

Mommy Dearest: The Focus on the Family in Legal Feminism

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Just when it would seem that family values and child protection rhetoric could not spread any further into the cultural and legal landscape,¹ feminist legal scholars have begun a debate with similar terms. While family relations and employment discrimination have long been feminist issues, recent scholarship has focused specifically on gender inequality in the responsibility for family care and ways to rectify this problem.² Although this debate, which I refer to as the care-work or childcare debate, does not always center on the best interests of children, some feminists have explicitly appealed to the public fear over the erosion of family values and the specter of suffering children to galvanize support for public policy reform.³ As Katherine Silbaugh writes, some feminists attempt “to engage the public’s sense that children need time

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¹ For a discussion of the prevalence of family values and child protection rhetoric, see MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 47 (1999) [hereinafter WARNER, *TROUBLE WITH NORMAL*] (“People are constantly encouraged to believe that heterosexual desire, dating, marriage, reproduction, childrearing, and home life are not only valuable to themselves, but the bedrock on which every other value in the world rests It is the one thing to which every politician pays obeisance, couching every dispute over guns and butter as an effort to protect family, home, and children.”); Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET* vii, xvi (Michael Warner ed., 1994) [hereinafter Warner, *Introduction*] (“In a culture dominated by talk of ‘family values,’ the outlook is grim for any hope that child-rearing institutions of home and state can become less oppressive.”).

² As Joan Williams writes, while feminist jurisprudence focused for two decades on sex, “attention is now shifting back to the work-family axis of gender.” Joan Williams, *From Difference to Domination to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1442 (2001) [hereinafter Williams, *Domesticity*]; see also Katherine B. Silbaugh, *Foreword: The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389, 1389 (2001) [hereinafter Silbaugh, *Foreword*] (“A fantastic amount of activity is brewing around the subject of care work.”); Vicki Schultz, Syllabus, Reading Group: Feminist Theory and Law, Harvard Law School, Fall 2001 (“For reasons that aren’t entirely clear to me, this debate has become the ‘hot-button’ issue of the day.”).

³ For example, Joan Williams contends that political realities force feminists “to use the language of family values to renegotiate rights.” JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 240 (2000) [hereinafter WILLIAMS, *UNBENDING GENDER*].

with parents to demand that employers provide that time without penalty.⁴ The appeal to family values and child protection is a disturbing strategy in that this rhetoric uncritically normalizes traditional definitions of family, sex, and reproduction—all behind the supposedly apolitical language of children's needs and family health.⁵ While the normalizing effects of this debate have not gone unnoticed,⁶ many feminists have yet to acknowledge the normalizing power of their work.

This Note continues the project of unveiling and resisting the presumptions of the feminist childcare debate. As others have argued, feminist legal theory generally takes for granted that women will become mothers in their lifetimes.⁷ Along these lines, reproduction has assumed the status of a biological and social imperative in this debate, as feminists presume that “We must reproduce the species.”⁸ Indeed, the childcare debate is premised on the need to make what is taken as “the fact” of reproduction less of a burden for women. As Katherine Franke argues, legal feminists should begin to question this seemingly unassailable premise and expose the ways that reproduction is the product of discursive systems and institutional incentives, not just a biological fact.⁹ But while the goals of the debate are misplaced, the rhetoric is even more troubling. Legal feminists use language that appeals to reactionary fears about child protection and family health, and in the process, they resort to a type of moralistic politics in which political arguments masquerade as appeals to universal moral or biological truths.¹⁰ Given the sentimental appeal of children and family togetherness, it is not surprising that such rhetoric has gone largely unchallenged. After all, who is against children?¹¹ All the same, legal feminists who use this rhetoric do not, as they claim, destabilize gender relations or family norms.¹² In fact, feminists who use this language naturalize the idea that women are defined by their maternal instincts and reproductive potential. To move away from this maternalist ideology, feminists should denaturalize sentimental ideas about motherhood and develop a new vocabulary of intimate and sexual relationships.

⁴ Silbaugh, *Foreword*, *supra* note 2, at 1392–93.

⁵ See *infra* Part II.C.

⁶ In the most resounding critique of this debate, Katherine Franke argues that legal feminism has unacceptably assumed the inevitability and naturalness of reproduction and motherhood. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 185 (2001) [hereinafter Franke, *Theorizing Yes*].

⁷ See *id.* at 190–91.

⁸ *Id.* at 186 (suggesting that feminists frequently respond in this way to criticism of the natalist presumptions in their work).

⁹ See *id.* at 184–85.

¹⁰ For an explanation of the use of moralism as a political strategy, see *infra* Part III.C.

¹¹ As Mary Anne Case so aptly put it, “who but the selfish and heartless could oppose more benefits from employers or the state for mothers and their children?” Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1755 (2001).

¹² See *infra* Part II.B.

In many respects, the idea that women should resist the oppressiveness of the traditional family has a history. The radical feminists of the late 1960s and early 1970s launched a powerful critique of marriage, maternalism, and the family.¹³ Further, the impulse at the heart of the childcare debate—that care and nurturing are socially valuable activities, which should be recognized and economically rewarded—comes directly out of cultural feminism.¹⁴ The crucial ideological divide in the contemporary childcare debate, however, is not a recycled version of the sameness-difference debate in feminist scholarship;¹⁵ instead, the dividing line in the current debate involves a disagreement about the value and inevitability of convention, traditionalism, and normalcy. Many legal feminists have succumbed to a political climate where family values and child welfare are the prevailing consideration in public policy discussions.¹⁶ For these scholars, traditional families and legislators' deference to them are political realities that women can exploit for their own benefit.¹⁷ With political realities as a background, family values rhetoric and sentimental discussions of family, home, and children have almost entirely eclipsed radical critiques of the family.¹⁸ In the interest of promoting choice in intimate affairs, as well as transforming the institutions of marriage and the family,¹⁹ I hope that feminists can overcome this political nihilism

¹³ See Ellen Willis, *Foreword*, in ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967–1975*, at ix–xiii (1989) [hereinafter Willis, *Foreword*]; Ellen Willis, *Radical Feminism and Feminist Radicalism*, in *THE 60s WITHOUT APOLOGY* 91, 98–99, 102–03 (Sohnya Sayres et al. eds., 1984). A partial list of early radical feminist critiques of the family includes: TI-GRACE ATKINSON, *AMAZON ODYSSEY* (1974), as well as essays published in *RADICAL FEMINISM* (Anne Koedt et al. eds., 1973); *NEW YORK RADICAL WOMEN, NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION* (1970); and *NEW YORK RADICAL WOMEN, NOTES FROM THE THIRD YEAR* (1971).

¹⁴ Some relevant American cultural feminist writings include: Jane Alpert, *Mother Right*, Ms., Aug. 1973; ROBIN MORGAN, *GOING TOO FAR* (1978); ADRIENNE RICH, *OF WOMAN BORN* (1976); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). See generally ALICE ECHOLS, *The Ascendance of Cultural Feminism*, in *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA*, *supra* note 13, at 243, 243–86.

¹⁵ For a claim that current disagreements “have begun to recycle the sameness/difference debate,” see Joan Williams, “*It’s Snowing Down South*”: *How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 815 (2002) [hereinafter Williams, *Snowing*]. For a background on the sameness-difference divide in feminist theory, see NANCY FRASER, *Multiculturalism, Antiesentialism, and Radical Democracy: A Genealogy of the Current Impasse in Feminist Theory*, in *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* 173, 175–77 (1997) [hereinafter *JUSTICE INTERRUPTUS*] and CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES OF LIFE AND LAW* 33–34 (1987); see also Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1291–1301 (1986) (discussing the formal/substantive equality divide in feminist theory). While the sameness-difference divide still has resonance in contemporary literature, I argue that it is not the best way to understand current ideological disagreements.

¹⁶ See, e.g., WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 239–40.

¹⁷ See *id.*

¹⁸ See Willis, *Foreword*, *supra* note 13, at xi.

¹⁹ In proposing that an anti-normalization campaign will both change the structure of the family as we know it and encourage more options in family affairs, I hope to challenge

and resist family values orthodoxy. In developing a new epistemology of sexual and intimate relations, feminists can attempt to change not just the relations among family members, but the very terms of the institution.²⁰

This Note proceeds in three parts. Part I discusses the feminist debate on work and family care that is ongoing in legal literature, including the critiques that question the normalizing assumptions of feminist arguments and the ultimate goals of the debate. Part II unravels the various ways legal feminists have used family values and child protection rhetoric. It discusses how legal feminists adopt an ethos of sentimentalism and victimization as they attempt to argue for legal and social reform by appealing to images of suffering children and deteriorating families. This section also argues that family values and child protection language has productive effects in normalizing conventional family relationships. In this way, I want to show that the references to family values and child victimization in the feminist debate are not really about what is good for children, but about who gets to define the family and what the consequences will be for everyone else. Part III suggests possibilities for an antinormalizing feminist position. It employs queer critiques of same-sex marriage projects to challenge legal feminists' use of family values. This section concludes by discussing alternative notions of family that have emerged from queer theory to show what is at stake in resisting the normalizing ideas in this legal feminist debate.

the classic distinction between radicalism and liberalism (both in its toleration and pluralism forms). Cf. NANCY FRASER, *From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age*, in JUSTICE INTERRUPTUS, *supra* note 15, at 11, 27 (arguing that there is a fundamental opposition between transformation and affirmation politics). I think that opposition to normalizing regimes actually has the effect of promoting choice in family affairs. By opposing traditional family arrangements, feminists can actually pluralize, rather than homogenize, the meaning of family. An anti-normalization project will not suddenly render the traditional family obsolete. The traditional ideal will continue to persist alongside other models. However, to help make alternatives to the traditional model viable options, feminists should privilege unconventional family arrangements over normal ones.

²⁰ This does not mean abandoning any idea of family. As Bidy Martin suggests, some idea of family, intimacy, and sex is surely worth preserving. See Bidy Martin, *Extraordinary Homosexuals and the Fear of Being Ordinary*, in FEMINISM MEETS QUEER THEORY 109, 133 (Elizabeth Weed & Naomi Schor eds., 1997) ("Radical anti-normativity throws out a lot of babies with a lot of bathwater [—] family along with its normalizing and constraining functions and forms . . ."). Eve Sedgwick similarly writes, "[r]edeeming the family isn't, finally, an option but a compulsion." EVE KOSOFSKY SEDGWICK, *Tales of the Avunculate*, in TENDENCIES 52, 72 (1993) [hereinafter SEDGWICK, *Avunculate*].

I. THE FEMINIST CARE-WORK DEBATE

A. *Joint Property Proposals*

The feminists in the care-work debate differ primarily over whether to seek monetary compensation for family work or to demand women's emancipation from the home and entry into the paid labor market.²¹ As Reva Siegel demonstrates, the feminist argument that women should be compensated for work done at home has a long history.²² In the nineteenth century, as the American economy modernized and a divide formed between the home and the market, the definition of work increasingly excluded labor performed by women.²³ In response, antebellum feminists argued for joint property laws to recognize women's claims to marital assets.²⁴ Doubting the fairness of any market evaluation of women's work, feminists then did not argue that women's labor should be compensated in accordance with market terms or that the division of labor should be changed.²⁵ Instead, they concentrated on property law

²¹ See NANCY FRASER, *After the Family Wage: A Postindustrial Thought Experiment*, in JUSTICE INTERRUPTUS, *supra* note 15, at 41, 43 (discussing the two approaches, which she respectively labels the "Caregiver Parity" model and the "Universal Breadwinner" model). It is beyond the scope of this Note to discuss every contribution to legal scholarship on the issue of reproduction and gender inequality. In particular, I do not address the vibrant debate over how to accommodate pregnancy in the workplace. See, e.g., Samuel Issaacharoff & Elise Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986). Instead, I concentrate on the conversation in legal literature regarding the responsibility for domestic duties.

