

CHANGING THE MEANING OF MOTHERHOOD

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like amnesiacs
in a ward on fire, we must
find words
or burn.

—Olga Broumas¹

Linda McClain's alliteratively titled contribution to this Symposium, *Care As a Public Value: Linking Responsibility, Resources, and Republicanism*, makes a number of important contributions to the discourse of dependency in legal, political, and feminist theory.² She argues that we should conceive of parenting as a public value, contesting the privatization of care that is central to the 1996 federal welfare reform, and buttressing her claims with popular rhetoric such as support for "responsible fatherhood." Braiding a wide range of interdisciplinary material and considerable data to support her argument, she explores ways that poor women suffer abysmally from legal and social understandings of care as a private responsibility, and further proposes that these injustices could be remedied by expanding the category "working families" to include women caring for their children. She rightly points out that "[w]hat is needed is a more sustained focus upon the role of care in fostering human and social capital and a rejection of the simple equation of

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1. Olga Broumas, *Artemis*, in BEGINNING WITH O 23, 24 (1977).

2. Linda C. McClain, *Care As a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673 (2001) [hereinafter McClain, *Care As a Public Value*]. Professor McClain's article in this Symposium is but one piece of her "larger project of attempting to develop a synthetic, or feminist and liberal, normative account of rights, responsibilities, and governmental promotion of good, self-governing lives." Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1221 (2000).

personal responsibility and good citizenship with market participation.”³

As McClain recognizes, there are many kinds of work. Such an insight is crucial to any proposal to alter the current tendency not to remunerate the homemaking labor that primary caretakers do for their families. Her approach poses some difficulties, ones suggesting that future analysis should build on her fine work and continue exploring ways to achieve the important goal of increasing the economic and social support that primary caregivers receive. One way to continue the exploration of the problem of undervaluation of care, an alternative to McClain’s focus on public law, looks to the ways that private law might address the problem of undervaluing care. Either approach is possible because families, like wage labor, have both public and private dimensions.

There are, of course, benefits and dangers in focusing on either public or private remedies to the problem of devalued homemaking.⁴ Public law generally rests on majoritarian, moral considerations and can justify distribution of public funds. However, it also tends to recognize only those activities that are consistent with majoritarian morality and forces people into particular forms of intimate affiliation in order to enjoy access to the public fisc.⁵ Private law, in contrast, rests on considerations of intentionality, individuality, and freedom from majoritarian morality. As such it can best protect those who have the resources (both material and social) to exercise their individuality and express their intentionality. However, it is less helpful to those who cannot exercise contractual intentionality or lack the resources to do so. In spite of these limitations of using private law, I have attempted to craft a proposal that uses private law to value homemaking labor.⁶

I have suggested that we import the debtor/creditor rules of Uniform Commercial Code Article 9 to recognize the contributions

3. McClain, *Care As a Public Value*, *supra* note 2, at 1679.

4. The very distinction between public and private has generated extensive critique. See, e.g., *Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

5. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999). While additional elements of public law, such as constitutional law, purport to protect minority interests, even these protections are often thin and contingent, supporting majoritarian interests indirectly in a seeming support of minority claims. For a discussion of this pattern under the First Amendment religion provisions, see Stephen M. Feldman, *The Development of Religious Freedom As a Constitutional Norm* (2000) (unpublished manuscript, on file with author).

6. See Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

that primary homemakers make to family wealth, in particular to the earning capacity of primary wage-earners.⁷ Couples would sign a document that I call a Premarital Security Agreement (“PSA”) when applying for a marriage license, and the PSA would grant the lower-earning spouse a security interest in marital property (construed to include part of the primary wage-earner’s post-divorce income).⁸ When a couple divorces, the security interest would entitle the primary homemaking spouse to exercise self-help to repossess marital property to recoup her investment in the marital enterprise, much as financing companies repossess cars when debtors default on loans.⁹ My proposal would largely benefit primary homemakers with sufficient marital property to repossess, but could also benefit poorer homemakers by offsetting their entitlements to remuneration for homemaking against any marital debts.¹⁰ Other post-divorce income sharing proposals similarly benefit middle- and upper-middle-class people more than the poor caregivers who are in particularly dire need of material support.¹¹ Thus purely private solutions cannot resolve the problem of remunerating carework across the board. I identify in this Commentary some parallel weaknesses of a public law approach and suggest that public-private hybrids may offer opportunities to maximize the strengths and minimize the weaknesses of each approach.

My main concern about McClain’s public law approach is that it may have unintended consequences of valorizing contemporary gender roles that push women into maternity and away from economic, social, and political independence. To be fair, she disassociates herself from that goal, identifying her aim as taking “both care and women’s equality seriously, and so move from the gendered division of labor for care to a redistribution of responsibility between women and men, and among families, employers, and government.”¹² However, despite these good intentions, her proposal might reify the very maternal category that she sets out to

7. *Id.* at 19-20.

