

SUBSIDIZED LIVES AND THE IDEOLOGY OF EFFICIENCY

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"We all live subsidized lives."

— Martha Albertson Fineman¹

"[T]he habits of self-reliance and individual responsibility . . . are
and must be constitutive of the entire American political order."

—William J. Bennett & John J. DiIulio, Jr.²

Martha Fineman challenges us to move caretaking from the margins to the center of society. In a recent book,³ she argued powerfully for a vision of the family that recognizes the relationship of caretaking—Mothering⁴—as central. Her current work further

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1. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 13, 22 (2000) [hereinafter Fineman, *Cracking the Foundational Myths*].

2. *What Good is Government?*, 104 COMMENTARY 25, 31 (1997).

3. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*] (criticizing the dominant focus on sexual affiliation as the legal and cultural core of the family).

4. Fineman uses "Mothering" and the Mother/Child pair as metaphors to recognize the gendered history and continuing gendered culture of caretaking. FINEMAN, *THE NEUTERED MOTHER*, *supra* note 3, at 233-34. She intends this metaphor to be non-essentialist and non-biological, allowing for men to be Mothers and for women to be non-Mothers. *Id.* at 234-35.

develops that analysis by explaining how caretaking⁵ also should be recognized and rewarded as central to the market and the state.⁶ This vision reveals and reshapes the interrelationships between the three basic institutions of state, market, and family.

In the dominant "liberal" theory of politics and economics, autonomy is the key to both a free state and a free market;⁷ dependency is relegated to the family.⁸ By probing this founding myth, Fineman strikes a fault line: globally and locally, the institutions of state, family, and market are undergoing a dramatic shift. This shift, however, is moving the family and its caretaking labor further toward the margins of the market and state. Fineman's vision challenges us to reverse the direction of this shift at a critical—and critically difficult—moment.

Fineman directly defies what many see as the unavoidable demise of the welfare state.⁹ A new political consensus claims to endorse "individual responsibility, as opposed to social responsibility, for societal problems."¹⁰ This is a time of strong political movement *away* from collective responsibility for caretaking.

5. Fineman chooses the term "caretaking" over "caregiving" to counter the assumption that this labor should be a "gift." FINEMAN, *THE NEUTERED MOTHER*, *supra* note 3, at 234.

6. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 14-15 (arguing for a theory of collective responsibility for dependency).

7. See, e.g., RICHARD ASHCRAFT, *LOCKE'S TWO TREATISES OF GOVERNMENT* 102 (1987) (explaining that the assumption that individuals have the "freedom to order their [own] actions" is the foundation of Locke's theory of political liberty); JOHN GRAY, *LIBERALISM* 60-61 (1986) (describing the liberal view that "[a] free man is one who possesses the rights and privileges needed for him to act autonomously—to rule himself, and not be ruled by another"). Here, "liberal" refers to liberal political theory, which grounds both "liberals" and "conservatives" in contemporary U.S. politics. See *infra* note 16 (noting different usages of the term "liberal").

8. See ASHCRAFT, *supra* note 7, at 109-11 (stating that Locke conceives the family as a pre-natural, pre-political institution in which people act not individualistically, but for the mutual benefit of others); FINEMAN, *THE NEUTERED MOTHER*, *supra* note 3, at 17-18.

9. See, e.g., Thomas J. Duesterberg, *Reforming the Welfare State*, 35 SOC'Y 44, 44 (1998) (reporting that "the welfare state is under broad attack" for failing in its goals and for possibly even "worsen[ing] the conditions it was designed to alleviate"); *Free to Grow*, WALL ST. J., Sept. 3, 1996, at A16 (quoting World Economic Forum report: "We know that the era of big government is over The current social welfare system is proving to be too heavy a burden—even for rich European countries such as France, Germany, and Sweden."); Llewellyn H. Rockwell, *Republican Reforms Fail Market Test*, J. OF COM., Apr. 18, 1996, at A5 (stating that "[t]he welfare state has become an unworkable and crushing burden"); Joseph Kahn, *China Quietly Shrinks Classic Welfare State, Leaving People to Pay for Pensions, Healthcare*, WALL ST. J., Jan. 30, 1998, at A10 (quoting a Chinese government official's report declaring that "the state doesn't take care of people anymore. You take care of yourself."); James S. Smith, *Latin Countries Rediscover Joys of Capitalism*, L.A. TIMES, Oct. 9, 1989, at 1 (noting that "[a]cross Latin America, governments are throwing out their welfare-state economic recipes"). Welfare state programs have fallen far short of feminist ideals: they generally incorporate race, class and gender bias and have offered inadequate, stigmatized support for many caretakers—but recent attacks on the welfare state aim to exacerbate, not alleviate these problems.

10. Duesterberg, *supra* note 9, at 44.

For example, recent welfare "reforms" require parents in poverty to substitute market labor or unpaid "workfare" for government support for child care.¹¹ Increased pressure for labor market "flexibility" in a competitive global market often requires working class and middle class parents to bend their family lives to accommodate lower pay, longer hours, fewer benefits and protections, and less stable employment.¹² Reduced government spending on social services and public infrastructure means families—caretakers—put more time and money into procuring or providing transportation, education, health care, recreation, and dependent care.¹³ Around the world, this movement away from social support for human needs appears to many to be the inevitable result of a newly integrated global economy.¹⁴

11. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 3, at 110-14 (discussing wage work requirements in the federal Family Support Act of 1988 and in subsequent state legislation); see generally JOEL F. HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* (1997) (criticizing the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and recent state "welfare reform" policies for inadequate attention to the problems of low-wage labor).

12. See Guy Standing, *Labor Insecurity through Market Regulation: Legacy of the 1980s, Challenge for the 1990s*, in *POVERTY, INEQUALITY AND THE FUTURE OF SOCIAL POLICY: WESTERN STATES IN THE NEW WORLD ORDER* 153-79 (Katherine McFate, Roger Lawson, & William Julius Wilson eds., 1995) (discussing the growth of worker insecurity and inequality from "flexible labor markets"). Whether flexibility is *good* for women with caretaking obligations depends on *who* has to be flexible, the employer or worker; much of the new labor market "flexibility" involves a female-dominated "secondary" job market with less control and more risk for workers. See generally CHRIS TILLY, *HALF A JOB: BAD AND GOOD PART-TIME JOBS IN A CHANGING LABOR MARKET* (1996). For example, some employers explain the advantages of part-time employment as the ability to cover shifts at odd and unpredictable hours. *Id.* at 72. See also PIERRE BOURDIEU, *ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET* 34 (Richard Nice trans., 1998) (criticizing "flexible working" as "another magic word of neoliberalism . . . meaning night work, weekend work, irregular working hours, things which have always been part of the employers' dreams").

13. See Isabella Bakker, *Engendering Macro-economic Policy Reform in the Era of Global Restructuring and Adjustment*, in *STRATEGIC SILENCE: GENDER AND ECONOMIC POLICY* 10-13 (Isabella Bakker ed., 1994) (discussing the effect on women in many nations, both North and South, of reduced government capital expenditures, service delivery, and public employment); Mariarosa Dalla Costa, *Introduction*, in *PAYING THE PRICE: WOMEN AND THE POLITICS OF INTERNATIONAL ECONOMIC STRATEGY* 1-12 (Mariarosa Della Costa & Giovanna F. Dalla Costa eds., 1993) (arguing that economic adjustment policies imposed by international institutions on some African and Latin American countries have systematically intensified women's family and community labor and worsened conditions for women and children). In the United States, federal domestic discretionary (non-entitlement) spending fell from nearly five percent of Gross Domestic Product (GDP) in the late 1970s to a little more than three percent of GDP in the late 1980s and early 1990s; this spending includes many resources which support caretakers and dependents, such as education, Head Start, and housing assistance. See Doug Henwood, 88 *LEFT BUS. OBSERVER*, Feb. 25, 1999, at 1, 7.

14. See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* xviii (1999) (introducing his book on the triumph of global free-market policies by explaining that he views "globalization" like the sunrise: there's not much he can do to stop it, and he's not going to waste time trying). See BOURDIEU, *supra* note 12, at 34 (criticizing the "myth" of "globalization" as "the main weapon in the battles against the gains of the welfare state"); GARY TEEPLE, *GLOBALIZATION AND THE DECLINE OF SOCIAL REFORM* 104-07 (1995) (describing and criticizing the neoliberal

What accounts for the widening chasm between Fineman's vision and the current political reality? How can we begin to establish collective responsibility for caretaking as the reasonable, reachable policy goal Fineman elegantly shows it to be?

Fineman's visionary proposal is blocked from mainstream view by two strands of right-wing ideology. First, and most obviously, neoconservative ideology defends a hierarchical and patriarchal vision of caretaking at the margins of state and market, relegated to unpaid or underpaid women in families headed by men. For example, George Gilder argues that the "most fundamental" problem with welfare is that it tends to "destroy the key role and authority of the father."¹⁵ Second, neoliberal¹⁶ ideology, which defends the "free market" and "economic efficiency" as pillars of state and society, may present a more subtle but even stronger barrier to Fineman's vision. Like neoconservatism's overtly gendered vision, neoliberalism's superficially gender-neutral doctrine keeps caretakers and their dependents—most women—from securing their fair share of support from the state and market.

Fineman explains that "we all live subsidized lives."¹⁷ At one level, this statement recognizes the importance and universality of

rationales for dismantling the welfare state in industrial countries); JULIA S. O'CONNOR, ANN SHOLA ORLOFF & SHEILA SHAVER, *STATES, MARKETS, FAMILIES: GENDER, LIBERALISM & SOCIAL POLICY IN AUSTRALIA, CANADA, GREAT BRITAIN & THE UNITED STATES* 219-22 (1999) (describing how globalization has formed a "policy logic" in those four countries that has justified economic changes harmful to women, including restricted social programs and restructured labor markets); WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* 360-87 (1997) (giving examples of global market pressures constraining the welfare state in Germany, Japan, and the United States, and arguing that these pressures are not inevitable but dependent on political choices).

15. George Gilder, *The Coming Welfare Crisis*, 11 HERITAGE FOUND. POL'Y REV. 25, 26 (1980). Gilder goes on to complain that the father "can no longer feel manly in his own home. . . . In the welfare culture, money becomes not something earned by men through hard work, but a right conferred on women by the state." *Id.* at 26-27.

16. Neoliberalism revives the nineteenth century laissez-faire ideals of markets unfettered by government regulation. See DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS* 14-16 (1998) (discussing the "return toward traditional liberalism around the world" and distinguishing this "liberalism" from the common American usage of the term as the opposite of "conservatism"). The term "neoliberal" gained prominence in reference to policies led by the United States in response to the 1980s Latin American debt crisis. These policies typically include cutting federal spending (particularly funds for social welfare programs), raising consumption taxes, tightening credit, maintaining high interest rates, and promoting increased foreign trade and investment. See Enrique Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221 n.117 (1994). For a discussion of the historical development of neoliberal economic theory, see TEEPLE, *supra* note 14, at 2-3. Though the term "neoliberal" is more often used outside of the United States, I use it in part in an effort to join a global conversation not cabined by the limited spectrum of American "liberal" and "conservative" politics—neither of which challenge fundamental assumptions of "free market" ideology.

17. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 22.

caretaking. None of us are self-made; all have depended on others—especially mothers—to give us birth, to nurture and teach us in the myriad ways required to become functional human beings.¹⁸ All will need to depend on others at some point in our lives to perform the mundane tasks of daily living, as well as to reach larger goals. At another level, we all live subsidized—and subsidizing—lives because we all receive benefits—and costs—from a wide range of resources we did not directly produce or purchase: whether in the form of government aid, inheritance, tax breaks, private charity, infrastructure, the natural environment, or the generations of labor and wisdom that went into shaping the political, social and economic institutions that frame our lives. Fineman's dystopian vision shows how far from the mainstream we would have to go to try to construct a world of "un-subsidized" lives.¹⁹

From this foundation of subsidized lives, Fineman questions why some subsidies are "stigmatized while others are hidden" or rewarded.²⁰ In this Article, I aim to follow up on her question by exploring how neoliberal ideology, which pervades contemporary policy, scholarship, and culture,²¹ makes ubiquitous subsidies take on drastically different meanings.

Neoliberalism incorporates and promotes the neoclassical version of economics as a matter of scientific fact divorced from politics or ideology.²² Neoclassical economics teaches that scarce resources mean we cannot have it all, but that impartial cost-benefit

18. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 19 (noting that infants will perish if not nurtured).

19. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 19, 27-28.

20. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 23.

21. "Everywhere we hear it said, all day long—and this is what gives the dominant discourse its strength—that there is nothing to put forward in opposition to the neo-liberal view, that it has succeeded in presenting itself as self-evident, that there is no alternative." BOURDIEU, *supra* note 12, at 29 (criticizing the dominance of free-market ideology). See also YERGIN & STANISLAW, *supra* note 16, at 14-15 (favorably describing a fundamental shift in ideas, with the result that "it is the University of Chicago's free-market school that is globally influential in the 1990s").

22. See, e.g., Joshua Cooper Ramo, *The Three Marketeers*, TIME, Feb. 15, 1999, at 39 (reporting that leading U.S. policymakers Federal Reserve Chairman Alan Greenspan, Treasury Secretary Robert Rubin, and Deputy Treasury Secretary Lawrence Summers insist on focusing on free-market economic facts beyond ideology or partisan considerations). Legal scholars analyzing feminist issues frequently treat neoclassical economics as an objective, descriptive tool separable from political ends. See, e.g., EDWARD J. MCCAFFERY, TAXING WOMEN 168-69 (1997) (expressing some skepticism about the neutrality of neoclassical economic theory in tax law, but concluding that it "does provide an external grounding . . . outside the subjective preferences of any one author, or of any liberal, culturally elite vanguard"). For a critical analysis of how neoclassical economic analysis in law incorporates value judgments in the guise of value-free science, see Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 478-81 (1974).

calculations tell us how to make the most of what we have.²³ The question of which subsidies are public rights and which subsidies are public wrongs thereby appears to become a question of economics, not politics—of principle or fact, not power.²⁴ Neoliberal ideology transforms the privatization of caretaking from a moral, divine, or biological imperative (in the view of neoconservatives and the religious right) to an economic imperative.²⁵

Feminists—including Fineman—have gone far to expose the biases underlying seemingly neutral liberal principles in the context of equality theory.²⁶ But as “efficiency” goals eclipse “equality” goals,²⁷ feminists’ critical scrutiny needs to turn toward “economic efficiency” principles. By re-envisioning subsidies for dependency,²⁸ Fineman leads us in this crucial direction.

23. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (5th ed. 1998) (declaring that “[e]conomics is the science of rational choice in a world—our world—in which resources are limited in relation to human wants”).

24. See SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW & POLICY* 55 (1993) (economic analysis deflects normative criticisms by disclaiming any normative judgments implicit in economic theory); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 118-21 (1987) (explaining that Law and Economics claims to base its policy prescriptions not on moral or political goals but on a technical and empirical determination of people’s freely chosen self-interest).

25. See, e.g., YERGIN & STANISLAW, *supra* note 16, at 323-24 (asserting that Europeans will reduce their welfare state programs because “the overextended welfare system undermines the ability to create the wealth required to pay for it” and because of “competitive pressures” from a newly integrated global economy). Secretary of the Treasury Lawrence Summers explained U.S. economic policymakers’ approach to global economic problems by saying, “we start with the idea that you can’t repeal the laws of economics,” *quoted in* Ramo, *supra* note 22, at 36 (interviewing Summers during his former job as Deputy Treasury Secretary). For an insightful analysis of how neoliberal ideology conjoins with conservative authoritarianism, despite neoliberalism’s apparent emphasis on individual freedom, see EVAN WATKINS, *EVERYDAY EXCHANGES: MARKETWORK AND CAPITALIST COMMON SENSE* 49-54 (1998).

26. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 52 (1991) [hereinafter FINEMAN, *THE ILLUSION OF EQUALITY*] (explaining how equal division of property at divorce ignores most women’s unequal contribution to caretaking); MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 111 (1990) (presenting an equality approach that recognizes difference not as located in particular persons, but as produced socially from the perspective of those with the power to label others); CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 32-35 (1987) (analyzing attributions of gender “difference” as a problem of gender “dominance”).

27. See Gerald F. Seib & Alan Murrey, *Changed Party: Democrats’ Platform Shows How Different They Are From 1972*, *WALL ST. J.*, July 15, 1992, at A1 (quoting 1992 Democratic Party platform’s statement that “[a]n expanding, entrepreneurial economy . . . is the most important family policy, urban policy, labor policy, minority policy, and foreign policy America can have”); see also Irving Kristol, *Board of Contributors: Hoover, Nixon, Carter . . . Bush?*, *WALL ST. J.*, Oct. 8, 1990, at A12 (stating that “[t]he American people are much more interested in economic growth and in the individual economic opportunity it creates, than in coercive redistribution of income or a legislated equality of condition.”).

28. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 19, 22-23 (explaining collective support for caretaking as payment on a social debt, in contrast to the dominant view of caretaker subsidies as charity).

I. FROM "SPECIAL" TREATMENT TO "REDISTRIBUTIVE" TREATMENT

In an earlier book, Fineman broke new ground by explaining how the illusion of *equality* serves to shift family resources away from caretaking women in divorce.²⁹ The neoliberal illusion of *efficiency* similarly serves to shift state and market resources away from caretaking women in work and citizenship. The opposition between "efficiency" and "redistribution"—or between economic "growth" and social "equity"—is a central strategy through which public subsidies to support caretaking needs are constructed as *antithetical* to state, market, and family, while public subsidies to support (non-human) capital and corporate needs are constructed as *essential* to state, market, and family.

In neoclassical economic theory, "efficient" policies are those that increase the overall size of the economic "pie,"³⁰ while "redistributive" policies are those that change the size of different slices within the "pie."³¹ This opposition between wealth *creation* and wealth *division* forms the dominant framework for analysis of law and policy today.³² Liberals and conservatives disagree on the relative weight that should be given to each side of this opposition, but scholars and policymakers typically assume that these two choices frame the debate.³³

29. See generally FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 26, at 52 (arguing that the principle of equality in divorce law reform has harmed many women by treating them the same as men even though they tend to be unequal in terms of unpaid family labor).

30. See A. MICHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7 (2d ed. 1989). This definition of "efficiency" reflects how the term is commonly used in law and policy, *id.*, and is a rough statement of what is more technically called Kaldor-Hicks efficiency. Neoclassical economics defines Kaldor-Hicks efficiency as resource allocations that produce aggregate gains outweighing aggregate costs (even though some individuals may be worse off). See POSNER, *supra* note 23, at 14. In contrast, Pareto optimality, a "purer" version of efficiency, occurs when resource allocations make the pie bigger (increasing aggregate gains) without making any slice smaller (no one is worse off, in their own subjective view). *Id.* But true Pareto efficiency is at best impractical when applied to real-life policy questions, at worst a tautology; because by definition it only happens when no one would object to it happening. See KELMAN, *supra* note 24, at 120 (describing Pareto efficiency as a banal concept).

31. See POLINSKY, *supra* note 30, at 7.

32. See Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1823 (1995) (noting that "the tradeoff between maximizing and equalizing (whether utility, wealth, or resources) . . . is a familiar one"); ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975) (discussing the question of the proper balance between equality and efficiency as the central challenge for American society); MARTIN NEIL BAILY, GARY BURTLESS & ROBERT E. LITAN, *GROWTH WITH EQUITY: ECONOMIC POLICYMAKING FOR THE NEXT CENTURY* 3 (1993) (evaluating a range of policies according to two contrasting goals of "growth" and "equity").

33. See, e.g., NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 189 (1997) (describing a continuing debate about whether economic efficiency or fair distribution should be law's primary concern, and supporting a search for a balance between the two goals); KENNETH ABRAHAM, *DISTRIBUTING RISK, INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 18 (1986) (presenting insurance law issues as a

Just as contemporary public policy analysis presents two competing choices, efficiency versus redistribution, traditional equality analysis similarly presents two competing choices, equal treatment versus special (or different) treatment.³⁴ Within both of these analytical frames, one choice tends to appear objective, the other subjective; one choice tends to appear neutral, the other preferential.³⁵ This article argues that for both frameworks, that appearance is false. By framing the choices this way, both dichotomies mask inherent biases and baseline moral judgments that devalue caretaking labor.

To bring caretaking from the margins to the center, feminists have challenged the supposedly neutral framework of equality law where support for women's particular needs—such as the demands of caretaking—is constructed as a “special” accommodation outside the scope of “normal” equal treatment.³⁶ Similarly, to bring caretaking from the margins to the center in the neoliberal age, feminists must challenge the supposedly neutral “free market” framework within which women's particular needs—especially those of caretaking—are

choice between the contrasting goals of efficiency and redistribution); CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 350 (1997) (rejecting economic efficiency as an absolute requirement for regulatory statutes, and instead favoring a balance between economic efficiency and other goals, such as redistribution); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2013-16 (1996) (analyzing feminist tax policy in terms of choices between competing goals of efficiency and equity); John J. Donohue, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1366 (1989) (concluding that judgments about how to value and interpret employment discrimination laws depend on choices between equity and efficiency goals, but arguing that efficiency as well as equity can support strong sex discrimination laws); Michael I. Swygert & Katherine Earle Yaines, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249 (1998) (proposing a model for reconciling these goals).

34. See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity in the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142-44 (1986) (summarizing the feminist debate over equal versus special treatment, and noting that this binary is also described as the choice between formal and substantive equality, or between equality of opportunity and equality of outcomes); see also Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 567 (1998) (explaining that the equal versus special rights debate in the context of sexual orientation shows the limits of the equal/special binary); Martha Minow, *The Supreme Court, 1986 Term: Justice Engendered*, 101 HARV. L. REV. 10, 31 (1987) (drawing a parallel between the feminist equal treatment/special treatment debate and the debate between color-blindness and affirmative action in the racial equality context).

35. See Finley, *supra* note 34, at 1146 (explaining that the equal treatment/special treatment binary makes “equal treatment” appear to be the more objective and value-neutral choice); see *infra* text accompanying notes 65-73 (explaining and criticizing the parallel claims to neutrality of “equal treatment” and “efficiency” approaches).

36. See, e.g., Finley, *supra* note 34, at 1146 (arguing that equality analysis fails to challenge male-biased workplace norms that make maternity and parenting a private matter special to women); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (arguing for a new “equality as acceptance” principle that would challenge social institutions that devalue women's “differences,” such as childrearing responsibility); Mary Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 247 (1987) (analyzing how formal equality has only limited potential for social change, noting that it fails to challenge job structures that interfere with many women's parenting responsibilities).

constructed as “redistributive” subsidies outside the scope of a normally efficient market.

The efficiency/redistribution framework has become a primary means of differentiating among programs of public support. Public support for caretaking falls squarely on the “redistributive” side of the line, in the conventional wisdom. For example, many characterize the former Aid to Families with Dependent Children (AFDC),³⁷ the target of recent federal welfare “reform,” as redistributing money from taxpayers to single parents (or unemployed couples) in poverty.³⁸ Similarly, many describe the Family and Medical Leave Act³⁹ as redistributing resources from employers to workers by giving some employees a right to twelve weeks unpaid leave from their jobs for dependent care or serious illness.⁴⁰

But, by framing collective responsibility for caretaking as a policy choice in favor of redistribution over efficiency—fairness over growth—neoclassical economic theory implicitly devalues this choice.⁴¹ By definition, efficiency is about promoting overall gain (maximizing aggregate resources);⁴² redistribution is about benefiting some at the expense of others (moving resources around). Efficiency, in other words, is defined as furthering the *public* interest; redistribution as furthering *particular* interests.⁴³ Even if these redistributive goals deserve public support, compared to efficiency goals, they will always seem parochial and problematic.

Since an *efficient* distribution of resources, by definition, maximizes overall gain, a “*re-distribution*” of resources that deviates from this efficient division will risk *reducing* overall gain.⁴⁴ According to the

37. 42 U.S.C.A. § 601 (repealed 1996).

38. See, e.g., Alstott, *supra* note 33, at 2077 (describing AFDC as an income transfer program that redistributed federal revenues to the poor).

39. Pub. L. No. 103-3, 107 Stat. § 7 (codified as amended in scattered sections of 29 U.S.C.).

40. See, e.g., Thomas F. Cotter, *Legal Pragmatism and the Law & Economics Movement*, 84 GEO. L.J. 2071, 2112 (1996) (giving example of the Family and Medical Leave Act as redistributive, rather than efficiency-oriented).

41. See Martha T. McCluskey, *Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 716-22 (1998) (using example of workers' compensation “reforms” to show how, within the dominant economic framework, so-called efficiency goals wrongly appear to produce the most equitable results); Cotter, *supra* note 40, at 2102-07 (summarizing and questioning the mainstream law and economics argument that equity can be more effectively achieved through efficiency-oriented laws).

42. See POLINSKY, *supra* note 30, at 7.

43. See McCluskey, *supra* note 41, at 721 (criticizing the use of “efficiency” in workers' compensation policy to construct certain interests—particularly those of employers and insurers—as “public” and workers' interests as “special”).

44. See McCluskey, *supra* note 41, at 717, 717 n.245.

neoclassical framework, then, redistribution poses tough tradeoffs. Scarce resources limit the benefits that can be achieved by re-dividing the pie in pursuit of fairness.

Following this reasoning, the dominant economic theory teaches that redistributive policies driven by good intentions (such as subsidizing caretakers) will have unintended consequences that hurt both their beneficiaries and others. For example, the smaller pie resulting from a choice of redistribution over efficiency may negate the gains resulting from the redistribution.⁴⁵ A redistributive subsidy may provide a temporarily bigger "slice" of the pie, but at the risk of shrinking the overall pie—thereby diminishing that slice over the long run and hurting the beneficiaries of the redistribution, as well as others.⁴⁶

Many feminists have criticized the equal treatment/special treatment framework for presenting a bad choice for women with caretaking responsibilities, arguing that either way women lose.⁴⁷ Under this framework, women can either be "equal," at the cost of ignoring gender differences (social or biological) such as the particular demands of pregnancy or caretaking.⁴⁸ Or, women can be "different," at the cost of perpetuating pregnancy or caretaking needs as inherently deviant and dependent on "special" protection.⁴⁹ For

45. See, e.g., Gordon Tullock, *The Reality of Redistribution*, in POVERTY & INEQUALITY: ECONOMICS OF INCOME REDISTRIBUTION 127-30 (Jon Neill ed., 1997) (using mainstream economic theory to assert a tradeoff between redistributive income transfers and aggregate growth).

46. See *id.* at 130-31 (questioning the ethics of providing a gain to the current poor at the expense of the future poor, based on the assumption that redistribution reduces growth that would benefit the future poor).

47. See, e.g., CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 221 (1989) (explaining that approaching equality as a matter of sameness or difference "merely provides two ways for the law to hold women to a male standard"); Finley, *supra* note 34, at 1158 (explaining how the "focus of equality analysis on comparisons with the male norm makes it well-suited for perpetuating existing distributions of power").

48. See FINEMAN, THE ILLUSION OF EQUALITY, *supra* note 26, at 21-30 (discussing problems of the equal treatment standard, particularly in family law); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1003 (1984) (criticizing Constitutional doctrine for failing to reconcile the "ideal of sex-based equality with the reality of categorical biological difference" and developing an approach to equality doctrine that would subject laws governing reproductive differences to heightened scrutiny); Linda J. Kreiger & Patricia N. Cooney, *The Miller Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983) (arguing against an "equal treatment" approach that prohibits sex-based protection for pregnant women in the workplace).

