Times, Sept. 21, 1995, at A1, B10 (describing what several states are doing with their welfare programs "in anticipation of gaining complete responsibility for welfare from Washington").

500. See Joel F. Handler, Two Years and You’re Out, 26 Conn. L. Rev. 857, 858–59 (1994).


Children turn out the way they do. Thus workfare is explicitly about separating nonworking mothers from their children. That goal is not incidental to the project, but central.

The new policies may differ with regard to the importance of maternal presence but retain one traditional understanding about motherhood: mothers remain wholly responsible for how their children turn out. The difference is a reconceptualization of value transmission. Patricia Hill Collins summarizes this view: Black welfare mothers are seen as "being content to sit around and collect welfare, shunning work and passing on [their] bad values to [their] offspring." Without overstating the parallel, the new language of value transmission has a striking neo-Lamarckian touch. The mechanism may no longer be exactly genetic, yet there is a late nineteenth-century quality to the argument: children's characters are molded after their mothers. Like many such theories, this neo-Lamarckianism has a special racial resonance. Concern about a generation of children thought unfamiliar with work because of their mother's reliance on public benefits is often a concern about particular racial groups. In consequence, the hardships once thought to result from maternal absence are less of a worry. Dorothy Roberts puts the point simply: "Maternalistic rhetoric has no appeal in the case of Black welfare mothers because society sees no value in supporting their domestic service. The public views these mothers as less fit, less caring, and less hurt by separation from their children."

In the case of the welfare mothers blame adheres whether she stays home or works. On the one hand, if she does not work and needs assistance, her children will turn out badly because they will lack a work ethic. On the other hand, if she works to provide her family with income, and her children turn out badly because of her absence, that too can be laid at her door—since in the absence of any more serious reflection on social conditions, it is her fault that poverty posed the dilemma for her in the first place.

Whether workfare will produce the desired effect—fewer children seeking welfare when they become adults—is unknown. As things stand now it is unlikely that workfare will do much to improve the mate-

Accountability and Taxpayer Protection Act of 1992," specifically mentioned "intergenerational dependency" as a ground for imposing work requirements.

503. Collins, supra note 10, at 77.


505. See R. Kent Weaver & William T. Dickens, Looking Before We Leap: An Introduction, in Looking Before We Leap: Social Science and Welfare Reform 1, 8 (R. Kent Weaver & William T. Dickens eds., 1995) ("We have no experience with tough work requirements for women with children and have no idea what their effects will be.") For an explanation of the position that recent welfare reform "like all of its predecessors, will ultimately be judged a failure because it did not accomplish goals that were beyond its reach (the elimination of poverty and welfare dependency) or because it did not resolve, once and for all, the conflict between insuring children against the risk of poverty while
rial circumstances of children's daily lives. Poor mothers must often use the cheapest child care, take the least satisfying jobs, rely on inadequate transportation in getting to work and picking up their children, and at best improve their families' financial circumstances only slightly and so still remain in poverty—the very circumstances that can push a mother-child separation into the category of harm.

Requiring the mothers of young children to work may have a variety of explanations. These typically include ending welfare dependence and redressing perceived inequities among mothers. Yet isolating workfare simply as a separation decision, these explanations become less relevant. Moreover, there is a quiet familiarity about poor women working that undercuts the usual hesitations. Dorothy Roberts offers an historical explanation for why workfare advocates are not "hindered by any disharmony in the idea of a Black working mother": since slavery Black mothers have always separated from their children to earn a living. Despite their work as mothers, both of their own children and the children of others, poor and minority mothers have never been considered as properly within the sphere of domesticity.

For mothers within the protected sphere, however, concern about harm to their children on account of maternal absence has been central to regulatory debate about whether or not motherhood should be combined with work. Because developmental injury to children is at the heart of policy objections to maternal employment, it is prudent to investigate the validity of the claim. This is the task of the next section.

2. Maternal Employment and Harm to Children. — Research on the effects of maternal employment presents a far more complex picture than earlier studies "designed to simply regress maternal employment status against a number of child outcome variables." In this section, I address three variables that researchers have identified as mediating work-related separations and developmental outcomes for children: the quality of substitute care, the quality of the child's family life, and the mother's attitude toward work.


506. As Theodore Marmor and co-authors point out, "just as mainstream norms now expect most mothers to work outside the home even when their children are in their preschool years, so it will be for AFDC mothers." Marmor et al., supra note 505, at 120. Compare Martha Minow, The Welfare of Single Mothers and Their Children, 26 Conn. L. Rev. 817, 826-31 (1994) (explaining how the lives of unemployed poor mothers are not like the lives of other working mothers).

507. Roberts, supra note 504, at 875; see also Jones, supra note 38, at 4 (arguing that "whites tended to see black mothers' family responsibilities as detrimental to their own economic welfare").

The quality of substitute care the child receives in the mother's absence, not child care per se, is independently correlated to child outcomes on such measures as intellectual and cognitive development, social development, social competence, and relations with peers and with adults. The four most important factors are the size of the child care group, the child/caregiver ratio, caregiver training in child development, and the stability of the child's placement. Not surprisingly, the smaller the group, the fewer the number of children per adult, the higher the overall educational level of the caregiver, and the fewer changes in caregivers, the better off children are when measured on a variety of developmental scales.

The second variable is the quality of the child's family life. The relation between the quality of family life, often determined by socioeconomic status (SES), and the quality of child care is the focus of what the National Research Council identifies as the latest or "third wave" of child care research. This work seeks to understand how the quality of child care relates to a family's social and psychological characteristics. One finding is that "in general, it appears that in the absence of government subsidies, higher quality child care and higher SES are correlated." But lower SES—being poor—often means that the home is not simply poorer, but that as a result of poverty, home life is harder, more stressful, more "complex." The term is used to describe the kinds of daily activities that make the lives of families using low-quality child care more difficult—such concrete experiences as long work hours, split shifts, weekend work, parents living apart, and long travel times to work. The National Research Council summarizes the findings of this and other studies:

509. For an excellent review of the research on the effects of child care, see National Research Council, supra note 265, at 45-83.

510. See Scarr et al., supra note 297, at 1406. In contrast to stability of placement, the first three—group size, ratio, and caregiver qualifications—have been identified as the "policy variables" because they are subject to regulation through the mechanism of licensing. See 1 Richard Ruopp et al., Children at the Center: Final Report of the National Day Care Study 43 (1979).

Other important variables concerning the child care setting include the curriculum, space and equipment, age, mix of children, overall center size, parental involvement, and sensitivity to ethnic and racial backgrounds of children. See National Research Council, supra note 265, at 86-87.

511. See National Research Council, supra note 265, at 87-92. Different factors were more relevant for certain age groups. For example, the effect of adult-child ratios is most important for infant and toddler care. See id. at 89.

512. See id. at 72.

513. Id.

514. See id. In contrast, the parents of children in high-quality child care were more nurturing toward their children. See Carollee Howes & Phyllis Stewart, Child's Play with Adults, Toys, and Peers: An Examination of Family and Child-Care Influences, 23 Developmental Psychol. 423, 426 (1987). The negative impacts of poverty on parenting are not limited to families in persistent poverty or to families headed by single mothers. See Glen H. Elder, Jr. et al., Families Under Economic Pressure, 13 J. Fam. Issues 20-31
In the absence of subsidies or interventions, families that are more stressed, both psychologically and economically, are more likely to use lower quality care. The United States thus has a group of children in double jeopardy: the children in greatest need of high-quality care to offset stress at home often receive low-quality care.515

This trend tells us something about the impact of the second variable on the first. But the second also has its independent effect mediating separations and outcomes for the child. A poor working mother may well offer her child a different quality of care—be less patient, less relaxed, more tired—at the end of her work day. In addition, background home conditions such as a dangerous neighborhood or an undermaintained apartment building require greater supervision of one’s child than is required in safe, warm, protected surroundings of more privileged children.

The third variable is the mother’s reaction to her employment and to leaving her child. Whether mothers work or stay at home, children are developmentally better off when the mothers’ preferred status matches what she is actually doing.516 One measure of a mother’s preferred status is what researchers call “maternal separation anxiety” or the “unpleasant emotional state reflecting a mother’s apprehension about leaving her child.”517 Working mothers often grill themselves with a series of hard questions: Do I really want to work? Is it worth it financially? Would my child (would I) be happier with me at home? What will my husband/classmates/mother/children’s teachers think? What shall I do about child care? Can the ten-year-old let herself in after school? The composite answer to these questions may not determine whether a mother de-

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515. National Research Council, supra note 265, at 76. The implications of this for workfare are discussed in infra Part V.C.2.

516. See Anita M. Farel, Effects of Preferred Maternal Roles, Maternal Employment, and Sociodemographic Status on School Adjustment and Competence, 51 Child Dev. 1179, 1184 (1980) (noting that “children whose mothers’ attitudes toward work and work behavior are congruent score higher on several measures of adjustment and competence than children of mothers whose behavior and attitudes are not congruent”); see also Linda Hoffman, Effects of Maternal Employment on the Child—A Review of the Research, 10 Developmental Psychol. 294, 257. (“[T]here is agreement that satisfaction with one’s employment status—whether that status is employee or full-time homemaker—will have a positive effect on family relations, mothering behavior, and child outcomes.”).

517. Ellen Hock, The Transition to Day Care: Effects of Maternal Separation Anxiety on Infant Adjustment, in The Child and the Day Care Setting: Qualitative Variations and Development 183, 194 (Ricardo C. Ainslie ed., 1984). These researchers developed a Maternal Separation Anxiety Scale (MSAS), a 35-item questionnaire that measured three things: the mother’s separation anxiety (high scoring mother believes that child prefers her and is better off if she is taking care of him); her perception of separation effects on the child (low scoring mother believes that “exposure to many different people is good for my child”); and employment-related separation concerns (low scoring mother believes strongly that outside employment is important and so finds separations less stressful). See id. at 196–98.
cides to work or not, but it does contribute to how she may subsequently feel about the resulting separation.

The level of a mother's separation anxiety is a function of her personality and of her beliefs about separations.\textsuperscript{518} Prevailing cultural beliefs in twentieth-century America indicate that the grip of the nineteenth-century "moral mother," uniquely skilled and exclusively responsible for the well-being of her children, holds strong:

[For the American mother, to leave her child with another caretaker is to miss the chance to share and understand the daily unfolding of that child’s distinctive character, and such sharing is both the central pleasure and operating principle of American parenting.\textsuperscript{519}]

The centrality of the pleasure and the principle is not universal among American mothers. The ability to notice, let alone share in, a child’s "daily unfolding" is often a luxury, for as black feminists and others have observed, lack of a job rather than guilt over taking one has often been of more immediate concern.\textsuperscript{520}

Many mothers prefer to work and this preference positively affects their attitudes toward the separation and its consequences for their children.\textsuperscript{521} Research findings have shown a consistent correlation between child outcomes on the one hand, and congruence between a mother’s employment status and her employment preference on the other. These findings demonstrate yet again that what might be characterized as self-interested behavior—whether it is the mother’s preference to stay home or to work—is not at odds with the interest of children. Such findings challenge judicial wariness on the point as revealed in custody cases. If maternal role congruences were actively facilitated as a matter of public policy, the congruence between the interests of mothers and their children might also become more apparent and more accepted.

3. Maternal Motivations. — Maternal employment provides perhaps the most common example of separation decisions prompted by a mix of a mother’s concerns for her children and concern for herself.\textsuperscript{522} Many

\textsuperscript{518} The quality of child care is not unrelated to maternal separation anxiety; when a mother thinks her child is being cared for inadequately, she is likely to be more anxious about the separation.

\textsuperscript{519} Kurtz, supra note 10, at 264 (comparing the conflict of American working mothers with its absence for traditional Hindu Indian mothers for whom “multiple mothering” through a process of collective child rearing has lessened the child’s dependency on one mother).

\textsuperscript{520} bell hooks, Feminist Theory: From Margin to Center 133 (1984). Ellen Ross makes a similar observation in her study of working-class English mothers before the First World War: “family survival was the mother’s main charge . . . ; the emotional and intellectual nurture of her particular child or children and even their actual comfort were forced into the background.” Ellen Ross, Love and Toil: Motherhood in Outcast London, 1870–1918, at 9 (1993) (emphasis added).