8. *Id.* at 39-41.

9. *Id.* at 94-95.

10. *Id.* at 104-05.

11. See, e.g., Katherine Wells Meighan, *For Better or for Worse: A Corporate Finance Approach to Valuing Educational Degrees at Divorce*, 5 GEO. MASON L. REV. 193 (1997); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Disassociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

12. McClain, *Care As a Public Value*, *supra* note 2, at 1680.

deconstruct. Many of the same types of criticisms can be, and have been, made about my work as well.¹³ Thus, this Commentary is less a critique of McClain's approach than an exploration of some of the obstacles faced by anyone attempting to fashion a remedy to the manifestly unreasonable nonremuneration of the work that many women do caring for their families.

Perhaps one cause of this difficulty is that both work and family carry mixed political valences. Family is at once exploitative and a site of human flourishing; paid labor similarly involves both subjection to regulatory controls and freedom through access to capital and identity. Thus any model justifying public support (or lack thereof) for care will be both empowering and retrograde. The trick, if this is the case, is to adopt a proposal that maximizes benefits while minimizing burdens. To contribute to this analysis of whether the benefits outweigh the burdens of a public law approach, I identify here some of the drawbacks of a public approach and sketch out how a private law approach, or a mixture of public and private law, might provide an alternative route to remunerating care work.

One benefit of private law approaches is that they can accommodate more family forms. In positing that families, "in a good society, serve as places or sources of growth or development of capacities and virtues important to being good citizens and good people,"¹⁴ McClain implicitly raises questions of what counts as appropriate capacities and virtues important to being good citizens and good people. Left open is the question of whether some families are better at producing good citizens than others. What concerns me is the possibility that only one type of family, or a limited range, will count.

For example, would families who home school their children create good citizens, given that home schooling is often associated with withdrawal rather than participation in public communities?¹⁵ Might one argue that families with two parents of the same sex do not create good citizens because they might generate confused gender roles? McClain does not address families other than those with

13. See Jane S. Schacter, *Taking the InterSEXional Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 DENV. U. L. REV. 1255, 1258-59 (1998); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1900, 1905 (2000).

14. McClain, *Care As a Public Value*, *supra* note 2, at 1690.

15. See Margaret Talbot, *A Mighty Fortress*, N.Y. TIMES, Feb. 27, 2000, § 6 (Magazine), at 34.

heterosexual parents and their minor children.¹⁶ In doing so she overlooks how other family forms might or might not be vehicles to citizenship. These include families characterized by substantial care responsibilities (such as adults caring for elderly, ill, or otherwise dependent adult family members) as well as families where two partners are economically and physically independent. Because her justification of reconceiving childcare as a public value turns on harnessing popular rhetoric viewing parenting as “the most important job anyone has in society,”¹⁷ her analysis leaves out many intimate affiliations and elevates one endeavor above all others. It moreover runs the risk of denigrating other, nonparenting work.¹⁸ As I have written elsewhere, private law offers a range of models (such as corporations, partnerships, and limited liability companies) that could justify recognizing a range of family forms (such as marriage, cohabitation, and polyamory).¹⁹ As such, private models may be necessary components of a model that remunerates care in the greatest number of contexts. While one could argue that many of these alternative affiliations do not need government support in the same way that families with children do, many of the affiliations include dependencies (such as caring for an elderly or ill partner or parent) that are not covered when we focus on parenting as a justification for publicly supporting care.

An additional reason that McClain’s argument does not take us as far as we need to go in the care debate is that her reliance on liberal theory may be internally inconsistent. Liberalism rests on ideals of individualism and autonomy, but McClain rests her claim that mothers are entitled to rights to public support on derivative rather than individual grounds. Specifically, she contends that mothers are citizens, not as individuals, but rather by virtue of the

16. McClain does support extension of family forms, but does not specify how that extension might conflict with a model valorizing childcare above all other work. McClain, *Care As a Public Value*, *supra* note 2, at 1690. For further analysis of how her approach to deliberative democracy could accommodate same-sex marriage, see Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 *FORDHAM L. REV.* 1241 (1998).

17. McClain, *Care As a Public Value*, *supra* note 2, at 1677.

18. I would say that artists, electricians, teachers, garbage collectors, doctors, lab technicians, activists, and farmers, to name just a few, have jobs that are as important as parenting.