Further, I do not cite every scholar who has written on these issues. I only hope to highlight the consistent themes and rhetorical strategies of the debate, and to do so, I have focused on scholarship that has practical suggestions for public policy reform. Some scholars have argued that we should reframe the way we discuss these issues. For example, Nancy Fraser suggests that feminists should promote what she calls a Universal Caregiver model. See FRASER, *supra*, at 61–62. Her work, however, "is not directed primarily at policy-making elites," *id.* at 44, and has no specific suggestions for resolving gender inequity in responsibilities for care work. Similarly, Katharine Silbaugh has argued for a symbolic revision of the treatment of women's work. She suggests that women's domestic labor should be regarded as market labor. See Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 83–84, 94–95 (1997) [hereinafter Silbaugh, *Commodification*]; Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 5–7, 85–86 (1996) [hereinafter Silbaugh, *Labor into Love*]; see also Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998). However, like Fraser, Silbaugh does not propose any specific method to reward housework or imply that housework should actually become market labor. See Silbaugh, *Labor into Love*, *supra*, at 85–86. While these symbolic reframing approaches contribute to the literature, they do not form the core of the debate, and they still, for the most part, idealize care work.

²² See Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994).

²³ *Id.* at 1092–93.

²⁴ *Id.* at 1111.

²⁵ *Id.* at 1112, 1122–24, 1166.

reform and the struggle for cultural recognition of women's work. However, the feminist position shifted over time.²⁶ After the Civil War, feminists began to disparage household labor²⁷ and to argue that women could achieve economic equality only by earning market wages and making housework a cooperative enterprise.²⁸

Despite the historical shift that Siegel documents, the joint property proposal still has proponents. For example, Joan Williams advocates a joint property system designed to redistribute wealth in order to compensate care work.²⁹ Echoing the arguments of nineteenth-century feminists, Williams objects to the remnants of the coverture system in modern property law, a system that gave a husband title to all marital assets. To reform this system, Williams proposes a joint property system that would entitle homemakers to an equal share of family income.³⁰ Williams also addresses the ideological barriers to gender equality, discussing a system that she labels "domesticity." This system has several components, including the gendered structure of market work, the understanding that the ideal worker has no childcare responsibilities, and a gendered sense of how much childcare can be delegated.³¹ To combat these constraints on women's choices, Williams argues that care work should be democratized under a "norm of parental care" that would encourage men to share responsibility for care of children's needs and would require the workplace to accommodate family responsibilities.³² Williams advocates removing those penalties and incentives in the market that, taken together, reinforce the image of the ideal worker, which mothers, according to Williams, never have time to become.³³ Arguably, with these incentives, men, as well as women, would choose to devote more time to family work.³⁴

²⁶ *Id.* at 1166–67, 1189–91.

²⁷ *Id.* at 1165, 1190–91.

²⁸ *Id.* at 1189–91, 1198.

²⁹ See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 124–31; Joan Williams, *Is Coverture Dead? Beyond a New Legal Theory of Alimony*, 82 GEO. L.J. 2227, 2257–66 (1994) [hereinafter Williams, *Is Coverture Dead*]; see also Williams, *Snowing*, *supra* note 15, at 819–20.

³⁰ See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 124–31.

³¹ See *id.* at 20, 124; Williams, *Is Coverture Dead*, *supra* note 29, at 2236. Although Williams varies her definition of what she calls "domesticity," these components reappear in her descriptions of the ideological constraints on women's choices.

³² WILLIAMS, UNBENDING GENDER, *supra* note 3, at 52–54. In a reference to Judith Butler's work on performativity and resignification, Williams calls her approach "domesticity in drag." *Id.* at 198, 245; see also JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 137 (1990) [hereinafter BUTLER, GENDER TROUBLE]. For a discussion of this incorporation of poststructuralist theory, see *infra* Part II.B.

³³ As Williams writes, "Social Security, unemployment, and other social programs linked with paid work help to systematically impoverish women by making receipt of benefits contingent on ideal-worker schedules that mothers do not work." Williams, *Domesticity*, *supra* note 2, at 1456.

³⁴ This conclusion has been challenged on grounds that Williams' proposals would not discourage some employees from working long hours. Furthermore, merely giving men the opportunity and the right to take leave for care responsibilities does not mean that they will

Martha Ertman advocates a similar type of community property system that would redistribute economic capital within the family to reward care-taking work.³⁵ Ertman argues that a “full life includes both work and love” and that “work for love” is as important as “work for wages.”³⁶ To recognize the value of care work, Ertman proposes a reformed system of property law governing marriage in which couples would be required to sign Premarital Security Agreements.³⁷ In this system, marriage would be viewed as a type of commercial relationship, in which the homemaker would be considered a secured creditor who extends credit to the primary wage earner in the form of domestic services.³⁸ Whether or not a marriage remains intact, the homemaker would share in the wage earner’s income.³⁹ As Ertman argues, primary homemakers make it possible for wage earners to achieve ideal worker status, unhindered by childcare responsibilities, and this contribution entitles those homemakers to a share of the market wages earned by their spouses.⁴⁰

B. State Welfare and Market Accommodation Approaches

Departing from the family-based strategies of joint property proposals, some feminists look to the state to solve the problem, endorsing the socialization of family work and the regulation of the market to require accommodation of care responsibilities. Arguing against the traditional assumptions of liberalism, this feminist approach advocates a revision of the relationship between the individual, the family, and the state in order to reapportion responsibility for family care. In one of the most sophisticated positions on the problems that reproduction poses for women, Martha Fineman uses the concept of the social contract to argue that there should be a collective responsibility for children and other dependents.⁴¹ Ac-

do so. See Case, *supra* note 11, at 1761 (“Even where they can, fathers often do not seek childcare leave. Why don’t they? For at least two reasons: because they think it will make them less attractive in the workplace and because, in more cases than I care to see, they can get women to do it for them.”).

³⁵ See Martha M. Ertman, *Commercializing Marriage*, 77 TEX. L. REV. 17 (1998) [hereinafter Ertman, *Commercializing Marriage*].

³⁶ Martha M. Ertman, *Love and Work: A Response to Vicki Schultz’ Life’s Work*, 102 COLUM. L. REV. 848, 848 (2002) [hereinafter Ertman, *Love and Work*].

³⁷ Ertman, *Commercializing Marriage*, *supra* note 35, at 55–57 (noting that the system would only impose default rules and would require couples actually to sign the agreement to place them on notice of the rules).

³⁸ *Id.* at 23, 41–44.

³⁹ On divorce or separation, the caretaker would have self-help remedies to claim marital property. *Id.* at 23, 38, 52.

⁴⁰ *Id.* at 21–22.

⁴¹ Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1410–11 (2001) [hereinafter Fineman, *Contract and Care*]; Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL’Y & L. 13, 16, 18 (1999) [hereinafter Fineman, *Cracking*]; see generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) [hereinafter FINEMAN, *NEUTERED MOTHER*];

According to Fineman, the family unjustly bears the burden of care work.⁴² Since all people are dependents at some time,⁴³ says Fineman, the public has an obligation to subsidize caretaking. In this theory, the liberal ideal of an independent and autonomous individual is neither practical nor desirable.⁴⁴ While traditional ideas about consent and assumption of individual responsibility suggest that women who choose to do care work have accepted their situation,⁴⁵ Fineman argues that background rules to social institutions define the terms of the social contract and that those background rules can be changed.⁴⁶ A social contract with Fineman's background rules would have subsidies for caregivers, including income redistribution and a restructured workplace to ensure that the market accommodates dependency burdens.⁴⁷

Linda McClain similarly seeks to establish care as a public value.⁴⁸ Arguing that the public should take responsibility to support the "society-preserving work done by families,"⁴⁹ she suggests reimagining the liberal ideas of independence and personal responsibility. Her approach, similar to Fineman's, would reward and subsidize the socially reproductive work that families do in training children to be responsible citizens.⁵⁰ According to McClain, care work is necessary to foster the capacity for self-government and should be understood as performing a vital civic function.⁵¹ Criticizing social structures that ignore the value of care, McClain seeks a reformation in all types of family structures, government benefits, and employment policy. She argues, for example, that the workplace should be restructured to accommodate childcare responsibilities and that the government should recognize the "work families do in providing care" through social programs that champion care work.⁵² Although McClain resists any precise blueprint for institutional remodeling, she

Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287 (1996) [hereinafter Fineman, *Dependencies*].

⁴² Fineman, *Cracking*, *supra* note 41, at 20 ("The assignment of responsibility for the burdens of dependency to the family in the first instance, and within the family to women, operates in an unjust manner because this arrangement has significant negative material consequences for the caretaker."); Fineman, *Dependencies*, *supra* note 41, at 288.

⁴³ Fineman, *Contract and Care*, *supra* note 41, at 1409 ("[B]oth dependency and subsidy are universal in our society."); Fineman, *Cracking*, *supra* note 41, at 18.

⁴⁴ Fineman, *Contract and Care*, *supra* note 41, at 1423; Fineman, *Cracking*, *supra* note 41, at 25–26.

⁴⁵ See Fineman, *Contract and Care*, *supra* note 41, at 1419–21; Fineman, *Cracking*, *supra* note 41, at 21–22.

⁴⁶ Fineman, *Contract and Care*, *supra* note 41, at 1424–48; see also Fineman, *Cracking*, *supra* note 41, at 21–22.

⁴⁷ Fineman, *Contract and Care*, *supra* note 41, at 1437.

⁴⁸ See Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673 (2001).

⁴⁹ *Id.* at 1687.

⁵⁰ See *id.* at 1682–83.

⁵¹ See *id.* at 1684–85.

⁵² See *id.* at 1704, 1717–22. For example, McClain approves of the "responsible fatherhood" component of the 1996 welfare reforms.

suggests that care work must receive greater social recognition for the public service it provides.

C. *The Commodification Approach*

Taking a different angle, other feminists argue that paid work is a central part of citizenship and identity formation and that complete equality can be achieved only through full participation in the market.⁵³ Vicki Schultz, for example, argues that feminism should abandon the project of seeking monetary compensation for domestic household duties.⁵⁴ Instead of staying at home, women should seek meaningful, life-sustaining work in the paid labor market. For Schultz, the gender-based distribution of work is the cause of women's disadvantage,⁵⁵ and the solution is to promote gender integration across both paid and unpaid labor.⁵⁶ Schultz sees work as a central part of identity formation and as an inviolate right commensurate with life, liberty, and the pursuit of happiness.⁵⁷ To promote the goal of giving women the opportunity to pursue meaningful work, Schultz proposes the commercialization of most household labor, creating more paying jobs and liberating those who currently provide family labor to pursue other work. Schultz suggests that the government and private employers must provide social supports like child-care⁵⁸ and must reduce the standard number of hours in the workweek to give all workers, including men, more time for family activities.⁵⁹ Similarly, the government should raise the minimum wage, offer wage subsi-

⁵³ See Barbara R. Bergmann, *The Only Ticket to Equality*, 9 J. CONTEMP. LEGAL ISSUES 75 (1998); see also WILLIAMS, UNBENDING GENDER, *supra* note 3, at 40 n.1 (coining the phrase "full-commodification" to describe Bergmann's argument). In another use of the concept of commercialization, many feminists defend their theories against the idea that they improperly commercialize family relationships. See Williams, *Is Coverture Dead*, *supra* note 29, at 2275–82; Ertman, *Commercializing Marriage*, *supra* note 35, at 33, 63; see also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1885 (1987) (arguing that "universal market rhetoric does violence to our conception of human flourishing"); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1631 (1996); Silbaugh, *Commodification*, *supra* note 21, at 83–84, 99–109, 120–21.

⁵⁴ Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000). Schultz criticizes other feminist proposals for resolving the care-work dilemma, including the joint property proposals, traditional welfare strategies, and the economic-based human capital theory, which holds that women perform household labor because they are simply better at it than men.

⁵⁵ See *id.* at 1883.

