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Women's Work

"The exodus of women into the economy," writes sociologist Arlie Hochschild, "has not been accompanied by a new view of marriage and work that would make this transition smooth. Most workplaces have remained inflexible in the face of the changing needs of workers with families, and most men have yet to really adapt to the changes in women."

So far, that's true. But growing demand for a more flexible, family-friendly workplace has at least put issues like parental leave on the bargaining table. While certain feminists have argued that such modest reforms will do little to improve women's status, most people agree that women stand to benefit from them. The only question is how much they will benefit.

A greater worry is whether the newly flexible workplace, combined with recent trends in family law, might actually leave many women *more* vulnerable than they were before. It's fine to sacrifice some money and career growth for the sake of home and family; it's good when businesses will let employees take leave, or share jobs, or work part-time. But in the age of no-fault, low-alimony divorce, women who make these sacrifices may pay dearly for them in the long run. We seem to have entered a period where policymakers want employers to take family ties seriously, yet want marriages easily dissolved, and preferably with no strings attached. How did we end up in this double-bind?

The law traditionally viewed production and reproduction—that is, work and family—as fundamentally separate and incompatible realms. Indeed, the strict separation of the "private" domestic sphere from the "public" world of work and politics was thought necessary not only to promote economic growth, but also to safeguard the family's place as a "haven in a heart-

less world." The legal and ideological separation of the two realms was also a cornerstone of the system of gender hierarchy that permeated virtually all aspects of life.

This sharp division between work and family hurt women and men alike. It hurt women by severely restricting their participation in the paid labor market and thereby ensuring their continued economic dependence on men. It hurt men by denigrating their nurturing capacities and limiting their role in the family

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to that of economic provider. The notion of a deep natural division between our productive and our reproductive lives also tended to obscure the interconnections between the structure of the workplace and the structure of the family. As a result, work-family conflicts came to be seen as essentially private matters. The inability to handle both work and family responsibilities was viewed as an individual failure, not as a social problem.

Today this rigid compartmentalization is beginning to break down. Both scholars and policymakers are coming to recognize the inevitable connections between work and family. They now acknowledge that the laws governing each realm help to shape the structure of the other.

All of this is a step in the right direction—better, at least, than the “separate spheres” ideology that for so long characterized the legal relationship between our productive and reproductive lives. Nevertheless, the integration of work and family is taking place in ways that may do many women more harm than good.

In the first place, many “pro-family” workplace reforms are based on a picture of the typical American family that is far removed from the realities experienced by many women in the paid labor force. Second, some of the most popular reform strategies—for example, those that create a separate “parenting track”—may only serve to perpetuate the economic marginalization of women. Finally, the notions of economic sacrifice and shared family responsibility that underlie many workplace reforms run counter to the emphasis on individual autonomy and economic self-sufficiency that characterizes recent changes in family law, especially in the area of divorce and alimony. The result of this mismatch of incentives may be to leave women who avail themselves of current family-related “benefits” in the worst of all possible positions.

The Changing American Family

What is the picture of the American family embodied in recent workplace reform strategies? It is the picture of a two-parent, two-income family. The worker who can best afford to take advantage of most of today’s family-related accommodations has a partner who is himself a full-time wage earner on the “career track.” This is particularly true of unpaid leave proposals, such as the Family and Medical Leave act vetoed by President Bush last year and now once again before Congress.