19. See Martha M. Ertman, *Marriage As a Trade: Bridging the Private/Private Distinction*, 36 *HARV. C.R.-C.L. L. REV.* 79 (2001). By polyamory I mean any affiliation including more than two adults, whether or not sexual. The category includes polygamy, polyandry, group marriage, a lesbian couple with a known sperm donor, and a gay male couple and the biological mother of their child.

way that they engage in the “task of nurturing children and ensuring their moral development and education in order to prepare them to take their place in the wider culture, as responsible, self-governing persons.”²⁰ Yet a robust liberal notion of citizenship likely requires individual, rather than derivative, grounding. Mothers, in McClain’s analysis, are not citizens in their own right but rather citizens by virtue of the fact that they create citizens. This model seems to suggest that women can access citizenship through two routes: care work and wage labor. This possibility raises a number of issues. Does it mean that we have (or should have) two classes of female citizenship, a direct one for wage laborers and a derivative one for mothers? Is fatherhood also a route to citizenship, or do men access citizenship through other routes, such as military service and wage labor?²¹ Are women who do not engage in “the most important job anyone has in society”²² somehow inferior citizens to mothers?²³ In the alternative, female wage-labor citizens may be viewed as superior to mothers because their claims are direct rather than derivative. The answers to these questions would illuminate the precise way in which McClain seeks to reconstruct both motherhood and citizenship.

McClain seeks nothing less than to redefine motherhood from selfless caregiver to citizen. In the 1970s, lesbian feminists (scholars, poets, artists, activists, musicians) performed the kind of cultural alchemy that McClain and other feminist theorists seek to accomplish.²⁴ Olga Broumas’s poem *Artemis* conveys the urgency of this task:

20. McClain, *Care As a Public Value*, *supra* note 2, at 1683.

21. This question raises the issue of whether it is the status of parenthood that creates citizenship, or the conduct of engaging in caretaking labor of intimates. If it is the conduct of caretaking that constitutes citizenship, then of course primary caretaking fathers access citizenship through childcare just as primary caretaking mothers can. However, this status/conduct distinction raises additional issues, such as whether, under a regime that focuses only on conduct, a primary caretaker who is not a family member, such as a nanny, can access citizenship through that conduct. If so, does it happen immediately, or only after a period of service?

22. McClain, *Care As a Public Value*, *supra* note 2, at 1677.

23. Of course, any particular person can access citizenship in a number of ways. A mother could be (and often is) also a wage laborer, and many men both serve in the military and later engage in wage labor. The question, then, might be whether someone who is a citizen on multiple fronts (primary caretaker, veteran, and wage earner) is more of a citizen or entitled to more benefits than someone who is only a wage laborer, or who is only a primary caretaker.

24. See, e.g., MARY DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* (1978); JILL JOHNSTON, *LESBIAN NATION: THE FEMINIST SOLUTION* (1973); KATE MILLETT, *SEXUAL POLITICS* (1970). In the 1980s, lesbian feminists of color similarly engaged in cultural alchemy. See, e.g., AUDRE LORD, *SISTER OUTSIDER: ESSAYS AND SPEECHES* (1984); *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (Cherríe Moraga & Gloria Anzaldúa eds., 1981).

like amnesiacs
 in a ward on fire, we must
 find words
 or burn.²⁵

In this same spirit, McClain's project further develops Martha Fineman's groundbreaking work suggesting that legal regulation should focus on dependency rather than sexual affiliations.²⁶ Thirty years ago, lesbian feminists similarly shifted the cultural understanding of lesbian from desiccated spinster to ambitious amazon. One crucial voice in this process was folk singer Alix Dobkin, who held women-only concerts and cleverly converted folk and other standards to the use of this revolution. One classic Dobkin piece, *Amazon ABC*, reworks the heterosexual classic *A You're Adorable, B You're So Beautiful*:

"A" you're an Amazon
 "B" -coming Brave and strong
 Clearly and Consciously you "C"
 "D" you're so Dykey
 "E" how you Excite me
 How Fortunate a Female Faculty²⁷

25. Broumas, *supra* note 1.

26. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

27. The rest of the lyrics are:

"G" I Guess it's Good for me
 "H" how Heavenly
 "I" never knew how butchy I could be
 "J" for sweet Justice
 "K" for sweet Kisses
 "L" -e-s-b-i-a-n for Letting go of
 "M" -e-
 "N"
 "O" -ppression is no longer Over me, Oh
 "P" is Political: Power to the Personal
 "Q" for the Queer you feared you
 "R" Remember you gotta Respect your
 "S" -sential Sensibility (sexuality)
 Time and Truth Touch (Between us is a Tie)
 "U" -terine empathy
 "V" is for Vagina, the Virgin you can
 "W" experience (a universe) until you can do (get through to)
 "X" -actly what you want (where you want) to X-ist
 "Y" let them drive you craaa- (not Y's up? but it's not e e-)
 "Z"
 Now I know my "ABC's"

Just as Alix Dobkin and other radical lesbians contributed to a cultural climate that allowed us to tamper with the archetype of a woman without a man, remapping it from pitiful, ugly, and asexual to strong, independent, and feisty, McClain seeks to tamper with that most sacred of cows, the mother. Her mothers are sometimes with men, sometimes without them. This breadth alone marks her project as an ambitious one. My comments sound a cautious note of what unintended consequences might flow from it, and suggest some alternative routes to this important goal.