⁵⁶ See *id.* at 1884.

⁵⁷ See *id.* at 1886–92, 1938.

⁵⁸ See *id.* at 1938.

⁵⁹ See *id.* at 1956–57; see also *id.* at 1937. The proposal would make overtime more costly and provide an incentive for employers to hire more workers rather than require longer hours. To be widely successful, it assumes the elimination of the exceptions to the overtime provisions in the Fair Labor Standards Act. See 29 U.S.C. § 207 (1994). For similar proposals to restructure government benefits and workplace regulations, see WILLIAMS, UNBENDING GENDER, *supra* note 3, at 110–13.

dies, eliminate incentives in the welfare system that encourage women to stay home,⁶⁰ and recognize work as the cornerstone of family life.⁶¹

D. *The Critiques of Natalist Presumptions*⁶²

While some legal feminists struggle over how to make reproduction less burdensome for women, others have begun to question the premises and normative goals of the care-work debate.⁶³ In the most stinging critique, Katherine Franke challenges the largely unquestioned assumption in legal feminist theory that women must reproduce in their lifetimes.⁶⁴ She notes that while feminists have become more or less critical of the technologies of power that produce gender and sexuality, they have refused to apply the same critique to ideological forces that coerce women into motherhood.⁶⁵ She calls assumptions about the naturalness and inevitability of child bearing “repronormativity” and compares it to heteronormativity.⁶⁶ Franke insists that ideas about reproduction and preferences about whether to have children are the product of social forces but that legal feminists have refused to question the inevitability of reproduction. As Franke puts it, “To suggest that we reconceptualize procreation as a cultural preference rather than a biological imperative . . . is to initiate a conversation within feminism that has been explicitly and curtly

⁶⁰ See Schultz, *supra* note 54, at 1947–48.

⁶¹ *Id.* at 1952. See also Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557, 1565 (2001) (“Within our existing constraints, it seems rather clear that women are likely to gain more power through their labor market work, than by trying to enhance the value society places on what both Professors Fineman and Williams label as care work.”). In a response to Schultz’s work, Deborah Rhode argues that public policy, workplace structure, and cultural values should promote “balanced lives” for both men and women. See Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 834–35 (2002) [hereinafter Rhode, *Balanced Lives*]. Rhode rejects the idea that employment always defines individual identity and argues that no one should be forced into the paid labor force. See *id.* at 836. Instead, Rhode believes that care work should be recognized as a public good, and everyone should spend more time doing it. See *id.* at 839–41, 846–47. In a similar response, Joan Williams claims that Schultz privileges the viewpoint of work-identified women (whom she labels “tom-boys”) and silences the perspective of family-identified women (whom she labels “femmes”). See Williams, *Snowing*, *supra* note 15, at 815–16. While the emphasis in Rhode’s and Williams’ work differs from Schultz’s, they all have similar recommendations—reduce the number of hours in the workweek and eliminate career penalties for care work. See *id.* at 821–22; Rhode, *Balanced Lives*, *supra*, at 846.

⁶² By “natalist presumptions,” I am referring to the idea that women will find themselves inexorably drawn down the path to motherhood.

⁶³ While Martha Ertman and Joan Williams attempt to incorporate queer and post-structural theories of power, their writing appears committed to cultural feminist objectives, in that both take positions that celebrate what cultural feminism views as inherently female characteristics, such as “care, connection, and taking responsibility of others.” McClain, *supra* note 48, at 1706; see also *infra* Part II.B.

⁶⁴ See Franke, *Theorizing Yes*, *supra* note 6, at 184–85.

⁶⁵ See *id.* at 185–86.

⁶⁶ See *id.* at 185 (“[R]epronormativity remains in the closet even while heteronormativity has stepped more into the light of the theoretical and political day.”).

rejected.”⁶⁷ Franke encourages feminism to reimagine the social practice of reproduction, rather than merely arguing that it is the epitome of society-preserving work.⁶⁸ To start this revision, Franke questions the motives behind reproductive decisions, suggesting that women who choose to become mothers rarely if ever do so for purely altruistic reasons.⁶⁹ Instead, decisions to have children are based on personal and private considerations, including the selfish desire to create a family.⁷⁰ According to Franke, the important questions for feminism revolve around “choice, coercion, and policies that incentivize and disincentivize reproductive uses of women’s sexual bodies.”⁷¹

In a similar argument, Mary Anne Case suggests that feminism should question the incentive structures that privilege certain family forms by subsidizing reproduction. In particular, Case questions the ultimate implications of feminist proposals to shift childcare costs to employers.⁷² She worries that childless women will bear the brunt of such a shift, since those women have little to gain from such reforms but still face the risk of discrimination due to their childbearing potential.⁷³ Case wonders about the incentives created by workplace accommodation laws, suggesting that even gender neutral laws, like the Family Medical Leave Act, will not necessarily persuade men to help with family care responsibilities.⁷⁴ Further, under feminist proposals to socialize care work, private families would, and perhaps should, be accountable to the state for the citizens they raise and for ensuring that the public financing is actually spent for its intended purpose.⁷⁵ As for the market incentives that already subsidize family responsibilities, Case criticizes the childcare benefits offered by employers that condition benefits on parental status.⁷⁶ Ac-

⁶⁷ *Id.*

⁶⁸ Franke challenges the implicit distinction between production and consumption underlying the feminist debate that holds that reproduction is society-preserving work, while market consumption is not. *See id.* at 190–91 (“To portray mothering as purely altruistic, other-regarding, and socially valuable, and [market consumption] as purely selfish and socially inconsequential, is to ignore the complex interrelations between production, reproduction, and consumption, as well as the social forces that govern the ‘choices’ and priorities we set in our own lives.”).

⁶⁹ *See id.* at 190 (“I question whether ‘society-preserving work’ accurately or adequately describes how women actually experience the labor they are performing by having and raising children. . . . Indeed, I suspect that if polled, mothers would rank a species-regarding reason well behind more private and personal motivations for their decisions to reproduce.”).

⁷⁰ *See id.* at 190–91. Franke hypothesizes: “Women have children because they love them or the idea of them, to keep a marriage together, to meet social, spousal or parental expectations, to experience pregnancy, or to pass on the family name, genes, or silver.” *Id.* at 190.

⁷¹ *Id.* at 186.

⁷² *See Case, supra* note 11, at 1756.

⁷³ *See id.* at 1758–59.

⁷⁴ *See id.* at 1761.

⁷⁵ *See id.* at 1778, 1784–85.

⁷⁶ *See id.* at 1763–67. Because men in high-paying jobs are more likely to have children than are women in those positions—largely because men are more likely to have

ording to Case, if feminists must focus their attention on care work, they should struggle for workplace reform that allows more flexible work time for *all* employees regardless of parental status.⁷⁷ In this way, Case suggests that feminism should be committed to resisting ideas of reproductive inevitability particularly because the fact that childrearing has opportunity costs means that women have a wide range of options in addition to motherhood.⁷⁸

II. KIDS AND THE PRODUCTION OF NORMALCY

While the natalist premise of legal feminism has been discussed in general terms, the family values and child protection rhetoric, as well as the moralism of the debate, remain largely unexamined.⁷⁹ To be sure, some legal feminists try to distance themselves from the import of their rhetoric by cursorily mentioning the value of diverse family forms.⁸⁰ Nevertheless, most legal feminists use language that exalts the most traditional ideas of reproduction and family. As Joan Williams admits, for example, her work “posits a rosy vision of two parents each working a 30-hour week”⁸¹ in order to enable them to spend time with school-age children. Deborah Rhode falls prey to the same family values language when she laments the fact that “[f]amily values are a mainstay of political rhetoric but not of public policies or workplace structures.”⁸² This section discusses the prevalence of family values and child protection rhetoric in the feminist debate. I argue that feminist attempts to harness

spouses to take care of their children—the existing benefits may disproportionately benefit men in addition to rewarding certain types of family structures. *See id.* at 1765.

⁷⁷ *See id.* at 1768.

⁷⁸ *See id.* at 1781. Thus, according to Case, in deciding what legal reforms to support, feminists, should consider what sorts of other activities—like education or artistic endeavors—should be encouraged in place of childrearing. *See id.*

⁷⁹ Martha Fineman has criticized the rhetoric used to discuss the family. *See* Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2181–83 (1995) [hereinafter Fineman, *Masking Dependency*]. However, she focuses her attention on the myths of independence and autonomy circulating in the popular culture, not on the rhetoric in the feminist childcare debate itself. *Id.*

⁸⁰ *See, e.g.*, WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 9 (“The central argument of this book is that conventional family life does not work well for those who live it. I cannot stress enough that this is not the same as saying that everyone should live conventionally.”). The rest of the book, however, belies such an assertion. Williams’ proposals for institutional reform suggest that, at the end of the day, she would be happy if everyone formed traditional nuclear families—as long as a norm of parental care alleviated the gender inequity in the responsibility for care work. *See also* Martha M. Ertman, *Changing the Meaning of Motherhood*, 76 CHI.-KENT L. REV. 1733, 1736 (2001) [hereinafter Ertman, *Motherhood*].

⁸¹ Williams, *Snowing*, *supra* note 15, at 821.

⁸² Rhode, *Balanced Lives*, *supra* note 61, at 841; *see also id.* at 846 (“No country’s leadership talks so much and does so little about family values in workplace practices and resource priorities.”).

the moral and sentimental force of the innocence of children and the political power of family values are not neutral rhetorical strategies—nor do the theories that use this rhetoric have subversive potential, as some feminists claim.⁸³ Instead, the rhetoric normalizes and produces the very types of families that it purports to describe.

A. *Family Values and Child Idolatry in Legal Feminism*

The references to family values and child victimization in the feminist childcare debate are not just isolated or sporadic; they are everywhere. For purposes of discussion, the normalizing rhetoric can be organized under two headings. First, feminists mobilize ideas about child protection as the justification for social reform. By invoking images of suffering children, feminists argue that the workplace and other institutions must be altered to save children from harms of parental neglect. Second, feminists reference aspirational ideas of the good life, personal happiness, and individual health as the basis for public policy proposals.⁸⁴ Under this type of argument, feminists claim that mental health depends on the ability to spend time with family and assume that the decision to spend time at home raising children represents a necessary part of maturity and self-realization.⁸⁵ Both types of rhetoric take a putatively apolitical discourse and use it to make political arguments by framing the debate in terms of the supposed biological truth of children's needs and psychological health.

Some feminists rely heavily on the sentimental appeal of suffering children. Joan Williams, for example, uses the specter of the tormented child as the basis for much of her writing.⁸⁶ The norm of parental care, which is the structuring principle of her work, “starts from an assessment of children's needs.”⁸⁷ The ideal worker schedule that she criticizes “is inconsistent with the level and type of parental attention children need.”⁸⁸ In particular, the image of the impoverished child allows women to claim derivative victim status: “Children suffer in a system that first allocates

⁸³ See, e.g., Williams, *Domesticity*, *supra* note 2, at 1459 (“[T]he work/family agenda I propose would go a long way toward deconstructing the power now associated with hegemonic masculinity, by eliminating its legal/economic infrastructure . . . and the design of market work around men's bodies and life patterns.”).

⁸⁴ See Rhode, *Balanced Lives*, *supra* note 61, at 836–37 (“There are, of course, a host of problems in identifying precisely what makes people happy . . . [but] some consistent measures emerge from individuals' self-reports over time, together with information from family, friends, coworkers, and health records.”).

⁸⁵ For a criticism of the normative power and homophobic assumptions of the psychoanalytic literature that forms the basis of some of these claims, see EVE KOSOFKY SEDGWICK, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, in TENDENCIES, *supra* note 20, at 154, 154–64 [hereinafter SEDGWICK, *Gay Kids*].

⁸⁶ See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 48–63.

⁸⁷ *Id.* at 54.