49. See MACKINNON, FEMINISM UNMODIFIED, *supra* note 26, at 35 (rejecting a "difference" approach); Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279 (1998) (suggesting a redefinition of equality rather than a rejection of equality in favor of "difference"); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985) (arguing for the treatment of pregnancy as similar to disability rather than as a "difference" in need of "special treatment").

example, the “normal career track” assumes freedom from caretaking demands; but the “mommy track” channels workers with caretaking responsibilities into a separate and subordinate path which is likely to lead to lower pay and greater job insecurity.⁵⁰ Anti-feminists (and some liberal feminists) insist that we cannot have it both ways: women must either demonstrate equality and independence by forsaking “special” protections, or else accept (or even celebrate) subordination and insecurity as the price of difference.⁵¹

Though superficially neutral, the efficiency/redistribution dichotomy presents a similarly skewed choice for feminism in general and caretaking responsibilities in particular. Either way, most caretakers (and most women) lose. Feminists can choose “efficiency,” which involves directing public assistance away from caretaking in order to support economic growth. Or, feminists can choose “redistribution,” which involves taking public assistance away from economic growth in order to support caretaking—with the predicted result that many caretakers (and society as a whole) will face greater economic insecurity in the long run. According to “free market” theory, the economic reality of scarce resources dictates that we cannot have it both ways. If feminists insist on rights to redistributive subsidies, they must accept the hidden costs of these subsidies.

Examples of the purported costs of “redistributive” policies are legion. In the prevailing story told by welfare “reform” advocates, the former federal AFDC program ended up hurting the families it aimed to subsidize.⁵² This view asserts that AFDC created a “cycle of dependency” by providing an alternative to wage work (or wage-working husbands) for single mothers, thereby encouraging women and families in poverty to forgo productive labor market (or marriage) opportunities that supposedly would have improved their

50. See Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 870 (1997) (using the “mommy track” as an example of the problems with a “difference” approach to equality); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1237 n.197 (1989) (discussing how alternative models for combining work and family may become de-valued as “mommy tracks”).

51. See *Interview by Mary Tillotson with Suzanne Fields*, CNN & COMPANY, Cable News Network (Transcript #479) (Dec. 1, 1994) (giving the antifeminist argument against protections from sexual harassment and date rape on the ground that women cannot assert equality and victimization at the same time); Williams, *supra* note 49, at 367 (giving feminist arguments about the costs to women of treating pregnancy as a “difference” rather than as a condition similar to physical conditions affecting men). Criticizing such reasoning, Catharine MacKinnon explains that as long as equality is framed as an issue of women’s sameness or difference compared to men, “women’s demands for sex equality will appear to be demands to have it both ways.” See MACKINNON, *supra* note 47, at 233.

52. See Duesterberg, *supra* note 9, at 44 (stating that critics believe the welfare system may worsen the problems it aims to solve).

lives in the long run.⁵³ In addition, many condemned AFDC for shrinking the "economic pie," arguing that this "redistributive" program diverted society's resources from "productive" economic activity that would have improved job opportunities for welfare recipients (and others).⁵⁴

Similarly, according to predominant wisdom, redistributive subsidies aimed at helping working or middle class caretakers also end up hurting their intended beneficiaries. For example, many argue that the employer-based subsidy for family care (unpaid work leave) mandated by the Family and Medical Leave Act induces employers to limit jobs and wages for workers with caretaking needs.⁵⁵ And once again, the neoclassical framework predicts that by diverting employers' resources from "production" to "redistribution," we will sacrifice economic growth and competitiveness—thus leading to fewer jobs and higher consumer prices in the long run.⁵⁶ Western European countries are often cited as a warning of these tradeoffs: more generous protections for workers and families bring high unemployment and slow economies, so the conventional story goes,⁵⁷ although the evidence of this link is tenuous.⁵⁸

53. See Pete Wilson & Chuck Poochigan, *California's Gains in Welfare Reform are Merely a Start*, FRESNO BEE, July 1, 1997, at B5 (discussing what they describe as the "inescapable conclusion that while the welfare system was begun with the best of intentions, it has begun a downward spiral of permanent dependency and suffocating hopelessness . . . it is stifling and degrading to the very people it claims to help").

54. See David Charney, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1602 (1996) (stating the conventional economic argument that welfare programs have hurt economic growth).

55. See Maria O'Brien Hylton, *Parental Leaves and Poor Women: Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 493 (1991) (finding that parental leave policies create incentives for lower pay and fewer jobs).

56. For example, Massachusetts' business lobbyists warned that proposals for paid family leave would put state businesses at a competitive disadvantage. Diane E. Lewis, *Mass Advocates Hail Clinton Family-Leave Plan*, BOSTON GLOBE, May 25, 1999, at D2.

57. See Sylvia Nasar, *Where Joblessness is a Way of Making a Living*, N.Y. TIMES, May 9, 1999, § 4 (The Week in Review), at 5 (attributing high European unemployment rates to generous safety-net programs); see also James H. Weaver, *What Is Structural Adjustment*, in STRUCTURAL ADJUSTMENT, RETROSPECT AND PROSPECT 10 (Daniel M. Schydrowsky ed., 1995) (explaining that, for less developed countries, wages are often "kept higher than market wages" by social insurance schemes, and that International Monetary Fund (IMF) and World Bank policies designed to reduce labor protections and wages are a means of bringing about a "great increase in the use of labor" that will foster economic development). This reasoning rests on the problematic assumption that a shift in labor from unpaid domestic labor to wage labor (often combined with unpaid labor) is necessarily good and "productive." See *infra* notes 109-13 and accompanying text (questioning the biased norms incorporated in dominant standards of "growth" and "productivity").

58. See, e.g., Rebecca Blank, *Does a Larger Social Safety Net Mean Less Economic Flexibility?*, in WORKING UNDER DIFFERENT RULES 157, 178 (Richard B. Freeman ed., 1994) (finding that differences among nations in family leave and day care policies affected family behavior, but that other factors caused higher European unemployment rates in the 1980s and 1990s).

The primacy of efficiency over redistribution is the core principle of the neoliberal "consensus" that drives contemporary policymaking in the U.S. and much of the world.⁵⁹ As a Wall Street Journal article approvingly noted, the choice of efficiency over redistribution now has bipartisan support.⁶⁰ The article quotes the 1992 Democratic party platform to show how far that party has turned away from the redistributive goals of its past: "above all, instead of dividing the economic pie, [the "new" Democratic party] focuses on making the pie grow."⁶¹ Similarly, the 1996 national Democratic party platform singled out welfare as an example of the failures of redistribution, and highlighted "reforms" replacing welfare with wage work as an example of the party's embrace of the opposite course of wealth-production.⁶² After President Clinton's 1996 reelection, the head of the Democratic Leadership Council attributed Clinton's continued success to his ability to "reconnect the Democratic Party with its real tradition . . . of economic growth and opportunity, not redistribution."⁶³

To defend public support for caretaking, feminists must challenge not simply this prevailing choice of efficiency over redistribution, but also the framework that makes redistribution seem so costly. That is, we must show that efficiency is not only the *wrong* goal, but an *illusory* goal—just as Fineman showed that a neutral concept of equality is illusory and should be abandoned.⁶⁴ As with the equal treatment/special treatment dilemma, feminists can escape the bad

59. See GERALD EPSTEIN, JULIE GRAHAM & JESSICA NEMBARD, *Introduction*, in CREATING A NEW WORLD ECONOMY: FORCES OF CHANGE AND PLANS FOR ACTION 3-4 (1993) (explaining and criticizing the new "conservative consensus" embracing free market ideology for domestic and international policy); GREIDER, *supra* note 14, at 264, 270-71 (describing the development of the neoliberal "Washington Consensus," embracing privatization and financial deregulation); Weaver, *supra* note 57, at 5 (describing a "remarkable convergence" among theoreticians and policymakers in favor of "laissez-faire, free trade" strategies for economic development); MICHEL CHOSSUDOVSKY, *THE GLOBALISATION OF POVERTY* 17 (1997) (concluding that "[a] 'political consensus' on macro-economic policy has developed, governments throughout the world have unequivocally embraced the neoliberal policy agenda"). Some commentators see this consensus as beginning to unravel at the end of the 1990s, particularly after recent global economic crises. See, e.g., Robert L. Borosage, *The Global Turning*, THE NATION, July 19, 1999, at 19.

60. Seib & Murrey, *supra* note 27, at A1 (reporting that the Democratic Party's 1992 platform reveals a fundamental change in policy, possibly because of increased fund-raising demands).

61. Seib & Murrey, *supra* note 27, at A1.

62. See *Platform Committee to the 1996 Democratic National Convention*, available in Westlaw, 1996 WL 490886, at *41.

63. Joel Bleifuss, *Whose Party Is It?*, IN THESE TIMES, Feb. 3, 1997, at 12 (quoting Al From, in a speech for the Democratic Leadership Council's annual policy forum).

64. See FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 26, at 189-90 (summarizing the failures of equality principles in the context of divorce law).

choices of the efficiency/redistribution dilemma by showing that this framework rests on biased norms and double standards.

II. WHOSE EFFICIENCY?

Fineman and other feminists have explained how seemingly neutral ideas of "equality" in liberal theory in fact incorporate gendered norms.⁶⁵ Women's reproductive or caretaking needs are "different" and in need of "special" treatment only if one assumes as the norm a person without these needs—such as a stereotypical man.⁶⁶ Any analysis of "sameness" or "difference" necessarily requires a standard of comparison.⁶⁷ It is the implicit standard of a traditional man that makes the choice of equal or different treatment so costly for women—and so beneficial for men.⁶⁸ Traditional men can be both equal *and* different—having it both ways—because "equal" treatment is defined to privilege their specific needs not as "differences" but as unstated norms.⁶⁹ For example, the recent constitutional challenge to the male-only admittance policy of the Virginia Military Institute raised the question of whether women should have "equal" treatment, by being given the opportunity to join a public military-style school featuring a stereotypically masculine "adversarial" model of education—or whether women would be best

65. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 3, at 38 (discussing how purportedly gender-neutral approaches to equality have historically failed to remedy women's exclusion and subordination); MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 26, at 34 (explaining that the choice of the framework of sameness versus difference for equality law itself forms a political strategy that conceals a male-biased standard); Finley, *supra* note 34, at 1152-59 (analyzing how the assumption of a male norm in traditional equality analysis creates problems for women).

66. See Finley, *supra* note 34, at 1156 (explaining how maternity leave becomes "special" in a pejorative sense "only because it is not something men need"); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 435-36 (1981) (arguing that legal recognition of women's specific needs relating to pregnancy and breastfeeding should be a matter of equality not "special" rights); Williams, *supra* note 49, at 318 (arguing that "allowing women to perform as ideal workers along with the men but without the flow of family work that supports male ideal workers is not equality, it is discrimination").

67. MINOW, *supra* note 26, at 3-4 (discussing how the traditional legal analysis of "difference" incorporates unstated points of comparison that have social and moral consequences).

68. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 26, at 34 (explaining that, "[u]nder the sameness standard, women are measured according to our correspondence with man . . . [u]nder the difference standard, we are measured according to our lack of correspondence with [man]").

69. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 26, at 39 ("this is the way men have it: equal and different too . . . the same as women when they are the same and want it, and different from women when they are different and want to be, which usually they do"); Williams, *supra* note 49, at 318 (arguing that the central focus of equality should be deconstructing masculine norms, rather than deciding between sameness and difference); see also Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 870-73 (1988) (arguing similarly that biased able-bodied norms, not "difference," should be the focus of disability discrimination law).

served through “different” treatment, by being offered a separate, less well-endowed, and less well-connected school featuring a more nurturing approach.⁷⁰ Men who conformed to the dominant stereotype, however, had no such dilemma: they had a prestigious and prosperous publicly-supported school geared to their particular “differences.” This contrasting set of choices, one tough and one easy, is neither neutral nor natural. It is the result of gendered power: the political decision to devote public resources to promote a specific ideal of masculinity.⁷¹

In short, ostensibly neutral ideals of “equality” necessarily incorporate assumptions about *whose* particular “differences” are taken as the standard for comparison. Feminists accordingly ask the questions: equal to *whom*, according to *what standard*? Similarly, the ostensibly neutral ideal of “efficiency” always incorporates assumptions about *whose* particular interests are taken as the standard for determining society’s well-being. Feminists should ask the questions: efficient for *whom*, according to *what standard*? Distributive ideals are integral to—not opposed to—efficiency ideals,⁷² just as value judgments about “difference” are inherent in ideals of “equality.”

The current neoliberal view of “efficiency” rests on the biased assumption that certain *capital and corporate* interests are necessarily in the *public* interest—because these interests are the standard by which economic growth is measured. In contrast, this view of “efficiency” generally assumes caretakers’ interests are *private* or *special* interests—because these interests are defined as a deviation from that standard of economic growth. Because the needs of elite capital and corporate interests are presumed to stand for the needs of society as a whole, these interests can have it both ways.⁷³ They can be both subsidized and efficient at the same time.

The current economic orthodoxy embraces this double standard as an economic fact. “What’s good for General Motors is good for

70. See *United States v. Virginia*, 518 U.S. 515, 526-27 (1996) (holding that Virginia’s policy of excluding women from admission to the Virginia Military Institute was unconstitutional sex discrimination, even though the state established a new women-only institute).

71. For an analysis of how the school was shaped and re-shaped as Virginia’s dominant ideals, power relations, and morality changed, see Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the “Record” in the VMI Case*, 1996 S. CAL. REV. L. & WOMEN’S STUD. 189 (1996).

72. See McCluskey, *supra* note 41, at 722-50 (showing how “efficiency” ideals incorporate distributive values in the debate over workers’ compensation “reforms”).

73. Similarly, under traditional equality principles that make men the standard for sameness and women the deviation, men have it both ways. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 26, at 39.

America" is a joke with a serious message. By presuming that our existing economic structure generally reflects an efficient "free market" that maximizes overall growth, this orthodoxy reaches the circular conclusion that those whom the existing market benefits most are those who benefit society the most—and therefore those who should get the most social support.⁷⁴ This rationale continues to support the trickle-down policies which gained prominence in the Reagan years.⁷⁵

For example, former President Bush explained that his capital gains tax cut, directly benefiting the richest Americans,⁷⁶ would also be best for the majority because it would "make us more successful in the increasingly competitive international marketplace, creating more jobs and better living standards for Americans."⁷⁷ Support for wealthy investors is therefore about "creating wealth" not "redistributing wealth," according to Republican leaders.⁷⁸ Similarly, fiscal austerity policies, which are a centerpiece of neoliberal foreign and domestic policy "reforms,"⁷⁹ feature deficit-cutting provisions that

74. For example, Judge Richard Posner explains that "in general, the wealthier people will be those who have the higher marginal products, whether because they work harder, or are smarter, or for whatever reason." RICHARD A. POSNER, *ECONOMICS OF JUSTICE* 81 (1981). See also Tullock, *supra* note 45, at 129-30 (declaring that "most economists would agree that taking funds from the poor and giving them to the well-off would accelerate growth" and concurring that such a policy would, in theory, make the poor better off).

