PROPERTY, TAXATION, AND DISTRIBUTIVE JUSTICE

WHAT DOES A FAIR SOCIETY OWE CHILDREN—AND THEIR PARENTS?[1]

*Anne L. Alstott**

What role do—and should—parents play in a fair society, taking the term fair society in a Rawlsian sense? Over time, our society's demands on parents have steeply increased, while the economic rewards of child-rearing have diminished. At one time, children were an emotional *and* economic bonus, providing workers for the farm or factory as well as security in old-age. For today's parents, in contrast, child-rearing is a one-way obligation: parents spend time and money preparing their offspring for modern life, without expecting much other than love in return.

Today, society expects parents to do the intensive work of preparing children for modern life. We expect parents to invest far more time and money in their children than ever before; we rely on parents to give priority to their children's needs for nearly two decades; and we expect them to do so without much economic reward. Slowly but surely, a combination of technological, social, and legal change has transformed modern parenthood into an extraordinarily demanding social role—and one that carries a built-in tension between meeting our children's needs and pursuing lives of our own.

But should we understand the demands of modern child-rearing to be a matter for *public* concern? Or should we, instead, conceive of parenthood as an essentially personal endeavor? On this latter view, parenthood is a *private project* and nothing more: Every individual is free to choose parenthood, or to reject it, but parents have no special claim on state assistance.

In this Article, I challenge the private project view, drawing on a line of argument that I develop in my forthcoming book, *No Exit*.[2] Using principles adapted from the work of John Rawls and other

* Professor of Law, Yale Law School. I am grateful to Jim Fleming for inviting me to the "Rawls and the Law" Symposium and to Linda Sugin, Tom Nagel, and Bob Cooter for an excellent panel discussion.

1. *See* Anne L. Alstott, No Exit (forthcoming Spring 2004). The material in this Article is adapted from the book with permission of Oxford University Press.

2. Alstott, *supra* note 1.

liberal egalitarians, I argue that a fair society does owe a special obligation to parents. Society expects—and needs—parents to provide their children with *continuity of care*, meaning the intensive, intimate care that human beings need to develop their intellectual, emotional, and moral capabilities. And society expects—and needs—parents to persist in their role for eighteen years, or longer if needed. A variety of social and legal institutions convey a common message: Do what it takes to give your children the continuing care that they need. Put simply, "Do Not Exit."

Society's "No Exit" command to parents is grounded in a deep and appropriate commitment to human dignity and equality. If every child is to have a fair start in life, we cannot authorize parents to act in any way they wish. A society that seeks to protect the life chances of every person cannot be indifferent to the conditions of child-rearing. We understand that society owes every child the conditions she needs to flourish—every child deserves a parent who will not exit.

But from a parent's perspective, "No Exit" has a double edge. Continuity of care is good for children and for society too, because well-cared-for children can grow into autonomous adults. But at the same time the "No Exit" command promotes children's interests, it also burdens parents' opportunities. We can acknowledge the moral and emotional satisfactions of parenthood while also recognizing that parents provide continuity to their children at considerable cost to themselves. The "No Exit" obligation can severely limit the ordinary jobs, and ordinary lives, that parents can choose to live.

In response, a fair society ought to take measures to lighten the autonomy burden of child-rearing. The goal should not be to render child-rearing costless. It would be impossible, as well as unwise, to attempt to erase any imprint of parenthood on parents' lives. Most parents derive great pleasure and satisfaction from their children, and many can hardly imagine a childless life. But the fact that parents choose their path should not obscure the unique "No Exit" burden that attends parenthood. Society may fairly expect parents to remain with their children for the long term, but it should not ignore the consequences of that dictate for parents' own lives. Child-rearing should be a life stage, and not a life sentence.

I. WHAT IS CONTINUITY OF CARE?

Continuity of care requires parents to take on a dual role. Put succinctly, parents must be both nurturers and advocates, and they must continue in both roles until the child is grown.

This much seems familiar and intuitive. It is obvious that children need nurturing. And a moment's reflection confirms the importance of advocacy, too—young children cannot speak for themselves, and even older children may not be able to identify and articulate what they need from schools and other institutions. But what does

continuity add to the idea of *care*? Why is it important that each parent continue in his or her role for the long term?

A. *How Continuity Fosters Children's Development*

Joseph Goldstein offered a striking account of the importance of continuity of care for children. Writing with Anna Freud and Albert Solnit, Goldstein emphasized the importance of continuing care provided by one (or more) "psychological parents."[3] The authors explained that every child needs "unbroken continuity of affectionate and stimulating relationships with an adult."[4] The goal for society, they wrote, should be to ensure "each child a chance to be a member of a family where he feels wanted and where he will have the opportunity, on a continuing basis, not only to receive and return affection, but also to express anger and to learn to manage his aggression."[5]

I begin with Goldstein, Freud, and Solnit because their theory has become a touchstone in family law. The basics of their psychological theory of continuity have been widely accepted, and their 1973 book is still cited, with approval, by leading family law scholars today.[6] The Goldstein, Freud, and Solnit books have been controversial primarily for their legal prescriptions and not their psychological insights.[7] Even those who disagree with the authors' proposals for legal reform acknowledge that there is near-consensus on children's need for continuity of care.[8]

---

3. *See* Joseph Goldstein et al., Before the Best Interests of the Child (1979); Joseph Goldstein et al., Beyond the Best Interests of the Child (1st ed., 1973); Joseph Goldstein et al., In the Best Interests of the Child (1986). A second edition of the 1973 book was published in 1979 with a helpful epilogue, and so I usually cite to that version. *See* Joseph Goldstein et al., Beyond the Best Interests of the Child (2d ed., 1979) [hereinafter Goldstein, Beyond the Best Interests, 2d ed.].

4. Goldstein, Beyond the Best Interests, 2d ed., *supra* note 3, at 6.

5. *Id.* at 5-6.

6. *E.g.*, Elizabeth Bartholet, Nobody's Children 39 (1999); Mary Ann Mason, The Custody Wars 89 (1999); Carol Sanger, *Separating From Children*, 96 Colum. L. Rev. 375, 443 (1996); Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 Va. L. Rev. 2401, 2412 (1995); Elizabeth S. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 Cal. L. Rev. 615, 630 (1992).

7. Critics of Goldstein, Freud, and Solnit's psychology tend not to attack the continuity norm itself, but instead challenge psychoanalysis or the authors' legal prescriptions. *See* David Fanshel, *Urging Restraint in Terminating the Rights of Parents of Children in Foster Care*, 12 N.Y.U. Rev. L. & Soc. Change 501 (1983-84); Everett Waters & Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons*, 12 N.Y.U. Rev. L. & Soc. Change 505 (1983-84). For a response, see Joseph Goldstein, *In Whose Best Interest?, in* Joint Custody and Shared Parenting 47 (Jay Folberg ed., 1984).

8. The focus of debate has been the authors' recommendation that courts in custody disputes should award custody to just one psychological parent, granting her (or him) the legal right to deny visitation by the other parent. Indeed, "Goldstein, Freud, and Solnit" became fighting words to some fathers' rights groups. *See* Mason,

The heart of the Goldstein, Freud, and Solnit theory is the observation that children rely on their psychological parents to create a stable environment and set of close relationships in which the child can accomplish his developmental tasks. Good parents, for example, feed and soothe infants, and begin to establish routines that help infants learn to "tolerate postponement of gratification and inevitable frustration."[9] Later in the child's development, good parents provide appropriate praise and discipline, laying "the first foundations for the child's own control of his drives and impulses, the lessening of his selfishness, and the beginning of consideration for others."[10] Parents also provide role models for attitudes and values with which the child can identify. During the rebellions of adolescence, parents offer a stable relationship, permitting the child to experiment with rejection and distance without rejecting the child in return.[11]

Goldstein, Freud, and Solnit worry that adults systematically underrate the challenge of being a child:

> Physical, emotional, intellectual, social, and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones.[12]

Throughout the child's development, stability is key—it is crucial that children be able to rely on a parent's continuing presence. Disruptions in continuity of care can inflict serious psychological trauma on children. Children, say the authors, are egocentric and have difficulty maintaining equilibrium when their environment and relationships are disrupted.[13] They may experience disruption as a personal attack or rejection; and they "respond to any threat to their emotional security with fantastic anxieties, denial, or distortion of reality, reversal or displacement of feelings—reactions which are no help for coping, but rather put them at the mercy of events."[14]

The continuity principle distills a basic insight—supported by common sense as well as psychology—that children do best when they maintain a long-term relationship with at least one caring adult. This insight does not demand allegiance to any particular school of child-

---

supra note 6, at 88. But for my purposes, what is striking about the joint-custody controversy is that continuity of care plays a crucial role on both sides of the debate, with critics contending, in effect, that Goldstein, Freud, and Solnit have misapplied their own principles.

9. Goldstein, Beyond the Best Interests, 2d ed., *supra* note 3, at 14.
10. *Id.*
11. *Id.* at 34.
12. *Id.* at 32.
13. *Id.* at 32-34.
14. *Id.* at 12.

rearing or child psychology. Goldstein, Freud, and Solnit were psychoanalysts, but continuity of care has also been advanced by attachment theorists. While psychoanalysis and attachment theory represent quite distinct approaches to child psychology, both endorse continuity of care (in the general formulation I have presented) as an important value in guiding arrangements for children's care.[15]

It is worth emphasizing that continuity of care does not rely on maternal-bonding theories. These spring up from time to time in the popular press, warning that any working mother is doing lasting damage to her children. But these extreme views are empirically questionable, and in any event they represent neither mainstream attachment theory nor the views of Goldstein, Freud, and Solnit. The modern view is that children may develop attachments with multiple caretakers, and nothing in the psychological parent theory requires parents to refrain from working—or to devote their every moment to their child. Empirical studies have generally rejected the simple prediction that maternal employment compromises children's development.[16] While continuity of care emphasizes a loving bond between parent and child, it also recognizes that children develop such bonds with more than one parent, and that appropriate use of a substitute caregiver will not disrupt the parent-child relationship.[17]

Continuity, then, is an integral part of nurture—children need a sense of stability and permanence that helps them navigate the challenges of growing up. But the psychological bond between parent and child serves a second function as well: Continuity helps parents act as effective representatives for their children in the wider world.

B. *How Continuity Protects Children's Interests*

Today, children interact with a variety of large, impersonal institutions. The assumption that parents will faithfully represent their children's interests is ingrained in virtually all our public institutions for children's care. Public education and healthcare rely

15. For an account of continuity of care that draws on a variety of psychological sources, see Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 902-11 (1984); for an account of continuity based on attachment theory (and vehemently rejecting psychoanalysis), see Waters & Noyes, *supra* note 7. For a nuanced discussion of the differences and commonalities between psychoanalysis and attachment theory, see Peter Fonagy, Attachment Theory and Psychoanalysis (2001).