⁸⁸ *Id.* at 51.

children's care to women and then marginalizes the women who do it, thereby undercutting their power to stand up for children's needs."⁸⁹ Linda McClain similarly argues that care work must be restructured to maximize "children's capacities for self-government."⁹⁰ She insists that we are currently in the middle of a care crisis that forces "mothers to leave children in unsafe and/or inadequate childcare arrangements," as she decries the "serious costs to children of having inadequate childcare in terms of their cognitive and social development, safety, and overall well-being."⁹¹ The need for the public to take responsibility for care work is demonstrated, according to McClain, by "the harm done to children" when it is not provided.⁹² Even Vicki Schultz deploys the idea of what is good for kids to support her work-centered approach: "Most of us work to provide better opportunities for our children than we had for ourselves."⁹³ According to Schultz, market work that women perform provides "some measure of economic stability [that] is a powerful gift to . . . children."⁹⁴ Finally, Deborah Rhode suggests that the mantra of "leave no child behind" should assume priority in setting public policies.⁹⁵

Some legal feminists also invoke monolithic and homogenizing ideas about the good life, personal happiness, and psychological health in support of their proposals.⁹⁶ Martha Ertman, for example, argues that "[p]rominent theories of psychological development support the view that work and love are equally important"⁹⁷ and assumes that the goal of feminism is consistent with the psychological definition of "a healthy personality."⁹⁸ Deborah Rhode similarly refers to what is "necessary or sufficient to a life well lived"⁹⁹ and "what makes people happy"¹⁰⁰ in the course of criticizing the idea that work is the only avenue to personal

⁸⁹ *Id.* at 57. Williams takes an extreme "pro-family," *id.* at 54, view of feminism and suggests that religion provides feminism with a "nongendered language of selflessness and virtue." *Id.* at 204; *see also id.* ("Both Christianity and Judaism thus offer strong nongendered rhetorics of selflessness that can serve to degender domesticity's allocation of selflessness to women.").

⁹⁰ McClain, *supra* note 48, at 1687.

⁹¹ *Id.* at 1696.

⁹² *Id.* at 1697. McClain insists that an argument to reward care work would apply equally to care for any dependent family member, elders as well as children, but her theory of social reproduction centralizes the importance of passing on values to the next generation. *See id.* at 1690–91.

⁹³ Schultz, *supra* note 54, at 1961.

⁹⁴ *Id.*

⁹⁵ Rhode, *Balanced Lives*, *supra* note 61, at 845.

⁹⁶ For a critique of the use of concepts like "the good life," see WARNER, TROUBLE WITH NORMAL, *supra* note 1, at 112 (discussing the ideological manipulation of "people's substantive and normative vision of the good life"); *see also* SEDGWICK, *Gay Kids*, *supra* note 85, at 154–64.

⁹⁷ Ertman, *Love and Work*, *supra* note 36, at 852.

⁹⁸ *Id.*

⁹⁹ Rhode, *Balanced Lives*, *supra* note 61, at 836.

¹⁰⁰ *Id.*

“fulfillment”¹⁰¹ or “satisfaction.”¹⁰² Rhode argues that feminism should support balanced lives for everyone, based on the claim that “close family relationships are as crucial to the well being of men as of women.”¹⁰³ Linda McClain also references “family health and the well-being of children” in calling for social reform.¹⁰⁴ Even Schultz romanticizes time spent with family when she advocates public policy reforms that would provide workers with “saner”¹⁰⁵ hours so they can spend more time with their families. These are only a few examples of the uses of this rhetoric; there are many others.¹⁰⁶

B. Poststructuralism, Subversion, and Excuses for Normalcy

Some legal feminists participating in this debate claim that their proposals, even with this rhetoric, have the capacity to transform the family and to undermine traditional definitions of gender. In making this claim, feminists invoke the language of poststructuralism, including its concept of subversive resignification and its plural and decentralized understanding of power. To appreciate how some legal feminists have turned poststructuralism against its radical roots by using it to sanction conventional family arrangements and to legitimate traditional gender identities, it is necessary to make a brief digression into poststructuralist theory and feminist use of poststructuralist concepts.

According to poststructuralism, power comes from everywhere.¹⁰⁷ It is decentralized¹⁰⁸ and emanates from every discursive apparatus and social institution, including, among other things, hospitals, schools, the market, and the family as well as any system of knowledge.¹⁰⁹ It is con-

¹⁰¹ *Id.* at 837.

¹⁰² *Id.*

¹⁰³ *Id.* at 838.

¹⁰⁴ McClain, *supra* note 48, at 1696.

¹⁰⁵ Schultz, *supra* note 54, at 1939.

¹⁰⁶ See, e.g., Rhode, *Balanced Lives*, *supra* note 61, at 845 (“Millions of children are in unsupervised, unsafe, or developmentally inadequate settings”); WILLIAMS, UNBENDING GENDER, *supra* note 3, at 273–74 (“One part [of domesticity] worth preserving is the notion that children need parental guidance and companionship throughout their youth”).

¹⁰⁷ See MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION 93 (Robert Hurley trans., Vintage Books 1990) (1976) [hereinafter FOUCAULT, HISTORY OF SEXUALITY] (“Power is everywhere; not because it embraces everything, but because it comes from everywhere.”).

¹⁰⁸ *Id.* at 94 (“Power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away; power is exercised from innumerable points”).

¹⁰⁹ See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) [hereinafter FOUCAULT, DISCIPLINE AND PUNISH] (“Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons.”); see also *id.* at 211–12, 226 (discussing the proliferation of disciplinary mechanisms).

stantly shifting and reproducing itself¹¹⁰—it is productive rather than repressive.¹¹¹ Similarly, because individual subjectivity is created in and through discourse, there is no outside position from which to resist the workings of power; in fact, individuals in this theory are the bearers of their own subjection.¹¹² Resistance is not impossible, but it is never exterior to power,¹¹³ and it is as diffuse as the power it opposes.¹¹⁴

Feminists have used this theory of power to analyze gender and sexual identity and to theorize resistant strategies. In Judith Butler's work, which several feminists in the childcare debate claim they endorse,¹¹⁵ the theory of gender performativity suggests that ideas about sex are created through the repetition of gender performances.¹¹⁶ Repeated performances of femininity create the notion of a natural or biological sexual identity—an idea that switches the priority of what is typically thought to be the original, i.e., biological sex, and what is typically thought to derive from sex, i.e., the social meaning of gender.¹¹⁷ Under a theory of subversive resignification, imitations of femininity *both* reinforce the norm *and* subvert it through slippage in the repetition.¹¹⁸ For example, drag perform-

¹¹⁰ See FOUCAULT, HISTORY OF SEXUALITY, *supra* note 107, at 93 (“‘Power,’ insofar as it is permanent, repetitious, inert, and self-reproducing, is simply the over-all effect that emerges from all these mobilities . . .”).

¹¹¹ *See id.*

¹¹² See FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 109, at 217 (“We are . . . in the panoptic machine, invested by its effects of power, which we bring to ourselves since we are part of its mechanism.”).

¹¹³ See, e.g., FOUCAULT, HISTORY OF SEXUALITY, *supra* note 107, at 95 (“[R]esistance is never in a position of exteriority in relation to power.”); *see also id.* at 45–46; BUTLER, GENDER TROUBLE, *supra* note 32, at 29; FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 109, at 26–28, 195–228.

¹¹⁴ See FOUCAULT, HISTORY OF SEXUALITY, *supra* note 107, at 95–96 (“[T]here is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances . . .”); *see also id.* at 101 (“We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.”).

¹¹⁵ See, e.g., Williams, *Domesticity*, *supra* note 2, at 1459 (“Indeed, . . . I declared my solidarity with the queer agenda by centering the work of Judith Butler and the political uses of drag.”).

¹¹⁶ See BUTLER, GENDER TROUBLE, *supra* note 32, at 31–34, 137–41.

¹¹⁷ *See id.* at 33 (“Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being.”); *id.* at 140 (“Gender ought not to be construed as a stable identity or locus of agency from which various acts follow; rather, gender is an identity tenuously constituted in time, instituted in an exterior space through a *stylized repetition of acts*.”).

¹¹⁸ *See id.* at 141 (“The possibilities of gender transformation are to be found precisely in the arbitrary relation between such acts, in the possibility of a failure to repeat, a deformity, or a parodic repetition that exposes the phantasmatic effect of abiding identity as a politically tenuous construction.”); *see also* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX 128–37 (1995) [hereinafter BUTLER, BODIES THAT MATTER] (discussing the ambivalent relationship to power of the drag performances in the

ances destabilize the gender system by exposing the imitative structure of gender,¹¹⁹ but, at the same time, drag reinscribes and legitimates the desirability of the norm through a type of flattering imitation.¹²⁰ Despite this ambivalence, subversive resignification and parodic imitation are the privileged techniques of resistance in feminist poststructuralism.

In the care-work debate, these poststructuralist concepts have been used to validate traditional gender performances and conventional family arrangements. Joan Williams, for example, references poststructuralist theories of subversive resignification, gender performativity, and a totalizing theory of power. In particular, she suggests that her theory should be understood as “domesticity in drag” with “gender bending” potential.¹²¹ She claims that women who are trapped in the system of domesticity should get credit for the ways they already resist strict conformance with traditional ideas of femininity.¹²² For example, some housewives already refuse to do particularly difficult types of household labor, such as scrubbing floors.¹²³ This resistance, according to Williams, bends the system of domesticity.¹²⁴ Similarly, she suggests that her norm of parental care deconstructs the ideal of a worker without childcare responsibilities and encourages all workers, including men, to perform care work.¹²⁵ These small deviations from conventional ideas of gender, Williams claims, have the revolutionary potential to change the whole system of gender and the family.

Martha Ertman similarly cites poststructuralist theories of gender performativity to support her claim that her proposals have subversive

documentary “Paris is Burning”).

¹¹⁹ BUTLER, *BODIES THAT MATTER*, *supra* note 118, at 137.

¹²⁰ *See id.* at 133, 137.

¹²¹ WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 257. Williams also confuses the both/and theory of subversive resignification with the idea that all progressive politics are equally valid. Williams suggests that legal feminism should incorporate *both* a theory of sameness *and* a theory of difference, arguing that neither side in the debate should be silenced. Williams, *Snowing*, *supra* note 15, at 816–17. Williams similarly uses “tomboy” and “femme” in a way that distorts queer projects. *See id.* at 813–15. While queer theory used “butch” and “femme” to expose the performative nature of gender and its contingent connection to sexuality, *see* BUTLER, *GENDER TROUBLE*, *supra* note 32, at 31, 137, Williams uses the rhetoric simply to describe conforming (femme) and non-conforming (tomboy) gender performances. *See* Williams, *Snowing*, *supra* note 15, at 813–14. What is particularly unsettling about these definitions is that it destroys what was interesting about butch and femme gender identities—that both exposed the imitative structure of gender rather than representing the opposite poles of a rigidly diacritical system. *See* Bidy Martin, *Sexualities Without Genders and Other Queer Utopias*, *DIACRITICS*, Summer-Fall 1994, at 104, 104–21 (Judith Butler & Bidy Martin eds.); *see also* Gayle Rubin & Judith Butler, *Sexual Traffic: Interview*, in *FEMINISM MEETS QUEER THEORY* *supra* note 20, at 95 [hereinafter Rubin & Butler, *Sexual Traffic*] (discussing the continued need for a theory of gender in a theory of sexuality).

¹²² WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 258.

¹²³ *Id.*

¹²⁴ *Id.* at 257–60.