\textsuperscript{521} See generally Hock, supra note 517.

\textsuperscript{522} During the 1992 Presidential campaign we learned that as a young widow Bill Clinton’s mother Virginia Kelly “took control of her life in a manner that was unusual for
mothers (and so their children) may need income, health care coverage, or the prospect of future security. In 1991, twenty-two percent of American children—fourteen and half million of them—lived in families headed by single mothers. Of these, only sixty-one percent had any sort of support order from the children's fathers, a figure of cold comfort as support orders are often low in amount, frequently unpaid, and haphazardly enforced. In many families then, maternal employment is the sole source of income. Middle-class mothers in two-parent families work less to provide than to supplement family income. For white married mothers, working appears to be less a matter of economic necessity than a "standard of living preference."

In addition to benefitting their families, mothers also work to enjoy the satisfactions of adult company, non-domestic accomplishment, and the sense of economic independence that work provides. The income may be used for a range of purposes. Sharon Harley notes that in the 1930s, paid work "provided Afro-American women and men with the ability, however minimal, to assist institutions (primarily the church) and organizations within the black community financially." Working Chicana mothers report that they enjoy having their "own" money, even if most of it goes for family expenditures. Surveys of working-class mothers—

waitresses, factory workers, and domestics—report that they are committed to their jobs and would not leave the workplace even if they did not need the money. In short, "[e]mployment, marriage and motherhood are integral pieces of the preferred life-style for most women today." 

It appears that mothers work for many of the same reasons as fathers do: to provide or supplement family income, to achieve a sense of self worth and financial independence, to accomplish a goal in a chosen area of interest, and for the satisfactions of adult contact and interaction. There is, however, a crucial difference in the circumstances between fathers and mothers as they decide whether, for whom, how long and how hard they will work. The difference is that mothers are still assigned and still accept the primary responsibility for raising children. This state of affairs derives from a combination of familiar explanations: tradition, socialization, economic rationality, and individual preference. In this section I have added the legal system to the list by showing how law too has contributed to the seeming inevitability of maternal presence by directly restricting women's workforce participation and indirectly penalizing mothers who work by recasting their work decisions as separation decisions.

Even so, women now seem to be "out to work" for the duration. As Alice Kessler-Harris reminds us, "when economic imperatives acquired their own momentum so that even an intact family with a fully employed male head-of-household could hardly maintain expected consumption patterns without two wage earners, women were locked into wage labor whether men willed it or not." Not only do mothers continue to work, but many find satisfaction in combining the burdens and pleasures of work with those of motherhood. Social scientists describe this satisfaction as "task mastery," the recognition that one is managing several jobs simultaneously. But while "task mastery" may keep working mothers afloat psychologically, it is less satisfying as a social response to the work that women do. For that we need something more substantial than new vocabulary. Thus in Part V I suggest a number of regulatory reforms that more evenly redistribute the task (and the mastery) of caring for children.

be "a good wife and mother." Id. Mothers too understand that expressions of self-interest are more happily received when presented in terms of maternal obligation.

529. See Eggebeen & Hawkins, supra note 525, at 58 (citing 1984 study showing many wives say they would keep working even if their husbands' incomes increased).

530. Id.

531. Kessler-Harris, supra note 26, at 318.

V. Maternal Perspectives and Regulatory Reform

[W]e may safely assert that the knowledge which men can acquire of women, even as they have been and are, without reference to what they might be, is wretchedly imperfect and superficial, and always will be so, until women themselves have told all that they have to tell.

— John Stuart Mill, The Subjection of Women (1869)\textsuperscript{533}

Until recently the legal system has regulated most maternal separation decisions through a set of rules that have encouraged mothers not to separate, penalized those who do, and put those who might be thinking about it on notice to the risks. Even in circumstances when a decision to separate seems prudent or admirable—such as mothers working—the decisions and their consequences are often handicapped by the law. The disparity between practice (mothers separate) and regulation (most should not) indicates how differently the causes and consequences of separations are comprehended by those who make and those who experience the law.

How might the regulation of separations differ if separating from children were regarded as a reasonable decision for mothers to make? One way of answering this would be to envision the content of policy and law if mothers separated from children to the same degree, for the same reasons, and with the same consequences as those which obtain when fathers separate. But I intend (for now) to adopt a more modest approach and that is simply to propose that we incorporate into current law—into its content, its application by various officials, and its interpretation by judges—what we now know about actual maternal preferences regarding the terms, conditions, and circumstances of separating.

I recognize at the outset that “actual maternal preferences” about separating from children are not so easy to ascertain. Mothers are often reluctant to discuss the subject, and “preferences” have at times been less than trustworthy. Nonetheless, by drawing upon emerging social science data, the actual behavior of mothers, and accounts of separations occasionally offered by mothers themselves, patterns of preference emerge.\textsuperscript{534}

In urging that law should take account of what mothers know, my argument is not that women’s experience should be heeded only because women have had it, although there is something persuasive, appealing, and familiar in law about expert testimony. As the federal Women’s Bu-


\textsuperscript{534} Other, less traditional (for lawmakers) sources of insight might also be profitably engaged. I have in mind the use of literary works, a familiar expression of subjective experience within the culture and especially useful in an area like separation, where real mothers are often hesitant to speak. I offer a detailed explanation and application of this methodology in Sanger, supra note 40 (Chapter 4, “The Uses of Fiction”).
seau commented in 1953 after policymakers had ignored the advice of female experts and female workers regarding wartime child care policies:

It seems sound, in any case, to permit a voice in their own affairs to one-third of the working population, especially when that one-third carries a far greater proportion of responsibility for the maintenance of family and community welfare.\(^5\)

Listening to mothers implicates notions of respect as well as fairness and expertise. Respecting the dignity of those subject to regulation seems an integral aspect of lawmaking in a democracy. According respect involves taking seriously the lives of those persons most deeply affected by the regulation—here mothers. Because the daily circumstances of mothers' lives are not always immediately apparent to those who enact, apply, and interpret the laws, lawmakers may have to attend with particular care, and perhaps extra effort, to the substance and details of maternal experience. Recall Abigail Adams's warning to John Adams in 1776:

> [I]n the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. . . . Do not put such unlimited power in the hands of Husbands. Remember, all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies, we are determined to foment a Rebellion. . . .\(^5\)

In addition to the integrity of lawmaking, mothers' judgments matter in policy formation for more traditionally instrumental reasons: much of what mothers want is likely to benefit their children. The relation between some separations and children's welfare has been (grudgingly) condoned. Separating to earn family income, for example, has always been a more acceptable explanation than the fulfillment of some personal goal of the mother. Thus advocates for working women learned early on to frame workplace participation in terms of family obligation.\(^5\)

Yet as discussed earlier, even self-interested reasons for separating are not

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535. Kessler-Harris, supra note 26, at 293 (quoting Womanpower Committees During World War II, 244 Women's Bureau Bull. 45 (1953)).


For suggestions of nonviolent forms of maternal rebellion today, see Polakow, supra note 480, at 182:

> What if women were to strike, crippling the bureaucracy? . . . What if poor women organized to take over buildings from abusive and neglectful landlords—refused to be evicted for inability to pay rent? . . . What if Head Start Teachers earning only $11,000 a year went on strike? What if poor, uninsured mothers marched on doctors' offices and clinics and hospitals that denied them services—just as black South Africans marched on white hospitals, forcing them to open their doors to all patients in 1990?

Polakow notes that while these nonviolent strategies have been used in other protest movements, "such strategies . . . create ominous risks, particularly for women with children." Id.

537. See Cott, supra note 160, at 204–08.
inevitably inconsistent with children's interests. Research on role satisfaction suggests that mother-centered reasons for working may benefit children too. Daughters of working mothers score particularly well on measurements for intelligence, academic achievement, and educational aspirations. Child care itself may benefit children in the areas of social and intellectual development. These findings confirm what generations of mothers have known but have been hesitant to discuss: not all mothers are suited to take care of children all the time; not all children benefit from the daily supervision of frustrated mothers.

In addition to advancing the interests of individual mothers and their children, incorporating maternal perspectives into separation regulation serves the society as a whole. One does not have to be a utilitarian in order to recognize that social well-being or the common good depends on everyone flourishing, everyone living up to capacity. The circumstances now marked as necessary for individual flourishing in general require that women, as much as other individuals, be able to imagine, articulate, and act upon preferences unconstrained by the vast limitations now imposed by motherhood. We might keep in mind the protest of Thomas Mann's daughter Elizabeth, who at age eighteen was sent to an analyst who informed her that she must choose between her art and her "fulfillment as a woman." "'Why?,' she asked, 'Why must I choose? No one said to Toscanini or to Bach or my father, that they must choose between their art and fulfillment as a man, a family life . . . . Injustice everywhere.'"

Ignoring maternal perspectives in the formation of separation policies has proven foolhardy. This is dramatically illustrated by the disregard of public officials to the views of black clubwomen and activists during the 1920s and 1930s. Because most black mothers worked for wages regardless of class, staying home with children was much less a part of personal or community expectation. Loving, responsible mothers did separate from children. The maternalism of black mothers was defined by the concrete circumstances of their daily lives. They recognized that day nurseries and kindergartens—not to mention the extension of minimum wage and maximum hour protections to domestics—would be the most useful assistance that the state might provide. However, because

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538. See supra note 516 and accompanying text.
539. See Hoffman, supra note 516, at 222–25.
540. See Scarr et al., supra note 297, at 1406 ("[H]igh-quality day care settings have been shown to compensate for poor family environments and to promote better intellectual and social development than children would have experienced in their own homes.").
541. Olsen, supra note 19, at 330 (quoting Elizabeth Mann Borghese).
542. See Linda Gordon, Pitied but Not Entitled 135–40 (1994). In contrast, as Linda Gordon suggests, the indifference to child care among white reformers, who, as we have seen, put their energies behind obtaining maternal stipends, "may have reflected the fact that most of the mothers among them had servants to care for their children; while black women, who were these servants . . . needed affordable child care." Id. at 136. Gordon further points out that because black families of all classes lived closer to one another than
motherhood as a political matter meant white middle-class motherhood, programs to facilitate maternal employment were never part of Progressive or New Deal legislation. The irony is acute. In failing to listen to what mothers knew they needed, no groundwork was laid for the very child care infrastructures that would have made maternal employment, now required of poor mothers, more possible all along.

The case of black working mothers in the 1930s underscores the complexity of including maternal perspectives in the project of regulatory reform: there is always more than one maternal perspective. In addition, there is often disagreement, often among women themselves, about what a good separation decision would look like. For example, many, including many feminists, oppose women's decisions to act as surrogate mothers. In the area of employment there is opposition to policies that benefit mothers who work and are therefore thought to reproach or demean mothers who stay home. Differences in class as well as ideology explain these divisions. Many middle-class homeworkers now favor the deregulation of homework. In contrast, feminist labor organizers argue that a rule that satisfies the knitters of ski sweaters in Vermont has immensely different consequences for garment workers in the nation's many Chinatowns. And what about teenage birth mothers who may choose to surrender their babies under the terms of an open adoption but only out of a "self-related concern about their own ability to know the child." Researchers inform us that "given the developmental status of adolescence in regard to altruism versus self-concern and the difficulty for teens to think through long-term consequences of behavior, this finding of self-interest is not surprising." If, as these examples suggest to some, there is no consensus among mothers and a mother's judgment or maturity is at issue, why should lawmakers regulating separation practices credit their views or preferences at all?

The answer returns us to notions of agency and control. Maternal judgments may be contested—that might be expected in an area as psychologically, philosophically, and practically laden as separating from white families in more class-stratified communities, community leaders knew more about the daily practices and needs of poorer women and their children. See id. at 127-29. White social welfare workers, in contrast, tended to impose values and standards from on high. See Ross, supra note 520, at 204 (noting that professionals' standards of infant health, for example, "were based partly on the experience of middle-class social worlds in which children were larger; better fed; less anemic; freer of rashes and less prone to more serious diseases").