16. For a critical debunking of mother-infant bonding theories, see Diane E. Eyer, Mother-Infant Bonding (1993). For research on attachments to multiple caretakers, see Robert F. Kelly & Shawn L. Ward, *Allocating Custodial Responsibilities at Divorce: Social Science Research and the American Law Institute's Approximation Rule*, 40 Fam. Ct. Rev. 350 (2002); for a review of studies of maternal employment, see Sanger, *supra* note 6, at 434-38, 478-83.

17. *See* Eyer, *supra* note 16; Kelly & Ward, *supra* note 16; Sanger, *supra* note 6, at 434-38, 478-83.

especially heavily on the parent's role as advocate for her child. Teachers and medical personnel can provide expert advice, but their diagnoses often rely on the parent's close observation of the child. Parents may seek special programs or treatments for a sick or disabled child, or they may actively contest a proposed course of therapy. One vivid example comes from special education. Although federal law requires public schools to provide a free and appropriate public education, parents' repeated experience is that they play a crucial role in asserting their children's rights and in ensuring that the schools provide educational programs appropriate for a particular child.[18]

Even good institutions cannot function without parental participation and advocacy. We will never be able to create impersonal care that mimics personal care—we will never train teachers who know our children as we do, or doctors or nurses who remember every critical detail of the child's medical history.

Once again, continuity is a critical component of parental care. Parents are more likely to act with greater fidelity to children's interests if they bond to children over the long term. When parents have a close emotional tie to their children, they can promote the child's interests most effectively. When parents know that they are responsible for the child for the long term, they may more feel a greater stake in the child's life. And parents who persist with their children develop expertise about their children that neither the state nor shorter-term caretakers can match.[19]

To see the point, compare a parent's role with the role of other representatives for children. In different settings, various professionals may speak on children's behalf—teachers, doctors, caseworkers, even lawyers in a courtroom setting. These representatives bring special expertise, but they are most effective when they work *with* parents. Their formal training is not designed to substitute for the knowledge and intensity that a parent brings to the table. Parents' long-term, close, and continuing relationship with their children creates a depth of knowledge and personal identification that cannot be duplicated in shorter-term or more casual relationships.

II. SHOULD SOCIETY EXPECT PARENTS TO PROVIDE CONTINUITY OF CARE?

One of the standard cases taught in almost any family law course is *Painter v. Bannister*,[20] which illustrates just how painful the demands of continuity can be for parents. The case is a custody dispute

18. See, for example, the advice, guidelines, and model correspondence offered by the Autism-PDD Resources Network website, at www.autism-pdd.net (last visited Feb. 17, 2004).

19. This line of argument is developed in both Scott & Scott, *supra* note 6, and Emily Buss, *"Parental" Rights*, 88 Va. L. Rev. 635 (2002).

20. 140 N.W. 2d 152 (Iowa 1966).

involving seven-year-old Mark Painter, and the contesting parties are his father, Harold Painter, and his (maternal) grandparents, the Bannisters. When Mark was five, his mother and baby sister died in a car crash, leaving Harold and his five-year-old son, Mark, to pick up the pieces of their lives. Harold decided to leave Mark with his grandparents in Iowa for a while.[21] Mark had a rocky time at first: he was aggressive toward smaller kids, cruel to animals, and disliked by his peers. But he grew to love his grandparents, the Bannisters, and to depend on them. Although Mark remained somewhat anxious in personality, he ultimately developed a closer and more secure relationship with his grandfather than he had had with Harold.[22]

Harold returned after an absence of fifteen months. He had remarried and found a house in California, and he was eager to bring Mark along to make a fresh start with his new family. But Mark's grandparents objected: They worried that Mark could regress if he left the environment in which he was (by then) thriving.[23]

In the end, the Iowa Supreme Court decided that Mark should stay with his grandparents.[24] In reaching its decision, the court relied heavily on the testimony of a child psychologist, who testified that Mark's grandfather had replaced his father as the primary "father figure" in the child's life.[25] The psychologist emphasized the importance of stability and continuity for Mark, and he worried that Mark's more tenuous relationship with Harold would be insufficient to sustain the child through the stress of another family transition.

Some critics view *Painter v. Bannister* as an artifact from the culture wars of the 1960s. On this view, the Iowa Supreme Court simply indulged its own cultural prejudices, discounting Harold's love for his son in light of his "Bohemian approach to finances and life in general,"[26] and endorsing instead the more familiar, Midwestern values of the Bannister family.[27]

But *Painter v. Bannister* is more complicated than that. The dilemma of continuity of care is a wrenching one, and the Iowa Supreme Court's opinion attempted to deal with it seriously. Harold had his heart set on taking Mark back, and he considered his son's

21. *Id.* at 153.
22. *Id.* at 156-57.
23. *Id.* at 153.
24. *Id.* at 156.
25. *Id.* at 157.
26. *Id.* at 154.
27. *See, e.g.*, William Louis Tabac, *Give Them a Sword: Representing a Parent in a Child Custody Case*, 28 Loy. U. Chi. L.J. 267, 275 n.48 (1996) (calling *Painter* a "notorious example" of judges deciding cases based on their own values); Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 Colum. L. Rev. 118, 123 n.23 (1986) (discussing *Painter v. Bannister* and stating that "[j]udges seldom use 'best interests' analysis so blatantly as a vehicle for imposing their own values on their decisions").

stay with the Bannisters a temporary measure—nothing more. Harold's exit is a very human reaction to tragedy: Imagine how devastating it would be to lose a beloved partner and a child in a car accident. It seems cruel to dismiss Harold's pain or to expect him not to act out in some fashion. Some people might respond to catastrophe with fortitude, but others might become depressed or need to exit the scene for a while, as Harold did.

Still, even as we sympathize with Harold, we can question whether he did the right thing. If Harold was in pain, imagine what five-year-old Mark must have felt. He lost his mother and sister and then, for more than a year, his father too. Fifteen months can be a long time in the life of a small boy, and during that time Mark made an important emotional adjustment—he came to feel secure in the Bannister family. It was the Bannisters, who must have been feeling considerable pain themselves (Mark's mother was their daughter), who stepped up to recreate continuity for Mark—to provide him with a family where he felt wanted.[28] When Harold reappeared, with a new wife, it might have been too much to expect Mark to leave the Bannisters and make yet another transition.

There is a postscript to *Painter v. Bannister*, and it does little to resolve the ambiguity. Two years after the court decision, Mark asked to live with his father, and the Bannisters consented.[29] Is that proof that the court's initial decision was wrong? Or evidence that two more years with his grandparents helped Mark recover sufficient equanimity to make a choice that (this time) his grandparents felt was reasonable?

The larger significance of *Painter v. Bannister* is that it demonstrates the potential conflict between parents' needs and children's needs: Harold needed to leave, but Mark needed him to stay. Even in less dramatic circumstances, parents encounter these conflicts all the time. Parents may want, or need, to take (or leave) a job, to marry (or to leave a marriage), or simply to change a way of life they have come to dislike. But their children need something else. Perhaps the family needs the money that the hated job brings in. Or perhaps the children need so much care that a demanding job can no longer be managed. Perhaps a fiancé demands a geographic move or other changes that would too seriously disrupt the children's sense of stability. Just as in Harold's case, we may have conflicting intuitions about how parents should act in these cases. We want parents to do what is best for the children. But parents also deserve to have lives of their own.

---

28. *See* Goldstein, Beyond the Best Interests, 2d ed., *supra* note 3, at 5 (describing guidelines for judicial decisions for child placement).

29. Judith Areen, Family Law 1259 (1999).

How should we think about these conflicts? Is it fair to expect parents to provide continuity of care to their children, when doing so requires serious compromises in the lives parents wish to live?

A. *Children and the Conditions of Autonomy*

These are deep questions about the nature of child-rearing in a fair society. One way to approach these questions is to consult the underlying principles that guide the organization of our society. Individual autonomy is one such value: Many of our laws and institutions seek to make it possible for every person to live a life that is autonomous—a meaningful life of her own choosing. On liberal, egalitarian principles, one central function of the state is to create institutions that ensure to every person the conditions of autonomy—the chance to develop the capabilities that she will need to formulate, choose, and pursue a vision of the good life.

If we are committed to the ideal of autonomy for everyone, we should create institutions to provide the conditions of autonomy to every child—the material, intellectual, and emotional preconditions that permit human beings to develop the capacity to be self-governing. For instance, a fair society should provide universal education, including not only skills training, but also the chance to explore diverse visions of the good. Although liberal theory has somewhat less to say about the role of family life in children's development, most theorists seem to agree that children deserve parental time and attention sufficient to cultivate their capabilities.[30]

My point is that continuity of care should be an integral part of this ideal of child-rearing. Although theorists debate precisely what capabilities each individual may need, continuity of care represents a minimal, threshold requirement—a foundation for building *whatever* additional capabilities children may need.

Children need continuity of care to flourish: Outside of science fiction, there simply is no acceptable substitute for parental care. Of course, the law cannot prevent all disruptions in continuity: death, divorce, illness, and other calamities will always occur. Children can recover from these traumas, but they do so most effectively when a new family (or custody arrangement) recreates continuity of care. While continuity can be recreated, though not easily or without pain, some degree of continuity is essential: In the rare cases in which children are deprived of continuity for long periods or during formative stages, they suffer serious and lasting emotional problems.[31]

---

30. The importance of families as the first school for citizens is a central theme in Susan Moller Okin, Justice, Gender, and the Family (1989). *See also* John Rawls, A Theory of Justice 462-72 (1971); Bruce A. Ackerman, Social Justice in the Liberal State 139-67 (1980).

31. Several studies document the suffering of children who lose psychological parents to death or voluntary exit, and they emphasize that one of the key

The conditions of autonomy for children are so central to a fair society that they merit some degree of priority (how much, I will discuss below) over parents' (and other adults') competing claims to autonomy and privacy. To see why, imagine a group of people gathered together in the Rawlsian original position. To ensure that everyone's interests are represented, the assembly includes adults from the present generation as well as children who will not be born for some time yet. And to guarantee impartiality, the participants do not know to which generation they belong. What guidelines would these representatives adopt for children's care? How would they balance children's need for care against adults' wish to exercise their autonomy?

Contractarian hypotheticals of this type often produce indeterminate results, because it is difficult to determine, from abstract premises, the terms of the agreement that such representatives would reach. Would most people prefer institutions that promise greater freedom, or greater security? Would they favor an economy that produces more consumer goods, or more leisure time?