75. See generally Golam Azam & Alonzo Redmond, *Revisiting the Relationship Between Growth and Poverty*, 22 REV. OF BLACK POL. ECON. 5 (1993) (explaining and criticizing the theory that overall economic growth will provide benefits that trickle-down to all income and racial groups, thereby making specific anti-poverty programs unnecessary); DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED* 8-9 (1986) (explaining the "central idea of the Reagan Revolution" was that the good society rested on a "minimalist government," strong free market, and "unfettered production of capitalist wealth... the opposite of the coast-to-coast patchwork of dependencies, shelters, protections, and redistributions that the nation's politicians had brokered over the decades"). For an analysis of how President Clinton's economic policies have continued or even amplified the Reagan administration's approach, see MICHAEL MEEROPOL, *SURRENDER: HOW THE CLINTON ADMINISTRATION COMPLETED THE REAGAN REVOLUTION* (1998).

76. Eighty percent of the cut's benefit would go to individuals who earn more than \$100,000 a year. Jeffrey H. Birnbaum, *Vote, Key Victory for Bush, Increases the Likelihood of Tax-Cut Law in 1989*, WALL ST. J., Sept. 29, 1989, available at Westlaw, 1989 WL-WSJ 467839. Similarly, a Treasury Department analysis of the 1999 House Republican tax cut proposal showed that 78.1% of the benefits would go to families with incomes exceeding \$100,767 a year. Gregg Hitt, *House Clears \$792 Billion Tax-Cut Plan*, WALL ST. J., July 23, 1999, at A3.

77. See Birnbaum, *supra* note 76.

78. See Birnbaum, *supra* note 76 (quoting House Republican leader and Illinois Congressperson Robert Michel). Similarly, Republicans defended their 1999 tax cut proposals against criticism that these would primarily benefit the very rich by suggesting the proposals "would help ensure continued growth." Hitt, *supra* note 76, at A3.

79. See Stanley Fischer, *Structural Adjustment Lessons from the 1980s*, in *STRUCTURAL ADJUSTMENT: RETROSPECT AND PROSPECT*, *supra* note 57, at 23 (arguing that "fiscal tightening is almost always the key to stabilization" necessary to attract foreign investment for economic growth, although it entails hardships for people in developing countries); Paul A. Gigot, *Clintonomics, Tastes Great, Less Filling*, WALL ST. J., June 7, 1996, at A12 (explaining that Treasury

shift government spending from social welfare programs and public infrastructure to private investors (by making debt servicing or debt reduction the fiscal priority).⁸⁰ Neoliberal ideology explains that favoring these capital interests will encourage more investment, and therefore, more growth and jobs over the long run—thereby benefiting the rest of society.⁸¹

But a standard of justice that measures public policy according to the specific interests of the wealthiest capital holders is no more likely to benefit the average caretaker and her family than is a standard of equality that measures women according to the specific needs of the stereotypical non-caretaking man. The double standard which holds that public support for capital, not caretaking, will promote the overall public good rests on ideological faith—and political power—more than on economic evidence.

First, evidence of supposed “aggregate growth” resulting from such policies is weak.⁸² More importantly, the “aggregate growth”

Secretary Robert Rubin prevailed over other Presidential advisors so that, in the Clinton administration, “[d]eficit cutting became the White House priority, and the bond market its official measure of success,” adopting the ideal of “slow growth” so that “Wall Street won’t get scared by too much prosperity”).

80. See Doug Henwood, *Sloth and Discipline*, 88 LEFT BUS. OBSERVER 1, 7 (1999) (explaining that money for debt paydown comes disproportionately from low- and middle-income taxpayers and is paid to mainly upper-income bondholders). The prominent “public choice” theory of law and politics, based on neoclassical economic principles, typically presents deficit spending as a problem of “special” interests, while assuming that the fiscal restraint of balanced budget policies represent the “public” interest. See Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1110, 1113-16, 1173-74 (1999) (presenting the neoclassical reasoning underlying a purported scholarly consensus in support of deficit reduction, and arguing that recent balanced budget policies demonstrate Congress’ ability to act in the public interest). Progressive critics explain that, depending on economic conditions, both deficit spending and deficit reduction can be a means of redistributing resources from the majority to elite capital interests. See TEEPLE, *supra* note 14, at 98-99; Robert Pollin, *Can Domestic Expansionary Policy Succeed*, in GLOBALIZATION & PROGRESSIVE ECONOMIC POLICY 433, 449-51 (Dean Baker, Gerald Epstein & Robert Pollin eds., 1998).

81. A “very important element” in neoliberal reforms for developing countries is the effort to “change the relative prices of capital and labor” so that international capital gets higher returns and freedom, and labor gets lower wages and fewer rights—on the theory that this will benefit society through “a great increase in the use of labor.” See Weaver, *supra* note 57, at 1, 10. Similarly, Clinton administration policy assumes that shifting resources from social spending to private capital interests will enhance the economy. See *Economy: The Clinton Budget: President’s Budget Offers Broad Package of Tax Incentives and Spending Increases*, WALL ST. J., Feb. 2, 1999, at A2 (quoting President Clinton’s statement that “[t]he less money we tie up in publicly held debt, the more money we free up for private-sector investment”); see also Amity Shlaes, *Why Tax Cuts Make Sense in Good Times*, WALL ST. J., July 1, 1999, at A22 (stating that “there are plenty of good reasons to cut top rates in a time of prosperity . . . the private sector is good at creating wealth and jobs—today’s unemployment is lower than it was in the heyday of the weightiest welfare program”).

82. Although the purported primary goal of neoliberal policies is to promote aggregate “growth,” neoliberal policies appear more effective at increasing redistribution (upward). One analysis of the annual average rate of growth of GDP per capita for 56 countries shows that growth *declined* in the period of liberalization (1973-1992) compared to the prior period of currency and trade controls (1950-1973) in all regions of the world except for Asia. Robin

promoted by neoliberal policies fails to benefit most people.⁸³ In the United States, the majority of society has gained little from the supposed economic booms of the 1980s and 1990s: the top one percent of wealth holders received sixty-two percent of the total gain in marketable wealth between 1983 and 1989, while the "bottom" eighty percent of Americans received only one percent of this growth.⁸⁴

Furthermore, while "growth" may produce jobs, more jobs do not necessarily translate into improved living standards for the majority, especially for caretakers—because more jobs can simply mean more work for less gain. Income inequality rose more in the Clinton economic recovery years of 1993 and 1994 than during the entire previous decade of Reaganomics.⁸⁵ In the mid-1990s, median family income was less than it was in 1986.⁸⁶ After inflation, private sector workers' compensation per hour was less in 1995 than in 1992.⁸⁷ From 1967 to 1997, the annual income of the poorest 20% in the United States declined 2.4% and that of the middle 20% declined 0.7%, while the income of the richest 5% gained 20.4%.⁸⁸ Even though, since 1996, average wages have increased compared to the early 1990s, these gains from economic expansion have still left U.S. workers with lower average earnings (adjusted for inflation) than in 1973.⁸⁹

Hahnel, *Capitalist Globalism in Crisis: Part IV: What to Want and What to Fear from Globalization*, 12 Z MAG. 52, 53 (Mar. 1999) (citing figures from ANGUS MADDISON, *MONITORING THE WORLD ECONOMY 1820-1992*, Appendix D, 193-206 (1995)). International Monetary Fund (IMF) researchers have admitted that the economic evidence of improved economic "growth" from its policies is uncertain. See Mohsin S. Khan, *The Macroeconomic Effects of Fund-Supported Adjustment Programs*, 37 IMF STAFF PAPERS 195, 222 (1990) (stating that "it is often found that [structural adjustment] programs are associated with a rise in inflation and a fall in the growth rate"). A 1997 internal IMF review reported lower per capita GDP growth during the period of 1991-95 for countries participating in its Enhanced Structural Adjustment Facility, designed to foster "sustainable economic growth," than in non-participating developing countries. IMF, *The ESAF at Ten Years: Economic Adjustment and Reform in Low-Income Countries*, Table 1, (IMF Occasional Paper No. 156, Dec. 1997).

83. In fact, the defining feature of neoliberal economic "expansion" may be that it does not lead to wage increases for most. See Mark Weisbrot, *Globalization for Whom*, 31 CORNELL INT'L L.J. 631, 637 (1999) (stating that, during the Bretton Woods era, "a rising tide lifts all boats," but that this is no longer true today).

84. See EDWARD N. WOLFF, *TOP HEAVY*, 12-13 (1995). If we look at financial wealth only (rather than total net worth), the majority of society *lost* ground from 1983 to 1989: this period of "trickle down" growth left the "bottom" 80 percent with 3 percent *less* financial wealth. *Id.*

85. See Paul A. Gigot, *Potomac Watch: Clintonomics: Tastes Great, Less Filling*, WALL ST. J., June 7, 1996, at A12 (quoting Larry Lindsey, Federal Reserve Governor).

86. See *id.* (reporting data from White House statistics).

87. See *id.* (quoting Martin Feldstein).

88. See Doug Henwood, *Playing the Numbers: Proposal to Adjust Consumer Price Index*, THE NATION, Mar. 29, 1991, at 4 (citing inflation adjusted figures).

89. In 1998, hourly wages for average workers were 6.2% below 1973 levels (adjusting for

Moreover, many Americans have buttressed their stagnant or declining income by working longer hours—a change that is especially burdensome for caretakers. Americans worked for wages 138 hours a year more on average in 1987 than in 1969.⁹⁰ This growth in work hours has continued. In 1996, Americans' wage work hours averaged forty-five hours a year more than in 1989;⁹¹ middle-class married couples increased their annual hours of work outside the home by more than three weeks a year during this same period.⁹² It took approximately 500 more hours of wage work to make the average U.S. family income in 1997 than in 1977.⁹³ Furthermore, rising perceptions of job insecurity may make it harder for workers to bargain for accommodations for family responsibilities.⁹⁴

This trend toward lower wages, longer hours, and increased income inequality extends worldwide.⁹⁵ The International Monetary Fund (IMF) has promoted neoliberal "structural adjustment"⁹⁶ policies aimed at shifting developing nations' economic support from social welfare to private capital, but these policies have produced

inflation); weekly wages were 12% below 1973 levels. CHUCK COLLINS, BETSY LEONARD-WRIGHT, & HOLLY SKLAR, *SHIFTING FORTUNES* 27 (1999). In contrast, non-farm business productivity rose almost 33% from 1973 to the late 1990s. *Id.* See generally LAWRENCE MISHEL, JARED BERNSTEIN & JOHN SCHMITT, *THE STATE OF WORKING AMERICA 1998-99*, 119-218 (1999) (presenting data on changes in wage levels and structures over the last several decades).

90. Juliet Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI-KENT L. REV. 157, 158 (1994).

91. MISHEL, BERNSTEIN & SCHMITT, *supra* note 89, at 122.

92. MISHEL, BERNSTEIN & SCHMITT, *supra* note 89, at 17-18.

93. Doug Henwood, *Work Detail*, 86 LEFT BUS. OBSERVER, Nov. 18, 1998, at 1.

94. See Paul Loop, *Champion of Working Moms: Pediatrician T. Berry Brazelton Sees a Hardening of Attitudes Against the Needs of Parents*, L.A. TIMES, Nov. 6, 1995, at D2 (interviewing child development expert who explained that recent trends of downsizing and layoffs make it harder for parents, especially women, to get employers to accommodate family needs); Phineas Baxandall & Marc Breslow, *Does Inequality Cause Overwork*, in REAL WORLD MACRO 25 (16th ed., Marc Breslow, Ellen Frank, John Miller, Abby Scher & the Dollars & Sense Collective eds., 1999) (reporting economists' analysis that American workers' insecurity, due to high inequality and a precarious middle class, has caused them to increase work hours rather than leisure during recent periods of economic growth). From 1979 to 1990, 24% of workers in large corporations reported that they feared job layoffs; by 1995 and 1996, that percentage increased to 46%. See Weisbrot, *supra* note 83, at 635-36 (quoting the *Hearing Before the Comm. on Banking, Housing and Urban Affairs*, 105th Cong. 36 (1997) (statement of Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System)).

95. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *OPEN MARKETS MATTER: THE BENEFITS OF TRADE AND INVESTMENT LIBERALIZATION* 11 (1998) (admitting increased inequality of wages and increased unemployment for some in OECD countries, but arguing that neoliberal policies promoting international trade and investment have contributed only modestly, at most, to this problem); see also CHOSSUDOVSKY, *supra* note 59, at 38 (declaring that "[i]n many indebted Third World countries, real salaried earnings in the modern sector have declined by more than 60% since the beginning of the 1980s").