McClain mines the public benefits of the three Rs (responsibility, resources, and republicanism), overlooking the retrograde dangers of elevating conventional families to “seedbeds of civic virtue”²⁸ and making women’s citizenship claims derivative by linking them to the creation of citizens. Fully recognizing that private rhetoric comes with its own retrograde dangers, I nevertheless prefer those dangers to the majoritarian morality of the public sphere. Where McClain focuses on the three Rs, I go back to (almost) the beginning of the alphabet, focusing on three Cs: consideration, commodification, and citizenship.

I. CONSIDERATION

McClain focuses on care, as do other scholars addressing the tensions between childcare responsibilities and full economic and social citizenship, making a convincing case that care is both crucial and undervalued on numerous levels. Another way to think about care is through the lens of consideration. Consideration has multiple meanings, including the act of thinking about another person and the contract doctrine used to describe value given that makes an agreement legally enforceable.

Socially, consideration is defined as “continuous and careful thought.”²⁹ Kindness (which is etymologically related to kinship)³⁰ is implicit in this understanding of consideration. McClain rightly

Next time won’t you sing with me!

Alix Dobkin, *Amazon ABC*, on LOVE & POLITICS: A 30 YEAR SAGA (Ladyslipper Music 1992).

28. McClain, *Care As a Public Value*, *supra* note 2, at 1690. Civic virtue, could, of course, include equality on the basis of race, sex, gender, and sexual orientation as key components. This kind of civic virtue, however, might not command the majoritarian support that expenditure of public funds often requires.

29. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 246 (10th ed. 1993).

30. *Id.* at 642.

points out that we should continuously and carefully think about the extraordinary contributions and sacrifices that go into caring for children. She also points out that we need to consider the caretaking work that poor people do for their families.³¹ I would add that we should also consider the care for other dependents, such as elderly, ill, or disabled parents, partners, or other intimates, and moreover remember that economically independent partners may also be citizens by virtue of their partnership.

A second meaning of consideration is contractual: consideration is “bargained for,” meaning that a performance or return promise is “sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”³² McClain suggests that we think of mothers as citizens and remunerate them for their public contributions, remaining agnostic about whether that payment should take the form of public subsidies of mothering (which she calls a “modern mothers’ pension”) or daycare as a mandatory employee benefit.³³ Either one could further her goal of laying the theoretical foundations for reconceptualizing motherhood, and “break[ing] down the breadwinner/caregiver dichotomy.”³⁴ Once we accept this new liberal conception of motherhood, then monetary gains should follow.

Consideration is one way to justify the payments. If the bargain society strikes with mothers is that they create citizens, then both material support for that activity and the act of childcare could constitute consideration. Implicitly, mothers bargain for support in exchange for caregiving, bargaining with partners and/or with the state. In bargaining with partners, the partners exchange support for the benefits of fatherhood (or, where parties are same-sex couples, parenthood). In bargaining with the state, the state exchanges support for citizen creation. This last analysis justifies getting material resources to people who need them most: poor women and their children. However, paradoxically, policymakers may deem the caregiving work of poor women and many women of color insufficient consideration to support their citizenship claims.³⁵

31. For a review of how the 1996 federal welfare reform devalues poor people’s family work, see JULIE A. NICE & LOUISE G. TRUBECK, *CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE* 235-84 (Supp. 1999); Dorothy E. Roberts, *The Value of Black Mothers’ Work*, 26 CONN. L. REV. 871 (1994).

32. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

33. McClain, *Care As a Public Value*, *supra* note 2, at 42.

34. *Id.* at 1714.

35. See Roberts, *supra* note 31, at 873-74.

Perhaps McClain's goal of deconstructing the homemaker/breadwinner dichotomy could be further developed through the private law doctrine of contract. If the above analysis of bargained for exchange seems strained or troublesome, suppose that, rather than see the contract as a discrete one between the mother and the state, we view the contract as the social contract that is said to justify civil society in the first instance.³⁶ Marsha Garrison has sketched the outlines of a contractarian theory of family that could further McClain's goal of getting cash to poor women and caregivers generally.³⁷

Garrison, like McClain, grounds her proposal in liberal theory, namely John Rawls's theory of justice.³⁸ Garrison's social contract analysis both echoes and diverges from McClain's. Where they diverge, Garrison's better serves considerations of justice because her analysis would justify more money going to a wider range of caregivers and moreover is direct rather than derivative. Specifically, Garrison and McClain both justify public funding for childcare, but Garrison's social contract approach also justifies payments for elderly and other nonchild dependent care.