But in this case, the answer follows from the structure of a society committed to equality and autonomy—and not from a contingent prediction about individual tastes. Suppose, as Rawls suggests, that the representatives would choose a society that would seek to provide every individual with a meaningful chance to choose and to pursue her own vision of the good life.[32] That kind of society is possible only if

---

prescriptions for recovery is to maintain a continuing relationship with the remaining caretaker. *See* Brigid Daniel, et al., Child Development for Child Care and Protection Workers 93-94 (1999); Douglas Davies, Child Development 67-68 (1999); Suzanne D. Dixon & Martin T. Stein, Encounters With Children 505-09, 561-62 (2000) (documenting divorce and parental death). For studies of children deprived of parental (or substitute) care for extended periods, see Michael Cole & Sheila R. Cole, The Development of Children 251-57 (1989).

32. Some critics contend that representatives in the original position would not reach that result, but I will not engage that larger debate here; instead, I begin with Rawlsian principles that have held wide appeal, despite the debate over their derivation. For readers who are methodological sticklers, I point out that there are other ways of reaching the result I describe in the text. For instance, we might follow Dworkin's method of asking what kind of "insurance" each person would buy—would each person (hypothetically) agree to purchase "continuity of care" insurance? Although Dworkin does not address this question, he uses a similar method to address other questions of social organization. *See* Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality (2000) [hereinafter Dworkin, Sovereign Virtue]; Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 Phil. & Pub. Aff. 283 (1981) [hereinafter Dworkin, *Equality of Resources*].

We can reasonably suppose that the answer is yes, because continuity of care is a basic building block for human development. Alternatively, consider Ackerman's assembly, governed by the principle that no individual can assert she is better than another. Only someone who had already had continuity of care could meaningfully stand up in the assembly and assert that she rejected continuity; and if such an adult asserted that her values were more important than continuity for the next generation,

children have developmentally-sound conditions for their upbringing. Only autonomous people can participate (meaningfully) in choosing a vision of the good life; and continuity of care is at least necessary, although probably not sufficient, for the development of children's autonomy.

Because children are human beings, they deserve developmental conditions that give them a chance to develop the capabilities that let them define and choose a vision of the good. At a minimum, then, each child should have a caretaker committed to providing continuity of care, because only such a caretaker will give the child a good chance to develop the capabilities she needs to participate in society.

Some liberal, egalitarian theorists have imagined something close to an ideal of continuity of care, without quite hitting the mark. Rawls, for example, assumes that families will exist and that they will provide children with early moral instruction. In a brief passage on child-rearing (intended to illustrate how family life instructs children in moral authority), he seems to be reaching for continuity of care as he emphasizes parents' intimate relationship with the child and the importance of the stability of that relationship over time.[33] Ackerman emphasizes that the task of public education is to liberate children from their parents' views and social context—to give children a sense of the wider possibilities for life in a pluralistic society.[34] Still, he concedes, the family has a constructive role to play: Children rely on their parents to give them "cultural coherence" that acts as a foundation for ventures into the wider world.[35] Continuity of care is one way of understanding just how families do this.

We can imagine an objection to the contractarian hypothetical. Suppose that an adult representative stands up and asserts, "I do not particularly value the development of children's autonomy, and I do not want to squander my time or society's other resources on continuity of care. I would far rather spend my resources, and have our society spend its resources, on more important matters. Thus, I am perfectly willing to forgo continuity of care as a child in return for greater freedom to rear my own children as I choose once *I* am an adult."

This objection is plausible at first, but a closer look reveals its defect. The speaker is improperly asserting that her values—her wish to devote her resources on other pursuits—are more important than children's claims to the continuity of care they need to develop their autonomy. Children are human beings in their own right, and their

---

a member of the next generation (recall that Ackerman's assembly abstracts from temporal constraints) could stand up and object, decisively in Ackerman's scheme, "I am just as good as you." Ackerman, *supra* note 30, at 15.

33. Rawls, A Theory of Justice, *supra* note 30, at 463-64.

34. Ackerman, *supra* note 30, at 139-67.

35. *Id.* at 141 (emphasis omitted).

claim to the conditions of autonomy follows from their equal worth as individuals. Continuity of care is, in this sense, part of the bedrock of egalitarian society, and not an optional pursuit that can readily be traded off against other possible uses of society's resources. The question is not whether society should subsidize modern art, build a space station, or engage in some other optional endeavor that a fair society might, or might not, endorse. Instead, continuity implicates a foundational question: Whether every child should be entitled to the conditions of autonomy (as we understand them, today, in this society).

Continuity of care cannot be an elective value in an egalitarian society. It cannot be up to parents to decide whether they endorse continuity or instead would prefer to spend their time and money on other things. Instead, continuity of care is part of the basic package that every individual ought to have if she is to grow up to be a fully autonomous person, and a full participant in a liberal, egalitarian society.

This rationale implies that the state should expect parents to give priority in their lives to continuity of care for their children.[36] I hasten to add that parents need not be slaves to their children in order to provide them with continuity. In the ordinary case, it is acceptable, even desirable, for caretakers to pursue independent activities and relationships. The psychological and social functions of continuity can all be satisfied by caretakers who hold jobs (or not), who are married (or not) and who hold diverse views about how to accomplish the day-to-day work of child-rearing. Parents may be strict or lenient, anxious or casual, conventional or idiosyncratic. What *is* essential to continuity is "direct, intimate, and continuous" care by one or more parents who persist in the work of child-rearing over time.[37]

Thus, although parents should have considerable freedom to organize their lives as they choose, when continuity itself is at stake, a parent's own wishes should yield to the child's needs. Ordinarily, for instance, a child should not be deprived of her parents for periods that are unacceptably long given the child's developmental stage—so long that the child experiences a serious disruption in continuity of care. A parent who is severely emotionally troubled or disengaged for long

---

36. For principles along these lines, see Jeffrey Blustein, Parents and Children 103-14 (1982). Blustein proposes that:

> parents have a right to satisfy their own individual interests, parental and nonparental, as long as this is consistent with the satisfactory performance of their parental duties. These interests include the need for a certain degree of privacy within the family, the desire to engage in activities unrelated to child-rearing, and the desire to care for a child.

Id. at 113.

37. The phrase is from Goldstein, Beyond the Best Interests, 2d ed., *supra* note 3, at 3.

periods may also disrupt continuity. And, of course, continuity is incompatible with parental neglect or abuse in any form.

This simple formulation does not begin to address every hard case. For instance, what about a parent who is very ill—should the child's care take priority over the parent's needs then? Or what about a parent who has many children, some of whom have greater needs than others—is it ever acceptable to compromise continuity for some in order to provide it to others? I will not attempt to answer these questions fully here: My aim is to explain and justify the priority of continuity of care for the majority of parents in ordinary situations, rather than to craft ethical rules suited to extraordinary cases.

Still, continuity of care suggests some relevant considerations. Depending on the circumstances, a parent who cannot meet her child's needs should be expected to make arrangements for her child to be cared for by others—temporarily or permanently. Continuity puts a premium on maintaining the parent-child relationship if possible—but if that relationship is severely disrupted for a long period, it may be better to take steps to recreate continuity with another family. (This is, of course, the ongoing dilemma that the foster-care system faces—when to preserve a troubled or stressed family for the sake of the pre-existing relationship, and when to place children with new families.)[38]

What if parents object to the priority rule? Perhaps a parent simply does not wish to make continuity a priority in her life and prefers to keep her (exit) options open. Or perhaps a parent holds religious or personal views that reject continuity. The answer is that such parents should not be permitted to rear children. This conclusion may seem harsh at first, but if we keep in mind the importance of continuity for children's development, it is easier to see why parents should be expected to provide it. Just as the law denies custody of children to people who beat, starve, or neglect them, so it should (at least in theory) deny custody to people who do not intend to provide continuity of care, even if those people are biological parents. Biological parenthood may fairly give parents a "first right" to step up to the duties of caretaking, but it should not be a license for parents to use children to their own ends—which is what a refusal to provide continuity of care amounts to. In practice, society cannot detect every parent who shirks his responsibilities. In principle, however, the law should expect caretakers to provide children with meaningful emotional and physical care for the long term.

A more sympathetic objection comes from the parent who is willing to provide continuity of care under ordinary circumstances, but whose child—by reason of serious illness or disability—requires

38. For an account of the difficulties in striking the right balance between family preservation and adoption for foster children, see generally Bartholet, *supra* note 6.

extraordinary amounts of care, time and effort. Child-rearing is usually an eighteen-year obligation, ending when the child reaches maturity. But some children with mental or physical disabilities may require longer-term and more intensive care.[39]

How, then, should we respond to the parent who understandably feels that she did not sign up for this kind of heavy responsibility? Providing care for children with disabilities can be physically and emotionally draining. As sympathetic as the parents in such cases are, however, we should also take into account the child's interests: While the parent suffers by being made a party to her child's misfortune, the child will suffer doubly if his disability is compounded by parental abandonment.

I do not mean to imply that society should deal harshly with parents who cannot cope: It would be intolerably smug as well as counterproductive to punish them or hold them up for censure. Instead, we should try to recreate continuity for those children whose parents do exit—and we should try harder to assist those parents who are willing to remain with their children, but who need extra help to do so.[40]

A skeptic might point out that the family does not always play a hero's role in an egalitarian society. Theorists have worried that families may perpetuate inequality, because some families do better than others in preparing their children for success in the wider world. Some families provide better developmental conditions than others: Some emphasize reading and send their children to preschools, for instance, while others do not. And some families have greater wealth, human capital, and social capital—all of which help provide their offspring with greater material opportunities than children of families of more modest means.[41]

But the potential conflict between family inequality and children's life chances does not undermine the claim that the law ought to encourage *every* family to provide continuity of care. Continuity should be understood as necessary, though not sufficient, for equality. The law may wish to take other measures to "level up" developmental conditions for some children: Universal, public preschool, for instance, might be a good start.[42] But virtually no one has advocated

---

39. Not every disability will necessitate continuing parental care: A child who cannot walk, for example, but who has no other disabilities will generally make the psychological transition to adult life. Although she may need physical assistance in some aspects of daily life as an adult, she will ordinarily be able to take responsibility for arranging her care, and it will not be critical to her psychological well-being that those tasks be performed by a parent. In contrast, some children with developmental disabilities may require a parent's care for far longer than eighteen years.

40. *See* Alstott, *supra* note 1, ch. 8.

41. *See generally* James S. Fishkin, Justice, Equal Opportunity, and the Family (1983).

42. *See generally* Barbara R. Bergmann, Saving Our Children from Poverty: What

"leveling down" by denying some children continuity of care. Although families are diverse in their resources, interests, and capabilities, the great majority of them are capable of providing continuity of care—and indeed, already do so.