96. "The objective of structural adjustment programs is . . . to establish a market-friendly set of incentives that can encourage the accumulation of capital and more efficient allocation of resources." WORLD BANK POLICY RESEARCH REPORT, *ADJUSTMENT IN AFRICA* 2 (1994).

little evidence of trickle-down benefits to the average caretaker and her family. Indeed, much evidence suggests that most women and their dependents have paid an enormous price. In most developing nations, "structural adjustment" policies appear to have led to increased prices for basic consumer goods⁹⁷ and to dramatic declines in public sanitation, public health, education, and infrastructure.⁹⁸ For large portions of the world's population, these effects have contributed to catastrophic increases in disease⁹⁹ and malnutrition,¹⁰⁰

97. Neoliberal policies purport to benefit consumers in the aggregate through reduced prices from a more competitive marketplace and reduced inflation. In fact, however, neoliberal policies often result in rising prices for non-luxury goods, such as food and water. Reduced subsidies for domestic agriculture, reduced public infrastructure spending, increased dependence on imported goods, and collapsed currency prices are some of the typical factors contributing to these price increases. See Nicole Wendt, *50th Anniversary of the World Bank and the IMF Prompts Criticism*, Part B(5) at 6, in *INTERNATIONAL FINANCE AND DEVELOPMENT BOOK* (Enrique Carrasco, ed.) (visited July 2, 1999) <<http://www.uiowa.edu/ifdebook/Part-Two/Two-II.shtml>>; see also CHOSSUDOVSKY, *supra* note 59, at 38-41 (stating that neoliberal policies of global economic integration have caused "dollarisation" of prices of food staples and other necessities, bringing commodity prices closer to U.S. levels, but without concurrent wage and income increases). In 1992, it took the equivalent of nine months of an average worker's pay to buy a winter coat in Russia. *Id.* at 227. After Peru imposed neoliberal austerity policies in 1990, consumer prices in Lima were higher than in New York, while average earnings plummeted. *Id.* at 191. More recently, high prices of maize-meal sparked food riots in Zimbabwe, but the IMF and World Bank threatened to withhold credit to frustrate government price controls on grain and bread. *Price Controls Threaten IMF US \$200 Million Support*, ZIMB. INDEP., June 25, 1999, available in LEXIS, News Library, African News.

98. See generally CHOSSUDOVSKY, *supra* note 59, at 101-258 (describing case studies of social impact of neoliberal policy in Somalia, Rwanda, India, Bangladesh, Vietnam, Brazil, Peru, Bolivia, Russia, and the former Yugoslavia). One researcher investigating African women's health in 1989, following structural adjustment policies imposed by the IMF and World Bank, found "drastic reductions in the budgets of hospitals funded by the African Governments and in all health services" with particularly devastating effects on maternity wards. Andree Michel, *African Women, Development and the North-South Relationship*, in *PAYING THE PRICE*, *supra* note 13, at 58, 65-66 (reporting findings of Fran P. Hosken). For another example, the World Bank and the IMF recently required Mozambique, as a condition of debt relief, to increase charges for health services and to eliminate government spending on a planned system to provide clean water and sanitation services to that country's rural poor (although, following political pressure, these institutions permitted some increased social spending). Africa Policy Information Center, *Mozambique Gains an Extra \$28 Mn in Debt Relief*, AFRICA NEWS, July 7, 1999, available in LEXIS, News Library. Mozambique, a model of compliance with investor-friendly neoliberal policies promoted by the IMF, spends twice as much on interest payments to foreign creditors as it does on health services. Michael Holman & Quentin Peel, *Too Much to Bear*, FINANCIAL TIMES (London), June 12, 1999, at 12. In African countries participating in the IMF's Enhanced Structural Adjustment Facility, which provides low-interest loans conditioned on compliance with free-market structural adjustment policies, the average annual education spending declined between 1986 and 1996. Robert Naiman & Neil Watkins, *A Survey of the Impacts of IMF Structural Adjustment in Africa: Growth, Social Spending & Debt Relief, April 1999* (visited Jan. 18, 2000) <<http://www.preamble.org/IMFinAfrica.htm>> (citing data from the IMF and the Poor, IMF Pamphlet Series 52 (1998)).

99. See CHOSSUDOVSKY, *supra* note 59, at 72 (reporting a resurgence of formerly controlled communicable diseases in sub-Saharan Africa, Latin America, and India, arguably caused or exacerbated by declines in urban sanitation and other forms of public health spending as a result of structural adjustment programs). After neoliberal "shock treatment" in Peru, government vaccination programs broke down and government hospitals were closed, contributing to epidemics of tuberculosis, malaria, dengue, and leishmaniasis. CHOSSUDOVSKY, *supra* note 59, at 201. In Zimbabwe, an external review of the IMF's policies reported that these

resulting in depressed standards of living and life expectancies.¹⁰¹ Women typically increase unpaid labor to compensate for the loss of public services and increase in hardship.¹⁰²

Although neoliberals tend to argue that this disastrous global economic situation would be even worse without the recent shift in support from human needs to capital needs,¹⁰³ any truth to that argument may be attributable to contingent—and gendered—

“reforms” reversed a previous trend of improving health outcomes; for example, tuberculosis cases quadrupled after many years of decline. Naiman & Watkins, *supra* note 98 (citing KWEISI BOTCHWEY, PAUL COLLIER, JAN WILLEM GUNNING & KOICHI HAMADA, REPORT OF THE GROUP OF INDEPENDENT PERSONS APPOINTED TO CONDUCT AN EVALUATION OF CERTAIN ASPECTS OF THE ENHANCED STRUCTURAL ADJUSTMENT FACILITY (1998)).

100. See CHOSSUDOVSKY, *supra* note 59, at 192, 203 Table 10.4 (describing a rise in malnutrition following structural adjustment policies in Peru, where estimated food consumption dropped 25% from 1975 to 1985, after that nation’s first series of neoliberal “reforms”; by 1991, more than 83% of the population had “deficient calorie intake”); *id.* at 129 (describing how neoliberal economic policies in India, adopted under an IMF program, led to widespread famine and increased starvation deaths due to falling wages and rising food prices); Marc Breslow, *Freedom to Farm-And Starve-In Kenya*, 223 DOLLARS & SENSE 14, 14 (1999) (reporting that, in Kenya between 1970 and 1995, the daily supply of protein per person fell by 17%, and discussing how such problems are related to neoliberal policies).

101. For example, Russia’s life expectancy for men declined from 65.6 to 57 in five years. Robin Hahnel, *Capitalist Globalism in Crisis: Boom and Bust*, 11 Z MAG. 46, 48 (Dec. 1998). Economist Michel Chossudovsky concludes that “[i]n both the South and the East, the compression of living standards since the early 1980s has been considerably greater than that experienced by the rich countries during the 1930s.” CHOSSUDOVSKY, *supra* note 59, at 26. He describes the effects of structural adjustment policies as “economic genocide.” See *id.* at 37. In sub-Saharan African countries participating in the IMF’s Enhanced Structural Adjustment Facility (ESAF), real per capita incomes declined an average of .3% a year during the period of IMF adjustment between 1991 and 1995. Naiman & Watkins, *supra* note 98, at Section One (1) (citing a personal communication with Hugh Bredenkamp, principal author of an internal IMF review of the ESAF).

102. See Janine Brodie, *Shifting the Boundaries: Gender and the Politics of Restructuring*, in THE STRATEGIC SILENCE: GENDER AND ECONOMIC POLICY, *supra* note 13, at 50 (noting that “women have acted as ‘shock-absorbers’ during adjustment by curtailing their own consumption and increasing their workload . . . [so that] social services are shifted from the paid to unpaid labour of women.”); Michel, *supra* note 98, at 65 (stating that African structural adjustment policies “reassign” services from the public budget to women); Elmira Nazombe, *Women’s Labor: A Key Factor in Globalization* (visited Aug. 25, 1999) <<http://www.50years.org/ejn/v2n1/women.html>> (published by 50 Years is Enough: U.S. Network for Global Economic Justice, a coalition of organizations “dedicated to the profound transformation of the World Bank and the International Monetary Fund”) (explaining how women’s unpaid labor makes up for cuts in social services resulting from neoliberal “globalization” policies). For example, IMF and World Bank policies aimed at promoting export crops in African nations have caused many male farmers to emigrate to cities in search of wage work, leaving their wives to assume full responsibility for family labor, including agricultural production. Michel, *supra* note 98, at 60. See also Lisa A. McGowan, *Bailouts for Bankers, Burdens for Women* (visited Aug. 25, 1999) <<http://www.50years.org/factsheets/bailouts.html>> (published by 50 Years Is Enough: U.S. Network For Global Economic Justice) (stating that IMF-driven agricultural policies in Africa have decreased women’s farm income and increased their time as unpaid laborers).

103. See Weaver, *supra* note 57, at 13 (acknowledging evidence of negative effects correlated with structural adjustment policies in some countries, but saying that “even the ‘losers’ may be better off with reforms than without”); see also CHOSSUDOVSKY, *supra* note 59, at 69-70 (criticizing this kind of “counterfactual argument” and arguing that it reveals a contradictory reasoning that austerity—depressed growth—is the best route to increased growth).

political power, not to inviolable economic principles. President Clinton, for example, backed away from spending on social programs when Federal Reserve Chairman Alan Greenspan threatened to raise interest rates.¹⁰⁴ Similarly, threats of capital withdrawal have prevented many developing nations from sticking to their goals of maintaining social services.¹⁰⁵

But if countries restructured political and legal institutions to give more control to the average caretaker and less to elite capital interests, governments might have more bargaining power with which to make social spending less costly. Imagine, for example, the different economic choices that might be available if the law required the Federal Reserve's committee for setting monetary policy to meet openly and to include the same number of child care workers and welfare recipients as bankers,¹⁰⁶ or if the International Monetary Fund's governance structure gave a significant voice to women and their dependents in developing countries.¹⁰⁷ Or, imagine the

104. See Jacob Schlesinger, *The Clinton Budget: Keynes Mutiny: Why Is the Economist Passe, With So Much of the World in Recession?*, WALL ST. J., Feb. 2, 1999, at 1 (explaining that Greenspan makes it clear that he would "punish higher deficits with higher rates—a major factor in keeping the Clinton administration's spending desires in check"); see also ROBERT REICH, *LOCKED IN THE CABINET* 60-64 (1998) (describing his experience with the Clinton administration budget process through an imaginary drama in which Greenspan appears as an evil magician threatening to "wreck the economy" if the President fails to cut government social spending). Clinton also shelved his plans to support social program spending in response to campaign finance demands. Rick Wartzman & Dana Milbank, *Crossing Over: Clinton's Strength with Business Leaders is Rare for a Democrat*, WALL ST. J., Sept. 24, 1992, at 1. Without major campaign finance reform, most politicians are unlikely to shift public support from capital interests to most caretakers' interests.

105. "Every few weeks a team of economists from the International Monetary Fund shows up in Moscow to determine if [Russian Prime Minister Primakov] has put together what they politely term a realistic budget." David E. Sanger, *Markets Are Freer than Politicians*, N.Y. TIMES, Feb. 21, 1999, at 5 (describing how the "struggle between what investors demand and what politicians think they need to do to satisfy their constituencies is visible every day"). See CHOSSUDOVSKY, *supra* note 59, at 18 (reporting how Moody's Investor Services downgraded Sweden's debt rating in 1995, pressuring the government to cut child allowances and unemployment benefits). The IMF has substantial power to shape local policy because countries facing balance of payment problems usually must get IMF approval before other financial institutions, public or private, will provide credit. Weisbrot, *supra* note 83, at 651.

106. Currently, monetary policy is set by the Federal Open Market Committee in secret meetings by twelve voting members; five of these membership slots are, in effect, reserved for representatives of commercial banking interests who own and control district Federal Reserve banks. DOUG HENWOOD, *WALL STREET* 96-97 (1997). For a proposal to increase public control over the Federal Reserve, see Robert Pollin, *Transforming the Fed: A Path to Financial Stability and Democratic Socialism*, in *REAL WORLD MACRO*, *supra* note 94, at 91-94.

107. Current law does not give developing countries (much less women in those countries) a democratic voice in IMF policy, and efforts to adopt a one-nation one-vote rule have been unsuccessful. Sandra Blanco, *The 1960s and 1970s: The World Bank Attacks Poverty; Developing Countries Attack the IMF*, in *INTERNATIONAL FINANCE AND DEVELOPMENT BOOK Part One, IV*, (B)(1) (Enrique Carrasco, ed.) (visited Aug. 3, 1999) <<http://www.uiowa.edu/ifdebook/Part-One/One-V.shtml>>. U.S. Representative Bernie Sanders has drafted a Congressional Resolution that proposes increasing transparency and democracy in the IMF and other international policymaking bodies. See Global Sustainable Development Resolution (visited

different political choices that might be possible if major campaign finance reforms allowed Presidents and Congressional members to seek election without catering primarily to corporate and capital interests.¹⁰⁸

Even if we accept the neoliberal credo that “aggregate growth”—efficiency—is good for its own sake (regardless of whether the majority shares in that gain),¹⁰⁹ we are still left with the question of *whose* growth should count in measuring that aggregate gain. Conventional measurements of economic growth, such as Gross Domestic Product (GDP), are biased against caretaking. For example, GDP counts as growth an increase in health care expenses due to a rise in cancer cases from corporate pollution.¹¹⁰ In contrast, GDP does not count as growth an improvement in a family’s health, leisure and happiness when a mother has more time free from wage work to take her child to the park after school, instead of leaving the child alone in front of the television.¹¹¹ Nor would GDP include as “growth” the family’s gain from visiting a free public park instead of paying for a private recreational facility.¹¹² If the conventional

Aug. 25, 1999) <<http://www.house.gov/bernie/legislation/global/resolution.html>>. This proposed Resolution states that voting in international financial institutions such as the IMF and World Bank “must move toward the standard of equal representation for all the world’s people” rather than giving dominant voting privileges to the rich countries. *Id.* at Section 4(5)(B). It also declares that “procedures, decisions and programs of organizations including the World Bank, International Monetary Fund, and the World Trade Organization need to be open to public scrutiny.” *Id.* at Section 4(5)(C). Furthermore, it states that “decisions about international economic agreements and loans should require participation by labor unions, environmental groups, women’s organizations, development organizations, and other major sectors of civil society in each affected country.” *Id.* at Section 4(5)(D). For other efforts to restructure international financial organizations to increase women’s representation, see Women’s Environmental and Development Organization, *Women’s Eyes on the Bank*, Sept. 1997 (visited Aug. 26, 1999) <<http://www.wedo.org/global/bank.htm>> (describing an international campaign to increase participation of grassroots women in the World Bank’s economic policymaking); Women’s Environmental and Development Organization, *Women Take on the World Trade Organization (WTO2)* (visited Aug. 26, 1999) <<http://www.wedo.org/global/wto.htm>> (reporting on an international campaign to increase transparency in WTO meetings and to advocate for participation of women’s NGOs).