Garrison suggests that we go behind the veil and ask what we would choose the rule to be if we do not know whether we will be male or female, parent or not, rich or poor.³⁹ Under this reasoning people would reasonably choose to remunerate parenting.⁴⁰ I think that they would also remunerate through the public fisc other forms of care, such as care of elderly, disabled, or ill intimates. Similarly, because people would not know whether they would be in a socially sanctioned affiliation (marriage) or another one (say, polyamory) or single, they would choose to have the payments go to caregivers regardless of whether they are married. While McClain spends considerable time discussing poor single women and takes pains to say that marriage alone is insufficient to remedy the crushing

36. See CAROLE PATEMAN, *THE SEXUAL CONTRACT* 10-11 (1988).

37. See Marsha Garrison, *Toward a Contractarian Account of Family Governance*, 1998 UTAH L. REV. 241.

38. See Garrison, *supra* note 37, at 257; McClain, *Care As a Public Value*, *supra* note 2, at 1683. McClain focuses on Rawls's analysis of the family as "part of the basic structure [of political society], since one of its main roles is to be the basis of orderly production and reproduction of society.... The family must ensure the nurturing and development of... citizens in appropriate numbers to maintain an enduring society." *Id.* (quoting John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 788 (1997)).

39. Garrison, *supra* note 37, at 261-68.

40. See *id.* at 262.

indigency of many mothers,⁴¹ her focus on the responsible fatherhood movement suggests that as a normative matter she agrees that fathers should be more involved in families. Garrison's approach allows us to consider that we might be single, in a couple, or in a polyamorous affiliation, and justifies public funding for care because we do not know ahead of time whether we would be the kind of person needing care (a child, an aging parent, or a disabled intimate), a caregiver, or neither. Because all of us are dependent children at one point, many or most will be dependent elders, and a number are ill or disabled at various points, reasonable people would choose to remunerate all of these forms of care. Thus, liberal social contract theory may be equally adept at serving McClain's goals as her liberal citizenship theory. Moreover, for the reasons discussed below regarding citizenship, Garrison's social contract approach remedies the problem of making mothers' citizenship derivative of their role in creating (real) citizens. Before citizenship, however, I will consider commodification.

II. COMMODIFICATION

Commodification is the term that is generally used to describe things, ideas, or services to which the culture (or subculture) resists according a market value.⁴² If caring for one's child had a market value, or a higher market value, much of McClain's goal would be met. But it does not. A rich body of literature documents the many ways that the work that people (mostly women) do for their families is neither socially nor economically valued.⁴³ McClain sees this as a problem of privatized responsibility: we leave to parents the responsibility to take care of their own children. At the heart of her article is the goal of making children a public responsibility and remunerating their parents for their care as a matter of public law. I want to highlight three dangers of focusing on public rhetoric and

41. McClain, *Care As a Public Value*, *supra* note 2, at 1728-29.

42. The canonical text on commodification is MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996). Equally groundbreaking are VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994), and Viviana A. Zelizer, *The Purchase of Intimacy*, 25 *LAW & SOC. INQUIRY* 817 (2000).

43. Two recent contributions to the literature are ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (2001), and JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000). Another book that takes the opposite position, contending that parents enjoy subsidies, is ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* (2000).

raise the issue of whether care work that is already remunerated (however modestly) is also a route to citizenship.

First, the term public denotes, among other things, “of, relating to, or affecting all the people or the whole area of a nation or state,” and “general, popular.”⁴⁴ It also connotes majoritarian decision making, reducing solutions to the lowest common denominator upon which everyone (or a majority) can agree. It is not surprising that McClain focuses on heterosexual, two-parent families in her analysis, as this is the only intimate relationship that passes the rigid test of public acceptability. Marginalized affiliations (same-sex parents, families without children, affiliations with more than two adults, and nonsexual affiliations) are hard to account for in this rhetoric. McClain does account for single mothers, but seems, in contrast to Martha Fineman’s approach, to support a policy where they will pair up with men rather than champion one which allows them to live their lives free of men.

Second, public decision making also involves, in many circumstances, high levels of government oversight and intrusion. Public schools are held to constitutional standards as private schools are not, and the public gets to comment on how public money is spent.⁴⁵ This communalism, as Fineman has recognized, is inconsistent with what many people view as a flourishing intimate life. Because the danger of government incursion into the intimate lives of caregivers raises difficulties for her theory, Fineman has devoted attention to addressing the problem.⁴⁶

Third, public funding is not the only way to get cash to caregivers. Private law provides subsidies to particular classes of people to encourage socially beneficial conduct. For example, Article 9 of the Uniform Commercial Code gives secured creditors special rights to exercise self-help to repossess collateral if debtors default on their loans, and does so to encourage creditors to extend credit.⁴⁷ Private law further provides subsidies to business forms that enjoy

44. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 29, at 944.

45. Examples of public scrutiny of public expenditures involve controversies over whether the National Endowment for the Arts or New York City should only fund art that complies with predominant views of religion and sexuality. This limitation disfavors marginalized viewpoints, as does much public decision making.