B. *Parenthood in Social (and Legal) Context*

These principles find expression in our real-world institutions. Our society expects parents to provide continuity of care to their children, and to sacrifice their own opportunities if need be.

Most obviously, society requires parents to care for their children. The law makes parents responsible for feeding, clothing, and sheltering their children. And state statutes require parents to protect children from physical and emotional harm, to secure medical care when necessary, and to see to it that children attend school, typically until age sixteen.[43]

Society also relies on parents to do much more—to provide not only day-to-day supervision but real continuity of care as well. Public schooling can begin as late as age five or six, because the law presumes that parents provide primary moral and social instruction. And both the educational and health-care systems demand intensive participation by all parents, and especially those whose children who are chronically ill or who suffer disabilities.

C. *Carrots and Sticks*

Society uses both carrots and sticks to encourage parents to provide continuity of care. Using the coercive power of law, the state rewards parents who persist, and punishes parents who exit.

Begin with the carrots: When parents persist with their children, the state rewards them with a sphere of privacy that is protected from state intervention. What lawyers call the doctrine of parental authority grants parents wide latitude to rear their children as they choose. Parental decisions can only rarely be challenged by the state, third parties, or even the children involved. Very generally, the state has the legal authority to challenge parents' actions only if they threaten serious harm to the child. The state intervenes in child-rearing only in cases of abuse and neglect, and only when these conditions become apparent to outsiders—teachers, medical personnel, or neighbors, who report the situation to child-welfare authorities.

---

the United States Can Learn from France (1996).

43. For a description of parents' legal duties, see Bartlett, *supra* note 15, at 885; Ann M. Haralambie, Handling Child Custody, Abuse, and Adoption Cases 576-96 (1993). Parents whose children do not attend school may be guilty of neglect. *See id.* at 592-93. For medical care, see *id.* at 584-91. For compulsory school-attendance laws, see Michael J. Dale et al., Representing the Child Client ¶ 6.02[5] (2003).

It may at first seem odd that the state grants parents so much authority. Although most parents may act responsibly, some do not. If the goal is to protect the children, wouldn't some children be better off if the state took a more active role in monitoring parents? But parental authority is a social institution deliberately structured to protect and promote continuity of care. The underlying judgment is that most children are best served when the state gives parents heavy responsibility accompanied by considerable control.[44] To see the point, step back a moment and consider the state's dilemma when it seeks to ensure continuity of care for children. The state seeks continuity of care for children, but it confronts two problems. First, the state cannot monitor parents' actions too closely without putting continuity at risk. Clumsy intervention by bureaucrats can easily disrupt family bonds and children's perceptions of their parents as authoritative and powerful. One can imagine how intrusive and upsetting it would be if a state-appointed "family counselor" made weekly home visits to your house, correcting your disciplinary techniques, soliciting complaints from your child about you, or pointing out the mess in your kitchen.

The second dilemma is equally serious: The state cannot easily recreate continuity of care in a substitute family. Even if the state discovers a mildly suboptimal situation—for example, a parent who is loving, but sometimes emotionally immature—the state will find it difficult to predict whether the child might do better in another household. Removing the child from such a parent might do harm, since children become deeply attached even to flawed parents.

When the state does intervene, it will have predictable difficulty arranging a new placement that will be superior to the first one. Ideally, the state would create a deep pool of thoroughly-screened foster parents and adoptive parents. But even in theory, it may be difficult to forecast how a particular caretaker will interact with a particular child, especially in the difficult situation in which the child has been removed from parental care. In the real world, the state has even more limited competence to provide adequate substitute care, as the dismal state of foster care suggests.[45]

Faced with these deficits in information, expertise, and administrative capacity, the state relies on parental authority to

---

44. The themes in this section draw on Scott & Scott, *supra* note 6; Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 Va. L. Rev. 2493 (1995); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747 (1993) [hereinafter Woodhouse, *Hatching the Egg*]; Buss, *supra* note 19.

45. Buss, Woodhouse, Goldstein, Freud, and Solnit, emphasize state incompetence as a rationale for parental authority. *See* Buss, *supra* note 19; Woodhouse, *Hatching the Egg*, *supra* note 44; Goldstein, Beyond the Best Interests, 2d ed., *supra* note 3.

promote continuity of care. Because the state can only monitor *formal* continuity (i.e., the physical presence of a parent), it adopts that minimal standard as a proxy for substantive continuity of care, unless further evidence comes to light showing that parental conduct is harming the child. The state declines to second-guess parental decisions, except in cases where the harm to the child is clear and the risk of disrupting continuity of care is warranted by the certainty (or high risk) of abuse or neglect.[46]

This regime is not perfect. It leaves some children to live with parents who may not care for them as assiduously, or take their interests as seriously, as society would ideally like. Still, parental authority, as imperfect as it is, is likely to do better at protecting continuity of care than any alternative regime of active state intervention. Parental authority not only protects continuity of care by good parents, but may even improve parental care by marginal parents. When parents know that their decisions will not be second-guessed by the state, they may act with a greater sense of commitment. In addition, when parents are confident that they have a lasting relationship with their children—one that is not likely to be interrupted by state intervention—they may identify their children's interests more closely with their own, and act more faithfully to represent their interests.[47]

Also, it is important to bear in mind that the state does not grant parents absolute authority over their children. The law does set minimal standards for children's care, and it limits parental authority when necessary to protect children from harm. Generally speaking, parents must vaccinate their children and seek appropriate medical care; parents must send children to school; and parents must not permit children to drive, to go to work at too early an age, or to act harmfully toward others.[48]

---

46. The Supreme Court has also expressed this functional understanding of the parental-authority doctrine. For example:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979) (upholding state procedures for committing minors to state mental hospitals); *see also* Troxel v. Granville, 530 U.S. 57, 69 (2000) (noting the "traditional presumption that a fit parent will act in the best interest of his or her child").

47. This theme emerges strongly in Scott & Scott, *supra* note 6, and Buss, *supra* note 19.

48. For First Amendment reasons, the state grants somewhat greater latitude to parents who advance religious reasons for their decisions. Most famously, in *Wisconsin v. Yoder*, Amish parents were permitted to keep their children out of high school, even though the state insisted that the children had an independent interest in an education that could widen their horizons. 406 U.S. 205 (1972). Still, even the religious exceptions have a limited scope: Parents may not generally deny life-saving

The state's grant of authority to parents is the "carrot"—parents who provide continuity of care to their children will, for the most part, be left free to live their family lives as they choose. But the state also uses a "stick": Parents who violate continuity of care may lose their opportunity to be parents at all.

We have already seen that when parents abandon their children or neglect or abuse them, the state grants custody of the children to a relative or places the child in foster care.[49] Depending on the circumstances, an exiting parent may lose his legal status as a parent (his "parental rights"), and the child may be adopted by others. In 1996, four percent of children lived in a household without a parent; about half of these lived with a grandparent.[50] In 1999, less than one percent of American children lived in foster care.[51]

But even parents who are not obviously abusive may lose their opportunity to be parents—if they exit their children's lives. In *Painter v. Bannister*,[52] for instance, Harold paid a high price for exiting. He lost the opportunity to be a parent—to live with his child and to share with Mark the values and pursuits that he, Harold, held dear. The law's message to the next parent who finds himself in Harold's situation is quite clear: Do not exit.

In a variety of circumstances, people who persist with their children for the long term are granted a strong preference to remain parents, while parents who exit or participate only intermittently in their children's lives may well lose the chance to be parents at all.[53] This is

---

medical treatment to children for religious reasons; and parents may not violate the child-labor laws even if the children's work is religious in nature. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding the application of child-labor laws to a Jehovah's Witness who took her niece and ward out to sell the *Watchtower*); Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967) (upholding a statute authorizing declaration of children as wards of the state for purposes of permitting blood transfusion over parental religious objection).

49. *See supra* note 38 and accompanying text.

50. U.S. Bureau of the Census, Living Arrangements of Children by Race and Ethnicity: Fall 1996, at 3 tbl.1 (Apr. 2001), *available at* http://www.census.gov/prod/2001pubs/p70-74.pdf.

51. Children's Bureau, U.S. Dep't of Health and Human Servs., The AFCARS Report, Interim FY 2000 Estimates as of August 2002, *available at* http://www.acf.hhs.gov/programs/cb/publications/afcars/report7.htm.

52. 140 N.W.2d 152 (Iowa 1966).

53. For example, a line of famous Supreme Court cases involved disputes between biological fathers and stepfathers. These cases involved mothers who had remarried and whose husbands wished to adopt the children from the prior marriage, over the objections of the biological father. In these cases, the stepfathers prevailed, because they had established long-term relationships with the children–while the biological fathers had not. In *Lehr v. Robertson*, the father had not been given notice of the child's adoption, but the Court emphasized the father's prior failure to take steps to see or to claim the child. 463 U.S. 248 (1983). In *Quilloin v. Walcott*, the Court also approved adoptions by a stepfather when the biological father had little involvement with his child. 434 U.S. 246 (1978).

society's stick: Parents who violate society's no exit command risk losing their parental authority altogether.

D. *Why Does Society Permit Parents to Exit?*

Still, there is a puzzle here. Society depends on parents to provide continuity of care and encourages them to do so; and when they exit, the law may deny them the right to be parents at all. But society does not absolutely oblige parents to remain with their children—it permits exit for people who simply no longer wish to be parents.

And in fact, many parents do exit their children's lives, leaving the day-to-day rights and obligations of parenthood to the child's other parent, or perhaps to a grandparent. Most commonly, one parent exits in the context of a divorce or a romantic breakup. And typically, it is the father who exits and the mother who remains as the child's only, or primary, parent. Today, nearly one-third of American children live with just one parent, usually their mother.[54] About four percent of children live in a household without any parent at all, half of these living with a grandparent.[55] Although many children in single-parent (or no-parent) families have warm relationships with their non-custodial parent(s), many do not; it is not uncommon for visits, especially by fathers, to diminish after a year or two.[56]

Parental exit clearly is not beneficial from children's point of view. From children's point of view, the more adults who are committed to them, the better. And many children form strong and beneficial attachments to their mothers and fathers when both are present in daily life—bonds that are severed if one parent exits permanently. In an ideal world, marital and romantic breakups would not lead to *parental* exits: Ideally, all of the important adults in a child's life should persist in their relationship with the child, even after divorce or parental separation.[57]

But the problem is not that society does not aspire to continuity for every child. Instead, the problem is that society has only limited means at its disposal to secure continuity. Our laws and institutions

---

54. Committee on Ways and Means, U.S. House of Representatives, 106th Cong., Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 1239, 1240 (2000).