543. See Gordon, supra note 542, at 142.
544. See supra notes 371, 397-398 and accompanying text.
545. See supra notes 371, 397-398 and accompanying text.
546. See supra notes 371, 397-398 and accompanying text.
547. See supra notes 371, 397-398 and accompanying text.
548. Id.
children—without being condemned or controlled. As with any decision that affects others, and especially those involving children, there are decisional limits: mothers cannot separate from children by locking them in closets or driving them into lakes. Earlier in this Article I distinguished abandonment from separation, but that is not to ignore the legitimacy of social concern about children who are genuinely neglected or forsaken by their parents. Still, within the parameters already established as the legal boundaries of care, mothers should be able to separate (or not separate) for whatever reasons that they think are best. Their decisions may be discomforting or considered unwise, particularly when they reveal a degree of self-interest inconsistent with the cultural demands of motherhood—that is to say, any self-interest at all. Nonetheless, parents in general already have tremendous authority to determine the style, amount, and quality of their connections to their children. Extending the same respect to maternal judgments in particular seems extraordinary rather than just, only because cultural expectations regarding maternal obligation have obscured the mother as a legitimate player with legitimate preferences. In the following pages, then, I shall demonstrate how these insights and preferences might reasonably be included in the structure of law.

In considering regulatory reform in light of maternal preferences, I make one last observation. The official responses to mothers who separate from children depend to some extent on a prior judgment about the mother's behavior. When separating from children is understood as sensible, a demonstration of a rational commitment to the child's or family's good, mechanisms for providing substitute care develop in ways less constrained by the need to punish bad mothers. We have seen this in the official responses to exposure, wet-nursing, and apprenticeship. My argument is not that the balance between maternal presence and separation was marvelous in past centuries, and that it is now time for oblation to make a comeback. We are unlikely to mimic the exact responses of earlier times; the call today is more often for temporary separations. In addition, the social worth and psychological significance of children is greatly changed; separating from children (or even thinking about it) is now often brushed with a degree of inhibiting guilt. Nonetheless, when considering public responses to mother-child separations today, we could do worse than to reflect on systems in which disapproval of the mother was not a part of the calculation and responsibility for children's care was not hers alone.

549. That is not to say that earlier programs sought to encourage or indulge separation practices. The Russian foundling system experimented constantly with its admissions requirements to ensure that only mothers in need would place their children and to discourage any perceived freeloading, such as reclaiming a child after he had completed a useful education. See Ransel, supra note 39, at 73–74, 94–96, 110–11, 119–28.
A. Adoption

For most of this century the terms of adoption have been dictated to birth mothers by a set of legal rules largely informed by adoption agencies. The constituencies served by these agencies were couples seeking to adopt and children to be adopted, with birth mothers limping in a poor third. As we have seen, the birth mother's underlying decision has been subject to intense manipulation by agencies advancing one or another theory of maternal redemption, morality, or neurosis.\textsuperscript{550} The most abusive practices—those involving procedural or psychological maneuvers around maternal consent—have largely been cleaned up. Yet until recently, birth mothers have still had little to say about substantive adoption law, its terms statutorily fixed with little room for modification by private agreement.

In this section I explore how one aspect of adoption practice has moved from absolute to negotiable as maternal preferences have been given greater weight. The issue concerns the comprehensive replacement of the biological family by the adoptive family in a traditional closed adoption. As discussed earlier, traditional adoption law has required severing all legal ties between the child and the birth parents. In addition, the law precludes the development of even informal ties between the two families by denying either set of parents information about the identity or whereabouts of the other. The child's birth is symbolically rerecorded and the adoption proceedings are sealed. Anonymity and confidentiality mark the transaction. These measures were intended to advance the interests of all parties—the adoptive parents, the birth mother, and the child—to get on with their reconstituted lives protected from the stigmas of childlessness, premarital sex, and illegitimacy.

In the last twenty years, however, a protest has arisen against the compulsory protection of closed adoptions. Organizations of adult adoptees argued that secrecy was not at all in their best interests and demanded information about their biological origins.\textsuperscript{551} They have been supported in their efforts by research findings identifying "genealogical bewilderment" or "identity lacunae" among adopted children, particularly during adolescence.\textsuperscript{552} In response to pressure from adoptee

\textsuperscript{550} See supra Part IV.A.2.
\textsuperscript{551} See, e.g., In re Roger B., 418 N.E.2d 751 (Ill. 1981) (upholding state confidentiality provisions against constitutional challenge by adult adoptee that statute violates fundamental right to "personhood").
\textsuperscript{552} See Annette Baran & Reuben Pannor, Perspectives on Open Adoption, Future of Children, Spring 1988, at 119, 120 (noting that adopted children "live with the knowledge that an essential part of their personal history lies on the other side of the adoption barrier"). Confusion about identity is offered to explain a greater incidence of mental health problems among adopted children than children living with their natural parents. Elizabeth Bartholet argues, however, that not all adopted children have mental health problems and points out that the adoption studies often fail to control for a variety of other factors or to differentiate between children adopted in early infancy or at older ages. See Bartholet, supra note 164, at 177–78.
groups, such as the Adoptees' Liberty Movement Association (ALMA), forty-one states have now authorized adult adoptees to retrieve nonidentifying information about their birth parents. The release of information is justified on two grounds: it provides adoptees and their adoptive parents with medical or genetic histories relevant to the child's health and reproductive decisions, and it satisfies the psychological needs of (at least some) adoptive children. To the extent that the rules of confidentiality have been relaxed, it has been to benefit the child. In contrast, demands by birth mothers themselves to discover what became of their children have rarely been considered sufficient to breach the confidentiality of the closed records.

More recently, however, birth mothers themselves have become more active and aggressive in adoption reform. Their participation is the result of market forces. As the National Committee for Adoption explained in 1989, "[m]ore than a million couples are chasing the 30,000 white infants available in this country each year." In consequence, unmarried mothers—once powerless, stigmatized, and submissive—now have significant presence and power in the marketplace. Because they control a desirable commodity in short supply, birth mothers have begun to think through the terms under which they might be willing to part with it. In this rethinking, they have come at the issue of confidentiality anew.

Many have envisioned a model of adoption inconsistent with the absolute termination once considered necessary. From their newfound positions of authority, birth mothers have pressed for open adoptions in which the adoptive parents and the birth mother, and sometimes the birth mother and child, are no longer strangers to one another. Birth mothers not only know but commonly select their child's next parents, often from albums in lawyers' offices filled with carefully drafted resumes of couples seeking children. Once selected, the birth mother and the


554. See id. at 41–46 tbl. 16 (listing specific information statutorily required in an adoptee's medical history, including prenatal, medical, developmental, and psychological data). Such requirements grew out of suits by adoptive parents against agencies for "wrongful adoption." Id. at 1–12.

555. See, e.g., In re Christine, 397 A.2d 511, 513 (RI. 1979) (noting the "heavy burden" birth mother must bear to establish a claim for access to sealed records).


557. See It's a Seller's Market, Life, Sept. 1988, at 80 (noting that with 100 couples vying for each healthy Caucasian infant adopting couples are turning to independent and open adoptions); see also Lisa Perlman, Michigan Trend Gaining Acceptance, L.A. Times, May 1, 1988, § 1, at 2 (noting increasing trend toward open adoptions and preserving ties with birth mother); Harry Wessel, Adoption: An Open Approach, Orlando Sentinel Trib., Dec. 16, 1992, at E1 (reporting that 98% of adoptions of one agency have some degree of contact between birth and adoptive parents after child is born).
adopting couple negotiate the extent of their contact during the pregnancy. Adoptive parents are sometimes present at the birth itself.558

Open adoption is further distinguished by the possibility of contact between the birth mother and child after the child is born. Sometimes the contact is indirect: birth mothers regularly bargain for, and often receive, commitments from the adopting couple such as snapshots, annual reports on the child’s progress, or the couple’s promise to tell the child (when older) about his mother. Sometimes birth mothers receive permission to visit the child at its new home.559

State courts have begun to enforce these private bargains, despite their inconsistency with existing law requiring confidentiality and barring contact. In Michaud v. Wawruck, the Supreme Court of Connecticut upheld an agreement between the birth mother and the child’s would-be adoptive parents to permit visitation by the birth mother during the child’s minor years.560 The trial court had found that the agreement violated state law under which a final adoption decree operates as a “complete severance by court order of the legal relationship . . . between the child and his parents.”561 However, the child in this case had lived with his mother for two years prior to the adoption. Based on these facts, the Connecticut Supreme Court held that a parent who has had an ongoing personal relationship with her child may contract with the adopting parents for visitation so long as visitation remains in the best interests of the child.562 Other states explicitly authorize open adoptions. New Mexico now permits the parents of the adoptee and the adopting parents to “agree to contact between the parents and the [adopting parents] or con-

558. Lincoln Caplan captures the moments following an open adoption birth: “[A] nurse took some pictures: Dan holding Lee’s arm, . . . Peggy holding Rebecca while Lee, Don, and Aaron drank some champagne from Dixie cups; . . . Peggy sitting at the head of the bed drinking a Coke, and gazing at the Stones, at the foot of the bed, as they huddled around Rebecca.” Lincoln Caplan, Open Adoption 70 (1990).

559. See, e.g., Kurt Chandler, Open vs. Closed; Adoption’s New Trend of Less Secretiveness Causes Debate, Star Trib., Feb. 28, 1993, at 1A (noting range of contact in open adoptions: “Sometimes it’s scheduled visitations and shared greeting cards and photographs. Sometimes it’s more.”); Perlman, supra note 557, at 2 (“Open adoption can range from an anonymous exchange of information and letters between the birth parents and adoptive parents to pre-birth meetings between the two sides with a plan for a continuing relationship after the child is born.”). Indeed, to the extent that birth mothers in open adoptions seek contact that exceeds the original agreement, it is more often to seek advice from the adoptive parents than to renew contact with the child. See Berry, supra note 547, at 32.


561. Michaud, 551 A.2d at 739.

tact between the adoptee and one or more of the parents or contact between the adoptee and relatives of the parents.”

Open adoptions illustrate three points about the relationship between law and maternal separation practices. The first is straightforward: when mothers' preferences are heeded, the structure of the legal regime is likely to change. That much may seem obvious but until recently the system responded to maternal needs or preferences only when the failure to do so meant that someone else—usually the adoptive parents—would suffer. The move toward open adoption marks an important reorientation of adoption law to include mothers themselves among those who count.

Second, taking account of the preferences of birth mothers appears to benefit not just the mother, now willing to separate on her own terms, but other parties to the transaction as well. Consider first childless couples who stand to benefit from open adoptions if the practice increases the number of children available. In upholding a visitation agreement between a natural mother and the child’s stepmother, the Maryland Court of Appeals noted that such agreements might well "foster [adoption] in those cases where the natural parent and adoptive parent are known to each other and the natural parent is reluctant to yield all contact with his or her child.”

Children themselves stand to gain in a number of ways. To the extent that open adoptions free birth mothers from the stigma of placing a child, more children may find themselves raised by parents unequivocally committed to the enterprise. Studies suggest that adopted children do better in terms of self-esteem and adjustment than children raised by birth mothers who considered but decided against adoption.

As the Maryland case suggests, open adoptions might specially benefit older children or children in foster care (often overlapping categories) who are

563. N.M. Stat. Ann. § 32A-5-35(A) (Michie 1995). The statute clarifies that “absent a finding to the contrary, [such an agreement shall] be presumed to be in the best interests of the child.” Id.; see also Wash. Rev. Code Ann. § 26.33.295(1) (West Supp. 1996) (“Nothing in this chapter shall be construed to prohibit the parties [to an adoption] from entering into agreements regarding communication with or contact between child adoptees, adoptive parents, and a birth parent or parents.”). The Washington statute provides that an order containing such an agreement is enforceable by civil action. See id. § 26.33.295(4). Other states permit visitation between birth mother and adopted child, but vest discretion to continue the arrangement in the adoptive parents. See Adoption of Gwendolyn, 558 N.E.2d 10, 14 (Mass. App. Ct. 1990). Tennessee follows a similar rule. See Tenn. Code Ann. § 36-1-121(f) (Supp. 1995) (“[N]othing under this part shall be construed to prohibit 'open adoptions' where the adoptive parents permit, in their sole discretion, the [birth] parent... to visit or otherwise continue or maintain a relationship with the adopted child and provided further, that [such permission] shall not, in any manner whatsoever, establish any enforceable rights in the [birth] parent...”).