46. See Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1221-24 (1999). She concludes that “[p]roperly conceived, privacy as a principle of self government allows the caretaker-dependent unit to flourish, supported and subsidized by the larger society without the imposition of conformity.” *Id.* at 1224.

47. U.C.C. § 9-609 (2000).

limited liability, such as corporations and limited liability companies.⁴⁸ While business organizations are not perfectly analogous to families, there may be ways to strategically import some business law rules to remunerate caretaking. For example, perhaps caregivers could enjoy limited liability for debts incurred in raising their children, treating them as investors in the entity (either the family, the mother-child dyad, or the child's citizenship). The business judgment rule, which insulates businesses from meddling, could also be adapted to protect mothers receiving public support from government intervention in their families.

The literature on corporate welfare suggests that corporations receive subsidies to further a social good such as creating jobs or fostering economic growth.⁴⁹ Government might, for example, offer a hog-processing plant a \$2.9 million low-interest loan, property improvements, and a deal on sewage charges to encourage the plant to reopen.⁵⁰ We might appropriate this model to transform the (politically unpopular) welfare that assists poor people to "incentives" to engage in conduct that furthers a public value (fostering civic participation by the next generation).⁵¹ Doctrines such as the business judgment rule insulate corporations that receive corporate welfare from suffering the kinds of intrusions into their operations that are routinely suffered by welfare families.⁵² Thus, private law doctrines such as the limited liability of corporations and the business judgment rule offer both public subsidies of beneficial conduct and insulation from the "heavy-handed and intrusive" interventions into family governance that McClain rejects.⁵³

48. See MODEL BUS. CORP. ACT § 6.22 (1984); UNIF. LTD. LIAB. CO. ACT § 303 (1995).

49. For examples of corporate welfare, see Nick Beermann, *Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare?*, 23 SEATTLE U. L. REV. 175 (1999).

50. Steven R. Little, *Corporate Welfare Wars: The Insufficiency of Current Constraints on State Action and the Desirability of a Federal Legislative Response*, 22 HAMLINE L. REV. 849 (1999).

51. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 23 (2000) ("[S]ubsidies are hidden when they are not called subsidy (or welfare, or the dole), but termed 'investments,' 'incentives,' or 'earned' when they are supplied by the government.").

52. See generally JULIE A. NICE & LOUISE G. TRUBECK, CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 636-52 (1997) (discussing Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. 1 (1995); *King v. Smith*, 392 U.S. 309 (1968)).

53. McClain, *Care As a Public Value*, *supra* note 2, at 1729; see also Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999).

One problem with granting parents limited liability is that it might cause creditors to either raise interest rates or refuse to extend credit to mothers, in particular poor mothers. However, creditors almost always raise these arguments when a debtor-friendly measure is considered or enacted.⁵⁴ But most people do repay their debts, so that creditors make money even if there is a risk of non-payment by a few debtors. Even if we worry that limited liability for caregivers would raise the price of credit for those borrowers or preclude their obtaining credit, legislation could counteract this concern by allowing creditors to deduct the caregivers' unpaid debts from the creditors' taxable income. This solution would create a public-private partnership that both subsidizes carework and avoids some of the difficulties posed with public rhetoric and derivative citizenship. The proposal has weaknesses, however, such as the difficulty of determining the extent to which a particular debt was incurred for childraising expenses and the derivative nature of the claim (stemming from the fact that creditors, rather than primary caretakers, would enjoy the tax break).⁵⁵

One final issue relevant to commodification is that much care work is already commodified through the modestly remunerated work of nannies, home healthcare workers, au pairs, and daycare workers. Questions that McClain's analysis raises include whether this already commodified care work is also a route to citizenship. If so, how, if at all, is it different from the wage-earner route to citizenship? If not, what about its current commodified state distinguishes it from the carework that people do for their own family members? Is there a distinction between the spiritual work of creating citizens and the menial work of wiping noses? If so, should we worry about the race and class implications of elevating the work that some caregivers do over the work of others?⁵⁶

54. See, e.g., *Credit Practices*, FTC Staff Report and Recommendation on Proposed Trade Regulation Rule 192-242 (Aug. 1980), in RAYMOND T. NIMMER ET AL., *COMMERCIAL TRANSACTIONS: SECURED FINANCING: CASES, MATERIALS, PROBLEMS* 34 (2d ed. 1999).

55. This final concern could be remedied in an alternative proposal allowing primary caretakers to deduct from their taxable income all childcare expenses to the same extent that business expenses are deductible.