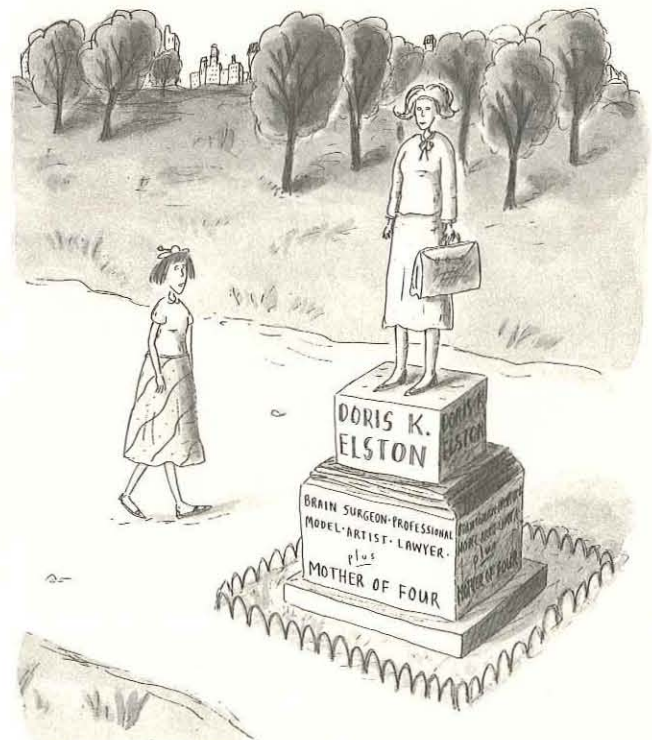
While unpaid parenting leave is obviously better than forced resignation or dismissal, the economic sacrifices accompanying such leave make it of little value to precisely those employees who face the most severe work-family crunch: single parents and other workers who depend exclusively on their own paychecks to support themselves and their dependents. The same picture of the modern worker as half of a two-earner partnership underlies many part-time and job-sharing arrangements, particularly those that fail to provide health insurance or other common employee benefits.

This comforting portrait of the middle-class (or even upper-middle-class) family utterly fails to reflect the realities faced by a substantial percentage of working women. Because of the soaring divorce rate and the high incidence of single motherhood, many employed women who are struggling to reconcile their work and family responsibilities do not have access to a second income.

Statistics underscore this point. At present, approximately one out of every two American marriages ends in divorce. This rate has held steady since the mid-1970s. Most divorces involve children, and in about 90 percent of the cases the mother ends up with custody. Moreover, although most divorced persons eventually remarry, the remarriage rates are significantly lower for mothers than for fathers.

At least as significant as the high divorce rate is the increase in families maintained by single women. Over the past two decades, the number of families maintained by never-married women has increased tenfold, rising from 248,000 in 1970 to 2.7 million in 1988. In 1960 slightly more than 5 percent of all births were to unmarried women; by 1987 that figure had risen to 25 percent. For women of color, the figure approaches 50 percent.

Taken together, these two trends largely explain why today almost one quarter of all American households with children are maintained by a single parent. In 90 percent of those households, the parent is a woman. At best, policies based on the model of a two-parent, two-income family are irrelevant to these single parents



Drawing by R. Chast; ©1987
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and their children. At worst, they place ever farther from the economic mainstream the very workers most in need of family-related workplace accommodations.

Policies based on the model of the two-parent, two-income family likewise fail to help those children most desperately in need of help. Researchers estimate that six out of ten children born in the 1980s will live for some length of time with only one parent—for the vast majority, with their mother. And children living with a single parent are much more likely to be poor than are children living in two-parent households. In 1988 less than one in ten two-parent families was poor; by contrast, almost half of the female-maintained families fell below the poverty line.

What Price the Parenting Track?

A second drawback to recent workplace reform proposals is that they may perpetuate, and even exacerbate, the economic marginalization of women workers. One important way that they may do this is by reinforcing the unequal gender-based division of labor within the family.

Although women's labor-force participation has increased dramatically over the last two decades, men generally haven't picked up the slack at home. Not only do employed wives devote a good deal more time than their employed husbands to housework and child care, but men who are married to "working women" do not spend appreciably more time on housework and child care than do husbands of full-time homemakers.

The result is that employed women usually work two shifts: a 9-to-5 shift on the job—paid, but often at a relatively low wage—and an unpaid evening shift at home (with weekends and early morning hours typically added). The effects of this double work shift on women, their husbands, and their children was recently chronicled in a book by Arlie Hochschild called, appropriately, *The Second Shift*.

One of Hochschild's most disturbing findings is that both women and men tend to view women's disproportionate household responsibilities as justified by their smaller financial contributions to the family and their lesser commitment to the work force. This is particularly ironic because wage-earning wives often suffer from greater stress on the job than their husbands. According to recent studies, many of the lower-paying pink-collar jobs typically held by women are actually more stressful than the more lucrative professional and blue-collar jobs typically held by men.

More important, however, is that employed wives often become trapped in a vicious circle. Because women generally earn less than men, it makes economic sense, in most two-income families, for the wife, rather than the husband, to cut back on her paid work in order to handle the housekeeping and take care of the children. But the more women limit their work-force participation, the less they will earn; and the less women earn, the more likely it is that they—and not their partners—will continue to work the second shift.