564. See Weinschel, 466 A.2d at 1306.

565. See Barholet, supra note 164, at 179 (citing Michael Bohman & Soren Sigvardsson, Outcome in Adoption: Lessons from Longitudinal Studies, in The Psychology of Adoption 93, 100–06 (David M. Brodzinsky & Marshall D. Schechter eds., 1990)).
more likely to have had an ongoing relationship with their mothers and who are also among the hardest to place.\textsuperscript{566} Finally, open adoptions may reduce the identity issues that trouble some adopted children. This conclusion is necessarily tentative, as the phenomenon of open adoption is new and studies of its long-term effects are still in progress.\textsuperscript{567} However, Marianne Berry's 1991 preliminary study of nearly 1400 adopted families suggests that children in open adoptions have higher behavioral scores than adopted children with no access to their birth parents.\textsuperscript{568}

Finally, open adoptions illuminate a positive reconceptualization of maternal separations. The nature of the bargains struck between birth and adopting parents show a flexibility for \textit{degrees} of motherhood in contrast to the exclusivity the law has required in the past. It seems reasonable, indeed natural, that some birth mothers might want to replace abrupt and permanent termination with limited, modest contact.\textsuperscript{569} This preference may be particularly important in cases where the child has an established relationship with his mother. In this regard open adoption is something of a cousin to joint custody in divorce, where the value of contact with both father and mother is now recognized.\textsuperscript{570} We now know that joint custody works best when both parents want it and cooperate with one another.\textsuperscript{571} Similarly, emerging data suggests that open adoption is most successful when the adoptive and birth parents agree on the amount and nature of continued contact.\textsuperscript{572} We can expect that information on successful joint custody arrangements—one existing form of

\begin{itemize}
  \item \textsuperscript{566} See Candace M. Zierdt, Make New Parents But Keep the Old, 69 N.D. L. Rev. 497, 503–12 (1993) (arguing for “weak adoption” that terminates most of a birth parent’s rights to her children except reasonable visitation and communication for adopted children who already know their parents); see also Marsha Garrison, Why Terminate Parental Rights, 35 Stan. L. Rev. 425, 461–64 (1983) (reviewing evidence which shows that contact with natural parents promotes well-being of foster children).
  \item \textsuperscript{567} See Berry, supra note 547, at 194.
  \item \textsuperscript{568} See Marianne Berry, The Practice of Open Adoption: Findings From 1,396 Adoptive Families, 13 Children & Youth Services Rev. 379, 388 (1991).
  \item \textsuperscript{569} Consider the language of unconditional surrender that a parent whose child is in foster care in New York may execute: “the parent [acknowledges she is] giving up all rights to have custody, visit with, speak with, write to, or learn about the child, forever . . . .” N.Y. Soc. Serv. Law § 383-c(5)(b)(ii) (McKinney Supp. 1996).
  \item \textsuperscript{570} See Andrew Schepard, Taking Children Seriously: Promoting Cooperative Custody After Divorce, 64 Tex. L. Rev. 687, 702 (1985). But see Joanne Schulman & Valerie Pit, Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children, 12 Golden Gate U. L. Rev. 538, 570 (1982) (stating that joint custody is appropriate only in cases where “both parents want the arrangement and are able to cooperate in joint decisionmaking”).
  \item \textsuperscript{571} See Judith S. Wallerstein & Sandra Blakeslee, Second Chances: Men, Women, and Children a Decade After Divorce 269 (1989).
  \item \textsuperscript{572} See Marianne Berry, The Effects of Open Adoption on Biological and Adoptive Parents and the Children: The Arguments and the Evidence, 70 Child Welfare 634, 637 (1991) (noting that a child is least “confused about loyalties” when the “open relationship between the adoptive and biological parents is clear and positive”).
\end{itemize}
modulated motherhood—will continue to provide insights into the emerging practice of open adoptions.

B. Surrogacy

Of all the regulated maternal separation decisions, surrogacy may be regarded with the greatest hostility. While the separations in adoption and maternal employment can be explained, or at least masked, in terms of maternal sacrifices, surrogacy does not easily lend itself to such a reading. Instead, the arrangement seems to mock everything our society likes best about mothers: their selflessness, generosity, devotion over time, and domestic location. Surrogacy turns these indicia of good mothering on their heads. Mothers agree to reproduce—sounds good so far—but also to a profitable separation at the very moment of birth. Surrogacy thus cunningly defies the order and logic of separate spheres ideology.

If the regulatory regime is going to take account of maternal preferences in the pre-heated context of surrogacy—and therefore permit paid surrogacy—two steps may be necessary. The first is to consider the decisions of surrogate mothers as not so unlike decisions that other parents are permitted to make with regard to where and with whom and for how long their child shall live. This requires taking at face value what surrogate mothers say about their reasons for contracting. They want to be mothers, sort of. As we have already discussed, wage-labor often requires mothers to separate from their children, and in some cases, such as immigrant mothers, the separations can be long-term. But separations in surrogacy differ in ways other than duration. The surrogate mother may see herself in a different relationship to the child. It is her child and it is also someone else's. As the coordinator of a leading surrogacy center has observed, "You never hear a surrogate saying 'my child.' They fully believe they are carrying the child for someone else." The affection which a surrogate mother may feel for her child is likely an interval somewhere between absolute devotion and the mercenary absence of any affection at all. She may love her child partially, the way one loves something not to be forever yours—perhaps a fair description of most mother-child relationships. The difference with surrogacy is that the mother herself has located the boundaries.

Like the preference of some mothers for open adoptions, surrogacy forces us to accept, or at least acknowledge, that motherhood is not an all-or-nothing proposition. Women sometimes elect to experience degrees of motherhood. And sometimes the legal system not only welcomes but insists upon this kind of partial mothering. Foster mothers, for example, are generally not permitted to adopt the children they help raise; they must promise to feel the very opposite of that which Daniel Deronda's mother described as what "most women say they feel"—maternal love. Unless participating in a designated "foster-adopt" program, foster

573. Overvold, supra note 418, at 139.
mothers know from the start that any claim they have to the child is subordinated to that of the biological or adopting family. Yet no one faults foster mothers for their willingness to care for children for finite periods of time, knowing separation from them is inevitable. This sort of partial mothering is not easy. Indeed, social welfare agencies acknowledge that recruiting foster families, especially for drug-exposed infants or "boarder babies," is difficult exactly because foster mothers "tend to fall in love with them, [and] some resist giving them up." Foster mothers perform an extraordinary social function in providing maternal care to children between two other sets of mothers, natural and adoptive. The society applauds this version of intense but partial mothering and demonstrates this by compensating, though not extravagantly, those mothers willing to take on a task complicated by its own inconsistencies.

Child care workers are similarly engaged in a form of partial mothering. They too are paid to care for children often for several years, often for nine hours a day. They too are likely to develop strong attachments to their "charges" although within a framework of limited authority (parents and sometimes the state instruct them on rules, food, and discipline) and limited responsibility (children go home at the end of the day). Sociologist Margaret Nelson calls this situation as "mothering interrupted" and notes that providers manage the dilemma by distancing themselves emotionally from the children. This "detached attachment" recognizes the inherent constraints of their position, especially the awareness of potential loss as children move away, grow up, or leave day care: "I reserve something, knowing they're not mine; 'I hold back a little.'" In much the same way, surrogate mothers also provide temporary maternal care for which they are paid. We might view them as not unlike foster mothers or other child care providers and accept their considered decisions to experience only part of motherhood.

574. See, e.g., Smith v. OFFER, 431 U.S. 816, 846-47 (1977) ("Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.").

575. Leslie Brody, Healthy But Hospitalized, Who'll Take Boarder Babies? State Seeking More Foster Homes, Record, Sept. 25, 1995, at A1 ("I fell in love with them something terrible," [foster mother Doreen Harrison said.] 'You have to get the mind-set; these babies will move on, but I get so sad about it.' ) The problem reveals itself in the social work literature on recruitment of foster parents. See, e.g., Eileen Mayers Pasztor & Elyse M. Burgess, Finding and Keeping More Foster Parents, Children Today, Mar.-Apr. 1982, at 2, 3 (explaining that foster parents are "caught in a trap of conflicting expectations" such as "[I]love and let go").


In a sense, surrogate mothers see themselves in a joint custody agreement with co-parents they themselves have chosen. This kind of arrangement—consensual agreements between biological parents regarding custody of their child—is common, indeed encouraged, in divorce. Courts routinely rubber-stamp parental custody agreements on the assumption that the parents themselves are more competent than the court to decide with whom the child shall live.\(^5\) Unlike surrogate mothers, divorcing mothers may freely give sole custody of the child to the father. Indeed, any parent has the authority to vest custody of his or her child with someone else—whether they decide to place the child with relatives or in boarding schools—with little intervention from the state (save licensing laws) about the wisdom of their choice or its effects on the child.\(^5\) Moreover, in surrogacy custody is transferred to the child's natural father, not to unrelated third parties, however well licensed they may be. Like the colonial practice of placing children out, and like surrogacy, these other placements are also often contractual as parents pay schools, camps, and residential facilities to train or care for their children.

Surrogacy thus combines residual parental authority over a child's residence with the birth mother's considered decision to reproduce. There is reason to think that her decisions on both counts will work in favor of a child's interests. As Marjorie Shultz points out,

> [D]eliberate, articulated and acted-upon intentions regarding child rearing have great importance as indices of desirable parenting behavior. There is a correlation between choosing something and being motivated to do it consistently and well. Where the birth of children is not intended, as is sometimes the case with ordinary coital reproduction, biological connection will not guarantee love or adequate care.\(^5\)

We are suspicious of what we think of as the commercialized impersonality of surrogate arrangements. But there is little evidence that these decisions are poorly thought through by those involved simply because they are dealing with one another contractually. Recall the solicitude of eighteenth-century courts toward the parents' choice of master for their apprenticed children and the judicial refusal to substitute in a bankrupt master's creditor.\(^5\) On the contrary, more care is likely to be taken in these circumstances—by participants who have every interest in the child doing well—than in the more ordinary but haphazard reproductive arrangements with which we say we are comfortable.

Once we have been able to accept a more flexible conception of motherhood, the next step in regulating surrogacy might be to focus

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\(^5\) See Sanger & Willemsen, supra note 308, at 314.


\(^5\) See supra notes 319–323, 366 and accompanying text.
SEPARATING FROM CHILDREN

carefully on mitigating those aspects of the practice which are troubling. A number of regulatory safeguards could be put into effect to protect the mother, the child, and their potential relationship. For example, many procedures now applied to adoption could be (and in some states are already) extended to surrogacy: required counseling (for the mother and perhaps for her children as well), no pre-birth consent, and a period of permissible rescission. In addition, home studies of the father’s home, not currently required in private adoptions, could be mandated. Perhaps most important, a state could protect the birth mother’s relation to the child by placing the risk of breach on the father. Surrogacy agreements would be unenforceable. In most cases this will have little effect; it appears that most birth mothers perform their contracts. Nonetheless, this feature might comfort critics and birth mothers by tipping the balance in favor of the more familiar version of motherhood.

I recognize that not all harms ascribed to surrogacy may be susceptible to statutory rectification. Legalized surrogacy might well result in certain kinds of women commanding higher prices as premiums for designer kids follow fashion. Legalized surrogacy may also mean that some unadopted children may remain unadopted, a concern raised by many. However, it is perhaps unfair to lay these problems directly on surrogacy’s stoop. As noted earlier, reproduction may already be highly “geneticized,” and children remain in foster care now, while surrogacy is largely prohibited. More efficacious solutions to the plight of foster children might include greater subsidies for adoption, open adoption procedures (particularly for older children), and rethinking present limitations on transracial adoption. In contrast, prohibiting surrogacy may serve only to thwart the aspirations of certain childless couples and the reproductive choices of mothers willing to work as surrogates, with little gain to surrogacy’s ascribed victims.

If the evidence of harm from surrogacy is at best inconclusive, and if surrogacy can be regulated to minimize the danger of exploitation, what are the sources of continuing opposition to the arrangement? As argued above, fear and condemnation of abandonment may underlie much of object

582. See Surrogate Parenting Assoc. v. Kentucky ex rel. Armstrong, 704 S.W.2d 209, 212–13 (Ky. 1986) (applying adoption rule prohibiting pre-birth consent to surrogacy); see also Field, supra note 371, at 84–96 (urging integration of adoption and surrogacy laws regarding periods in which birth mother may revoke consent and prohibiting pre-birth consent).