56. See Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997).

III. CITIZENSHIP

Citizenship is the third and final component in this Commentary. McClain is in good company in correlating care and citizenship. Historically, as she explains, feminists “invoked the values of mothers’ social contribution (or ‘maternal citizenship’) to advocate for such measures as mothers’ pensions.”⁵⁷ Anne Dailey has suggested that caretaking is essential to democracy because good care creates good citizens.⁵⁸ Nancy Staudt similarly suggests that taxpaying is a mark of citizenship, and has proposed taxing the two groups that figure most prominently in McClain’s article, homemakers and poor people.⁵⁹ Fineman has suggested that motherhood might be a female analog to a common masculine route to citizenship, military service.⁶⁰ As a thought experiment, building on the alliterative theme of McClain’s article, and indeed this Symposium,⁶¹ I next sketch out some implications of treating motherhood in some ways like military service. The comparison holds both delights and dangers.

On the upside, military service accords education and employment to many economically marginalized people who otherwise would be stuck in dead-end jobs (if employed at all) in the civilian sector.⁶² Moreover, after discharge, veterans enjoy numerous perks, such as treatment in Veterans Administration hospitals, special low mortgage rates, vocational training, and support for their education.⁶³ However, these perks are not universally available and, like some elements of motherhood, they come at enormous, some would say prohibitive, cost.

While the military’s defenders claim that its existence makes democracy possible, it is hardly a democratic institution. First, it is

57. McClain, *Care As a Public Value*, *supra* note 2, at 1700 (citing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935*, at 165–67 (1994)).

58. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1825–60 (1995).

59. See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996); Nancy C. Staudt, *Taxation Without Representation: Contemporary Reality or Historic Misstep?* (unpublished manuscript, on file with the Chicago-Kent Law Review).

60. See Fineman, *supra* note 51, at 19.

61. See, e.g., Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001); Joan C. Williams, *From Difference to Dominance to Domesticity: Care As Work, Gender As Tradition*, 76 CHI.-KENT L. REV. 1441 (2001); Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495 (2001).

62. Stephen R. Barley, *Military Downsizing and the Career Prospects of Youths*, 559 ANNALS AM. ACAD. POL. & SOC. SCI. 141 (1998).

63. 1 MICHAEL E. WILDHABER ET AL., *VETERANS BENEFITS MANUAL: AN ADVOCATE’S GUIDE TO REPRESENTING VETERANS AND THEIR DEPENDENTS* 2-13 to 2-27 (1991).

restrictive. Gay people are excluded from military service, and women are often harassed and otherwise prevented from benefiting from military service as much as heterosexual men.⁶⁴ Second, far from being a haven of liberal individualism, the military requires compliance with dress and behavior codes, as well as unthinking compliance with commands made within a rigid hierarchy.⁶⁵

Analogies between maternal and military conscription are informative. As Katherine Franke has recently noted, feminist legal theory has yet to seriously deconstruct what she dubs “repronormativity,” the cultural and legal forces that incentivize and subsidize motherhood.⁶⁶ If Franke is right and repronormativity is rampant, then perhaps it makes sense to speak of maternal conscription. The military draft is clearly nonconsensual, and one can argue that repronormativity, particularly coupled with compulsory heterosexuality, renders the “choice” to become a mother problematic.⁶⁷ Margaret Atwood’s futuristic dystopia *The Handmaid’s Tale*, in which the religious right overthrows democratic government and conscripts women into bearing their children, is a dark spin on the maternal draft.⁶⁸ On the other hand, however, McClain’s rhetoric about mothering as a means to facilitate the continued existence of democracy echoes military calls to make the world safe for democracy.⁶⁹

64. See JANET E. HALLEY, *DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY* (1999).

65. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding a U.S. Air Force discipline of an orthodox Jewish officer for wearing a yarmulke, in violation of the air force regulation prohibiting the wearing of headgear while indoors). Justice Rehnquist justified judicial deference to military regulations as necessary to “foster *instinctive obedience*, unity, commitment, and esprit de corps.” *Id.* at 507 (emphasis added). Congress legislatively altered this outcome by passing 10 U.S.C. § 774 (2000) (providing that “a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force[s]. . . . [Unless] the wearing of the item would interfere with the performance of the member’s military duties . . . [or] the item of apparel is not neat and conservative”). Of course, the “neat and conservative” standard retains considerable authority for the military to enforce its dress codes.

66. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 194 (2001). Another, less catchy phrase for compulsory maternity is “matrigyno-idolatry.” Diana Tietjens Meyers, *The Rush to Motherhood—Pronatalist Discourse and Women’s Autonomy*, 26 SIGNS 735, 758-62 (2001).

67. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in THE LESBIAN AND GAY STUDIES READER 227 (Henry Abelove et al. eds., 1993).

68. MARGARET ATWOOD, *THE HANDMAID’S TALE* (1986).

69. See Fineman, *supra* note 51, at 19 (“[T]he armed services are established to attend to the collective need for national defense. . . . Caretakers should have the same right to have their society-preserving labor supported and facilitated.”).