¹²⁵ *Id.* at 4–5, 258.

potential.¹²⁶ For example, Ertman compares the housewife in her system to a drag queen: “Perhaps the homemaker, like the drag queen, plays a role that similarly has the potential to reshape gender. [The] drag queen and homemaker are both representations of idealized femininity. As such, radical feminists should appreciate a homemaker’s potentially subversive performance of femininity as much as a drag queen’s.”¹²⁷ Under Ertman’s theory, the housewife is understood as a creditor who extends a loan to the primary wage earner in the form of domestic services.¹²⁸ This understanding of the creditor housewife, according to Ertman, destabilizes the rigid system of gender identity by blending traditionally feminine performances with masculine market ideology; in this way, the housewife, just like the drag queen, upsets conventional notions of gender.¹²⁹

Despite these scholars’ claims, a housewife’s queeniness is questionable to say the least; the gender performance of the traditional housewife would seem to be the epitome of a repetition that, as Butler describes, is not truly “troubling” to the system of gender normalcy.¹³⁰ While some legal feminists find subversive potential in fairly conventional gender performances, the type of performance they champion is not even a parody, let alone a parody of the notion of an original. The gender performances these feminists discuss may not wholly embody the traditional norm, but they are not particularly troubling or disruptive to conventional notions of gender. They are not performances, in short, that expose the artifice of gender itself. In these cases, the performance or repetition does not compel—or even suggest—a radical rethinking of gender identity and sexuality. Instead, these feminists exploit the poststructuralist idea that power is ubiquitous and unavoidable to justify conventional gender performances and sexual relations. In other words, feminists turn poststructuralism against its project of destabilization and antinormalization when they use it to eulogize traditional family arrangements and conventional gender performances. In arguing this way, these feminists confuse the principle that resistance is never exterior to power with the idea that all performances are equally resistant.¹³¹ In short, poststructuralism has ironically become an excuse for normalcy.

¹²⁶ See Ertman, *Love and Work*, *supra* note 36, at 860 (“My perspective incorporates the postmodern insight that there is no position outside power relationships, and further that any particular institution has the potential to be both subordinating and liberating.”).

¹²⁷ Ertman, *Commercializing Marriage*, *supra* note 35, at 91.

¹²⁸ See *supra* notes 37–40 and accompanying text.

¹²⁹ See Ertman, *Love and Work*, *supra* note 36, at 861; Ertman, *Commercializing Marriage*, *supra* note 35, at 91.

¹³⁰ BUTLER, *GENDER TROUBLE*, *supra* note 32, at 139 (“Parody by itself is not subversive, and there must be a way to understand what makes certain kinds of parodic repetitions effectively disruptive, truly troubling, and which repetitions become domesticated and recirculated as instruments of cultural hegemony.”); BUTLER, *BODIES THAT MATTER*, *supra* note 118, at 133 (discussing the ways that drag performances at times reinscribe and legitimate the norm of femininity).

¹³¹ Michael Warner has criticized theories that presume all performances, no matter

C. The Effects of Legal Feminist Rhetoric

Not only does the appeal to family values and child welfare lack subversive potential, it is a doomed political strategy. Feminists may think that their use of family values language subversively redeploys a conservative rhetoric; however, it implicitly endorses other uses of the same type of language. To the extent child protection ideology is deployed elsewhere to punish women—for example, in the idea that women should stay home to care for children—feminists should hesitate before using it. Further, the moralistic politics and sentimentalism of the debate—particularly when some feminists argue that women are derivative victims because of the needs of their children¹³²—traps women in a position of subordination. To fight gender subordination effectively, feminists should rethink their political strategy.

In addition to failing on feminists' own terms, the child idolatry and family values of the debate has productive and destructive effects. It helps to encourage the formation of traditional families by making it easier for conservative groups to achieve their political agendas. In addition, their rhetoric reinforces the normalcy and desirability of the traditional family model. Despite feminists' claims that they remain neutral about the what types of families people should form, they tacitly encourage conventional family arrangements. If feminists are really neutral about what choices people *should* make, then why do they phrase their claims normatively, i.e., that care for children embodies a public good as well as a moral choice? Feminists should recognize the normalizing power of their work and admit that their proposals are political projects not moral imperatives.

how they are scripted, destabilize convention and normalcy. He writes: "No theory that takes queerness as inevitable in principle, or normalization as impossible in principle, can be much use in making . . . judgment[s]." WARNER, *TROUBLE WITH NORMAL*, *supra* note 1, at 143. However, at least some of the feminists in the childcare debate adopt an approach that resemble the inevitable-queerness idea. According to some scholars, domesticity has completely and totally trapped women such that any deviation from an idealized norm—which means every gender performance because the norm can never be perfectly played—destabilizes the norm itself. *See, e.g.*, WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 273; *see also* Ertman, *Love and Work*, *supra* note 36, at 860 (suggesting that any gender performance might be subversive since "there is no position outside power relationships").

¹³² *See, e.g.*, FINEMAN, *NEUTERED MOTHER*, *supra* note 41, at 163 ("The very process of assuming caretaking responsibilities creates dependency in the caretaker."); Fineman, *Dependencies*, *supra* note 41, at 293 ("Caretakers of inevitable or biological dependents are themselves often dependent on the resources of others to be able to provide that care. I call this type of dependency 'derivative dependency.'"); *see also* WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 57.

1. Social Conservatives Rely Heavily on the Same Family Values and Child Welfare Rhetoric

The references to family values and child protection by legal feminists do not exist in isolation. Anxieties over child protection and deteriorating families have been mobilized for an amazing range of conservative political agendas.¹³³ From the opposition to gay teachers¹³⁴ to the regulation of pornography,¹³⁵ the idea of children's vulnerability is used everywhere to appeal to and lobby for a certain vision of normalcy.¹³⁶ The more feminists appeal to sentimental ideas of the danger to families and children, the more difficult it is to attack these other uses of the same rhetoric. Thus, while legal feminists might claim to support sex education or gay adoption, for example,¹³⁷ their use of family values language allies them with anti-sex and homophobic political campaigns that vehemently insist that unconventional sexual desire threatens children.¹³⁸ The

¹³³ For a recent example of the idea of child protection as the animating principle in a conservative judicial opinion, see Chief Justice Moore's concurring opinion in *Ex Parte H.H.* in which he wrote: "This Court has recognized that homosexual conduct and the homosexual lifestyle have a detrimental effect on the well-being of children." *Ex Parte H.H.*, 2002 WL 227956, at *7 (Ala. Feb. 15, 2002) (Moore, C.J., concurring specially). The rhetoric of child protection has also been at the center of recent public policy discussions, including the release of Judith Levine's book *HARMFUL TO CHILDREN: THE PERILS OF PROTECTING CHILDREN FROM SEX* (2002). See Michael Bronski, *The Kids Are Alright*, *BOSTON PHOENIX*, Apr. 19, 2002, at 22–23 (discussing the political debate over the release of the book, which itself criticizes child protection ideas). For a classic example of the way that child vulnerability and the deterioration of the traditional family have been sensationalized for political purposes, see RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 167–90, 203–33 (1994).

¹³⁴ For a discussion of the child protection rhetoric in the Briggs Initiative, a referendum question on the November 1978 California state ballot that would have permitted the firing of any school employee who discussed homosexuality, see Nan D. Hunter, *Identity, Speech and Equality*, in *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 123, 128–31 (Lisa Duggan & Nan D. Hunter eds., 1995) [hereinafter *SEX WARS*]. See also Melinda Beck et al., *The New Issue: Gay Teachers*, *NEWSWEEK*, Oct. 2, 1978, at 56 (quoting State Senator Briggs, who said "The only way they can get children is to recruit our children. I can't think of a better setting than the classroom.").

¹³⁵ See, e.g., Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–736 (codified as amended at 47 U.S.C. §§ 223, 231).

¹³⁶ The perfect example of a political battle waged in the name of children occurred in the 1970s when the Save Our Children campaign was founded by Anita Bryant to oppose legal protection for gay men and lesbians. See Tom Mathews et al., *The Battle Over Gay Rights*, *NEWSWEEK*, June 6, 1977, at 16; Anita Bryant, *1977 Speech*, in *QUOTATIONS ABOUT HOMOSEXUALITY AND GAY RIGHTS*, at <http://www.quotegarden.com/homosexuality.html> (last visited Feb. 6, 2002) ("As a mother, I know that homosexuals cannot biologically reproduce children; therefore, they must recruit our children.").

¹³⁷ See, e.g., WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 200.

¹³⁸ For just some of the numerous examples of the child protection rhetoric deployed by the conservative right wing, see James C. Dobson, *The Family in Crisis*, *FOCUS ON THE FAMILY MAGAZINE* ("I have been most concerned about the anti-family agenda being pushed forward by radical homosexual activists . . . [who] have targeted children and youth with the objective of capturing their hearts and minds.") at <http://www.family.org/fofmag/pp/a0016944.html> (last visited Jan. 27, 2002); see also *id.* ("Radical feminists, abortion

specter of child victimization has a near conversation-stopping power because discussions about children and threats to their safety evoke strong sentimentalism and powerful moral taboos.¹³⁹ Feminists should be wary of further sensationalizing the vulnerability of children. By making it harder to oppose conservative anti-sex projects, feminists who use child protection rhetoric tacitly promote the type of traditional family that they purport merely to describe.¹⁴⁰

2. *The Family Values and Child Protection Rhetoric Defines Motherhood as Subordination*

Legal feminists rely on the language of victimization and moral re-primination to justify public policy reform.¹⁴¹ Most feminists in this debate employ a type of moralism to insist that childrearing represents the pinnacle of society-preserving work and that women have been punished for performing it. These feminists attempt to arouse sympathy for women by claiming that mothers have been victimized because of their responsibility for dependent children.¹⁴² In this rhetorical strategy, legal feminists appeal to a pathos of suffering by invoking the ultimate victim—the helpless child—to allow mothers to wield the weapon of righteous injury, an idea that has become a powerful political tool in modern times.¹⁴³ In particular, feminists attempt to evoke a sense of moral outrage to argue

zealots, liberal politicians and haters of the Judeo-Christian ethic have in their own ways ushered in a new era devoid of religion, gender distinctions and traditional family relationships.”).

¹³⁹ See Case, *supra* note 11, at 1754 (discussing how difficult it is to oppose benefits for children).

¹⁴⁰ The similarity between the rhetoric employed by feminists and that used by social conservatives is almost unmistakable. Compare FINEMAN, NEUTERED MOTHER, *supra* note 41, at 235 (“Mothering should be thought of as an ethical practice, as embodying the ideal of social ‘goodness.’”) with Governor George W. Bush, Address to National Summit on Fatherhood (June 2, 2000), in Presidential Campaign Press Materials, LEXIS, News Library, Transcripts File (“There is no more important mission in life than to love and care for a child.”), quoted in McClain, *supra* note 48, at 1678; and WILLIAMS, UNBENDING GENDER, *supra* note 3, at 63 (“If we as a society take seriously children’s need for parental care, it is time to stop marginalizing the adults who provide it.”) with Jason Collum, *What Influences America’s Youth*, AM. FAM. ASS’N J. (Aug. 2001), available at <http://www.afa.net/journal/august/family2.asp> (“[A]s America’s moral slide continues, experts agree parents need to spend more time with their children.”).

¹⁴¹ See, e.g., WILLIAMS, UNBENDING GENDER, *supra* note 3, at 4–5 (“Eliminating the ideal-worker norm in market work requires restructuring work around the values people hold in family life, in particular around the norm of parental care—the sense that children should be cared for (to a certain, undefined extent) by their parents, not by ‘strangers.’”).

¹⁴² See, e.g., Fineman, *Dependencies*, *supra* note 41, at 293 (describing the concept of “derivative dependency”).

¹⁴³ Even Martha Fineman, who has one of the most insightful critiques of the family, falls into the same moralistic trap and the language of victimization. For example, she says that “[A]s a society, we do not value caretaking or caretakers In fact, we burden those who would caretake with ideological and actual impediments that make their tasks more difficult.” FINEMAN, NEUTERED MOTHER, *supra* note 41, at 9; *id.* at 230–31 (discussing a concern for “the ‘weaker’ members of society, the dependents who need protection.”).

that care responsibilities should be valued and current career penalties on care responsibilities removed.¹⁴⁴ Some feminists presume that the needs of children and the value of care work are so morally universal that they do not frame their claims as moral arguments but as simple statements of truth.¹⁴⁵ Despite the apolitical appearance of moralism, these theories pursue a political agenda in deploying sentimental ideas of children and family to argue for a material redistribution of resources. Legal feminists attempt to ensure that women can have a successful career, while simultaneously having time to give the care to their children and husbands that they feel ethically compelled to provide.