583. See Overvold, supra note 418, at 130–31; Ragoné notes further that a “high number of surrogates... are desirous of repeating their surrogacy experience.” Ragoné, supra note 385, at 86.

584. See Bartholet, supra note 164, at 115–17 (suggesting a color-blind system of first-come, first-served for placing available children). But see Williams, supra note 411, at 917 (questioning the notion that “black children in white families are better off simply because they may have access to a broader range of material advantages”). Williams continues: “Such an argument should not... be used to justify the redistribution of children in our society, but rather to bolster a redistribution of resources such that blacks can afford to raise children too.”
the opposition. For a culture psychologically steeped in the necessity of maternal presence, a surrogate mother's clarity about giving up her child may not so much "shock the conscious" as the unconscious. Uncovering these more muffled sources of resistance may not carry the day in the deliberations now underway in state and national legislatures. Yet, setting aside objections for which there is little factual basis—harm to the child, and to the siblings—may advance the quality of the debate by exposing objections based on entrenched disapproval of separations that otherwise remain submerged and by removing arguments for which surrogacy may be only the most prominent lightning rod.

C. Maternal Employment

In considering how maternal perspectives would influence the regulation of employment decisions today, two reforms familiar from both the Progressive and New Deal eras again present themselves: income support to facilitate maternal caretaking and child care support to enable mothers to work with their children still well-tended. Before discussing the current health of these two approaches to mother-child separations, I note a few difficulties with the enterprise. The first is that the political influence of maternal preferences with regard to work differs substantially from maternal influence in, say, the area of adoption where mothers have the very thing that others want. In contrast, working mothers have less to bargain with. They already do most of the domestic work at home—the well known "second shift"—and earn less at work because of it. Even in two-parent households, it is working mothers who delay entry (and so seniority) into the labor force, accept part-time work, and lose pay when a child is sick. In short, because the costs of working are already absorbed by mothers themselves, there is little apparent gain to anyone else in helping them out.

In addition, unlike the early twentieth century when mothering as public service was recognized and compensated (however stingily) through the widespread enactment of mothers' pensions, social consensus regarding the importance of maternal caretaking and public responsibility for some of its costs no longer exists. There are several reasons for this new (lack of) consensus. While maternalist reformers in the early 1900s could argue that most poor mothers would, with some instruction, do well by their children, that view no longer holds. Many now doubt whether all children benefit from all mothers staying home; indeed, many are convinced that they do not. Current welfare reforms are premised on the belief that a working mother as role model is more impor-

585. See Arlie Hochschild, The Second Shift: Working Parents and the Revolution at Home 6–7 (1989). Certain jobs commonly held by women require a triple shift: many school teachers teach by day, do housework by night, and then turn to additional school work, such as grading papers (or writing articles). See Spencer, supra note 244, at 179.

586. See Fuchs, supra note 449, at 58–74 (examining how marriage and children "severely handicap women's efforts to earn as much as men").
tant for poor children than whatever they might gain from a homebound but publicly supported mother. An amazing range of social ills are now assigned to welfare mothers as a matter of course, so that holding them responsible for their children's outcomes has become an easy connection for critics to make.

Yet even support for child care (as opposed to income) is now contested. One explanation is that the prospect of releasing mothers from even some caretaking responsibility has always seemed portentous: mothers might lose the habit of domesticity. Thus the Board of Education in Erie, Pennsylvania voted in 1915 to abolish public kindergartens because "they were too expensive and merely relieved 'lazy' mothers of the care of their children." The Erie case captures the view that maternal interests are distinct from those of children. The possibility that "lazy mothers" might benefit is enough to overshadow any benefit to their children, a position that has thwarted the promise of social welfare in such areas as public housing. Unlike, say, French policies which generally accept that the well-being of the caretaker improves the lives of children, the United States has managed to disaggregate the interests of mothers and children. In addition, as Norton Grubb has suggested, there may be some ambivalence about helping even the children, particu-

587. See Lawrence M. Mead, Beyond Entitlement 37 (1986).
588. See Fineman, supra note 27, at 108, 115. In 1995, Speaker of the House Newt Gingrich twice linked welfare to murder: in the case of Susan Smith who killed her own children and in a bizarre Chicago case where a pregnant welfare mother was killed and her fetus removed. See William Douglas, The Fight Gets Dirty in Congress, Guardian, Nov. 28, 1995, at 12. In both cases his remarks were later more or less withdrawn, but they show how casually causal links between depravity and welfare can be asserted and how very weird they must be before they are challenged or modified.
589. Ladd-Taylor, supra note 142, at 53. (The local PTA was able to reverse the decision.) Returning to the wartime evacuations in London, there were rumblings about poor parents using the evacuations as a convenient way to foist their children off at public expense: "In many cases also it must be expected that impoverished or neglectful parents have been delighted to be free of their responsibilities and will do all in their power to delay their [children's] return." Denis Gwynn, Catholic Evacuation Problems in England. 150 Cath. World 691, 695 (1940) (noting also the "chorus of dismay at the discovery that some of the evacuated children were not only dirty but verminous and that many of them have no sense whatever of discipline or ordinary self-restraint").
590. See R. Kent Weaver, The Politics of Welfare Reform, in Looking Before We Leap, supra note 505, at 91, 93. The concern that mothers unfairly benefit from funds meant for children also arises in private wealth transfers, such as child support, where fathers have objected to the mother's gain in eating the same food and living in the same house as the children.
591. See Nancy E. Dowd, Envisioning Work and Family: A Critical Perspective on International Models, 26 Harv. J. on Legis. 311, 333 (1989) (noting that in France mothers may use maternity allowances granted by the state during pregnancy "as they wish"); id. at 334 (enrollment in French crèche care—day care for children under age two or three—is often limited to children of working mothers).
larly those who are "most threatening, most costly, and least like middle-
class children." 592

Reforming the regulation of work-related separations will therefore
require broadening the notion of who benefits from public assistance for
raising children, from mothers alone to a wider class of beneficiaries.
These include all children, all fathers, all employers, and the state.
Re-thinking public policies on work-related separations may also require
reconceiving the care of children from a mother's private obligation to
collective concern. This is not an easy move. Ideologically, support for
mothers—particularly for working mothers—is an admission of sorts that
the spheres are deflating. 593 Child care assistance threatens the exclusive
assignment of mothering and its costs to mothers alone. Inherent in the
notion of separate spheres—women doing women's work—has been the
tacit proviso that it be done for free. Others who pick up the task are
likely to expect higher levels of recognition, authority, and compensation
than that received by most mothers. Of course, "higher" levels may still
not be very high. A 1995 study of compensation levels for forty jobs
showed child care providers at the very bottom, earning an average of
$158 per week. Lawyers earned an average of $1,116 per week. 594

In sum, helping mothers raise children will produce costs, real and
transferred, institutional and personal. With such hurdles in mind, I turn
to possibilities for regulatory reform in the 1990s. My aim in this section is
not to provide finished blueprints for such employment-related policies
as tax credits, subsidies, or licensing, but rather to provide a list of specifica-
tions for architects to consult when drawing up the plans.

1. Income Support. — I begin with the possibility of resuscitating some
form of the maternal pensions of the 1920s. 595 As readers may anticipate,
this section is relatively short. That is not because the idea is bad; indeed,
throughout western Europe maternal stipends have long been an ordi-


(discussing weak public commitment to other people's children following privatization of
American families in the nineteenth century).

593. Similar reasoning was central to the defeat in the late nineteenth century of the
day nursery movement. See supra notes 158-157 and accompanying text.

594. See Louis Uchitelle, Earning It: For Many, a Slower Climb Up the Payroll
Pecking Order, N.Y. Times, May 14, 1995, § 3, at 11 (noting that the spread between the
lowest and the highest earners "is several times greater than in any other large industrial
country"). The finding is extraordinary only in the immense differential. Work denoted
as "women's" has been consistently devalued in the market, as the wages of librarians,
teachers, nurses, and secretaries throughout the century bear out.

595. I set aside for purposes of this discussion other policies that would help women
earn more money, such as comparable worth proposals to counter the effects of
occupational sex-segregation. See Ellen M. Bowden, Closing the Pay Gap: Redefining the
Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 Harv. L.
Rev. 1728, 1730-31 (1986). For discussion of the Earned Income Tax Credit, still another
mechanism for boosting the income of poor families, see infra note 612.
nary component of social legislation.\footnote{596} Even in the United States, there is general agreement that raising children puts most mothers to their highest and best use; the objection is only to compensate them for it. Yet there are \textit{glimmers} of the earlier Progressive Era view. For example, conservative analyst Richard Gill has argued that

\begin{quote}
[in order to secure parental childrearing we may well have] to treat the relatively brief period when parents are responsible for young children in much the same way as we treated veterans after World War II. [Like veterans, the careers] of all young parents, including welfare mothers, \ldots have been interrupted or, in many cases, have never even been launched. An enlightened policy might well be to allow such stay-at-home parents to earn points toward future training \ldots when their children reach school age.\footnote{597}
\end{quote}

Other analysts have argued the merits of more direct forms of financial support, such as universal (not means-tested) cash grants. Because such allowances are generally provided for all children regardless of parental income, the payments could serve as "a kind of low guaranteed income that a family can build on," without the stigma and administrative convolutions that accompany traditional welfare payments.\footnote{598} There is also the European model of children's allowances that pay mothers a stipend upon the birth of a child, or sometimes beginning during the mother's pregnancy.\footnote{599} While the stipends are often modest, adopting a European model may still be unthinkable in this country where there is a great reluctance of the citizenry to tax itself for anything that does not show immediate pay-off and where differences in the treatment of mothers based on race have long tainted the promise of social legislation.\footnote{600}

There is, of course, already a precedent for one form of waged parenthood. Through the foster care system, the state pays substitute parents to care for children at a rate that approximates the expenses of raising a child in modest but adequate circumstances. There is even \textit{some}

\footnote{596. See Kamerman & Kahn, supra note 21, at 43–51.  
598. See David T. Ellwood, Poor Support: Poverty in the American Family 118–19 (1988). As economist Victor Fuchs observes, "a cash grant to mothers of young children is the most direct way of helping women via their children." Fuchs, supra note 449, at 133.  
599. See Yousef M. Ibrahim, For French, Solidarity Still Counts/Message of the Strikes: Save the Safety Net, N.Y. Times, Dec. 20, 1995, at A14 (reporting that all mothers regardless of economic or marital status receive $150 a month beginning in the fourth month of pregnancy). In most European countries the amount is somewhere between three and six percent of the average production worker's earnings. See Alfred J. Kahn & Sheila B. Kamerman, Income Transfers for Families with Children: An Eight Country Study 202, 211 (1983) (figures based on 1979 data). In France the mother is paid 10\% of a worker's annual salary. See id. at 211.  
600. See Quadagno, supra note 225, at 117–54; Joel F. Handler, "Constructing the Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History, 56 Brook. L. Rev. 899, 935–36 (1990); Alisa Klaus, Depopulation and Race Suicide: Maternalism and Proratalist Ideologies in France and the United States, \textit{in} Mothers of a New World, supra note 147, at 188, 201–04.}
recognition that children may be better off with their relatives and that the relatives may need assistance in caring for one another. Accordingly, limited federally funded kinship foster care programs are now available.601 Resistance remains, however, to a stronger version of the plan: "paying all poor mothers to care for their infants and toddlers—not only because this work is socially valuable but also because it must be performed amidst a complicated array of environmental dangers and difficulties . . . that render their task more difficult than the parenting job faced by others."602

As a political matter, an array of objections to state support for maternal caretaking seem to overwhelm the merits its supporters prove. At the more romanticized end, mothering is understood as an act of love; the institution debased by payment. Others abhor on libertarian grounds the involvement of the state in any matters of family life. Proposals for maternal income subsidies also trigger concerns about market distortions.603 Still others would provide assistance but only to the deserving poor. Since poverty in the United States is usually defined as a self-imposed status, this leaves mostly widows, deserving and poor by virtue of calamity, and already covered under the more generous survivors' insurance provisions of the Social Security Act.604 Moreover, it appears that the concept of "deserving poor" has run its course, as "hard time limits" ranging between two and five years are set to replace need as the basis for determining who receives public assistance under current welfare proposals.605

601. See Jane L. Ross, General Accounting Office, Child Welfare: Complex Needs Strain Capacity to Provide Services 113 (1995) (reporting that states have increased use of kinship foster care to maintain children's ties to families, encourage long-term placements, offset shortages of traditional foster homes, and save costs); More Bad News on Foster Care, N.Y. Times, Feb. 8, 1996, at A24 (estimating that about 40% of New York City's foster children are in kinship foster care). There is, however, no requirement that states fund kinship foster care. See, e.g., Lipscomb v. Simmons, 962 F.2d 1374, 1381 (9th Cir. 1992) (stating that Oregon "may reasonably have concluded . . . that the greater good of the greater number of children in need of foster homes is served" by denying payment to relatives). See generally Randi Mandelbaum, Trying to Fit Square Pegs Into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers, 22 Fordham Urb. L.J. 907, 913-14 (1995) (arguing that current federal funding programs available to kinship caregivers—AFDC and foster care funds—fail to meet their needs and proposing a new and separate kinship care program).