55. U.S. Bureau of the Census, *supra* note 50, at 3 (tbl. 1).

56. For data on visitation by non-custodial parents, see Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child (1992); for accounts of fathers' reasons for not maintaining post-divorce relationships with their children, see Terry Arendell, Fathers and Divorce (1995).

57. Goldstein, Freud, and Solnit recognize this point, as do attachment theorists. Joseph Goldstein, *In Whose Best Interest?, in* Joint Custody and Shared Parenting 47 (Jay Folberg ed., 1984); Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 Fam. & Conciliation Cts. Rev. 297 (2000); Waters & Noyes, *supra* note 7.

can encourage continuity, but they cannot compel the intimacy and care that are its foundation.

It is no coincidence that most parents who exit do so in the context of a marital breakup (or a split in a nonmarital relationship). When parents become hostile, or simply can no longer cooperate with each other, it may be difficult or impossible for them both to remain in a close relationship with their child. Family experts and legal authorities have worked hard, over the years, to create joint custody options that could preserve the parent-child relationship even when the parent-parent relationship dissolves. Although joint custody has had notable success in some states, it does not work for many families.[58]

The hard, and unresolved, question about divorce is whether preserving continuity of care with just one parent is sometimes better for children than attempting to preserve continuity with both. Some legal theorists, notably the trio of Goldstein, Freud, and Solnit introduced in Part I, advocate sole custody for one parent.[59] Their idea is that the law best serves children by recreating in one parent the parental authority that characterizes the "intact" family. Goldstein and his co-authors did not imagine that sole custody was ideal; they acknowledged the value of having continuity with both parents. But the authors' prescription reflected their deep skepticism about the law's capacity to compel hostile parties to cooperate in a shared-parenting arrangement.[60]

In contrast, joint custody advocates typically believe that joint custody *can* preserve continuity of care with both parents.[61] Although strict fifty-fifty joint custody is a difficult logistical prescription for many families, some legal actors, including the august American Law Institute, are attempting to work out compromise arrangements, which can preserve the child's relationships with both parents but without expecting a strictly equal splitting of time.[62]

But while the legal experts continue the debate, parents quietly resolve the issue on their own—and they typically choose sole custody. Nearly eighty percent of custody cases are uncontested, and in the great majority of these, the mother takes physical custody and major responsibility for the children's day-to-day care. Joint physical

58. *See, e.g.*, Mason, *supra* note 6.

59. *See* Goldstein, Beyond the Best Interests, 2d ed., *supra* note 3, at 38, 117-18.

60. *Id.* at 116-21.

61. For a discussion, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 527-38 (1984).

62. American Law Institute (ALI), Principles of the Law of Family Dissolution § 2.09 (Tentative Draft No. 3, 1998); Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 Willamette L. Rev. 467 (1999).

custody remains relatively rare. Ten to thirty percent of cases involve joint custody, with California at the high end of the spectrum.[63]

The point is that the *fact* of parental exit in divorce does not reflect any societal lack of interest in the *value* of continuity of care for children. Rather, it reflects the difficulty of creating family structures that can preserve both continuity for children and a marital exit option for parents. It may be that we need to try harder. Perhaps we could do more to create support structures for joint custody, offering intensive counseling and other services to help parents cooperate after divorce. We might even restrict marital exit, as some experts advise.[64] But, to date, our society has not managed to deflect parents from breaking up, or prevented parents from exiting their children's lives when they do.

The problem of divorce illustrates the more general point that society cannot compel parents to care for one another or for their children. The state does not literally prohibit parental exit—and for good reason. In most states, parents may technically renounce their parental rights and responsibilities at any time.[65] To be sure, there are procedural hurdles to be surmounted, and parents who abandon their children without following the legal process can be prosecuted. But a parent determined to sever her relationship with her child may do so. This does not mean that the state is indifferent to parental exit—only that it is a bad idea to stop parents from exiting when they really wish to do so. Any parent who genuinely wishes to abandon her child forever probably should be able to do so—for the child's sake.

Still, the state accommodates parental exit only because it cannot absolutely prevent it. The state simply cannot coerce the intimacy and loyalty that characterize true continuity of care. It would be counterproductive to put exiting parents in jail. And it would be ineffectual, and most likely harmful to children, for the police to drag exiting parents back into their children's lives, kicking and screaming.

The limited power of the law does not imply, however, that the state treats, or should treat, parental exit with indifference. Given the critical importance of continuity of care, the state does what it can to encourage parents to remain, even if they would prefer to exit. The state's inability to compel continuity should not be taken as apathy.

We can put the point another way. Society expects parents to provide their children with continuity of care, and it depends on them to do so. *Whether or not* an individual wishes to remain a parent, she *ought* to do so, and the law depends on her to do so. Parents should

63. *See* Maccoby & Mnookin, *supra* note 56, at 103.

64. *See* Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 Va. J. Soc. Pol'y & Law 95 (2001).

65. A parent who (in technical terms) seeks to "relinquish" or "surrender" her parental rights must typically execute a formal document before a judge or legally-approved witnesses. *See* Haralambie, *supra* note 43, § 13.19.

understand themselves as having a duty not to exit their children's lives, because society could not function if most parents exited. All of society's institutions for child-rearing depend upon parental persistence. When parents exit, children's care suffers greatly: Education, health care, and children's basic emotional and social well-being are put at risk.

Society does offer escape hatches, which some parents use to escape an intolerable relationship with an ex-spouse, or to escape a set of responsibilities that they simply cannot meet. But the existence of these safety valves does not imply that society endorses parental exit. In a society that aspires to autonomy for all its citizens, parents should understand themselves as bound to their children: They have an obligation not to exit.

Today, most parents, and especially most mothers, provide continuity of care to their children. Parental exit does happen, too frequently perhaps, but still we achieve a high degree of continuity for most children. Ninety-six percent of American children live with at least one parent, and two-thirds live with two parents. Somehow, the combination of parental love, social norms, and society's carrots and sticks, induces most parents to do the right thing, most of the time.

I want to focus on the parents who stay. For this group, the social problem is not so much an incentive issue as a matter of distributional fairness. The difficulty is not how to get them to provide continuity of care to their children; they are already doing that. Instead, the question is whether the terms of modern parenthood are fair. Are the rules of the game equitable to those parents who meet their responsibilities?

III. EXIT AND PARENTAL AUTONOMY

We usually think of parenthood as a mix of blessings and burdens. Parents have less freedom than non-parents in some important ways, but most parents love their children and accept their duty to them. And in America today, almost everyone can decide whether or not to be a parent. Parents do have special responsibilities, but it is easy enough to avoid the duties of parenthood: Just don't have kids.

When we portray parenthood this way, it is difficult to see why society owes parents any extra help. Some people choose to have children, while others choose not to. There is less and less social compulsion to have children: The ranks of happy, childless people are large and growing. We can infer that parents must feel that the economic costs of child-rearing are worth it. Perhaps parents (and especially mothers) end up with less financial security, but greater emotional satisfaction.

But the picture changes if we step back and consider the parental role in a larger context. Society strongly regulates the content of

parenthood, and it demands more of parents than ever before. Individuals can choose whether or not to be parents, but society fixes the terms of that choice. In effect, society tells parents "Do Not Exit": It expects parents to persist with their children for the long term, to give priority to their children's needs, and to sacrifice their own plans, wishes, and opportunities if need be.

From this analytic distance, we can frame some larger questions: Has society structured the parental role fairly? When society expects parents not to exit their children's lives, should society, in return, give any special consideration to the consequences for parents' lives?

A. *The No Exit Obligation*

"No Exit" is the flip side of continuity of care. When parents commit to continuity of care for their children, they limit their own capacity to exit in two senses. Most obviously, parents undertake to stay with their children for the long term and not to leave them. But in addition, continuity of care requires parents to reshuffle their priorities: Parents must strive to meet their children's material and emotional needs, and they must, if need be, cabin their own aspirations and narrow their own opportunities to do so.

Thus, the "No Exit" obligation for parents represents not merely the duty not to abandon one's children by the roadside, but also the much harder, more intensive, and crucially important duty to create the kind of intimacy, stability, and loyalty that Goldstein, Freud, and Solnit describe. Continuity in its fullest sense requires parents deeply committed to the enterprise of child-rearing—so committed that they consult their children's interests as much as their own in setting their life priorities.[66]

In a sense, the "No Exit" obligation is thoroughly familiar—as we have seen, it is deeply embedded in the social and legal institutions that define parenthood.[67] A parent who acts as the state wishes her to should generally persist as the child's caretaker until the child reaches adulthood and no longer relies on continuing care for the development of her capabilities. That is not a controversial proposition—indeed it expresses at least part of what most people would say good parenting is. But if we look beyond parenthood to the wider social world, we can gain some perspective on how extraordinary the "No Exit" obligation really is.

Exit occupies a central place in most conceptions of individual autonomy. Although theories differ, most liberal, egalitarian accounts imagine that an autonomous individual should be capable of choosing a life plan that seems good to her, and of modifying that life plan as

66. Eva Kittay has a wonderful account of the "transparent self" that evolves when a parent cares for a dependent child. Eva Feder Kittay, Love's Labor (1999).

67. *See supra* notes 51-53 and accompanying text.

her values change over time. To be the "author of his own life," one should be permitted to choose among a variety of meaningful options.[68] And central to the notion of choice is the ability to alter one's decisions—to define and redefine one's projects and relationships over time.[69] A person who cannot exit her chosen life plan is a person whose set of choices is restricted; she is less able to govern her life than a person who can, even if everyone knows about the constraint ahead of time.

We have already seen how this abstract proposition becomes very concrete in parents' lives. Parents commonly find that their economic options are limited by their child-rearing responsibilities. And parents' noneconomic options may also contract. Parents may marry, decline to marry, or exit a marriage for their children's sake. They may reject other relationships that they might pursue were they childless. And they may stay in a community—or leave it—based on their children's needs rather than their own. Most parents continually make smaller sacrifices as well, adjusting their expectations and ambitions downward, a little or a lot, for the sake of these children we love.

What is less obvious is that the "No Exit" obligation represents an extraordinary command from the state to parents. The state ordinarily seeks to permit every citizen to choose a vision of the good life, and to shape a life according to that vision. But the "No Exit" obligation erases some life-planning options on the menu presented to parents. Child-rearing requires a parent to give reasonable priority to the child's care—sacrificing, if need be, her own projects and plans. No matter what new and exciting opportunities come along, no matter how appealing or socially productive a new project, the parent's duty to the child should come first. If the new opportunity or relationship cannot be reconciled with the child's need for care, it should be declined.