While some feminists suggest that their arguments rest on biological or moral truths, the relationship between politics, morality, and truth is not quite so simple. Wendy Brown has critiqued the piety and moralism of the contemporary feminist movement, suggesting that feminist moralizing is emblematic of the politics of late modernity in which political power has become tied to claims of righteous injury and vengeful re-tribution.¹⁴⁶ The moralism in contemporary political discourse veils a will to power behind the idea that moral principle is antithetical to politics.¹⁴⁷ However, the moralism of political movements dooms their ultimate goals because, as Brown discusses, “identity structured by this ethos becomes deeply invested in its own impotence, even while it seeks to assuage the pain of its powerlessness through its vengeful moralizing.”¹⁴⁸ The moralism of legal feminism in the childcare debate is deeply committed to this ethos of victimization and participates in the strategy of identity-based moralizing by attempting to use the politics of suffering to seek material gains for mothers. Despite the prevalence of this language in contemporary political debates, the sentimentalism and moralistic language has limited emancipatory potential as it entrenches the definition of motherhood in subordination.¹⁴⁹

¹⁴⁴ See, e.g., Rhode, *Balanced Lives*, *supra* note 61, at 841 (“The current balance of care-taking responsibilities is seriously askew, and women have for too long paid the price.”).

¹⁴⁵ See *id.*

¹⁴⁶ See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 45, 48 (1995) [hereinafter BROWN, *STATES OF INJURY*]; WENDY BROWN, *POLITICS OUT OF HISTORY* 20–21, 39–40 (2001) [hereinafter BROWN, *POLITICS OUT OF HISTORY*].

¹⁴⁷ See BROWN, *POLITICS OUT OF HISTORY*, *supra* note 146, at 22–26.

¹⁴⁸ BROWN, *STATES OF INJURY*, *supra* note 146, at 70; see also BROWN, *POLITICS OUT OF HISTORY*, *supra* note 146, at 27–30, 39–40.

¹⁴⁹ See BROWN, *STATES OF INJURY*, *supra* note 146, at 74 (discussing how identity structured by Nietzschean *ressentiment* continually resubjugates itself because of investments in its own pain); see also BROWN, *POLITICS OUT OF HISTORY*, *supra* note 146, at 139, 171–73 (discussing how political movements must view historical injury and contemporary redemption without resorting to the politics of moralism).

3. *The Language of the Feminist Debate Has Productive and Regulatory Effects*

The use of child welfare and family values rhetoric is not just a neutral political strategy to make the traditional family more livable for those already in it.¹⁵⁰ Simply put, the rhetoric does not just take families as it finds them. Instead, it encourages conventional family arrangements¹⁵¹ and sanctifies traditional ideas of maternalism, particularly when feminists insist that raising babies is “the most important job in the world.”¹⁵² This language has productive and normalizing effects.

Louis Althusser articulates how ideological institutions such as schools, churches, political parties, and the family¹⁵³ help to reproduce the conditions of production by indoctrinating people into the rules of the established order.¹⁵⁴ These institutions differ from the state apparatus—made up of such things as the police, courts, and prisons—in that ideological institutions function primarily through ideology,¹⁵⁵ rather than repression or violence, and belong in the private, rather than public, domain.¹⁵⁶ Ideology circulates through a process that Althusser calls interpellation or hailing.¹⁵⁷ In the classic example, a police officer hails someone on the street by shouting, “Hey, you there!”¹⁵⁸ In turning around and recognizing that the hail refers to him, the hailed individual submits to the language of the interlocutor, and in this process, subjectivity is formed.¹⁵⁹ In this way, lan-

¹⁵⁰ Some feminists have particularly emphasized that they do not want to discourage alternative family forms. *See, e.g.*, WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 9 (“[A]lthough this book concerns the settled household life, this focus is not meant to imply that is the only meaningful way to live. Alternatives have always existed, from monkhood to hippiedom, with many in between.”); *see also id.* at 200 (“I believe that families are healthier when alternatives exist to family life. So long as people with little predisposition toward family life are policed into it, families will suffer.”); Ertman, *Motherhood*, *supra* note 80, at 1736.

¹⁵¹ *See* WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 200 (“I believe . . . that family life is so important that everyone should have access to it. Anyone should be able to make a sincere commitment to start and sustain a family with someone they love.”).

¹⁵² *E.g.*, ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 2* (2001).

¹⁵³ LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 143 (1971). Althusser labels these institutions “ideological State apparatuses” or “ISAs.” *Id.* at 142.

¹⁵⁴ *See id.* at 132 (discussing how “the reproduction of labour power requires not only a reproduction of its skills, but also, at the same time, a reproduction of its submission to the rules of the established order, i.e. a reproduction of submission to the ruling ideology”).

¹⁵⁵ Ideology is defined as “the system of the ideas and representations which dominate the mind of a man or a social group.” *Id.* at 158. In other words, ideology is “not the system of real relations which govern the existence of individuals, but the imaginary relation of those individuals to the real relations in which they live.” *Id.* at 165.

¹⁵⁶ *See id.* at 144–45.

¹⁵⁷ *Id.* at 174.

¹⁵⁸ *Id.*

¹⁵⁹ As Althusser discusses, these things actually happen without temporal succession. *See id.* at 175 (“The existence of ideology and the hailing or interpellation of individuals as subjects are one and the same thing.”). In fact, individuality does not precede subjectivity; “individuals are always-already subjects.” *Id.* at 176. For an analysis of the hailing process

guage controls not only the way that individuals imagine their relationship to the material conditions of production—to use Althusser's terms—but the way that individuals imagine themselves. For my purposes, the relevant idea is that language has productive, formative, and even performative power.¹⁶⁰

Like other ideological apparatuses, the legal feminist discourse in the childcare debate conditions how family and reproduction are understood. By hailing subjects with family values and childcentric language, legal feminists produce and reinforce the desirability of the traditional family structure and childbearing as the preferred entrance into this institution. In fact, the moralistic discourse functions as a particularly effective regulatory mechanism because it has the appearance of ideological neutrality.¹⁶¹ The power of this rhetoric should not be underestimated; as Althusser suggests, the family and education have become the dominant ideological institutions of contemporary society.¹⁶² In sum, the feminist debate normalizes the traditional family and childbearing as a necessary part of the family structure. It does not, as some feminists insist, just propose neutral responses to the choices that women already make.

III. ANTINORMALIZATION FEMINISM

The argument that feminist rhetoric normalizes certain ideas about the family does not answer the question of whether legal feminists should have an antinormalizing agenda. That is to say, it could be argued that it is perfectly appropriate for feminists to encourage normalcy, as long as they admit the normalizing effect of their work.¹⁶³ After all, traditional families sometimes work out well for women, and motherhood may be

in Althusser's theory, see BUTLER, BODIES THAT MATTER, *supra* note 118, at 121–23.

¹⁶⁰ See, e.g., BUTLER, BODIES THAT MATTER, *supra* note 118, at 121, 224–25; MONIQUE WITTIG, *The Straight Mind*, in THE STRAIGHT MIND AND OTHER ESSAYS, 21, 24–25 (1992); ANDREW PARKER & EVE KOSOFSKY SEDGWICK, *Introduction: Performativity and Performance*, in PERFORMATIVITY AND PERFORMANCE 1, 1–18 (Andrew Parker & Eve Kosofsky Sedgwick eds., 1995).

¹⁶¹ See ALTHUSSER, *supra* note 153, at 156. To the extent that the feminist discourse veils its political project, it conveys the impression that individuals are completely free to make their own choices, and to the extent that the individuals hailed by this language believe themselves to be outside of ideology, they begin to self regulate. See *id.* at 182 (“[T]he individual is interpellated as a (free) subject in order that . . . he shall (freely) accept his subjection, i.e. in order that he shall make the gestures and actions of his subjection ‘all by himself.’”).

¹⁶² See *id.* at 151–54.

¹⁶³ For the idea that scholars should at least be honest about the effects of their work, see Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A SURVEY OF NATIONAL EUROPEAN AND INTERNATIONAL LAW 97, 97 (Robert Wintemute & Mads Andenaes eds., 2001) [hereinafter Halley, *Recognition, Rights, Regulation, Normalisation*] (“At the very least, I hope to persuade those who seek [same-sex marriage] to do so with more frankness about their implicit endorsement of Regulation and Normalisation.”).

the most important job in the world for some people. However, I want to suggest that feminism has a stake in antinormalizing projects. First, given the role that maternalism and reproduction have played in gender subordination, feminists should be suspicious of child idolatry and baby centrism. Second, the institutions of marriage and the family have historically limited the roles that women play and the way women are imagined. Feminism should oppose the maternalist ideology that has been ritualized in these institutions. Third, normalcy pushes people into limited, stultifying positions. To the extent that choice in family affairs is good, normalcy is bad. Finally, the traditional family and ideas of child welfare have been used to punish all types of sexual practices and relationships that fall outside of the traditional family model. An antinormal commitment resists the regulatory effects of traditional family orthodoxy.

In reaching the conclusion that feminists should oppose traditionalism and normalcy, it will be useful, as a preliminary point, to disaggregate four distinct theoretical positions that have emerged in discussions of the family. One position is a pro-normalcy approach, which holds that the conventional family is good for society, for individuals, and for children. Most obviously, conservative family groups take this view, but it is shared by many, if not most, individuals.¹⁶⁴ A second position is the multicultural toleration approach. This position suspends normative judgment on what family form works best, suggesting that we should acknowledge diversity without encouraging any particular choice. The classic liberal would take this approach, and in the feminist childcare debate, Joan Williams would fit somewhat uncomfortably here.¹⁶⁵ A third position endorses a multicultural pluralism model. This position suggests that we should encourage alternative family forms and pluralize the definition of family. Under this view, diversity or heterogeneity are normatively good, although no particular family form is necessarily better than another. Eve Sedgwick has articulated a propluralism idea, and many feminists would join her here.¹⁶⁶ Finally, a fourth view might be that traditional families are stultifying and banal and that it is better to live uncon-

¹⁶⁴ See, e.g., Collum, *supra* note 140.

¹⁶⁵ See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 9, 200. For an example of the liberal idea of choice appearing in feminist literature, see Littleton, *supra* note 15, at 1297 (“[T]he function of equality is to make gender differences, perceived or actual, costless relative to each other, so that anyone may follow a male, female, or androgynous lifestyle according to their natural inclination or choice.”).

¹⁶⁶ See, e.g., SEDGWICK, *Avunculate*, *supra* note 20, at 71 (“The easiest path [to redeem the family] . . . would be advocacy of a more elastic, inclusive definition of ‘family’ . . . to do justice to the depth and sometimes durability of nonmarital and/or nonprocreative bonds, same-sex bonds, nondyadic bonds, bonds not defined by genitality, ‘step’-bonds, adult sibling bonds, nonbiological bonds across generations, etc.”); see also MICHELE BARRETT & MARY MCINTOSH, THE ANTI-SOCIAL FAMILY 134 (1982) (arguing that “we should work for immediate changes that will increase the possibilities of *choice* so that alternatives to the existing favoured patterns of family life become realistically available and desirable”); *id.* at 134–59.

become defined around a fascinating paradox. Since queer theory first appeared on the scene in the early 1990s, queer politics has had a fervent anti-identitarian agenda—a politics of “I am not that name.”¹⁷¹ In an era of same-sex marriage wars, however, the focus of a queer critique has shifted to an anti-assimilation agenda—a politics of “I don’t want to be normal.”¹⁷² These different definitions of a queer politic imagine different threats: the anti-identitarian commitment resists identity-based categorization while the anti-assimilation idea reflects a fear of acculturation. Because of this dual definition, queer politics can alternatively be described as an anti-category or anti-identitarian theory on the one hand and a pro-minority or anti-assimilation theory on the other. The first aspect of the definition suggests that sexual identities have a disciplinary or regulatory function, and the second vehemently insists on difference from the mainstream.