Again, some statistics may help to underscore the point. Despite more than two decades of legal and social reform, full-time working women today still earn only about 70 cents for every dollar earned by men. Experts estimate that about 70 percent of this wage difference can be attributed to the fact that women assume primary responsibility for housework and child care. Current research also confirms that the economic effects of even a short-term hiatus in employment are likely to be both substantial and long-lasting. Economists have estimated, for example, that college-educated women suffer a 4.3 percent reduction in long-term earning capacity for each year out of the labor force. Thus, to the extent that employers' policies encourage women to reconcile their work and family responsibilities by limiting their participation in the paid labor force—without addressing either the long-term economic costs of this accommodation, or the broader issues surrounding the unequal division of labor at home—these policies may actually perpetuate women's economic dependence.

We seem to have entered a period where policymakers want employers to take family ties seriously, yet want marriages easily dissolved, with no strings attached. How did we end up in this double-bind?

Reforms that create a parenting track in occupations previously dominated by men may also end up recreating precisely the sort of job segregation by sex that still characterizes the overall labor market. The company's upper tier would continue to be populated by men, along with those few women who were willing to forgo family involvement in order to advance faster and farther on the job. Underneath would be the parenting tier, populated largely by women, joined by a few brave (or economically foolish) men. Workers in this second tier would have considerably more flexibility to meet family responsibilities, but at the cost of a truncated career ladder and permanent economic disadvantage.

Conflicting Ideals

The very notion of cutting back on paid work in order to improve life at home rests on the assumption that workers should sacrifice some degree of economic independence for the sake of their families. This assumption, in turn, seems to affirm the importance of family relationships and the values of caring and nurturing generally associated with those relationships. Moreover, our willingness to require employers to provide certain family-related benefits shows that we think it ap-

appropriate, at least in some circumstances, to limit the pursuit of private gain in the service of broader social goals.

Our desire to integrate work and family further reflects our acceptance of dependency. We take it for granted that children and elderly family members are dependent on the adult workers responsible for their care. Moreover, when the workers are themselves part of two-income families, we may even encourage the economic dependence of one wage-earner on the other. Whatever is lost in income, we think, will be more than made up for at home.

In general, we should be pleased that such "pro-family" assumptions are working their way into our legal and economic structures. The problem is that recent trends in family law embody precisely the opposite set of assumptions. Indeed, the modern law governing divorce and its financial consequences could well be summed up as "Every family member for himself," or possibly, "May the most self-interested person win."

Take, for example, the shift from fault-based to no-fault divorce. The overriding emphasis of our current no-fault system is on an easy exit from marriage. In most states, marriage has become a relationship terminable at the will of either party—either immediately, upon demand, or after a waiting period of less than a year. This means that someone who wants to preserve the legal or economic incidents of marriage is usually powerless to do so.

Perhaps even more important are the assumptions that have increasingly come to govern the financial consequences of divorce. Chief among these is the idea of a clean break between the partners. Thus, current rules regarding the division of marital property and the availability of alimony overwhelmingly reject the idea of any continuing financial responsibilities growing out of the marriage. Instead the rules emphasize the importance of individual autonomy and economic self-sufficiency.

Divorce statutes in many states, for example, dispense with the obligation to support a former spouse unless she—for it is almost always a "she"—is unable to provide for herself. The ability to provide for oneself, in this context, is defined quite liberally: almost any degree of earning capacity will jeopardize the availability of a support award. Even in states where such awards are more common, the primary purpose of

alimony is to "rehabilitate" an ex-spouse—that is, to enable her to become economically self-supporting.

Of course, our current divorce regime hasn't totally scrapped the notions of equity and marital partnership. By and large, though, it assumes that whatever partnership adjustments are appropriate when a marriage dissolves can be achieved through the equitable division of marital property. The problem with this assumption is that current definitions of marital property exclude the most valuable assets acquired during most marriages: the increased earning power that comes from such things as graduate and professional education, on-the-job training, and career advancement during marriage. As a result of this exclusion, most divorcing couples have very little marital property to divide, and even the most generous property-division schemes do little to compensate a spouse who has sacrificed economic independence for the sake of family commitment.