Does this account overstate society's role in defining the obligations of parenthood? After all, many parents would surely endorse the "No Exit" obligation as part of their own values. Most parents probably feel that their sense of obligation to their children comes from within—and not from society or the state.

It is certainly true that society relies on parents' natural affection for their children, and their strong sense of duty. Indeed, society tries to foster the conditions that permit love and responsibility to flourish: Think of the doctrine of parental authority, which preserves privacy and personal space for child-rearing. And the law counts on parental

68. *See* Joseph Raz, The Morality of Freedom 204 (1986).

69. *See id.* at 369-78; Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities, in* Law and the Community 219, 221-23 (Allan C. Hutchinson & Leslie J.M. Green eds., 1989).

love when it threatens to punish harmful or irresponsible parents by withdrawing their parental rights.

Still, parental obligation is strongly a social creation as well as a natural phenomenon. The historical record reveals that it is a mistake to suppose that parents "naturally" act responsibly toward their children even in a different social climate. A vivid study by John Boswell notes that child abandonment has a long history in Europe, ending surprisingly recently.[70] Romans frequently "exposed" unwanted children, leaving them literally by the roadside to die or to be enslaved by anyone who picked them up. In the Middle Ages, parents continued to expose children and to sell them. In the eighteenth century, in urban France and Italy, from ten to forty percent of children were abandoned, *including* children born in prosperous neighborhoods. It was not only the hard-pressed poor who gave up their children, but also better-off people who found them inconvenient. A significant percentage of children even in wealthy districts were sent to foundling homes, where many died from disease and neglect.[71]

It is not particularly surprising that parents perceive the "No Exit" obligation as a matter of personal values rather than a social command. The "No Exit" duty is so intertwined with parental emotion and social custom that parents may not be aware of the social and legal institutions that support and reward their persistence. But parents' felt experience should not be the gauge of whether the "No Exit" obligation constrains their lives. It is impossible to disentangle parents' "pre-social" values from their values as shaped by society. Indeed, it is one measure of our society's success in securing continuity of care for children that (most) parents have come to internalize the "No Exit" obligation, to incorporate it into their own morality.

But how does the "No Exit" duty create any collective obligation to parents? Doesn't society regulate people's conduct all the time? Why should we consider "No Exit" such an extraordinary burden that it merits special remedial action?

B. *"No Exit" as an Extraordinary Regulation*

The "No Exit" obligation curtails the exercise of two capabilities that citizens of a free society ordinarily take for granted: the capacity to set one's own priorities among competing projects or values, and the capacity to revise one's priorities and projects over time. The "No Exit" obligation requires parents to give reasonable precedence to children's needs, and it mandates parental persistence for the long term, even if parents' values and aspirations change during that time.

70. This is a central theme of John Boswell, The Kindness of Strangers (1988).
71. *Id.*

Without the "No Exit" obligation, parents might more easily take and change jobs and begin and end relationships. They could more thoroughly exercise their freedom, because they could live only (or primarily) for themselves, concentrating more fully on the task of self-authorship.

A free society ordinarily views "No Exit" rules with suspicion. It cuts against the liberal, egalitarian grain to use the power of the state to require individuals to persist in a particular way of life. The law professor Jed Rubenfeld frames an argument for abortion rights in just this way. Denying women the opportunity to have abortions, he argues, would amount to requiring them to live a life of the state's choosing.[72] Put another way, banning abortions would be like imposing a "No Exit" obligation on pregnant women. As long as we do not understand the fetus to be a child entitled to continuity of care, such a "No Exit" obligation would be an intolerable and unnecessary burden on women's capability to determine for themselves the way of life they wish to pursue.

Similarly, the modern trend in marriage law disfavors "No Exit" obligations. At one time, in Western societies, marriages were "No Exit" relationships, at least in theory, because divorce was illegal. (In practice, married individuals frequently abandoned their relationships, but they could not abandon, at least without fraud, their legal status as married persons.) Today, U.S. divorce laws are relatively liberal, permitting either spouse to exit the relationship. Most legal theorists approve this liberalizing trend, precisely *because* no-fault divorce permits autonomous adults to revise their lives and to exit relationships. Although some feminists criticize modern divorce rules for failing to protect the interests of women and children, for the most part they advocate greater financial awards and the revision of child-custody standards—rather than prohibitions on divorce.

One might object that parents freely choose to bear (or adopt) children: No one coerces them into doing so. But voluntary entry into parenthood cannot justify unlimited regulation of parents' lives. The state should not be able to harshly regulate fundamental life activities and then excuse its action on the ground that individuals can avoid that way of life. An abortion ban, for example, could not be dismissed as a trivial matter simply because women could avoid the ban by not having sex. When society commands parents to persist, it is denying to some people a course of life they might otherwise wish to pursue—the option to capture the satisfactions of rearing children while also preserving the opportunity to exit, or to reshuffle one's priorities if it becomes attractive, or meaningful, to do so.

It is a mistake to dismiss the problem by imagining that only immature people would want an exit option, or that anyone whose

72. Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989).

values change over time must be lacking in personal discipline. The disapproval that informs these stereotypes illustrates just how strong the social and legal norm against exit is. Suppose that a person committed to social justice came to believe it to be his calling to leave his children in foster care, intermittently, while he works in an impoverished country to improve conditions there. We might disapprove his choice, but we cannot easily dismiss it as shallowly self-indulgent.

Parents limit their plans in more ordinary ways all the time. A father may decline a better job that would require mandatory overtime. A mother may reject a job that requires night-shift work, or unpredictable hours. Parents with a sick child may put their own education and career aspirations on hold—for a time or forever. Parents are constantly living on less, curtailing their ambitions, and making hard choices for the sake of their children.

These parents may not resent these choices. They may make them without a second thought, or even with a sense of pride that their priorities are in the right place. My point is not that parents *feel* burdened, but that they *are* burdened—relative to the baseline of what childless people may do. A childless person might take the new job, work the night shift, or stay in college. The parent may not.

C. *A Libertarian Mistake?*

It may seem that this line of argument incorporates a libertarian mistake: I seem to be treating individual parents as if they have some "natural" right to exit their children's care when they wish—a right which society has foreclosed through the "No Exit" obligation. If I were making this argument, it would indeed be an error. To see the subtle, but crucial, difference, it is worth taking a few paragraphs to define the problem more precisely.

Liberal egalitarians normally reject the idea that there is some meaningful state of nature, or pre-legal state of affairs, which defines a baseline for measuring individuals' autonomy (and state infringements of it). Egalitarians theorize that the institutions of a fair society set the autonomy baseline by defining what individuals should and should not be permitted to do. Accordingly, liberal egalitarians ordinarily do not suppose that (legitimate) state regulations infringe individual autonomy. Take two commonplace examples: If I want to buy a dog, I assume a legal obligation to keep it on a leash. If I want to operate a gas station, I must abide by environmental regulations and the labor laws. All these regulations enjoin me to refrain from taking actions that I might wish to take: I may not let my dog run loose in the park, I may not release gasoline fumes into the air, and I may not require workers to work twenty-four-hour shifts without overtime pay. True, some or all of these regulations constrain the freedom I would enjoy in the state of nature. But egalitarians reject that idea: I have no

"right" to endanger my fellow citizens' safety, nor to pollute their air or require them to work under inhumane conditions. Put more abstractly, we treat such regulations as defining the scope of individual autonomy rather than limiting it.

So why isn't the "No Exit" obligation just another regulation of this thoroughly familiar type? At first glance, it seems to fit quite readily into one of the most familiar, and most widely-accepted justifications for state regulation—the prevention of harm to others. My own argument emphasizes that parents who exit do lasting harm to their children. Accordingly, it would seem entirely fair for the state to enjoin parents not to exit. "No Exit" prevents parents from harming or exploiting their children, just as the leash laws and environmental laws prevent harm to neighbors and the labor laws prevent exploitation of workers.

But this objection is misplaced. I am not arguing that the "No Exit" rule is inappropriate—that a fair society should reject it. The subtler insight that I am advancing is this: Not every regulation with a *legitimate purpose* imposes a *fair burden* on those individuals who pursue the regulated activity. The "No Exit" rule implements the state's legitimate interest in continuity of care for children, but simultaneously imposes an extraordinary restriction on parental autonomy.

Thus, the paradox is that society's "No Exit" command both expresses the state's legitimate interest in continuity of care for children and restricts the exercise of parents' autonomy. We can recognize that "Do Not Exit" is an appropriate command, without pretending that its consequences for parents are trivial or morally untroubling.

A philosopher might object that the autonomy burden of the "No Exit" obligation is not so unusual—isn't it just an example of the well-known precommitment problem? The precommitment dilemma has motivated a classic debate among liberal theorists; a brief introduction will clarify the issues.

In the standard case, an individual commits to a life plan at Time One and promises never to exit—for example, he might enter a strict monastery and sign a contract promising to remain for the rest of his life. At Time Two, he decides he would like to change his mind and leave. The question is whether the state best promotes his autonomy by permitting his exit at Time Two or by enforcing his Time One promise. If we emphasize the importance of revisability of life plans, the state should not enforce the contract. If we put decisive weight, instead, on the coherence of a single life and the importance of personal accountability, the state should enforce the original promise. The question is so perplexing that some noted theorists have simply

set it aside. Among those who offer an answer, some emphasize the value of revisability, although there is not a clear consensus.[73]

But the precommitment problem is a red herring in this case. The "No Exit" obligation does not apply only to those parents who choose to make a "No Exit" promise at Time One and then change their mind. Instead, the state properly imposes a "No Exit" obligation at Time One and enforces it at Time Two, *whether or not parents endorse the "No Exit" condition at either time.* The question is whether such a universally applicable regulation should be understood as a limitation on parents' autonomy.

True, the "No Exit" obligation creates the appearance of precommitment. Every parent should understand the "No Exit" obligation at Time 1, when he chooses to have a child. In this sense, he promises to abide by the "No Exit" obligation when he undertakes the task of child-rearing. But the state should not be able to justify draconian restrictions on autonomy simply by giving notice ahead of time. The question is whether the social role is itself fairly defined—is the state fairly assigning duties and rights to parents and the childless—a question to which the precommitment problem provides no answer.

D. *Society's Obligation to Parents*

Still, the central question remains: Why should the *childless* help pay to protect parents' autonomy? After all, the childless have lives of their own to live. If they must pay taxes to create programs for parents, they will suffer some diminution in the opportunities they might have pursued. Why is that fair?

To set the stage, return to the normative argument for continuity of care. A fair society, as I have argued in Part II, should aim to recognize and foster the autonomy of every person.[74] In such a society, every child would be entitled to the conditions of autonomy, including continuity of care and a parent subject to the "No Exit" rule. Every adult who had received the conditions of autonomy would partake of an obligation to reproduce those conditions for the next generation.