While on the surface the two positions seem incommensurable, the anti-assimilation commitment can in fact be reconciled with the anti-identitarian ideal. A resistance to assimilation by celebrating queer life does not necessarily reinforce the stability of identity categories. The celebration of dissident sexual practices does not rely solely on an identity logic.¹⁷³ In fact, it pluralizes ideas about sex, and in the process, it dislodges the centrality of the homo-hetero binary to the definition of

230; EVE KOSOFSKY SEDGWICK, *Queer and Now*, in TENDENCIES, *supra* note 20, at 1, 8–9 [hereinafter SEDGWICK, *Queer and Now*]; Warner, *Introduction*, *supra* note 1, at xxvi–xxviii. In fact, in recent years, queer theory seems to have had such striking insights into the cultural production of gender and sex that it is difficult to resist the impulse to subsume a politics of gender under the rubric of queer theory, an impulse that reverses the idea from which queer theory was born—that a politics of sex could be subsumed within a theory of gender. See EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 27–35 (1990) [hereinafter SEDGWICK, EPISTEMOLOGY]; Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 267–319 (Carol Vance ed., 1995); see also Rubin & Butler, *Sexual Traffic*, *supra* note 121, at 68, 94–97 (discussing the emergence and separation of sexuality studies from feminism); Martin, *supra* note 20, at 109, 109–10 (suggesting that a theory of gender still has importance to theories of sexuality).

¹⁷¹ See, e.g., Judith Butler, *Imitation and Gender Insubordination*, in THE LESBIAN AND GAY STUDIES READER 307, 307–18 (Henry Abelove et al., eds., 1993); see also SEDGWICK, EPISTEMOLOGY, *supra* note 134; Warner, *Introduction*, *supra* note 1; cf. DENISE RILEY, “AM I THAT NAME?” FEMINISM AND THE CATEGORY OF ‘WOMEN’ IN HISTORY 4–5, 112–14 (1988) (discussing the historical contingency and instability of the category of “woman”).

¹⁷² See WARNER, TROUBLE WITH NORMAL, *supra* note 1; Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). Kenji Yoshino adopts this understanding of the term “queer,” as he writes “By ‘queers,’ I mean a group of people who do not seek to cover their orientation, choosing instead to embrace their difference from the mainstream.” *Id.* at 839. Yoshino goes on to articulate his idea of what this difference from the mainstream might entail. See *id.* at 838–49. While his definition might be susceptible to criticisms on many fronts, including the possibility that his romanticized vision of “queer” identity merely substitutes one identity regime for another, cf. Martin, *supra* note 21, it nevertheless begins to capture the anti-assimilation impulse in queer thinking.

¹⁷³ See WARNER, TROUBLE WITH NORMAL, *supra* note 1, at 37 (“A political movement based in this kind of dignity, however, should extend far beyond questions of sex or sexual identity.”).

sexual identity.¹⁷⁴ In this way, an affirmation of a minority sexual identity, structured on what is considered a shameful sexual practice, can actually destabilize identity-based categorization.¹⁷⁵ For my purposes, a feminist project of encouraging alternative family arrangements reflects both anti-assimilation and anti-identitarian commitments. It resists the conscription of women into motherhood, as well as destabilizing conventional understandings of family. As I suggest in this section, a new vocabulary of the family does not merely replace one way of organizing family life with another; it also resists categorization so that it is always open to redefine what it means to be a family.

A. *Queer Critiques of the Family*

With the benefits of an antinormal approach in mind, it is clear that feminist legal theory could gain something by incorporating queer critiques of the family. The rhetoric and political goals of the same-sex marriage movement, for example, closely resemble the feminist childcare debate, and the queer criticisms of that debate apply similarly to the care-work debate. In the same-sex marriage context, Michael Warner, for example, has questioned the way that the same-sex marriage movement celebrates traditional notions of family and sex.¹⁷⁶ Same-sex marriage proponents confirm the moral preference for certain types of sex and traditional ideas about family in their struggle for a banal respectability.¹⁷⁷ Further, the arguments used by same-sex marriage proponents tend to disguise the normalizing power of marriage.¹⁷⁸ In short, the family ideology used by the marriage movement privileges a traditional vision of family and sex and, in the process, portrays unconventional relationships as shameful, disgusting, or just plain worse than the norm. As Warner writes, “If gay marriage requires such a massive repudiation of queer culture’s best insights on intimate relations, sex, and the politics of stigma, then the campaign is doing more harm than marriage could ever

¹⁷⁴ See SEDGWICK, *EPISTEMOLOGY*, *supra* note 170, at 72 (describing the centrality of the homo-hetero binary to Western epistemology).

¹⁷⁵ See WARNER, *TROUBLE WITH NORMAL*, *supra* note 1, at 34–37 (describing the ethics of shame that organize queer culture and its resistance to an identitarian regime).

¹⁷⁶ For the arguments of same-sex marriage advocates and responses to the queer critiques, see generally WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* (2002) [hereinafter *Eskridge, Equality Practice*]; WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994). See also ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 171–72, 178–87 (1995).

¹⁷⁷ See WARNER, *TROUBLE WITH NORMAL*, *supra* note 1, at 66; see also Halley, *Recognition, Rights, Regulation, Normalisation*, *supra* note 163, at 98–101.

¹⁷⁸ See Halley, *Recognition, Rights, Regulation, Normalisation*, *supra* note 163, at 107 (arguing that the Rights rhetoric used by same-sex marriage proponents occludes the Regulation imposed by the marital form).

be worth.”¹⁷⁹ Feminist legal scholars should also hesitate before sacrificing a radical critique of the family in order to gain material resources for women with children.

The queer critique of the same-sex marriage movement also exposes how the appeal to traditional ideas of family is not a neutral political strategy. Some advocates for same-sex marriage argue that marriage is simply a lifestyle option that gay men and lesbians should have the right to choose.¹⁸⁰ In this conception, the decision of some people to get married has no effect on the unmarried; it is simply a neutral choice. If the struggle for marriage means anything, however, marriage must be more than just a lifestyle option. It must be “understood to be better, on average, than other ways of living. Not mandatory, not good where everything else is bad, but better, a general norm, rather than a personal taste.”¹⁸¹ As a result, the pursuit of marriage as a political goal has implications for those who never want to marry. The same is true for child-rearing. The use of family values rhetoric and the adulation of child-rearing have repercussions for people not in traditional family relationships. The analogy is: just as the same-sex marriage debate has implications for people who never want to marry, the feminist childcare debate has implications for people who never want to have children. Like the same-sex marriage agenda, the feminist childcare debate tends to privilege traditional family definitions by relying on, as well as reinforcing, the conviction that people who pursue these options have followed the best path.

Finally, queer theory provides a critique of the liberal politics of toleration that many feminists adopt. According to the queer critique, the language of tolerance always makes normative judgments and encourages the idea that deviation from the norm can and should be eliminated. The idea of a gay gene provides a good example.¹⁸² Research to locate a gay gene is sometimes cited to encourage tolerance of same-sex desire because, in this argument, homosexuality is not a choice, it is a biological fact. However, insofar as the gay gene theory leaves in place the opposi-

¹⁷⁹ WARNER, TROUBLE WITH NORMAL, *supra* note 1, at 91. For a comprehensive response to these critiques, see generally ESKRIDGE, EQUALITY PRACTICE, *supra* note 176.

¹⁸⁰ See, e.g., Evan Wolfson, *Why We Should Fight for the Freedom to Marry: The Challenges and Opportunities that Will Follow a Win in Hawaii*, 1 J. GAY, LESBIAN, & BISEXUAL IDENTITY 79, 82 (1996) (“Because Marriage is a basic human right and an individual personal choice . . . the State should not interfere with same-gender couples who choose to marry.”); see also WARNER, TROUBLE WITH NORMAL, *supra* note 1, at 98 (arguing that these arguments suggest that “marrying has nothing to do with the unmarried, nor with the state regulation of sex, nor with changing cultural norms”).

¹⁸¹ Jonathan Rauch, *For Better or Worse?*, NEW REPUBLIC, May 6, 1996, reprinted in SAME-SEX MARRIAGE: PRO AND CON 169, 180 (Andrew Sullivan ed., 1997).

¹⁸² For the research on the biological foundation for homosexuality, see Simon LeVay & Dean H. Hamer, *Evidence for a Biological Influence in Male Homosexuality*, SCI. AM., May 1994, 44. And, for an idea of how it is exploited by gay rights advocates, see Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 439 n.33 (1997) and Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado’s Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1062, 1064–67 (1994).

tions between normal and aberration and healthy and deviant, and insofar as the explanations for homosexuality are “absolutely invariably couched in terms of ‘excess,’ ‘deficiency,’ or ‘imbalance,’”¹⁸³ the possibility of finding a gay gene perpetuates the idea that there could be a world without homosexuality.¹⁸⁴ If homosexuality is an aberration, the argument goes, then it should be corrected.¹⁸⁵ While sexual variation is merely tolerated, it is easy to argue that we would all be better off if it were gone.¹⁸⁶ The same is true for family definitions. Most childcare feminists insist that society should tolerate alternative family arrangements, but the language of toleration indicates a grumbled, forced acceptance of familial difference but continues to hint that the world would be better without it.

B. *A New Epistemology of the Family*

The normalizing dangers of the childcare debate suggest that feminists should develop an antinormal critique and reimagine the ways they understand and talk about the family. The dominant vocabulary of the family has at least two interrelated problems. First, it fails to recognize already existing relationships that do not fit its taxonomy. In this way, it punishes the relationships that have survived, and even flourished, outside traditional family life. This first objection to family values orthodoxy might be called a recognition critique. Second, and more fundamentally, the traditional family vocabulary coercively sorts relationships into predetermined categories. This compulsory sorting system limits the types of relationships that people can form by circumscribing the domain of cultural intelligibility. This second objection might be called a coercion critique. These critiques substantially overlap because of the productive power of language, but nevertheless it will be helpful to distinguish them for purposes of discussion.

¹⁸³ SEDGWICK, *Gay Kids*, *supra* note 85, at 164.

¹⁸⁴ *See id.* at 163–64 (“[I]t is becoming increasingly problematical to assume that grounding an identity in biology or ‘essential nature’ is a stable way of insulating it from societal interference. . . . Increasingly it is the conjecture that a particular trait is genetically or biologically based, *not* that it is ‘only cultural,’ that seems to trigger an estrus of manipulative fantasy in the technological institutions of the culture.”).

¹⁸⁵ *See id.* at 161 (“There are many people in the worlds we inhabit . . . who have a strong interest in the dignified treatment of gay people who may happen already to exist. But the number of persons or institutions by whom the existence of gay people is treated as a precious desideratum, a needed condition of life, is small. The presiding asymmetry of value assignment between hetero and homo goes unchallenged everywhere.”).

¹⁸⁶ Even the most progressive parents continue to think that gay life is so much harder that no parent would wish it for his or her children. When discussing the possibility that her children might be gay, Rosie O’Donnell expressed almost exactly this sentiment. *See* Rebecca Raphael, *Rosie’s Story: O’Donnell Talks About Being a Gay Mom*, available at http://abcnews.go.com/sections/primetime/ABCNEWSspecials/primetime_020313_rosie_gayadoption_feature.html (last visited Apr. 1, 2002) (“But if I were to pick, would I rather have my children have to go through the struggles of being gay in America, or being heterosexual. I would say heterosexual.”).