108. See generally DAN CLAWSON, ALAN NEUSTADTL & MARK WELLER, *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* 19-21 (1998) (explaining the powerful influence of campaign contributions in skewing public policy toward business interests, and proposing systematic reform).

109. Although efficiency is the stated goal of neoliberal policies, this should not be taken at face value; evidence of redistribution from these policies appears stronger than evidence of improved “aggregate growth” as defined by conventional economics. See *supra* note 82 and accompanying text.

110. See Marc Breslow, *Is the U.S. Making Progress?*, in *REAL WORLD MACRO*, *supra* note 94, at 6 (criticizing current standards for calculating GDP).

111. See Breslow, *supra* note 110, at 6 (explaining how GDP counts as negative the economic change resulting when a couple reduces their wage work hours, thereby decreasing their child care expenses and increasing family well-being).

112. That gain would count indirectly in GDP if the family spent the money saved from the

standards for measuring economic "growth" included unpaid household labor and caretaking, it could suddenly transform subsidies for a range of caretaking activities disproportionately performed by women from costly "redistribution" into productive "growth."¹¹³

III. WHOSE MORAL HAZARD?

In sum, the dominant efficiency/redistribution framework incorporates a double standard that exaggerates the public *benefits* of corporate and capital subsidies compared to caretaker subsidies. In addition, this framework perpetuates a double standard that exaggerates the public *costs* of caretaking subsidies compared to corporate and capital subsidies. In particular, the prevailing ideology of efficiency provides a purportedly value-neutral economic justification for complaints about "welfare dependency."¹¹⁴

According to neoclassical economics, to fully account for the costs and benefits of any given subsidy, we need to consider the inevitable *incentive effects*.¹¹⁵ That is, subsidies may *change* as well as *support* behavior.¹¹⁶ That incentive effect underlies the problem economists term "moral hazard"—the tendency of those who receive *protection* against a certain cost to take less care to *avoid* that cost than they

free park on more consumption or increased savings. No gain in GDP would occur if the reduced expense allowed the family to reduce wage work hours or if the free park allowed the family to engage in more desirable activities (for example, if it allowed family members to improve their health by substituting walking for TV watching). This is an example of how biased assumptions of what counts as an economic "gain" make "privatization" appear more advantageous than it really is. Neoliberal policies often encourage substitutions of formerly free public services with private facilities charging user fees, resulting in reduced access to those facilities and increased need for disposable income from wage work—thereby increasing the burden on caretakers. See Dalla Costa, *supra* note 13, at 7-8 (explaining and criticizing how the structural adjustment policies of the IMF and World Bank purposely rely on the "creative response" of women's "domestic management" and increased wage labor to make up for cuts in public services).

113. See Marjorie W. Williams, *Gender, Productivity and Macro-economic Policies in the Context of Structural Adjustment and Change*, in *THE STRATEGIC SILENCE: GENDER AND ECONOMIC POLICY*, *supra* note 13, at 81-82 (discussing how gender-biased measurements of macroeconomic growth give misleading support for diverting government subsidies from social spending that benefits women to subsidies for corporations); Kathleen Cloud & Nancy Garrett, *Counting Women's Work*, in *REAL WORLD MACRO*, *supra* note 94, at 12-13 (discussing alternative calculations of economic growth that recognize women's unpaid household labor).

114. See Tom Baker, *On the Genealogy of Moral Hazard*, 75 *TEX. L. REV.* 237, 240 (1996) (explaining and criticizing how the economic concept of moral hazard gives the appearance of a "scientific" basis for abandoning anti-poverty policies).

115. See, e.g., DAVID FRIEDMAN, *HIDDEN ORDER: THE ECONOMICS OF EVERYDAY LIFE* 36 (1996) (explaining the neoclassical theory of the incentive effects of subsidies, using an example of potato price subsidies).

116. For example, subsidizing the price of potatoes, other things being equal, would encourage people to buy more potatoes than they would otherwise. *Id.* at 38-39 (explaining the conventional economic theory that subsidies make everyone worse off).

would otherwise.¹¹⁷ Neoclassical economic theory explains that moral hazard is inefficient: it hurts society in the long run by driving up overall costs.¹¹⁸

In the recent debate over federal welfare "reform," the pervasive demands for "personal responsibility" have focused both explicitly and implicitly on moral hazard. For example, Heritage Foundation commentators explained that "[t]he key problem is that welfare programs present a 'moral hazard' . . . when welfare benefits are tied, directly or indirectly, to such behaviors as low work effort, divorce, and illegitimacy, welfare strongly promotes an increase in those behaviors."¹¹⁹

This Heritage Foundation report emphasizes the public harm resulting from welfare's moral hazard: "[T]he more that is spent, the more people in apparent need of aid who appear. The taxpayer is trapped in a cycle in which spending generates illegitimacy and dependency, which in turn generate demands for even greater spending."¹²⁰ Critics of other subsidies for caretakers have also stressed moral hazard problems. For example, conservatives have warned that federal subsidies for day care expenses will create financial incentives to remove children from unpaid family home care into "institutional" settings.¹²¹

But the supposed harms of moral hazard are social constructions, based on gendered values, not economic truths. The idea behind the "moral hazard" concept is simply that we tend to get more of something when it is subsidized. Whether or not that increase is

117. The term "moral hazard" comes from the insurance industry. In the eighteenth century, fire insurers categorized underwriting risk by distinguishing "physical hazards"—such as buildings made from wood instead of brick—from "moral hazards"—such as character flaws that might make an insured person prone to arson or carelessness. See CAROL HEIMER, *REACTIVE RISK AND RATIONAL ACTION* (1985) (discussing the history of moral hazard and explaining how moral hazard problems shaped insurance contracts and institutions).

118. See, e.g., MIT DICTIONARY OF MODERN ECONOMICS 291 (David W. Pearce ed., 4th ed. 1995) (defining moral hazard as resulting in "an allocation of resources that is not optimal"); FRIEDMAN, *supra* note 115, at 277 (noting that moral hazard is a type of externality).

119. See ROBERT RECTOR & WILLIAM LAUBER, HERITAGE FOUNDATION, *AMERICA'S FAILED \$5.4 TRILLION WAR ON POVERTY* 3 (1995). This report by two Heritage Foundation staffers, one of whom left to work [on welfare reform] for a Republican congressman, includes the caveat that it is not to be taken as an indication of the Heritage Foundation's views or as an attempt to influence public policy. *Id.* at inside front cover. This caveat is probably evidence less of the real intent of the report than of moral hazard: a change in behavior (or at least in appearances) to get the subsidy (tax break) afforded to nonprofits not engaged in lobbying.

120. *Id.* at 3.

121. Specifically noting that federal subsidies for child care expenses create moral hazard problems, one business publication warns, "It would be nice, first, if politicians took their minds off the big giveaway and thought a little about where all these proposals are taking us Toward a bigger, richer child-care industry that will pull more parents out of their homes and into the paid work force." *Day Care Crazy*, INVESTORS' BUS. DAILY, Dec. 19, 1997, at A26.

good or bad depends on a baseline norm: a value judgment about the appropriateness of having more of whatever is subsidized.

Consider the boom in corporate subsidies that has accompanied the recent decline in government social spending and welfare support. To encourage businesses to relocate or remain in their area, state and local governments have shelled out a conservatively estimated \$50 billion a year in the 1990s for business tax breaks, grants, loans, and services, along with plentiful protection from regulation.¹²² In a similar global trend, many nations offer generous subsidy packages to cultivate business development that otherwise might not be feasible.¹²³

Subsidies to attract business present a classic example of moral hazard. To maintain or attract local jobs, governments protect businesses from some of the risks of providing those local jobs.¹²⁴ But the more governments "insure" businesses against the costs of job creation, the more costly—and uncertain—job creation becomes for governments.¹²⁵ These subsidies encourage businesses to seek greater profit not through improved productivity or innovation, but by moving (or threatening to move) to jurisdictions that offer better protections, generating a cycle of escalating demands for ever-greater government handouts.¹²⁶

This moral hazard from corporate welfare is rarely labeled or condemned as such. Although criticism of government "bidding wars" is beginning to get more attention in the mainstream media,¹²⁷ the dominant political position appears to accept these bad incentives as a price worth paying.¹²⁸ The public costs of collective

122. See Neil DeMause, *Corporations Jump from Town to Town in Search of the Best Public Subsidy*, IN THESE TIMES, May 31, 1998, at 11-12. This is more than annual expenditures for welfare and food stamps—and does not include even greater federal spending on corporate subsidies. *Id.*

123. See GREIDER, *supra* note 14, at 82 (describing the "global jobs auction" whereby rich and poor nations compete to make the greatest concessions from the public domain to attract multinational corporations).

124. See Donald L. Barlett & James B. Steele, *States at War*, TIME, Nov. 9, 1998, at 44 (reporting that Pennsylvania subsidized a European shipbuilding corporation in hopes of keeping alive an otherwise dying industry that provides high-paying local jobs).

125. For example, as a condition of receiving government subsidies for a Rochester, N.Y., facility, the multinational corporation Asea Brown Boveri Ltd. (ABB) promised to increase jobs but instead eliminated them. *Id.* at 46.

126. See, e.g., Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 388-89 (1996) (describing escalating subsidies offered to attract automobile manufacturers). "[A]s the interstate competition intensifies, businesses are seeking incentives not only for the siting of new facilities, but also for simply keeping facilities in their present locations." *Id.* at 389.

127. See, e.g., Donald L. Barlett & James B. Steele, *Special Report: Corporate Welfare*, TIME, Nov. 9-30, 1998 (writing a series of articles on local and state subsidies aimed at attracting business).

128. See Donald L. Barlett & James B. Steele, *Five Ways Out*, TIME, Nov. 30, 1998, at 66

support for corporate relocation are widely discounted—in contrast to the presumed public costs of collective support for caretaking.

This double standard for moral hazard rests on several problematic normative assumptions that should be examined and challenged more openly. First, the incentive effects of corporate subsidies are often constructed as inherently desirable, ignoring any harmful effects. In the dominant rush to improve the “business climate,” the general assumption tends to be that it is *good* if business subsidies produce more business than otherwise would be possible under existing economic and legal conditions. In contrast, dominant politics often assumes it is *bad* that welfare or child care subsidies produce more child care—or children—in families that are not self-sustaining under existing legal and market arrangements. This logic values profits and jobs over children and caretaking.

But of course, the effects of more business or even more jobs are not necessarily beneficial to society. Corporate subsidies that succeed in attracting business may increase costs through lost funding for investments in public infrastructure and social services,¹²⁹ environmental damage,¹³⁰ higher taxes,¹³¹ higher government debt costs,¹³² decreased productivity,¹³³ or a decline in political legitimacy.¹³⁴

(reporting that “it’s not much of a debate; the mayors cave” when faced with never-ending demands for corporate subsidies as the price of local jobs); see also *infra* text accompanying notes 151-55 (describing the perception that corporate subsidies are now a normal part of doing business).

129. See Barlett & Steele, *supra* note 124, at 40-42, 50-52 (giving the example of a town in Arkansas unable to obtain funds for a safe water supply, while the state subsidized an expensive water treatment facility for a Frito-Lay plant; and giving another example of an overcrowded Alabama elementary school with inadequate classrooms and failing sewer system in a town with a new Mercedes-Benz plant, attracted by \$253 million in incentives). A Minnesota study reported that corporate subsidies diverted \$100 million a year from education funds. See DeMause, *supra* note 122, at 12.

130. See Donald L. Barlett & James B. Steele, *Paying a Price for Polluters*, TIME, Nov. 23, 1998, at 72 (giving examples of serious environmental and health hazards resulting from companies that receive corporate tax breaks in the name of job protection).

131. The rise in using corporate tax breaks as “incentives” for business development has placed an increasing share of tax burden on others. See Enrich, *supra* note 126, at 382.

132. Connecticut’s subsidy for the (failed) relocation of the New England Patriots football team would have added \$350 million in general obligation bonds to a debt level already ranked by Standard & Poors as one of the highest in the nation. William C. Symonds, *Hartford’s Hail Mary Pass*, BUS. WK., Dec. 7, 1998, at 38.

133. “Selective subsidies for mobile capital are likely to shift resources into footloose businesses, even though those resources could have been deployed more productively elsewhere.” Enrich, *supra* note 126, at 405.

134. Political leaders often feel pressured to bypass open democratic processes to compete in bidding wars. For example, Connecticut lawmakers approved a football stadium subsidy without advance notice of the details of the deal, and with public testimony limited to one evening after TV news broadcasts. See Christopher Rowland, *Providence to Play Host if All Goes Well for Pats*, PROVIDENCE J. BULL., Jan. 2, 1998, at A1. The state rushed to complete the deal in an (unsuccessful) attempt to prevent the team owner from pursuing negotiations with other

In addition, the supposed benefits from increased jobs may be illusory: jobs may be transferred,¹³⁵ or even eliminated, rather than increased;¹³⁶ or anticipated jobs may be low-paying, unsafe, or temporary.¹³⁷

Just as the supposed economic and social benefits of subsidies to attract private business can be viewed as costly moral hazards, the supposed moral hazards of caretaking subsidies can be constructed as social and economic benefits—depending in part on one's values about gender, race, class and sexuality. Martha Fineman's work powerfully advances the feminist view that making it easier for women (or men) to care (and to better care) for children outside patriarchal, economically privileged families is *good* for society.¹³⁸ For example, the so-called moral hazard from caretaking subsidies means more healthy, happy, and productive parents and children among the large numbers of families that do not fit the traditional stereotype. This supposed moral hazard also means less dependence by caretakers and children on abusive or unloving breadwinners, and less dependence of caretakers and children on unsafe, unhealthy, or unsatisfying jobs. As Deborah Stone argues, some behavior changes induced by protective subsidies should be viewed as positive "moral opportunities" instead of negative "moral hazards."¹³⁹

A second way in which biased norms, not impartial science, creates the double standard for moral hazard is through a selective rejection of economic efficiency goals. When it comes to social spending or labor regulation, advocates for an improved business climate typically invoke neoclassical economics to stress the need to substitute tough-minded cost-benefit calculations for soft-hearted sympathy for dependents or their caretakers.¹⁴⁰ The predominant view purports to

cities. *See id.*

135. *See* Bartlett & Steele, *supra* note 124, at 50 (giving an example of a Kansas town of 4,000 attracting a manufacturing plant with a \$15.8 million subsidy that produced no net increase in the company's payroll, but simply a job transfer from other plants).