This part adds a second insight: Such a society should also act with due regard for the impact of its child-rearing practices on *parents'* autonomy too. The underlying value is that each citizen should have some ongoing capacity to participate in the enterprise of defining and pursuing a life of his own choosing. But if that is true, then the state should not be indifferent to how it secures the conditions of autonomy for children. If the ideal is that everyone should enjoy the lifelong

73. *See* Ackerman, *supra* note 30, at 197-99; Joel Feinberg, Harm to Self 81-87 (1986).

74. *See supra* notes 21-66 and accompanying text.

capacity to form, refine, and pursue a vision of the good, then it is insufficient to focus on children alone: We owe some consideration as well to the conditions of autonomy for adults.

There are many different accounts of society's obligation to safeguard adults' autonomy. Consider two that seem especially apt for my purposes. First, an egalitarian society commonly takes measures to preserve individual autonomy against its citizens' predictable failure to do so. Put another way, society often expects some adults to help preserve other adults from choices that may ultimately damage their life chances. The conceptual problem is that life-planning is a difficult enterprise, because it requires one's younger self to empathize with an older self in different circumstances. In theory, we could hold each individual strictly responsible for planning for old age, unemployment, and bad health, but because it is so pervasively difficult for people to imagine themselves in difficult circumstances, we rely on mandatory, public *social insurance* to protect people who suffer predictable, but serious, injuries to their life chances: for instance, the elderly, the unemployed, and the sick.[75]

Public old-age insurance can be understood in exactly this way: We provide public pensions and medical care for the elderly because we know that many people will underestimate the financial and medical needs of old age. We could dismiss the plight of the elderly by insisting that they *chose* not to save (or to lead financially imprudent or unhealthy lives). But instead, we understand that there is a very human difficulty in planning so far ahead. How many twenty-one-year-olds can really empathize with the frailties of the eighty-year-olds they may become?

It might seem that it is far easier for people to anticipate parenthood. Most parents are relatively young, in their twenties or thirties, and most of them know plenty of other parents. But many new parents find, to their horror, that they really didn't understand what they were getting into. Anticipating a new baby to love is one thing; facing the day-to-day and year-to-year dilemmas of parenthood is quite different. The analogy to old age isn't perfect, but it has some resonance. After all, we all know plenty of old people, but many of us don't begin to empathize until the first pains and small disabilities of middle age, or a first spell of unemployment, give us a hint of what it will be like to feel ill and financially vulnerable beyond our working years.

Parents' economic situation also resembles the plight of what policy wonks call "displaced" workers—that is, workers who chose one occupation, only to find that globalization or technological change have made their skills obsolete. Skilled factory workers, telephone

75. *See generally* Bruce Ackerman & Anne Alstott, The Stakeholder Society (1999).

operators, and others have found themselves in middle age with skills no longer needed in a high-tech, information-based economy. We might dismiss their situation—after all, they *chose* their jobs. But, instead, we have made some public provision for unemployment insurance and retraining assistance to help them retool for the new economy. The situation of parents is a bit different: It isn't technological change that has unexpectedly shrunk their opportunities, but instead the predictable demands of child-rearing in a society that demands "No Exit." But technological change isn't instantaneous: Telephone operators and factory workers could have exited sooner for different jobs, while parents cannot.

Seana Shiffrin offers a more general account of when a society might act to assist some adults from bearing the autonomy consequences of their own life choices.[76] She points out that our society does not strictly call its citizens to account for the full costs of their choices. We do not require smokers, drinkers, or motorcycle enthusiasts to pay the full cost of their health care, even though their own choices contribute to their higher rates of illness and injury. Nonreligious employers may be required by law to permit religious people not to work on their Sabbath. Workers who care for children or elderly parents have a right to take job leave without penalty. And so on.

All these practices, Shiffrin points out, involve a collective effort to make some choices less costly than they would otherwise be, *even though* smokers choose to smoke; Sabbatarians choose to be religious; and parents choose to have children. Why do we do this? There are many possible explanations, but Shiffrin suggests that too-strict cost-accounting would chill people's capacity to deliberate about the lives they wish to lead.

For some readers, these accounts of collective obligation will be quite sufficient to justify the obligations of the childless to help lighten parents' load. These accounts suggest that parenthood is just one among many "costly choices" that people make—and that society protects their ability to make.

But other readers may object. In theory, at least, the state need not tax the childless to protect parents: The law might require parents themselves to set aside resources to counter the burden of the "No Exit" obligation. Perhaps every person who could potentially be a parent should be required to contribute to a special savings account to draw on if she ever became a parent. (Those who remained childless would receive refunds.) That kind of regime would ensure that parents paid the full cost of child-rearing—not only the direct costs of

76. Seana V. Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation, in* Reasons and Values: Themes from the Work of Joseph Raz (Samuel Scheffler ed., forthcoming 2004).

feeding and clothing the children, but also the cost of "rehabilitating" the parents' own opportunity set.

Call this the *private-project objection*. This view insists that every adult should bear the costs of her own actions. According to this way of thinking, parents bring children into the world and should take full responsibility for the costs of rearing them. After all, if it weren't for the (biological) parents, there wouldn't be any child who could lay claim to society's resources for her upbringing.[77]

But this account of causation is far too simple. True, parents choose to have children, and children require costly care. In addition, parents have considerable latitude in deciding how expensively and intensively to rear their children. At the same time, however, society regulates child-rearing with a heavy hand. Children are people, not projects, and parents cannot entirely rear their children as they choose. The "No Exit" story attempts to draw out this second strand—to highlight the state's deliberate role even in parental continuity of care, that most intimate and basic of parental functions.

In principle, causation cannot resolve the question. The private-project objection emphasizes *parents'* role in creating children. But we could just as easily emphasize the *state's* role in subjecting parents to the "No Exit" duty. We could even highlight *children's* role in the matter. Why should parents have to pay for the conditions of autonomy for other people (their children)? Why shouldn't children themselves (once grown to adulthood) be obliged to repay the cost of their own upbringing?

None of these three "theories" of causation reaches the bedrock issues here. In fact, the causal claim ("parents cause children to exist") isn't really about causation at all. Instead, it is a shorthand for a deeper judgment about the appropriate baseline distribution of society's resources. Implicitly, the claim is that every adult deserves an equal share of resources, ex ante, and thereafter no one may claim more (or be required to take less) based on his or her choices about how to live. That thesis has a respectable lineage in liberal, egalitarian theories. But a closer look suggests that the classical account of resource equality does not fully come to terms with society's role in making parenthood a "No Exit" obligation.

E. *Is Child-Rearing an Expensive Taste?*

Liberal egalitarian theorists typically endorse the principle of resource equality—the idea that every person should enjoy an equal share of society's wealth. While each individual may dispose of her share as she sees fit, she should accept the consequences of her choices, and she generally should not expect others to give her extra

77. *See generally* Eric Rakowski, Equal Justice (1991).

resources if she chooses an expensive way of life. Dworkin's classic example is that it would be unfair to redistribute from the beer-drinker to the champagne connoisseur.[78] By hypothesis, both the beer-drinker and the champagne-drinker had an equal endowment of resources, and an equal capacity to make choices about how to live. If the champagne-drinker chooses the more expensive beverage, she should not be able to complain that she can buy fewer bottles than her beer-drinking peer.

By analogy, the parent and the non-parent both begin with equal opportunities, and (at least in theory) equal resources, ex ante. If the parent, like the champagne-drinker, chooses to indulge a taste that is expensive—in terms of time or money—she will simply have fewer resources left for other pursuits. Her choice cannot authorize her to claim greater resources than her childless peer—because the parent could just as well have chosen a "cheaper" way of life, just as the champagne drinker might select a cheaper libation.

A familiar (and important) reply is that, in the real world, one's parental role is not entirely freely chosen. In particular, gender unfairly allocates a disproportionate share of child-rearing work to *women*. I incorporate gender into the policies I consider in "No Exit"; in moving from theory to real-world implementation, it is crucial to recognize the linkage between gender inequality and child-rearing. But at this point, I want to bracket the gender question. Even today, there is some element of choice involved in child-rearing: Some women choose not to rear children, and some men choose to do so. It is one thing to believe (as I do) that the conditions for choice are not presently fair; it is another to suppose that caretaking is so involuntary a choice that women should bear no responsibility for it.

Instead of going down that road, I want to address the problem at a higher level of abstraction: *Even if* all parents freely choose their project, they *still* should not bear alone the autonomy burden of the "No Exit" obligation. Even in a gender-free society, the "No Exit" obligation would render caretaking quite unlike the usual beer-and-champagne examples. Child-rearing is expensive not because of the operation of market competition among equally-endowed individuals but because the state must subject parents to the "No Exit" obligation in order to protect continuity of care for children.

The usual context for the expensive tastes debate is this: In liberal theory, markets that operate against a background of fair distribution are themselves fair. If we all enter the marketplace with strictly equal resources, then none of us should complain about the prices that result from bidding. If champagne is expensive and beer cheap, the pricing reflects the opportunity cost of the resources involved to our

78. *See* Dworkin, Sovereign Virtue, *supra* note 32; Dworkin, *Equality of Resources*, *supra* note 32.

fellow citizens. I should not be able to buy champagne at $1 per bottle if the growers value the alternative uses of the land and labor more highly than that. My claim for cheap champagne would be, in effect, a claim to conscript others' resources and opportunities.

But the "No Exit" obligation does not "price" parenthood based on a fair auction process in which individuals compete for resources. Instead it represents a deliberate and necessary social regulation of parents' lives—in effect, a conscription of their time. The fact of regulation is not, of course, unusual. Many life projects are legitimately the subject of state regulation that renders them more expensive than otherwise. The preclusion of exit represents an extraordinary erosion of the preconditions for autonomy. The "No Exit" obligation represents an exceedingly rare exercise of a power that only the state should wield—the power to prevent citizens from revising their conception of the good. The state should exercise that power rarely; and when the exercise of that power is justified by some collective aim, society as a whole should take part in ameliorating the consequences for individual autonomy.

Put another way, parenthood is a private project and an expensive taste only if you accept the premise that strict equality of resources, ex ante, is appropriate. The "No Exit" argument challenges that premise: My claim is that when society so heavily regulates just one social role, and in a way that fundamentally compromises the autonomy of people who choose that role, society may owe such people something *more* than their initial, ex ante, equal share of resources. The "No Exit" theory challenges the implicit assumption that underlies the objection that childless people are unfairly being taxed to "subsidize" parents.