602. Minow, supra note 506, at 842.

603. Jill Quadagno argues that President Nixon's 1971 Family Assistance Plan, a national guaranteed annual income for the poor, was defeated in part by the opposition of politicians fearful that the plan would drive up low wages particularly prevalent in the southern states. See Quadagno, supra note 225, at 117-34 (noting additional strong opposition from labor unions, chambers of commerce, and northern welfare rights groups).


605. See Handler, supra note 500, at 857.
Divisions among women contribute further to the collapse of public support for mothers’ work. As Theda Skocpol has noted, the political rhetoric of “honoring motherhood” might once have symbolically and relatively unproblematically connect[ed] many elite, professional, middle-class, and poor American women. . . . But in the United States today no such unproblematic connections of womanhood and motherhood, or of private and public mothering, are remotely possible—not even in flights of moralism or rhetorical fancy.  

There is concern by some nonworking mothers that facilitating maternal employment will take jobs away from fathers and thus penalize homemakers. Others worry that legislation aimed at helping working women, like family leaves, will in fact benefit middle-class mothers at the expense of poor women “who [will] lose their jobs . . . because of the increased wage bill faced by the employer.” There is resentment by some working mothers that others might be subsidized to stay home, even though about forty percent of mothers who receive AFDC also work part-time and so are not so clearly distinct from “working mothers.” Others fear that facilitating stay-at-home motherhood through stipends will sustain distinctions between the private and public life to the disadvantage of mothers who may later attempt to enter the work force. Still others resist further institutionalizing maternal caretaking on psychoanalytic grounds. If, as Nancy Chodorow contends, mothering reproduces mothering, state policies should not contribute to the intergenerational perpetuation of gender inequalities.

Yet concerns about sustained or perpetuated dependencies carry their own flights of fancy in the present political climate. The American public now sees the present welfare system—understood as AFDC, not

606. Skocpol, supra note 142, at 538. Skocpol notes that this is not altogether bad: “None of us who live as women participating fully in work and politics along with family would, for a moment, want to return to the days when higher-educated American women felt they had to choose between careers and marriage and childbearing.” Id.

607. See Kessler-Harris, supra note 26, at 317 (quoting Phyllis Schlafley).

608. Hylton, supra note 490, at 493.


610. This argument is similar in spirit to opposition to spousal support on the grounds that sooner or later women will have to learn not to rely on marriage for economic support. See Herma Hill Kay, No-Fault Divorce and Its Aftermath, 56 U. Cin. L. Rev. 1, 86 (1987) (concluding that gender equality is unlikely so long as women continue to “make choices that will be economically disabling” and urging the withdrawal of existing legal supports that sustain such inequality as a cultural norm). Under Martha Fineman’s theory of derivative dependencies, however, the analogy between child care and alimony is misplaced. See Fineman, supra note 27, at 161–64. Fineman argues that the legal system should recognize and support mothers because their dependency results from caring for others. See id. at 230–33.

mortgage deductions—as making things worse, not better.\textsuperscript{612} Congress's proposed reforms seek to end what many see as perverse incentives: family caps to prevent additional out-of-wedlock births; the exclusion of teenage mothers to discourage long-term welfare dependency; hard time limits to show that everyone means business.

2. \textit{Child Care Support}. — If there is insufficient support to renew or sustain maternal stipends, what about public support for child care to assist mothers who work? Here the horns of the dilemma become predictably sharp. While working mothers may demonstrate the very civic obligation we seek to instill in poor women, at the same time there is concern that some working mothers may have separated from their children when they did not quite have to. As Kathleen Jamieson notes, high salaried women in positions of power are presumed to be working for self-satisfaction or luxuries, not to meet basic family needs. [W]hen they purchase childcare, they are, as a result regarded as negligent mothers. [In contrast] the low wage mother . . . is assumed to be working for her children.\textsuperscript{613}

Like decisions about breast-feeding or spacing children's births, decisions about whether to stay home or go to work demonstrate the fine line that at least middle-class mothers must walk to make sure that they are separating from their children only for the right reasons, at the right time, and in the right ways.

Although professional mothers may be subject to greater social disapproval and perhaps experience greater levels of guilt, they are also more able to afford good substitute care or to leave work altogether when their children are sick or young. This is not to deny that there are costs for professional mothers as they balance concerns about career investment and satisfaction against a sophisticated awareness of child develop-

\textsuperscript{612} See R. Kent Weaver et al., Public Opinion on Welfare Reform: A Mandate for What?, in Looking Before We Leap, supra note 505, at 109, 112 (reporting results of survey that showed in 1995, 69\% of public agreed with the statement that welfare discourages work and breaks up families). Even the Earned Income Tax Credit (EITC), Congress's closest move toward income support, is being revised. The EITC is a cash subsidy or tax credit paid directly to welfare recipients who find jobs. See Anne L. Alstott, The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform, 108 Harv. L. Rev. 533, 534 (1995). In 1994 the maximum credit for a family with two children was about $50 a week, a significant amount for a parent earning the minimum wage. See Rebecca M. Blank et al., A Primer on Welfare Reform, in Looking Before We Leap, supra note 505, at 27, 57. Yet while the EITC has been described as “one of the few bright spots” for the working poor “in an otherwise dismal economy,” id., Congress’s most recent proposal is to cut back the EITC for families in the $12,000 to $28,000 yearly income range. See Peter Passell, Economic Scene: Making the Republican Plan Fairer to Poorer Families, N.Y. Times, Nov. 23, 1995, at D2 (noting that working poor “could lose as much as $1.25 in federal benefits and tax savings for every extra tax dollar they earn”). Passell reports that in contrast to the “pro-family” symbolism of the $500 child tax credit urged by the Christian Coalition, the earned-income tax credit “has no organized constituency.” Id.

\textsuperscript{613} Jamieson, supra note 162, at 63.
ment and the simple desire to experience their own child's growth. Nor is it to deny the commonalities among mothers as they negotiate the dilemmas of work and child care. The welfare of the children is in the minds of most working mothers: "Always worrying about a sick child. . . . Managers tell you to leave personal problems at home, but you can never separate child from mind." Yet it is one thing to dwell on whether one's toddler is becoming too fond of the nanny (and be able to quit if the concern becomes unmanageable) and quite another to lock one's nine-year-old son in a hot New York City apartment during summer vacation because there are no affordable activities for him to attend. The grim decision to lock the door, dispiriting for parent and for child, may be all that some working mothers can do in the absence of alternatives. Her son's welfare is totally her responsibility, but so is the family income.

It is now time for child care responsibility to be allocated more broadly, especially for poor and working class mothers. Their lives are more precarious with regard to each of the factors that determines the effect of maternal separation on children: the quality of care, maternal role satisfaction, and the standard of living and resulting stress at home. I shall therefore say little more here about professional women and suggest instead that the proper targets of government child care policies are those mothers with fewer resources and options. I note, however, that in western Europe, this kind of targeting is less necessary as child care (and such other services as medical care that reduce a mother's need to work)


616. Those feelings of jealousy were the first hints of a low-key, subtle competition . . . between Mrs. Bush and me. I wanted the babies to love her . . . . I wanted them to be happy . . . . And yet I have to admit that in some part of my head I wanted them to be happier with me. What an incredibly selfish perspective. I wanted to be free to do my own work and still to be the prime target of my children's affection. I wanted to be important to my children and yet not so crucial that they would be harmed by my absence.

Jane Greengold Stevens, in The Balancing Act II 107, 134 (Jayne Curley et al. eds., 1981). I do not offer this example mockingly. Many readers will have experienced similar and quite genuine pangs along these lines. If separating were still not regarded as an act of hostility to one's child and mothering not defined in such exclusive terms, competition and jealousy between caretakers and mothers might well sensibly dissolve. For the complications of the relationship from the provider's point of view, see Nelson, Mothering, supra note 576, at 219–23.

617. See Sexton, supra note 271, at 27.
are generally available as a matter of course. The value of this approach is enormous: child care is understood as a general social good; mothers are seen as ordinary citizens rather than a special interest group; and while separating from one's child remains a matter of personal choice, the decision is taken within a context of normality, not deviance.

In this country the mechanism for distributing such social benefits as sometimes exist is largely through employment. Employer-assisted child care may make particular sense as its very point is to support working mothers. Many employers have already recognized that providing child care assistance is good business. As the Executive Vice President of American Express testified before Congress in 1988, the competitiveness of American companies depends on a willingness to invest in child care:

I'm not just thinking of the morale and absenteeism of working parents. I am thinking also of the price exacted from their children—the future workforce of America. I don't have to be Dr. Spock to tell you that the learning, working, and socializing habits of a lifetime are formed in early childhood. . . . In an era where the dual-income or single-parent household is the rule, [those habits] must be aided by high quality child care. Thus "with-it" companies have introduced include on-site child care, vouchers for the parent's choice of off-site care, referral networks to help parents locate care, special networks for sick child care (often impossible to find and the most expensive when one does), family leaves, paid time-off for children's dental and medical appointments, school-age child care programs and services, and flex-time.

618. See Kamerman & Kahn, supra note 21, at 24 (noting that unlike Europe, the United States "limit[s] most of what is done in social welfare to children with problems, in poverty, or from deprived groups" as opposed to basic preventative and developmental services available to all).

619. Harry L. Freeman, The Corporate Stake in Child Care, Testimony Before Senate Subcomm. on Children, Families, Drugs and Alcoholism, Mar. 15, 1988, reprinted in The Work and Family Sourcebook 29, 30 (Fairley E. Winfield ed., 1988). For an excellent discussion of the relation between corporate and familial needs, see Fernandez, supra note 615, at 39–43 (arguing that corporate America's "provision of support for [child care] problems posed by dual-career and single-parent family structures . . . makes good business sense, since both employers and employees will benefit from that support"); see also Sylvia A. Hewlett, Good News? The Private Sector and Win-Win Scenarios, in Rebuilding the Nest, supra note 30, at 207, 217 (reviewing variety of current corporate initiatives for family support policies and noting that the "looming labor shortage has tilted the balance of power in society toward skilled labor. Working parents, particularly mothers, are prime beneficiaries of this shift.").


622. See Fernandez, supra note 615, at 168–69.

623. This includes "Chatters," a telephone service that calls latch-key children to make sure they are home and all right. See id. at 165.

624. Mary Kay Cosmetics actively recruits its female sales force by stressing that mothers can schedule their sales parties around their children's schedules. See Maureen
these benefits in order to reduce tardiness, turnover, absenteeism, and the psychological and physical stress on workers otherwise worried about their children—all good for the "bottom line."\textsuperscript{625} They also create good will and employee loyalty.\textsuperscript{626}

While these benefits provide tremendous help to working mothers, they are not uniformly available across companies or across employees. A 1992 study of employer-provided family leaves showed that "most poor children do not live in households that would be the chief beneficiaries of employer-mandated programs."\textsuperscript{627} In this regard, unions might play a stronger role in bargaining for child care, especially as women now constitute one of the few expanding union constituencies.\textsuperscript{628}

State and federal governments might also participate more energetically. Some states have obliquely acknowledged the obligation. The California legislature states in the preamble to its licensing code that "good quality child care services are an essential service for working parents" and that "affordable, quality licensed child care is critical to the well-being of parents and children in this state."\textsuperscript{629} Yet licensing regulates only child care arrangements already in existence; it does nothing to create or subsidize more.\textsuperscript{630} Some states have tried to increase the availability of child care through zoning laws. Thus localities have exempted family day care (day care in the provider's own home) from business exclusions

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\textsuperscript{625} See Fernandez, supra note 615, at 170. Of course, some employers use women's child care responsibilities to their advantage. Studies of the insurance industry in the 1980s suggest companies moved to suburbs in order to secure a "literate but cheap female labor force" constrained in their abilities to demand benefits because of "their household and child-care responsibilities." \textit{Barbara Baran, The New Economy: Female Labor and the Office of the Future, in Women, Class, and the Feminist Imagination} 517, 529 (Karen V. Hansen & Ilene J. Philipson eds., 1990).