136. One critic quipped that the goal of corporate subsidies is not to create jobs, but simply job announcements. *See* Bartlett & Steele, *supra* note 124, at 42 (quoting John Hood, president of the John Locke Foundation). *Time* magazine's report concluded that "[a]lmost without exception, local and state politicians have doled out tens of billions of taxpayer dollars to businesses that are in fact eliminating rather than creating jobs." *Id.*

137. *See* Bartlett & Steele, *supra* note 124, at 44 (giving an example of \$24-31 million in government aid awarded to a meat-packing company that provides high-turnover, low-paying work and limits workers, mostly new immigrants, to one bathroom trip a day).

138. *See* FINEMAN, THE NEUTERED MOTHER, *supra* note 3, at 125 (criticizing society's failure to affirm single-mother households as a desirable family form).

139. Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. INS. L.J. 11 (2000).

140. *See, e.g.,* DANIEL J. MITCHELL, WHY AMERICA NEEDS A TAX CUT, THE HERITAGE FOUNDATION, Sept. 1996, at 1 (asserting that policymakers need to subject more government

make economic efficiency and individual responsibility the overarching principles.¹⁴¹ When it comes to fostering support for corporate subsidies, however, pro-business advocates often argue for the primacy of spiritual ideals and social connection over economic calculations and individual autonomy.

For example, Connecticut legislators recently voted overwhelmingly in favor of a record \$374 million subsidy to encourage relocation of the Patriots football team to Hartford.¹⁴² Supporters discounted evidence that the net economic benefits for the state were meager at best.¹⁴³ A consultant defended his favorable report on the deal against criticisms of poor accounting by emphasizing "that many of the benefits are intangible" and that "the elected officials approved this project on more than just the numbers It wasn't just a fiscal benefits driver."¹⁴⁴ Political leaders backing the deal stressed that it "galvanized everyone in the community"¹⁴⁵ and could boost community "confidence,"¹⁴⁶ "vibrancy" and status, benefits that are "hard to measure in dollars."¹⁴⁷

Similarly, when business leaders lobbied county legislators for a \$60 million subsidy for the Buffalo Bills football team, they sidestepped a critic's efforts to investigate the costs and benefits of the deal like a "smart business decision."¹⁴⁸ Instead, advocates presented a report

spending programs, especially welfare, to cost-benefit analysis); Daniel Akst, *Cold Facts About Child Labor*, N.Y. TIMES, Aug. 1, 1999, § 3, at 4 (arguing that, although popular "sentiment" opposes child labor, "cold facts" show that labor regulations protecting children impose more costs than benefits).

141. See Duesterberg, *supra* note 9, at 1 (discussing how a focus on economic efficiency and personal responsibility has become the dominant policy approach).

142. See Tom Puleo & Christopher Keating, *State: We'll Take It by Overwhelming Margin, Legislature Approves Patriots Package: Excitement of Deal Overtakes Doubters*, HARTFORD COURANT, Dec. 16, 1998, at A1 (reporting cost estimate from the legislature's Office of Fiscal Analysis). For a discussion of the proliferation of government subsidies for sports stadiums, see generally JOANNA CAGON & NEIL DEMAUSE, *FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT* (1998) (criticizing the proliferation of government subsidies for sports franchises).

143. While bipartisan staff analysts found that the state would lose money, a more optimistic consulting firm reported that the impact would be revenue neutral. Puleo & Keating, *supra* note 142, at A1.

144. See Glenn Cheney, *KPMG Called Offsides on New England Patriots Study*, ACCT. TODAY, 5, 37, Feb. 22-Mar. 14, 1999 (quoting Ronald D. Burton, of consulting firm KPMG Peat Marwick).

145. See *All Things Considered: Controversy Over the Deal the State of Connecticut Has Proposed to Bring the New England Patriots to Hartford* (NPR radio broadcast, Dec. 4, 1998) [hereinafter *Controversy*] (quoting Connecticut Speaker of the House Tom Ritter).

146. See Paul Frisman, *Patriot Games*, CONN. L. TRIB., Mar. 19, 1999, at 11 (quoting supporter and real estate attorney Michael J. Cacace).

147. See *Controversy*, *supra* note 145 (quoting Kevin Sullivan, Democratic President of the State Senate, who promoted the benefits of "activity and vibrancy").

148. See Margaret Hammersley, *Report Calls Bills an Intrinsic Part of Life in WNY*, BUFF. NEWS, June 6, 1997, at 1C (reporting that Legislator Albert DeBenedetti, D-Buffalo, put himself at

emphasizing that the benefits of the Bills are “not merely economic” but of a “spiritual character,” providing a “powerful unifying force” to the community.¹⁴⁹ A gendered double standard underlies the view that state subsidies for football teams do not create a “cycle of dependency”¹⁵⁰ in need of public restraint, but instead exemplify beneficial community interdependence in need of public nurturing.

Third, the special treatment for moral hazards from corporate subsidies is frequently justified on the ground that these costs are inevitable.¹⁵¹ As one news report concluded, “[u]nfortunately, the subsidy game won’t end anytime soon. That being the case, most communities cannot afford to sit on the sidelines.”¹⁵² In fact, corporations tend to portray the competition for subsidies not as an inefficient market disruption, but instead as the kind of rational self-interest maximizing that grounds efficient markets. Defending Intel Corporation’s invitations to states to bid for subsidies for a new computer-chip plant in 1993, an executive explained, “[w]e’re going to build where Intel gets the best deal.”¹⁵³ Similarly, after admitting the intractability of moral hazard problems from IMF bailouts (which subsidize international investors),¹⁵⁴ IMF Deputy Director Stanley Fischer advised that “we should remind ourselves that moral hazard is something to be lived with and controlled rather than fully eliminated” because there are no better alternatives for dealing with international debt crises.¹⁵⁵

That is, neoliberal ideology presents corporate moral hazard as a *necessary price* of economic development in a competitive global market, while the caretakers’ moral hazard is an *unnecessary subsidy*

odds with Democratic leadership by emphasizing the need to consider possible costs of the subsidy).

149. *See id.* (quoting the report of a business task force of the Greater Buffalo Partnership, presented to the Erie County Legislature).

150. One sports team owner explained that proposed federal legislation aimed at limiting such corporate subsidies would have “a very negative impact” on the survival of professional sports franchises. DeMause, *supra* note 122, at 13 (quoting Dave St. Peter, spokesman for the Minnesota Twins, in response to the proposed Distorting Subsidies Limitation Act).

151. *See, e.g.,* Karen Brune Mathis, *Spate of Incentives Is Raising Eyebrows: Officials Are Looking for Ways to Track Development Dollars*, FLA. TIMES-UNION, Dec. 1, 1997, at 8 (reporting that the debate “has moved beyond” the question of whether incentives should be encouraged or banned because state governments do not see any possibility for stopping the competition).

152. Tony Cox, *Only the Real Stars Should Get Business Subsidies*, ARK. DEMOCRAT-GAZETTE, Aug. 23, 1998, at BM5 (NW edition).

153. *See* Barlett & Steele, *supra* note 124, at 48 (noting that the company received over a third of a billion dollars in aid from the highest bidder, Sandoval County, New Mexico).

154. *See* Robin Hahnel, *Capitalist Globalism in Crisis, Part III: Understanding the IMF*, 12 Z MAG. 47, 50 (Feb. 1999) (discussing IMF bailouts as taxpayer subsidies for international investors).

155. Stanley Fischer, *On the Need for an International Lender of Last Resort* (visited June 9, 1999) <<http://www.imf.org/external/np/speeches/1999/010399.HTM>>.

hindering competitive global economic development. This difference stems from power differences—shaped by legal and political structures—rather than from natural or neutral market forces. Because neoliberal policies tend to increase capital mobility, restrict local power to regulate business, and reduce collective sources of support for families, workers, and communities, these policies tend to make states, workers, and families more dependent on corporate and capital interests. Legal and political impediments to alternative routes toward economic development (such as support for local businesses, wage hikes, unionization, public jobs, public support for caretakers, as well as stricter antitrust laws) protect national and multinational corporate investors from seeking support on terms more favorable to taxpayers, workers, or families.¹⁵⁶

Finally, Fineman's analysis of the universality of subsidies reveals another bias in evaluating supposedly harmful incentives from caretaking subsidies: moral hazard runs both ways, because caretaking subsidies run both ways.¹⁵⁷ That is, *reducing* collective support for caretakers will *increase* moral hazard by *increasing* the subsidies provided by caretakers to the rest of society. Fineman's insightful and transforming move is to cast caretakers as *subsidizers* as well as the subsidized: the market and the state depend on their unpaid or underpaid labor.¹⁵⁸ "Welfare reform" policies that require caretakers to assume increased "personal responsibility" will therefore increase subsidies by caretakers to society in general. These policies make caretakers shoulder more of the costs of the dependent care

156. For example, rules of professional sports leagues construct the monopoly power that makes communities dependent on ever-greater giveaways to retain professional teams. Mark S. Rosentraub, Joanna Cagon & Neil Demause, *Why Baseball Needs New York to Just Say No*, NATION, Aug. 10, 1998, at 20. IMF-enforced policies of economic "liberalization" and integration are essentially about increasing nations' dependence on foreign investors and foreign corporations, making nations vulnerable to fluctuations in currency and financial markets. CHOSSUDOVSKY, *supra* note 59, at 45-73. Federalist structures tend to make local governments shoulder the costs of interstate competition—bidding for the highest subsidy and the least regulation—without giving those governments the power to retain the benefits of competition through protectionism or interstate trade barriers. See Enrich, *supra* note 126, at 379-80. If courts extended commerce clause prohibitions against protectionism to bar relocation subsidies, then interstate businesses might have less power to externalize costs onto taxpayers. Enrich, *supra* note 126, at 469.

157. Tom Baker shows how moral hazard is a multi-sided problem; that is, reducing one moral hazard problem tends to increase moral hazard somewhere else. See Baker, *supra* note 114, at 272-75. Moral hazard is the product of a reciprocal relationship in which each party may provide a protective "subsidy" or "insurance" to the other, depending on the baseline values or perspective from which that relationship is analyzed. See *id.* at 275 (describing the "relational nature" of moral hazard); McCluskey, *supra* note 41, at 747-48 & 747 n.353 (explaining the multi-sided nature of moral hazard in the context of workers' compensation as an example of the economic indeterminacy of moral hazard).

158. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 17.

from which society benefits.¹⁵⁹

These subsidies by caretakers to others create incentives for costly behavioral changes—a typical moral hazard scenario. For example, replacing “welfare” with “workfare” for single parents in poverty increases subsidies to employers. “Workfare” requirements (and other welfare limits) increase the supply of low-cost workers, which in turn depresses wages and job security for competing workers.¹⁶⁰ As employers increase their dependence on workfare (and former welfare recipients) to reduce their labor costs, more workers will increasingly need to supplement their wages (and offset increased costs and longer working hours) with unpaid and underpaid caretaking labor,¹⁶¹ taxpayer assistance,¹⁶² or charity.¹⁶³ In a “cycle of dependency,” employers and shareholders increasingly may seek profit not through the “hard work” of innovation and improved quality, but through wage reductions and increased labor “flexibility” (along with taxpayer and charitable subsidies) that redistribute and add to the costs of caretaking for workers (and communities).¹⁶⁴

In another example, “welfare reform” policies aimed at discouraging the supposed moral hazards of single motherhood and

159. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 17 (explaining that all members of society owe a debt to caretakers).

160. See Mickey Kaus, *Welfare Reform & Its Enemies*, WALL ST. J., Nov. 2, 1998, at A37 (arguing for the need to defend welfare reform against political challenges from unions who correctly perceive workfare as undermining workers’ interests in higher wages).

161. Relatives and children in need of care themselves often perform these unpaid family labor needs. See Jason DeParle, *As Welfare Rolls Shrink, Load on Relatives Grows*, N.Y. TIMES, Feb. 21, 1999, at A1 (giving examples of grandmothers struggling with their own illnesses and disabilities who took on care of grandchildren after the children’s mothers lost government assistance).

162. For example, in 1997 more than twice as many Americans benefited from the Earned Income Tax Credit, which subsidizes parents in low-wage jobs, than in 1993. *Council of Economic Advisers, Good News for Low Income Families—Expansions in Income Tax Credit & Minimum Wage*, M2 PRESSWIRE, Dec. 9, 1998, available in LEXIS, News Library. Spending on the EITC increased eleven-fold from 1986 to 1996, reaching \$21 billion. Gary Burtless, *Growing American Inequality*, 17 BROOKINGS REV. 31, 34 (1999). School lunch subsidies increased six percent between 1994 to 1997, although anti-welfare policies have decreased recent use of food stamps by the eligible working poor. Shailagh Murray, *Drop in Food-Stamp Rolls is Mysterious and Worrisome*, WALL ST. J., Aug. 2, 1999, at A20.

163. See, e.g., Heather Boushey, *Life After Welfare*, 90 LEFT BUS. OBSERVER 3 (June 28, 1999) (discussing reports of surging demand at soup kitchens and food banks, particularly from low-waged workers). Catholic Charities reported a 38% average increase in food assistance in 1998. See Murray, *supra* note 162, at A20.

164. Similarly, in a decision upholding minimum wage legislation, the Supreme Court reasoned that such laws do not necessarily force employers to subsidize workers, but instead may relieve taxpayers from subsidizing unconscionable employers who fail to pay a living wage and thereby force their workers to supplement their earnings with government relief. See *West Coast Hotel v. Parrish*, 300 U.S. 397, 399 (1937) (overruling a previous *Lochner* era case); see also Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 876 (1987) (analyzing this case as an example of how the idea of a “subsidy” requires baseline norms).