Still, the expensive taste objection has greater force when we consider costs of parenthood beyond the "No Exit" obligation itself. Parents have considerable latitude in meeting the demands of the "No Exit" obligation, and parents differ in their tastes and ambitions. Parenthood will be relatively cheap for those whose plans are extremely flexible, whose child-rearing style is casual, and whose life projects can flourish despite interruption. It will be far more expensive for those whose child-rearing style is intensive and whose projects can be easily derailed by interruption. Nothing in the "No Exit" argument seeks to justify greater compensation to the latter group.

What I am suggesting is that it may be best to think of child-rearing as an endeavor with both public and private costs. Parents should be responsible for costs that reflect their "private" taste for resource consumption (in lifestyle and style of child-rearing), but the childless should bear some responsibility for ensuring that each child has access to the (publicly-defined) conditions of autonomy, especially when the state's mandate proves extraordinarily costly for ordinary parents.

The "No Exit" obligation is one example of a state mandate of this heavily costly type. Education is probably another. As an empirical matter, it would be prohibitively costly for most ordinary families to pay the full cost of adequate schooling for their children. We do not expect families to do so; instead, we provide public schools. Although the childless (and those whose children are grown) sometimes protest that they are overtaxed to pay for the schools, we seem to understand that schools represent a *collective* obligation to the next generation of children. Interestingly, even some theorists who take the position that parents should pay for the costs of child-rearing seem to anticipate that the public should fund children's education.[79]

I recognize that this is only a beginning, and not a full-fledged theory of how society and parents should share the costs of child-rearing. When should we consider public mandates for child-rearing to be extraordinarily burdensome for parents' lives? How would the theory apply to children's health care? To college education? My present aim is to start by showing that even continuity of care, that very private and intimate aspect of parenthood, has a public aspect as well, and that there is a plausible rationale for collective measures to assist parents who provide continuity to their children.

F. *Public Goods and Public Obligations*

It may seem that the preceding sections labor too hard to craft a distinctive justification for redistribution to parents, when there is an easier one at hand. Many theorists and policy makers have argued that children benefit society as a whole and that, therefore, every member of society has an obligation to help defray the costs of child-rearing.[80] The logic is that children improve the society—they generate new cultural and economic opportunities that in some sense enrich us all. Thus, the argument concludes, the childless benefit from children's care, too, and so they should help fund it.

But the public-goods theory has characteristic weak points. The classic reply is that the childless should not be obliged to help pay the costs of child-rearing, even if children do benefit them, because the childless have not asked for (or consented to) the benefits they receive. The logic is that children are not necessary to liberal society. We could imagine a fair society in which everyone decided to remain childless. That society would crumble, which might be unfortunate, but it would not be unfair. Anyone who objected should have

79. Ackerman argues that parents should post a bond to pay the cost of their children's share of social resources, but he also seems to anticipate that the state should both operate and fund the public schools. *See generally* Ackerman, *supra* note 30.

80. *See, e.g.*, Nancy Folbre, The Invisible Heart 49-51, 109-13 (2001); Rolf George, *Who Should Bear the Cost of Children?*, 1 Pub. Aff. Q. 1 (1987).

children of his own; he should not demand that others do so.[81] According to this line of argument, it is beside the point that present institutions—the economy or the Social Security system—presume that younger workers will step up to support older ones. The current generation has no right to live up to a certain standard based on the presence of children. Because the benefits of children to third parties are unasked-for, the argument concludes, parents should not expect state compensation for the costs of child-rearing. Although the childless may benefit from parents' work, those parents undertook their work voluntarily and without promise of any extra reward.[82]

In contrast, the "No Exit" theory centers on mutual *obligation*, instead of (as public-goods theories do) mutual *benefit*. The claim is that every child has a right to claim developmental resources from society and that every adult has an obligation to help secure such resources for the next generation of children. The obligation follows from a relationship of obligation from the childless to their peers who are parents (or from children to the parents who reared them)—and not from the benefit that children provide to their elders.

The argument-from-obligation is not vulnerable to the involuntary-benefits objection, at least not in quite the same form. Society's obligation to parents does not arise because children benefit the rest of us (perhaps they do, perhaps they do not), but because an egalitarian society must accord dignified treatment to every human being: We owe each new generation the conditions of autonomy even if we do not benefit from their presence.

Some theorists justify a social obligation to parents by proposing that children are necessary for society.[83] But my argument is agnostic on that score. Instead, my point is that when children do come into being, parents and the larger society must undertake special obligations to secure them the conditions of autonomy. It is children's (and parents') value as human beings, and not their economic or social contribution to collective life, that justifies the state's obligation.

The public goods argument can avoid the involuntary-benefit objection only by making a move that brings the second empirical objection to the fore. An advocate of the public goods theory might reply that even though children are not strictly necessary to society, many childless people would likely pay *something* to keep the economy going and the culture flourishing in their old age. Like any public good, children (and children's care) may be under-provided unless the state provides extra compensation in order to align parents' incentives with the collective interest.[84] Collective action problems

81. *See* Ackerman, *supra* note 30, at 109-11.

82. *See* Rakowski, *supra* note 77, at 153-55.

83. For one example, see John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997).

84. *See, e.g.*, Ackerman, supra note 30, at 191-93.

probably would prevent those people from organizing to pay would-be parents, and so the state should step in and act on their behalf. Those who would willingly retire in a cave to chew acorns and read moldy books by the light of the last few candles will feel themselves overtaxed. The rest of us (let us suppose) would endorse some level of taxation for the benefit of children and their parents in order to keep the lights on and Social Security paying out.

But it is not obvious, as an empirical matter, that the childless would be willing to pay much for the *net* benefits that children generate. Although it would be impossible to calculate a definite sum, it is not even clear that the net payment would be positive. Children create negative externalities as well as positive ones. Overpopulation, urban crowding, clogged highways, and overburdened public utilities and parks come to mind on the negative side. Younger people in general are more likely to engage in crime, violence, and risky behavior that harm others (driving too fast, for example). Advocates of "child-free" living also note the intrusion of children into adult social life—in restaurants, housing, and so on.[85]

The public-goods theory also has troubling implications for the distribution of rewards to parents. On a strict interpretation, the goal should be to produce children who are well-socialized, law-abiding, economically productive, or culturally interesting. But not all parents are equally good at rearing such children, and there is no reason to suppose that financial redistribution would improve their capabilities. Parents might be taught to perform better—by attending child-rearing classes, for example—but that kind of redistribution would not do much for parents' own life-planning opportunities. Alternatively, the public-goods rationale may support institutions that improve children's circumstances while circumventing parents. The state could deploy resources for day care, preschools, and health clinics in order to enhance children's outcomes without requiring judgments about the merits of different parents.

The "No Exit" theory is subtly, but importantly, different. It aims to capture more directly the state's obligation to each individual parent—an obligation that cannot be circumvented by selective redistribution to "good" parents, or by the creation of schools and other resources that benefit only children. The key is the "No Exit" obligation, which both defines parents' obligations and binds the state to take measures to alleviate its burden.

IV. CONCLUSION

Parents make a private decision to have children, but when they do so, they also step into a public role. Every child deserves the parental care she needs to develop her autonomy and take her place in adult

85. *See generally* Elinor Burkett, The Baby Boon (2000).

life, but every parent deserves the chance to provide that care while leading a life of her own. A fair society should expect parents to care for their children and to sacrifice time and opportunity if necessary, but it should also help parents preserve a reasonable range of life options during and after their years of care.

The "No Exit" obligation is more than a theoretical problem. It is a serious economic problem for parents, and especially for mothers. Most parents—and most mothers—provide continuity of care to their children. But in the process, too many drift toward the margins of economic life. Study after study confirms that mothers in every income class compromise their working lives in order to provide their children with continuity of care.[86] Mothers work less, earn less, and achieve less than men—and than childless women. Job interruptions take their toll on mothers' earning power. Even when mothers stay in the race and accumulate the same credentials as their childless counterparts, they still earn less. Over the long term, work disruptions and lower earnings take their toll. Mothers are terribly vulnerable at divorce and accumulate less financial security for old age.

Changing gender roles have not saved the day. Although more mothers hold jobs now, they still bear primary responsibility for child-rearing. To be sure, attitudes have evolved, and fathers do more now than a generation ago, but the rate of change in actual behavior has been slow. On average, it is still the mother who manages the household, identifies the children's needs, and takes responsibility when children are sick, schools close, or the babysitter quits. But even if mothers' and fathers' roles could magically be equalized, the hard fact is that child-rearing requires intensive emotional work and a large time commitment—for 18 years or more.

But parents' present economic position reflects a failure of social policy and not a law of nature. It is both practical and affordable to create new programs to assist parents who live up to their obligation of care. Public policy can help ensure that these parents have the opportunity to combine child-rearing with independent projects over a lifetime.

In *No Exit*, I propose two new programs designed to enhance parents' long-term economic opportunities. Although I cannot provide more in this Article than a brief description, the two initiatives begin to suggest how public policy might aim to serve parents in a wide range of economic circumstances—and to respect

86. *See, e.g.*, Claudia Goldin, *Career and Family: College Women Look to the Past*, *in* Gender and Family Issues in the Workplace 20 (1997); Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 Am. Soc. Rev. 209 (1997); Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. Econ. Persp. 137 (1998).

parents' own judgments about how to combine paid work with child-rearing.

The first program, *caretaker resource accounts*, would provide parents with financial resources to help remain in—or re-enter—the mainstream of economic life. The program would give parents an annual grant of $5,000, which could be used for any of three purposes—child care, the caretaker's own education, or the caretaker's retirement. Each individual could choose how best to use the funds to further her own plans, but every option would improve parents' long-term economic prospects.

The second program, *life-planning insurance*, would offer extra help to the parents of children with serious illnesses or disabilities—job leave, income support, and supportive social services. The idea is that caretaker resource accounts would provide a standard package to all parents, while life-planning insurance would offer more individualized assistance to those whose children suffer severe illness or disability.

These ideas raise many questions. As a normative matter, why do I focus on *child*-rearing rather than *care* for vulnerable individuals? As an empirical matter, how heavy are the costs of child-rearing? And from a practical standpoint, isn't there a danger that rewarding parenthood will worsen women's situation, by making traditional gender roles more appealing?

There are also a host of institutional details that merit attention. How much would the proposed programs cost? Would they require expensive, and intrusive, new bureaucracies? Why aren't existing programs sufficient? And, given my commitment to assisting parents, why don't I embrace more familiar proposals for "family-friendly" workplace reforms that would guarantee parents access to flex-time and part-time work?

This Article motivates these questions, but it cannot do more. Readers will find a fuller exposition in *No Exit*.