To elaborate the first objection: family orthodoxy disregards and delegitimizes unconventional relationships. The traditional vocabulary of the family ignores the vibrancy, vitality, and frequent durability of many intimate associations.¹⁸⁷ In other words, the idea that adult relationships must fall into one of two exclusive groups—spouse or platonic friend—overlooks the relationships that defy categorization in this way.¹⁸⁸ Similarly, when reproduction is defined around the traditional parental model, it fails to account for other types of reproductive relationships, such as: step parents, non-biological mothers, extended relatives, surrogate mothers, sperm donors, teachers, mentors, role models, friends, enemies, and nemeses. Some people find their primary source of support at home, others with their friends; some people learn values from their parents, others from teachers and uncles. If feminists really respect the importance of these relationships, they should concentrate on developing alternative definitions of family to be able to account for them in discussions about intimacy and reproduction.

On the coercion issue: *normalizing* regimes—such as heteronormativity or repronormativity—are *normatively* bad. Normalcy forces relationships into certain predetermined categories and pushes people into limited, stultifying positions. In one example of this, traditional family dogma coercively herds people into conventional relationships. To the extent that choice and creativity in family affairs is good, normalcy is bad. A new vocabulary of the family has the power to dislodge the coercive pull of normalcy. As poststructuralist theory suggests, language has the formative power to open up or foreclose possibilities in the arrangement of intimate affairs by circumscribing the domain of cultural intelligibility.¹⁸⁹ In short, the traditional vocabulary of the family limits the types of relationships that people can form and violently forecloses possibility. Unorthodox ideas of intimacy alleviate the suffocating banality of normalcy.

Unconventional relationships, both the ones that already exist and potential ones, resist the coerciveness of normalization. In other words, unconventional relationships destabilize family norms by staking out po-

¹⁸⁷ WARNER, TROUBLE WITH NORMAL, *supra* note 1, at 116 (arguing that straight culture has an “impoverished vocabulary” organized around marriage as a defining institution).

¹⁸⁸ *See id.*; *see also* Halley, *Recognition, Rights, Regulation, Normalisation*, *supra* note 163, at 103 (sympathetically describing a French legislative proposal that would have made more people “question whether friendship deserves the same level of commitment which is now captured for sexual relationships by marriage and its substitutes”).

¹⁸⁹ *See* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* viii (2d ed. 1999) (“[T]he aim of [*Gender Trouble*] was to open up the field of possibility for gender without dictating which kinds of possibilities ought to be realized. One might wonder what use ‘opening up possibilities’ finally is, but no one who has understood what it is to live in the social world as what is ‘impossible,’ illegible, unrealizable, unreal, and illegitimate is likely to pose that question.”).

sitions outside the dominant family model. As Michael Warner writes, in queer worlds,

[t]here are almost as many kinds of relationships as there are people in combination Between tricks and lovers and exes and friends and fuckbuddies and bar friends and bar friends' tricks and tricks' bar friends and gal pals and companions "in the life," queers have an astonishing range of intimacies.¹⁹⁰

The resilience and fortitude of these intimacies help to make alternatives to the traditional family model seem like truly viable options.¹⁹¹

Feminists should celebrate these types of unconventional relationships—the relationships that are not firmly institutionalized or ritualized.¹⁹² Through novel definitions of intimacy, women have the chance to escape imprisoning ideas of what women should be and how women should act. A new understanding of family and intimacy opens up all types of choices, family performances, and social possibilities, including spaces and roles for women that have previously unimagined possibilities. In addition, traditional gender roles lose much of their meaning without the conventional family background to define them. Because of this emancipatory potential, feminism should join the project of articulating new visions of family that will change not only the relations among family members, but the terms of the institution.

IV. CONCLUSION: (POST)FEMINISM AND REDEFINING THE FAMILY

In the feminist care-work debate, many legal scholars have been fairly conservative in their political vision, looking at existing empirical data and attempting to patch the resulting problems.¹⁹³ The language used by some legal feminists continues to assume that women are defined by motherhood and that they should be commended for selfless caretaking inclinations. I want to suggest that legal feminists should look at this rhetoric, examine their allies in the family values war, and question where they are headed. The idea that subjects are discursively produced and that power is everywhere does not excuse complacency or normalcy.

¹⁹⁰ WARNER, *TROUBLE WITH NORMAL*, *supra* note 1, at 115–16.

¹⁹¹ *See* WARNER, *TROUBLE WITH NORMAL*, *supra* note 1, at 115 (“Because gay social life is not as ritualized and institutionalized as straight life, each relation is an adventure in nearly uncharted territory.”).

¹⁹² *See generally* SEDGWICK, *Avunculate*, *supra* note 20.

¹⁹³ *See, e.g.*, WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 2 (discussing empirical data of the percentage of women that will actually become mothers in their lifetime); Silbaugh, *Labor into Love*, *supra* note 21, at 8–9 (detailing the empirical fact that women still take on more care responsibilities and household work than men do); Rhode, *Balanced Lives*, *supra* note 61, at 841 (“Despite a significant increase in men’s family responsibilities over the last quarter century, their contribution remains far from equal.”).

In this debate, some legal feminists have uncritically participated in a political project that romanticizes and normalizes the traditional nuclear family, and the moralism and sentimentalism of the language continues to veil political and ideological investments, even while it entrenches feminism in a politics of victimization. When feminists adopt a stance of moralizing recrimination, blaming the surrounding culture for allowing mothers to suffer because of children's needs, they doom the larger goal of achieving gender equality.

To clarify the limits of these arguments, I want to make clear that I am not suggesting that women should simply stop having children. Many unconventional people have children, and children are perhaps the most unconventional people. At a more basic level, I am not looking to canonize a new way of organizing family life or to replace one type of family orthodoxy with another. Instead, I am trying to articulate a theory to resist the normalizing pull of traditional family dogma. Ideally, a good taxonomy of the family would remain perpetually unstable. For now, childrearing occupies a privileged place in family life, but different family arrangements could assume a hegemonic position, and the performances embodying this new ideal would no longer have disruptive power. It is not the substance of abjected lifestyles, but their alienation from the norm that defines their subversive potential. Therefore, nonprocreative adults, because of the way their lives defy current convention, destabilize family norms, and it is for this reason that feminists might privilege their organization of family life, but any particular definition of alterity is not intrinsically or perpetually antinormal.

Second, I do not wish to suggest that all legal feminists have equally participated in a normalizing project. Hopefully, I have indicated that I share Franke's ideas on repronormativity, as well as Case's concerns about the current ways that childrearing is subsidized. Further, the commodification approach moves in the right direction, away from sentimental ideas about children and families, and even feminists who idealize care work have expressed agreement with sentiments that I share, including the idea that no woman should be forced into motherhood or defined entirely by reproductive potential.¹⁹⁴ Similarly, some feminists have asked the right questions about how care is defined and who benefits because of those definitions.¹⁹⁵ Finally, others have already begun critiques of the family and the legal structures used to define it.¹⁹⁶ However,

¹⁹⁴ See WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 272.

¹⁹⁵ See Silbaugh, *Foreword*, *supra* note 2, at 1389–90.

¹⁹⁶ See, e.g., Nan D. Hunter, *Sexual Dissent and the Family: The Sharon Kowalski Case*, in *SEX WARS*, *supra* note 134, at 101, 101–02 (“In the effort to end second-class citizenship for lesbian and gay Americans, no obstacle has proved tougher to surmount than the cluster of issues surrounding ‘the family.’ The concept of family functions as a giant cultural screen. Projected onto it, contests of race, gender, sexuality, and a range of other ‘domestic’ issues from crime to taxes constantly create and recreate a newly identified zone of social combat, the politics of the family.”).

it is still true that the accommodation of caregivers remains the overriding goal of the care-work debate.

Finally, I have discussed the rhetoric of the childcare debate in conjunction with its goals. Admittedly, the goals of any political campaign are analytically distinct from its rhetoric, and the goal of removing penalties from childcare might be a good objective, even if feminists should refrain from using certain language to achieve it. After all, one could argue that no matter how many children there are, women will always be the ones having them, so feminism should try to make childbearing costless. I have several responses. First, while I agree that reproduction and the family might be a proper focus for feminism, a theory of family and reproduction is different from the specific goal of removing penalties on care work. Second, even though goals and rhetoric are analytically distinct concepts, I do not think that the goals of the childcare debate can easily be distinguished from its rhetoric. In this instance, I think that feminists will inevitably resort to normalizing rhetoric when they attempt to make childbearing easier, and the overall debate is itself a type of rhetoric that funnels women into motherhood. Finally, feminists who are unable to surrender certain foundations, including “we must reproduce the species” or “who will take care of the children?”¹⁹⁷ miss the point raised here. The better questions are: What sort of assumptions do we make when we ask “how will we reproduce the species” or “who will take care of the children”? Should motherhood and family care be understood as productive, consumptive, or political practices? How has child protection rhetoric been used to appeal to and lobby for a certain vision of normalcy? And in what ways is child welfare a historical concept, rather than a universal moral truth?

In sum, the family is perhaps *the* crucial site for the production and normalization of meaning about gender and sex,¹⁹⁸ and all legal feminists should have an investment in encouraging new ideas of intimacy and association.¹⁹⁹ To do this, childcare feminists must shift their focus away

¹⁹⁷ See, e.g., WILLIAMS, UNBENDING GENDER, *supra* note 3, at 44 (critiquing Betty Friedan because she “minimized the question of who would take care of the children”). To understand why feminists might not want to capitulate (or even address) the reality that someone will have to care for children, see Willis, *Foreword*, *supra* note 13, at ix (discussing the “dilemma of who will care for children”); ATKINSON, *supra* note 13, at 6 (“I’m not going to fall into the male-supremacy trap tonight of ‘who’s going to take care of the children,’ . . .”) (citation omitted).

¹⁹⁸ See, e.g., FOUCAULT, HISTORY OF SEXUALITY, *supra* note 107, at 100, 108–10 (discussing how the family functions as the social institution and discursive apparatus in which meanings of sex and desire are created); Hunter, *supra* note 196, at 101–02 (discussing the importance of the family as the site of social struggle).

¹⁹⁹ Some feminists already acknowledge the political imperative of reforming the ideology of the family, even while they still cling to romanticized notions of children and caregiving. See, e.g., FINEMAN, NEUTERED MOTHER, *supra* note 41, at 7 (“In spite of the significant rhetorical reorientation of family law, the functioning family remains the most gendered of our social institutions.”); Fineman, *Masking Dependency*, *supra* note 79, at 2187 (“Historically, the American family has been our most explicitly gendered institu-

from the childcentric ideas of the family, which are at the heart of the care-work debate. As one way to imagine the queer feminist project of redefining the institution of the family, Eve Sedgwick has proposed a way to understand the family as a social space which includes an alignment of:

- a surname
- a sexual dyad
- a legal unit based on state-regulated marriage
- a circuit of blood relationships
- a system of companionship and succor
- a building
- a proscenium between “private” and “public”
- an economic unit of earning and taxation
- the prime site of economic consumption
- a mechanism to produce, care for, and acculturate children
- a mechanism for accumulating material goods over several generations
- a daily routine
- a unit in a community of worship
- a site of patriotic formation.²⁰⁰

A queer life resists the impulse to line up these dimensions. It disarticulates and disengages the component parts of what is now known as the Family.²⁰¹ Feminists should think about the power wielded by various social institutions when they speak in unison. Long school breaks, state holidays, commemorative postage stamps, public service announcements, product advertisements, and church sermons all paint a frighteningly similar picture of who should be at your holiday dinner table.²⁰² The current childcare debate in feminism comes precariously close to joining this chorus of voices that insist on the normalcy and naturality of the traditional ideal.

tion.”).

²⁰⁰ SEDGWICK, *Queer and Now*, *supra* note 170, at 6.

²⁰¹ *See id.*

²⁰² *See id.*