\textsuperscript{626} See Tamar Lewin, \textit{Workers of Both Sexes Make Trade-Offs for Family, Study Shows}, \textit{N.Y. Times}, Oct. 29, 1995, § 1, at 25 (employees who had used the company's work-family programs—flexible work hours, job sharing, subsidized emergency child care, and child or elderly care referrals—were more likely to "go the extra mile" for Du Pont).


\textsuperscript{628} See Marion Crain, \textit{Feminizing Unions: Challenging the Gendered Structure of Wage Labor}, 89 Mich. L. Rev. 1155 (1991) (noting that an "influx of women members with new ideas about . . . what they should do for their membership would give labor a much needed shot in the arm, psychologically and numerically").

\textsuperscript{629} Cal. Health & Safety Code §§ 1596.72(e), 1596.73(e) (West 1990). The finding endorses the joint consumption model of benefits.

\textsuperscript{630} Indeed, some argue that licensing drives up the costs of child care and therefore discourages new providers from entering the field. See Robert Rector, \textit{Fourteen Myths About Families and Child Care}, 26 Harv. J. on Legis. 517, 536 (1989).
otherwise applicable in residential neighborhoods,\textsuperscript{631} and cities have conditioned building permits on the inclusion of on-site day care centers.\textsuperscript{632} Each of these responds to maternal preferences to have children cared for either close by or in a family environment.

Another mechanism at the level of local government for increasing child care could be the public schools. Historically there has been a distinction between child care, considered mostly custodial, and schools, clearly educational in nature.\textsuperscript{633} Yet the two functions have begun to merge. Pre-school programs are now understood as extremely valuable in setting the stage for subsequent learning, and while the purpose of school remains primarily educational, it unquestionably functions as a form of child care as well.\textsuperscript{634} Combining education goals with parental concerns for well-supervised children, the public schools could be called into service in several ways: lowering the age of school readiness and creating age-appropriate instruction, as in good private pre-schools;\textsuperscript{635} offering a greater number of after-school programs;\textsuperscript{636} and providing year-round schools.\textsuperscript{637}

There is much for Congress to consider as well. It might start with the 1991 Report of the National Commission on Children, \textit{Beyond Rhetoric: A New American Agenda for Children and Families}, which featured a comprehensive set of recommendations to reduce childhood poverty, including subsidizing child care for the poor and working poor.\textsuperscript{638} The

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\textsuperscript{631} See Cal. Health & Safety Code § 1597.45(a) (West 1990) ("The use of single-family residence as a family day-care home shall be considered a residential use of property for the purposes of all local ordinances.").

\textsuperscript{632} See Natalie M. Hanlon, Note, Child Care Linkage: Addressing Child Care Needs Through Land Use Planning, 26 Harv. J. on Legis. 591, 592 (1989).

\textsuperscript{633} See Grubb, supra note 592, at 211.

\textsuperscript{634} Thus when Governor Pete Wilson of California sought to raise the school age for kindergarten students, as part of a move to lower the state budget, working parents were among those who opposed the plan. See Carlos Alcala, Kindergarten Delay Unfair, Wilson Critics Charge, Sacramento Bee, June 30, 1992, at A10. In some districts, schools already offer fee-based day care services. See Anna Cekola, Preschools Go Public, L.A. Times, Sept. 24, 1993, at B1 (describing southern California programs explicitly opened “to help working parents and get children involved in school sooner”).

\textsuperscript{635} See National Research Council, supra note 265, at 164–70 (describing existing school based pre-kindergarten programs including HeadStart); see also Starting Points, supra note 302, at 94–95 (describing “schools of the 21st century” model program in which local school links up with families beginning in pregnancy).


\textsuperscript{637} See Classes the Year Round Pass the Test for Many, N.Y. Times, Nov. 8, 1989, at B12 (quoting Dr. Ernest Boyer of the Carnegie Foundation for the Advancement of Teaching: “I’m convinced that a longer school year is inevitable [to] meet the changing work and family patterns of the nation.”); see also Arnold H. Lubasch, Koch Responds to a Panel on Blacks, N.Y. Times, Mar. 30, 1989, at B3 (quoting Schools Chancellor Richard Green: “We do want year-round schools’ . . . [in order] to offer more flexible access to the citizens of the community.”).

\textsuperscript{638} See National Commission on Children, supra note 353. But see Polakov, supra note 480, at 171 (noting that the commission’s proposals are in fact minimal and that
federal Child Care and Development Block Grant enacted in 1990 was a start. Despite its important commitment of funds to child care subsidies, there remains an immense shortage of reasonably priced, quality care, especially for the working poor.

Other approaches include government loans for families to purchase decent day care, much like student loans available for older children; increasing tax deductions for child care expenses; establishing child care programs for federal employees, as the armed forces have done; creating preferences in federal contracting for companies with sound child care policies; and requiring the states to provide reasonable child care assistance to workfare mothers. Others have suggested child care as an excellent vehicle for community based enterprise development, combining the demand for neighborhood-based care with the need for neighborhood-based employment. The Family and Medical Leave Act could be extended to firms smaller than fifty and to employees who work part-time, as is often the case for mothers of very young children. It might even fund the leaves so that the mothers who are least able to afford time-off or sick-care can provide for their children. Congress might also extend tax incentives for employers to provide child care benefits to those at the lower ends of the workforce as well as managers and professionals.

There are, of course, bolder moves that a Congress truly devoted to family values might take. I have in mind the creation of a special class of

"after the fanfare celebrating what America is doing for its poor children dies down, Beyond Rhetoric ... [will return] to its rightful place on the shelves of public policy proposals gone astray with idealism—to be debated, diluted, downsized, and dissolved in doses of fiscal realism that ... mask the textured horror of daily destitution").
worker—the parent—who would be protected from discrimination in hiring and terms of employment by virtue of her parental responsibilities.\textsuperscript{647} Employers would have to accommodate the reasonable needs of working parents, as is now required with disabled workers and religious minorities.\textsuperscript{648} I anticipate fervent opposition. Such legislation would unfairly favor mothers to the detriment of other workers who might prefer other benefits\textsuperscript{649} How will it work? Who will pay?

Here the ideology of family values moves from the rhetorical to the concrete. If we mean to take seriously the national commitment to children that commands applause at every State of the Union address, we must tailor that commitment to the times. Separations between mothers and children on account of work are increasingly common and expected. Social scientists have made it clear that separating alone does not harm children provided they receive good quality care. In this country we simply have not begun to identify all the mechanisms by which such care might be developed and distributed. But the endeavor is not beyond the practical pale. As policy analysts Sheila Kamerman and Alfred Kahn have recently detailed, all of Western Europe does it.\textsuperscript{650} Moreover, as Kamerman and Kahn underscore,

Contrary to American impressions, the European countries with comprehensive child and family policies fit no political stereotype. Some of the governments have been conservative, some social democratic, and some coalition-oriented. . . . Some of these countries are heavily Catholic, others Protestant, and some highly secular in their political patterns in recent years. [They include countries] with high labor-force participation rates for

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  \item \textsuperscript{647} I therefore disagree with Owen Fiss that [\textit{\ldots} it is difficult to imagine . . . any theory of antidiscrimination law that would enable it to become an effective instrument for separating the child-bearing and child-rearing responsibilities, so as to dispel the idea that a woman's place is in the home or that women are especially charged with the responsibility of caring for children.]

Owen M. Fiss, An Uncertain Inheritance, in The Outer Circle: Women in the Scientific Community 259, 272 (Harriet Zuckerman et al. eds., 1991). Fiss continues that [\textit{\ldots} something must be done, perhaps even by the state, but it is hard to see antidiscrimination law as the remedy . . . . ] Id. Perhaps an anti-discrimination principle is not the singular remedy, but as a framework for thinking about how to improve working conditions for those responsible for children, it could certainly move us along.


\item \textsuperscript{649} This was the basis of the Republican veto of the Family and Medical Leave Act. See Ann Devroy, President Vetoes Bill on Unpaid Family Leave, Wash. Post, June 30, 1990, at A4.

\item \textsuperscript{650} See Kamerman & Kahn, supra note 21, passim.
\end{itemize}
mothers of very young children and some with low rates. Currently, unemployment rates are high in most of these countries, and conservative governments are dominant in most, but the core policies are not being dismantled even where fiscal pressures dictate some adjustments at the margin. In short, policies that facilitate maternal employment by providing child care as a basic component of social welfare need not be a matter of great controversy.

But antipathy to child care is not just a matter of costs. Opposition also stems from the psychological discomfort created by mothers separating from children in order to work and the concern that public support acts as a kind of permission. The task therefore requires cultural as well as fiscal reorientation. Here too the experience of other countries is useful. There has been a dramatic shift in public attitudes toward day care in Japan. Traditionally viewed as stigmatizing because it was used primarily by the poor, high quality, state-subsidized day care is now understood to boost children's chances for future success. “Instead of worrying about whether it is right to pursue careers and hand over their children to strangers, some Japanese housewives wonder if they are doing their offspring a disservice by staying at home and looking after them.”

The catalyst for this policy shift was not new-found concern over children’s well-being or mothers’ self-fulfillment, but rather demographic alarm. Because motherhood in Japanese society has been inconsistent with a career, many modern young women were deciding not to marry, or to limit family size to one (or no) children. The result was a significant, projected decline in the birth rate and so a decline in Japan’s ability to replace competent workers in the next century. In response, the state set about to encourage marriage and births by reducing the economic disadvantages wrought by traditional motherhood and the reputational loss associated with nontraditional motherhood.

651. Id. at 25–26.
652. Nicholas Kristof, Japan Invests in a Growth Stock: Good Day Care, N.Y. Times, Feb. 1, 1995, at A4 (reporting that because state-supported day care is limited to the children of working mothers, “some parents get fake job certificates just so that they can send their children to what they believe is the superior environment of a nursery school”).
654. See Interview with Yoshiko Terao, Associate Professor of Law, University of Tokyo, in Tokyo, Japan (Nov. 27, 1995); see also Pasquale, supra note 653, at 3–4 (reporting that enactment in 1992 of mandated child care leaves was similarly designed to draw women of childbearing age back into labor force in response to declining population). The Japanese example replicates the development of French policies of the early twentieth century when generous maternal benefits were enacted to encourage births following a stagnant birthrate. See Klaus, supra note 600, at 194–96; Karen Offen, Depopulation, Nationalism, and Feminism in Fin-de-Siècle France, 89 Am. Hist. Rev. 648, 672–73 (1984). A Catholic women’s organization also vigorously supported maternal benefits. See Susan Pedersen, Catholicism, Feminism, and the Politics of the Family
The well-being of children has special implications in the context of workfare. Like other working poor, concerns about the quality of child care and home life are heightened for workfare mothers. Because they often cannot afford good quality child care, they may well be anxious during work or sometimes absent from their jobs. In his study of the impact of California’s proposed welfare reform on the state’s poor children, Professor Michael Wald concluded:

For AFDC mothers [of children under two] to be forced to cope with job problems and the need to find childcare, in addition to the stress caused by low income and the difficulties they may have in getting medical care, certainly makes bonding more difficult for these mothers. If the child has physical problems or was born low-birth-weight, conditions far more prevalent among poor children, extra attention is needed.\(^6\)

We do not yet know if newer workfare programs will succeed or even what success means in the context of workfare. The earned income of a workfare participant may well increase, an apparent measure of improvement. But it may also be that the workfare mother will still be in poverty, her life no easier, and her children no safer. A mother with two children working full-time at minimum wage still falls below the poverty line.\(^6\)

Thus even if workfare achieves the social goal of breaking the “cycle of dependency,” it may do little to end the pernicious cycle of poverty.