Both McClain and Fineman seek a theoretical justification of public support for care work without risking the public invasion that typically accompanies support. While this goal is well worth the considerable effort expended, we are not there yet. I suspect that the business sphere may provide some elements that are missing from the public law models but central to the goals of most feminists. Private law rewards entities for performing valuable public services but also shields them by rhetoric and doctrine from undue government meddling. If some feminists shy away from this model because the market often is associated with conservative rhetoric, they should rethink that position, as family is no less so.⁷⁰

McClain cites men's groups such as the Promise Keepers and their agenda of promoting "responsible fatherhood" as a potential means to break down the breadwinner/caregiver dichotomy. While these groups are not uniformly reactionary (Donna Minkowitz has documented interracial and homoerotic aspects of the Promise Keepers, for example),⁷¹ it is a leap to characterize them as feminist. McClain herself recognizes that "some groups within the social movement (such as Promise Keepers and the Nation of Islam) adhere to norms of male authority and leadership and female submission within the home."⁷² Embracing either market or family models entails sleeping with the enemy; feminists need only determine the evil of these two lessers in any particular context.

It is often a close call. McClain notes evidence that public support of mothers gives low-income girls "the time and freedom away from family work . . . to 'develop another picture of themselves' in the world,"⁷³ allowing girls to think of options other than

70. See *id.* at 16 n.9 ("[I]t is necessary to develop a rhetoric to counter the pervasiveness of market ideology that privileges the economic and confines assessments of success, progress and worth largely in monetary terms."). Conservative groups, such as the American Family Association and Focus on the Family, routinely use the term "family" in their name to signal a right wing political valence. One radical feminist recognizes the frequent confluence between family rhetoric and antifeminist politics, defining "family, patriarchal" as "primary unit of the sadosociety, consisting of slaves organized in domestic and sexual service to a snool as their head," and further defining "snool" as "normal inhabitant of sadosociety, characterized by sadism and masochism combined; stereotypic hero and/or saint of the sadostate." MARY DALY, *WEBSTERS' FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE* 197, 227 (1987). "[S]adosociety," in turn, means "society spawned by phallic lust; the sum of places/times where the beliefs and practices of sadomasochism are The Rule; Torture Cross Society: PATRIARCHY, SNOOLDOM." *Id.* at 94.

71. Donna Minkowitz, *In the Name of the Father*, MS., Nov./Dec. 1995, at 64.

72. McClain, *Care As a Public Value*, *supra* note 2, at 1722.

73. *Id.* at 1726 (quoting LISA DODSON, *DON'T CALL US OUT OF NAME: THE UNTOLD LIVES OF WOMEN AND GIRLS IN POOR AMERICA* 215 (2d prtg. 1999)).

adolescent motherhood for themselves. Moreover, she points out, the burden of caring for younger siblings at home (which happens more often when mothers lack material support), makes some young women seek out early motherhood, figuring that they may as well care for their own children if they are stuck doing childcare.⁷⁴ McClain also argues that young mothers could use government subsidies to pursue their education, thus improving their own prospects and their children's, as well as delaying the birth of additional children.⁷⁵ But legal economists might challenge these premises, contending that if we subsidize something, we get more of it.⁷⁶ Thus, if we subsidize female caregiving through "modern mothers' pension[s]," then perhaps we would get more mothering, more association of female gender roles with care, and less female market participation. On the other hand, of course, perhaps that increased mothering, as McClain presumes, would create better citizens and thus contribute to the public welfare in the long run. Moreover, if primary caregiving were remunerated, then it would be market work. A key question in any proposal is whether government subsidies of parenting would be accompanied by government interventions, decreasing the quality of care by requiring it to comply with majoritarian morality and destroying the very intimacy that fosters human flourishing and, in turn, good citizens.

Both public and private routes exist to the important goal of remunerating care work. McClain harnesses diverse theoretical and rhetorical discourses (liberalism, civic republicanism, responsible fatherhood), riding the horse in the direction it is going by using majoritarian rhetoric about valuing family life and feminine roles in creating citizens. Private law is another horse, also heading in the direction of popular discourse, given the increased privatization of domestic relations law and public hostility to assisting poor families.⁷⁷ I have tried to suggest that while McClain's article does impressive work on the task of carving out a place for parenting work in the political realm, private law can similarly provide models for remunerating parents for the valuable work they do in caring for their families (however constituted). Perhaps the optimal proposal, in this area as in others, is a marriage of public and private, strategically

74. *Id.* at 1726.

75. *Id.* at 1727.

76. See RICHARD A. POSNER, *SEX AND REASON* 167-68 (1992).

77. See Jana B. Singer, *The Privatization of Family Law*, 1992 WISC. L. REV. 1443; NICE & TRUBECK, *supra* note 52, at 96-132.

mining both toward the end of addressing the positive problem of caregiver indigency and the normative problem of transcending the dichotomy between the family and the market. While the route from selfless caregiver to citizen is not nearly as predictable as the progression from A to Z, McClain's analysis of the three Rs has made a substantial contribution to our education on the topic.