“illegitimacy” could instead be viewed as *increasing* moral hazard among heterosexual men seeking families. Conservative welfare critics often worry that many men will have difficulty attracting or retaining wives and children if they have to compete with other sources of support available to mothers.¹⁶⁵ By adopting policies that skew public support for caretaking to “traditional” families,¹⁶⁶ the state subsidizes some heterosexual men, so that they do not have to make as much effort as they otherwise would to satisfy their wives and children (using conservative welfare critics’ logic). These subsidies lead to what could be construed as a “cycle of dependency” in which men increasingly seek to retain marriageability or fatherhood through state regulation and state subsidies rather than by taking “personal responsibility” for their needs.¹⁶⁷

Finally, on a global scale, neoliberal policies—enforced by the IMF, World Bank, and international economic agreements—often increase moral hazard by shifting the costs of social programs from the state and the market to the family. Fineman notes that caretakers’ unpaid or underpaid labor is a societal debt used to support market and state institutions.¹⁶⁸ Collective support for caretakers is therefore an obligation owed in payment for this debt.¹⁶⁹ In this view, neoliberal fiscal austerity policies that reduce social support for caretakers result in a default on debt payments.

This caretaking “debt default” in effect requires caretakers to subsidize international investors. When the IMF’s “structural adjustment” policies require nations to cut social spending to reduce government deficits, an intended effect is to divert more government

165. See Gilder, *supra* note 15, at 26 (explaining that “nothing is so destructive” to men’s values, emotional well-being, productivity, and sexual potency than the knowledge that his wife and children may not need him as a financial provider).

166. One example of such a policy is the income-splitting, joint filing system in federal income tax law that allows financially well-off (and heterosexual) married couples consisting of one high-earning spouse and one homemaking or low-earning spouse to tax the high-earners’ income as if it were divided equally between the spouses—effectively allowing traditional middle and upper class “breadwinners” to “purchase” caretaking services with pre-tax income. See Martha T. McCluskey, *A Critical Analysis of the Treatment of Dependent Care and Household Expenses in Federal Income Tax Theory* 55-56 (1988) (unpublished manuscript on file with author). In contrast, this tax system penalizes low-income families and married couples with relatively equal incomes. See MCCAFFERY, *supra* note 22, at 137-38.

167. I am not necessarily endorsing extending such a “personal responsibility” approach to men in traditional families receiving state subsidies; instead, my aim is to reveal the double standard which unfairly stigmatizes other subsidies. I concur with Fineman’s goal of creating a system of caretaking subsidies available to caretakers regardless of their family type, and which would go to the family member who performs the caretaking labor rather than to a “breadwinner” who receives support from a caretaker. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 3, at 232-33.

168. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 21.

169. See Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 19.

resources from social welfare programs to payments to international creditors such as commercial banks.¹⁷⁰ The caretaking "debt default" that typically results from deficit-reduction policies provides international investors with higher returns for less risk by decreasing trade deficits, decreasing inflation, and supporting currency value.¹⁷¹

But these subsidies by caretakers to international financiers create moral hazard problems. Policymakers often use neoliberal fiscal austerity programs to bail out lenders whose original loans have failed to achieve expected economic results.¹⁷² If governments alter their fiscal policies to protect international creditors against economic difficulties that threaten investment returns or debt repayment, then international lenders may be less careful in making loans. As a result, we now face the possibility of a "cycle of dependency" in which international investors are becoming less self-sufficient, seeking profits through increased cost-shifting to unpaid or underpaid caretakers rather than through prudent investing—arguably contributing to a global race to the bottom that increases overall costs.¹⁷³

International institutions like the World Trade Organization (WTO) were formed to prevent the destructive competition that can

170. See Wendt, *supra* note 97, at Part Two (explaining critics' concerns that IMF/World Bank programs force many countries—like South Korea—to divert spending from social needs to repayment of commercial bank loans that failed to improve the countries' economies); see also Prabhat Patnaik & C.P. Chandrasekhar, *India: Dirigisme, Structural Adjustment, and the Radical Alternative*, GLOBALIZATION AND PROGRESSIVE ECON. POL'Y, *supra* note 80, at 83-84 (describing how India's structural adjustment program included a deficit-reduction policy that "increased transfers from the state to rentiers in the form of interest payments, and has concurrently enforced larger fiscal burdens on the people and cuts in public investment").

171. See Hahnel, *supra* note 154, at 47-48 (explaining that international creditors benefit from a surplus of exports over imports that raises local currency values, making debt repayments less risky); see also Fischer, *supra* note 79, at 24-31 (explaining that to attract the investment necessary for renewed growth, "the importance of fiscal policy is hard to overemphasize"); WORLD BANK POLICY RESEARCH REPORT, *supra* note 96, at 182-83 ("Keeping budget deficits small helps in controlling inflation and avoiding balance of payments problems," which promotes "realistic" exchange rates beneficial to international investment). Furthermore, spending cuts that eliminate alternative income sources may increase investors' bargaining power relative to labor, thereby allowing investors to pocket a larger share of productivity gains. See, e.g., Dorene Isenberg, *The European Monetary Union: New Mandates for Conservative Macro Policies*, REAL WORLD INTERNATIONAL 46, 48 (Marc Breslow, David Levy, Abby Scher & the Dollars & Sense Collective eds., 5th ed. 1999) (quoting Association of German Employers president Dieter Hundt's approval of Maastricht treaty requirements for reduced social spending on the ground that these would increase incentives to work).

172. Wendt, *supra* note 97, at Part Two, II (B)(5) (discussing critics' claims that, through IMF and World Bank mandates for reduced social spending, the poor bear the burdens resulting from failed commercial bank loans meant to improve the economy).

173. See HARRY SHUTT, *THE TROUBLE WITH CAPITALISM: AN ENQUIRY INTO THE CAUSES OF GLOBAL ECONOMIC FAILURE* 75 (1998) (noting a "fundamental fraud" at the heart of neoliberal orthodoxy: the expanding welfare state is dismissed as unrealistic "self-indulgence," while "the one central reality . . . is the inescapable dependency of big business on the state").

result from protectionist national subsidies.¹⁷⁴ In orthodox economic trade theory, competition produces incentives for nations to subsidize their own industries, even though those subsidies leave most nations and multinational corporations worse off in the end—a classic prisoner's dilemma problem.¹⁷⁵ According to dominant economic theory, therefore, international cooperation and regulation is necessary to ensure "fair competition" and "free" trade.¹⁷⁶

Taking seriously Fineman's analysis of caretaking labor as a hidden subsidy, perhaps we should re-orient the IMF, WTO, and other international institutions so that they work to prevent nations from pursuing economic gain through a destructive competition to increase subsidies from caretakers. That is, social welfare cuts could be viewed as anticompetitive "dumping" or unfair protectionism in violation of free trade policy. "Anti-dumping" provisions in international "free trade" agreements address the problem that government subsidies or protections may allow exporters to increase market share and to undermine foreign competitors by selling products at prices below "normal value."¹⁷⁷ Following this reasoning, the unpaid labor of caretakers can be viewed as a subsidy to local producers who may then offer exports in foreign markets below "normal value"—thereby pressuring competitors to similarly seek political and economic environments that shift costs to caretakers. Current economic orthodoxy makes such an argument seem far-fetched, but that shows the importance of Fineman's call to open a discussion about the gendered values implicit in the failure to recognize the social and economic value of dependent care.

IV. DEPENDENCE ON WHOM?

The revival of rhetoric stressing the virtues of independence¹⁷⁸ in

174. See BERNARD HOEKMAN & MICHEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 20-21* (1995) (explaining the view that the GATT and the WTO establish a multilateral trade regime that benefits the world as a whole by discouraging countries from trade restrictions that might otherwise be in their individual self-interest).

175. See *id.* at 56-60 & Box 3.1 (giving orthodox explanation of prisoner's dilemma problem in international trade); see also Gerald Epstein, *Power, Profits, and Cooperation*, in *CREATING A NEW WORLD ECONOMY*, *supra* note 59, at 39 (giving progressive explanation that corporations will benefit most if *only* their country offers protection, but that such a strategy would lead to competition among countries for protection, making capitalists worse off).

176. EPSTEIN, GRAHAM & NEMBHARD, *supra* note 59, at 39. The WTO incorporates the principle of "fair competition," which means governments should not subsidize exports. See HOEKMAN & KOSTECKI, *supra* note 174, at 32.

177. HOEKMAN & KOSTECKI, *supra* note 174, at 173.

178. See Clair McIntire, *Welfare Reform Puts People on Payroll*, TELEGRAM & GAZETTE, May 12, 1997, at A7 (noting that "we set the standard for the rest of the country in . . . breaking the cycle

fact serves to promote new (or renewed) dependence and control. Welfare "reform" is one wave in a powerful contemporary movement to make the state (and its citizens) along with most families (and their caretakers) increasingly subordinate to—and dependent on—a "market" structured in the interests of a wealthy minority.¹⁷⁹

This movement aims to construct collective support for caretaking as a major threat to society: the welfare state becomes the pejorative "nanny state."¹⁸⁰ For instance, a Cato Institute report used the title "The Advancing Nanny State" to portray child care subsidies as a great danger to family and market.¹⁸¹ An editorial in the *Investors' Business Daily* explains that the opposite of the Founder's vision of civil liberty is "a nanny state with growing bureaucracy, swarms of regulations, ever-growing taxes and coercive rules to force citizens to do just what big-government types want."¹⁸²

The "nanny state" slur is revealing for how it represents the nemesis of political and economic autonomy. This term ridicules the usurpation of a traditional class as well as gender order: it implies "nannies" are women and domestic servants, not leaders of a "free" society. This image suggests that making caretaking central to the state threatens not just to give women authority in state and market, but to give "servants" authority in those spheres. By insinuating that "nanny" should be removed from state to home, welfare state critics evoke an image of a return to a patriarchal estate, where freedom, responsibility and self-reliance means those who work—whether in the market or the family—leave the governing to their masters.

The rise of the neoliberal ideology of "efficiency" appears to have elevated "economics" over politics, "market" over state. While this ideology imagines a strong state as a stereotypical "nanny"

of dependency by assisting families to achieve self-sufficiency through work"); Deusterberg, *supra* note 9, at 51 (explaining that the revitalization of the neoclassical economic paradigm concords with the Jeffersonian ideal of independent actors as the foundation of American democracy).

179. For a discussion of corporate-funded organizations that led the media and political campaign for "welfare reform" in the United States, see JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 82-95 (1996).

180. See, e.g., Thomas J. Bray, *Perspective: Which Party Will Capture Sense of Nation's Potential?*, DETROIT NEWS, Feb. 14, 1999, at B6 (declaring that "the nanny state . . . discourages work, investment and innovation through subsidies for idleness and a growing maze of regulations, taxes, and laws"); Doug Fisher, *Strategies to Oust the Liberals*, EDMONTON SUN, Feb. 9, 1999, at C3 (advising Canada's right-wing leaders to stress that "[w]orkfare is progressive, the Nanny State is not").

181. See Suzanne Fields, *Viewpoint: Beware PM Day Care*, COMMERCIAL APP., Nov. 2, 1997, at B6 (favorably discussing the Cato report).

182. Editorial, *What the Founders Can Teach Us*, INVESTORS BUS. DAILY, July 2, 1998, at A28.

infantilizing her charges through excessive control or attachment,¹⁸³ it appears to imagine a strong market as a stereotypical "daddy" whose discipline and distance leads to self-reliant growth. But the neoliberal movement to make the supposed "free market" master of state and family is fundamentally about redistributing power within the market, state and family. "Free market" ideology turns moral questions of "rights" and "fairness," which should be open to public debate, into questions of "economic efficiency," relegated to technical cost-benefit calculation and removed from democratic control.¹⁸⁴

Where this economic ideology governs, it is not enough to make caretaking subsidies *fair* or *right*; we must go further to challenge the rules that make fairness costly and so-called "efficiency" neutral and necessary. By examining the double standard for public support for caretaking versus public support for capital and corporate interests, we can better see how supposed principles of "efficiency" inextricably depend on moral and political assumptions about the *fair* distribution of resources. The question for debate should not be whether subsidies for caretakers are economically efficient, but *for whom*, and according to *what standard* of economic well-being.

Furthermore, the debate should focus on the institutional arrangements that threaten to make caretaking subsidies such a costly choice for most governments. In the guise of promoting "efficiency," neoliberal policies are succeeding in redistributing political and economic power so that corporate and capital subsidies appear to be an economic necessity in a global market. At the same time, these policies are establishing structures that make caretaking subsidies appear to be an unaffordable luxury that most nations must sacrifice in favor of support for capital interests. But law and politics, not neutral economics, determines who must accept tough tradeoffs due to limited resources and who can reject such limits as "inefficient" or illegal constraints on "free trade," "property rights" or "competitiveness."¹⁸⁵

183. See Daniel Yergin & Joseph Stanislaw, *Now Comes the Hard Part*, WALL ST. J., Sept. 28, 1998, at R25 (reporting that British Prime Minister Tony Blair admonished opponents of his "free market" policies to "grow up").

184. See Janine Brodie, *supra* note 102, at 55-56 (noting that democratic control over economies has eroded because of neoliberal trade policies and globalization of capital, along with a discourse in which the "economic" and the "market" are depoliticized); TEEPLE, *supra* note 14, at 122-27 (discussing restrictions on democratic processes caused by increasing preemption of local and national decisionmaking by undemocratic international institutions like the WTO and IMF, controlled by capital interests); see also CHOSSUDOVSKY, *supra* note 59, at 23 (arguing that developed nations are under a kind of "political trusteeship of finance capital," because of a vicious circle of pressure by private banking and financial creditors).

185. See McCluskey, *supra* note 41, at 918-19 (explaining how conventional "efficiency"

The promise of Fineman's vision should not be clouded by the difficulty of getting from here to there. Challenging the supposed "economic" barriers to caretaking subsidies imposed by the dominant "free market" ideology is a crucial step along the way. By opposing the neoliberal ideology that is shifting costs to so many, feminists can open up new possibilities for democracy and fairness that will help transcend differences of family, race, geography, and gender.

analysis incorporates a double standard whereby constraints on some peoples' interests are constructed as expendable "market barriers" requiring correction, while constraints on other peoples' interests are constructed as inevitable market forces requiring acceptance).