And when workfare is looked at as a mandatory mother-child separation, its consequences seem even less auspicious. It requires separations between the mothers and children who in the absence of adequate housing, health care, and safety can least absorb the additional stresses of poor quality child care and overburdened lives. The ability of middle class and professional women to work and raise families at the same time is sometimes celebrated as an example of task mastery. The title of a recent study of working mothers makes the point: \textit{Juggling: The Unexpected Advantages of Balancing Career and Home for Women and Their Families}.\(^6\)

But task mastery is something different than “just getting by” and unexpected advantages are hard to find in a life with few advantages at all.

3. Family Law Reform. — Finally, providing support for child care will be of little solace to working mothers if their use of child care becomes a

\(^6\) During the Late Third Republic, \textit{in} Mothers of a New World, supra note 147, at 246, 248. In both cases, the immediate concern was to increase the numbers of children by either valorizing motherhood generally (France) or the more modern position, de-stigmatizing the working mother (Japan).


\(^6\) See Crosby, supra note 283.
ground for losing custody. Thus family court judges must attend to the apparent trend of penalizing mothers for work-related absences from home. Everyone expects fathers to be at work, yet maternal absence quickly catches the eye. As the appellate court in Burchard v. Garay noted, "in an era when over 50 percent of mothers and almost 80 percent of divorced mothers work, the courts must not presume that a working mother is a less satisfactory parent or less fully committed to the care of her child." In her concurrence, Justice Rose Bird emphasized the working mother's special predicament under the trial court's rationale:

If she did not work, she could not possibly hope to compete with the father in providing material advantages for the child. . . . If she did work, she would face the prejudicial view that a working mother is by definition inadequate, dissatisfied with her role, or more concerned with her own needs than with those of her child.

Bird's opinion underscores the importance of ascribed motive in official judgments regarding maternal separation decisions. A divorced mother may be working to satisfy "her own needs" and that alone may be held against her. But she is as likely to have taken a job as a consequence of the loss of income that inevitably accompanies divorce. Such was the case in Dempsey v. Dempsey, the West Virginia case mentioned earlier. The mother in Dempsey took outside employment only after a three-year period in which she received less than $300 in total support from the father. When the mother "had fallen so far behind on her bills that she felt she could no longer care for [the son]," she sent him to live with his father until she could get back on her feet. The father then filed for custody and won. Characterizing the majority decision as "a singularly inequitable result," the dissenting judge astutely observed that the evidence clearly shows that the mother was the primary caretaker until she had to relinquish temporary custody of the child to the father. . . . [We should not] permit a primary caretaker to lose her favored role simply because her husband abandons her and

659. Id. at 495 (Bird, C.J., concurring) (footnote omitted).
661. See supra note 476 and accompanying text.
662. Dempsey, 306 S.E.2d at 231.
663. The father argued that because the son had lived with him for the eleven months prior to the divorce, the mother was no longer the primary caretaker. See id. at 231. Under the presumption, the parent who is primarily responsible for the caring and nurturing of the child before the divorce is awarded custody. But because the court found that custody was "shared in an entirely equal way" during the year before the dispute, it concluded that neither party was entitled to the presumption. Id. (quoting Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981)). Applying a best interest of the child analysis, the court awarded custody to the father and the appellate court affirmed. See id. at 231-32.
his child without any meaningful support, thereby, forcing her
to give up physical custody of the child.664

VI. Conclusion

Breaking with social practices that have existed for most of human
history, the last hundred years or so have created a model of motherhood
in which a mother's physical presence is considered essential to the
proper raising of children. Many mothers embrace the assignment and
find nothing unnatural (and certainly nothing diabolical) in it. Yet even
among mothers who choose to raise children full-time, I suspect there is
an occasional impulse to separate. A subversive view of this was captured
in a recent episode of the cartoon program, *The Simpsons*. Homer, Marge
and the other parents of Springfield gather tearful-eyed around an old
school bus, loaded with their children en route to summer camp. As the
bus drives out of sight, the mournful waving stops. Cheering begins!
Champagne corks fly! They are gone! Parents understand that taking
care of children, particularly the animated ones, is hard work that some-
times requires a break. On occasion the law itself recognizes this. Several
states now subsidize respite care for the parents of severely sick or dis-
abled children who care for their children at home, but who need a tem-
porary rest from the demands of the endeavor.665

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664. Id. at 232 (Miller, J., dissenting) (citations omitted); see also Becker, supra note
27, at 192–201 (reviewing series of custody cases in which the primary caretaker test is
manipulated to defeat a mother's custody claim).

“alleviate stress . . . [in order to] increase the ability of families to successfully nurture their
other services that “enable a family to keep their child with developmental disabilities at
home”); Me. Rev. Stat. Ann. tit. 34-B, § 6208(1)(A) (West 1994) (stating that it is the
Commissioner’s duty to “[p]rovide a comprehensive system of support services, including
of “provid[ing] the family with rest and relaxation” and “improv[ing] the family’s ability to
cope with daily responsibilities”); see also Tex. Health & Safety Code Ann. § 534.059(a)(4)
(West 1996) (listing respite care as part of required community-based services); Wyo. Stat.
§ 35-1-628(a) (1995) (instructing department of health to administer respite care services
to families with developmentally disabled children who are not eligible for home and
community based waiver services under Medicaid).

The motivation for providing respite care is not quite compassion, gratitude, or
reward for maternal caretaking. Supporters explain that on balance respite services save
taxpayers money because in-home care provided by private families is cheaper than
institutionalization. See A. Rimmerman, Provision of Respite Care for Children with
Developmental Disabilities: Changes in Maternal Coping and Stress over Time, 27 Mental
Retardation 99, 99 (1989) (noting the consensus among social workers that respite care
significantly reduces levels of “stress, strain, and burnout” among family caretakers).

The need to relieve parents generally is reflected in a California statute that requires a
noncustodial parent to reimburse the custodial parent for child care duties if the
noncustodial parent “fails to assume the caretaker responsibility.” Cal. Fam. Code
§ 3028(a) (West 1994); see also Carol S. Bruch, Making Visitation Work: Dual Parenting
Orders, Fam. Advoc., Summer 1978, at 22, 42 (“Just as custodial parents must hire outside
As we have seen, mothers of more ordinary children also regularly decide to separate from them. Motivated by concerns about the welfare of their children, their families, and sometimes themselves, many mothers reject motherhood as a full-time practice whether by working or by consenting to more permanent forms of separation, as in adoption or surrogacy. With the exception of mothers already under suspicion for not being good mothers in the first place, these are not always popular moves.

The standard response to separation decisions has been that separations harm children. Yet we have seen that separations are not necessarily bad for children and that it is possible, if we as a society so choose, to minimize any harmful effects. Developmental psychologists continue to refine our knowledge about the components of good quality child care, the relation between background poverty and developmental outcomes, the importance of maternal role-congruence, and the significance of valid consent to permanent separations.

I want therefore to bracket the interests of children and suggest an alternative explanation for the continued opposition to maternal separations. My explanation concerns power, for separating from children has much to do with its exercise. In her book, Writing a Woman's Life, Carolyn Heilbrun defines power as "the ability to take one's place in whatever discourse is essential to action and the right to have one's part matter." She connects women's power to age, quoting an Isak Dineson character: "Women, . . . when they are old enough to have done with the business of being women, and can let loose their strength, must be the most powerful creatures in the world." Because "the business of being women" is in this country defined largely in terms of producing and raising children, the link between the power conferred by age and that acquired by separating from children becomes clearer. A mother who leaves her child is "doing away with the business of being a woman" ahead of schedule. She has not simply awaited power in passive consequence of age; she has seized it.

This exercise of power may be perceived as particularly bold or nervy in that it contains an element of cultural ingratitude. The starting (and end) point in the brief history of women and power in American society has been to consign both to the domestic sphere. As historian Ruth Bloch has explained, the transcendence of the moral mother toward the end of the nineteenth century "provided both ideological justification and incentive for the contraction of female activity into the preoccupations of motherhood." A grudging permission has been given for wo-

667. Id. at 128.
668. Bloch, supra note 98, at 120.
men to take their place in the discourse essential to action at home, as mothers. There they are the powers that be. But mothers who separate from children upset authority and unsettle the scheme. By abdicating the maternal role, even temporarily, they make everybody anxious, not only because they seek power elsewhere, but because they give it up precisely where it is permitted.669

Moreover, separating from children is not some kind of petulant or symbolic foot-stamping, but action with significant practical consequences. Children must be cared for, and if the nation is at all serious about its commitment to children or their value to the state, they must be well cared for. Part of what must be decided is how the costs of caring for children should be distributed among families, employers, and the state (at every level). To accomplish this, something more than and prior to economic reorientation is required: a sense of communal responsibility for what has over the last two hundred or so years been primarily a mother's task. Historian John Demos observes that the social obligation of caring for everyone's children has not endured into the twentieth century:

> [O]ur inherited habits and values—our constricted capacity for extra-familial caring—partly explain public indifference to the blighted conditions in which many families even now are obliged to live. . . . In this allegedly most child-centered of nations, we find it hard to care very much or very consistently about other people's children.670

This may be because we have come to see other people's children as qualitatively different: other people's children seem less promising, more dangerous, than ours. Not just the conditions in which they live, but the children themselves are blighted by their mothers' need for assistance. Of course, all mothers need assistance in raising children; it is simply that classier, camouflaging labels attach to the forms of assistance that enable wealthier mothers to separate from their children: preschool (not subsidized child care centers), nannies (not a patched-together network of relatives), vacations (not foster care), enrichment activities (not “congregating by the thousands after school in the lobbies and on the lawn of numerous factories while their parents, usually their mothers, are working the dayshift”).671

There is also an active indifference to the quality of women's lives, poor or otherwise, as they manage the often incompatible demands of

669. If maternal caretaking and nurturing are implicitly defined as “acting . . . to foster the growth of another on many levels—emotionally, psychologically, and intellectually,” then a mother who fosters her own preferred forms of growth is often regarded as selfish exactly because “she is not enhancing the power of others.” Jean Baker Miller, Women and Power, Women & Therapy, Spring/Summer 1987, at 1, 3, 8.


671. Uchitelle, supra note 264, at D2 (“Sometimes they go to the parking lots and wait in their parents' cars.”).
raising children, earning income, and pursuing individual skills and interests. Encouraging women to stay at home and insisting that those who choose to work are still responsible for what goes on at home has been too easy and too useful a pattern to interrupt. Everyone wants less competition in the work force, secure and successful children, and someone nice to come home to at the end of a busy, postmodern day.

But enough! It is time for the legal system to facilitate rather than presuppose the work that mothers do. The project of legal reform begins by acknowledging that separating from children remains a regular feature of mothering. If we could put that fact in place, we might then invoke a twentieth-century version of the Enlightenment theories upon which France and Russia relied in conceiving a heightened governmental duty toward their most vulnerable citizens—poor children and their mothers. As we have seen, publicly supported homes for children were built in recognition of the state's obligation to provide for these "mothers of misery:" "The Moscow Foundling Home... rivaled the Kremlin for dominance of the central Moscow skyline and served as an imposing symbol of tsarist solicitude for the unfortunate."

We need not wait to act until "mothers of misery" becomes an apt description of women's lives in this country, in this century, in order to improve how the law perceives and regulates separations between modern mothers and their children. We need not follow the tsarist model exactly: massive foundling homes are no longer considered the best way to raise children, and few mothers require the comprehensive assistance that such homes provided. Nonetheless, as poor mothers seek work in the absence of jobs and child care, and as more fortunate mothers try to sort through the sometimes competing concerns for their children's well-being and their own, there is still room on the current cultural skyline for solicitude, real rather than symbolic, as the dilemmas of separating from children confront mothers anew.

672. See Fuchs, Poor and Pregnant, supra note 39, at 130–51; Ransel, supra note 39, at 50–61.
673. The phrase is David Ransel's. See Ransel, supra note 39.
674. See id. at 56. It is fitting to end with Adrienne Rich's observation that in contrast to other important institutions—justice, education, the state—we have developed no architectural form to commemorate motherhood. Unlike the Vatican, the Pentagon, the Massachusetts Institute of Technology, or the Supreme Court, "[w]hen we think of the institution of motherhood, no symbolic architecture comes to mind, no visible embodiment of authority [or] power." Adrienne Rich, Of Woman Born 275 (1978).