Employed mothers who have stunted their careers in order to meet family obligations also run the risk of losing in a custody dispute. In some courtrooms they still face lingering prejudice against mothers who work outside the home. Worse yet, almost all judges initially assume that if both parents work outside the home, then neither qualifies as the "primary caretaker"—despite overwhelming evidence that employed mothers retain primary child-care responsibilities in the vast majority of two-income families. At the same time, an employed mother who has sacrificed economically to care for children is likely to be disfavored in a custody dispute because she earns less than her career-track husband. And, to the extent that her reduced commitment to the labor force makes her more vulnerable to layoffs and job changes, her ability to provide a stable home environment might be called into question.

Thus, someone who has accepted the invitation to accommodate her work to her family responsibilities—who, in effect, has "bought in" to the notions of economic partnership, shared financial responsibility, and the primacy of the family over individual well-being—will find herself confronted in the event of divorce by the legal systems's insistence on a clean financial break, its glorification of economic self-sufficiency, and its privileging of individual autonomy over the enforcement of family responsibilities. It is women who are likely to get caught in this clash of



ideals, even when parental leave and similar workplace reforms are formally gender-neutral. For both economic and cultural reasons, women will most often be the ones who cut back on paid work in order to accommodate their family goals. They will then be the ones who pay the economic and parenting price for that accommodation in the event that they divorce. The notion that any disadvantages they suffer are merely the unfortunate result of the work-family trade-offs they chose only helps to obscure the larger economic and structural inequalities contributing to these so-called choices.

Policy Recommendations

Are there any ways out of the work-family dilemma? There may at least be some partial solutions. On the family law side, we should support changes that would protect, rather than penalize, a woman's investment in her family. Among other things, this would mean requiring a much greater degree of continued sharing of financial resources after the dissolution of a marriage. Instead of making postdivorce income-sharing the exception, we should make it the rule, at least where the divorcing couple has not agreed otherwise. In the custody area, we must press for changes that reward past parenting activity and that emphasize parental responsibilities, rather than parental rights.

On the employment side, we should be very wary of policies that create a separate parenting track, or that force workers to choose between family commitment and economic security. Instead we should seek reforms that aim at restructuring the workplace and redefining the nature of careers. We should also consider more carefully the effect of various reform proposals on workers who are single parents.

In universities, for example, the entire tenure structure merits rethinking from the vantage point of work and family. Even a moment's reflection reveals that most existing tenure rules were not designed with primary parents in mind. The same years that a young teacher is expected to make good on the promise of scholarship are typically the years that require the heaviest family commitments. What would be gained, and what lost, by replacing our rigid career ladder with a more flexible system that allows individual faculty

members to petition for tenure at whatever point they believe they have achieved their scholarly potential?

As for the unequal division of household labor, we are often told that the law is powerless to change behavior within the family. But this simply isn't true. The law affects behavior at home in a myriad of subtle, and not so subtle, ways.

The more women limit their work-force participation, the less they will earn; and the less women earn, the more likely it is that they—and not their partners—will continue to work the second shift.

The failure to mandate pay equity for women in female-dominated occupations effectively reinforces traditional family patterns. The wage gap between men and women means that it will continue to make economic sense for wives, rather than husbands, to shoulder most of the load at home. Similarly, our toleration of work environments potentially hazardous to pregnant women stacks the deck in favor of men's economic dominance and the unequal division of family labor associated with it.

The legal doctrines governing family relations likewise influence the division of labor within the home. Custody and visitation rules that protect parental rights, but don't enforce parental obligations, help ensure that men will not be forced to assume a greater share of the work of raising children. By the same token, spousal support doctrines that discourage postdivorce income-sharing provide an incentive for fathers, and maybe mothers as well, to concentrate their energies on paid employment.

In light of these connections, the real question becomes not whether we can use the legal system to alter the unequal division of labor at home, but whether we have the political will to do so.

— Jana Singer



Jana Singer is assistant professor of law at the University of Maryland School of Law. This article was condensed and adapted from a paper she presented at the annual convention of the Association of American Law Schools. Among the sources used in preparing the paper are: Richard Delgado and Helen Leskovic, "The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue," *Rutgers Law Review*, vol. 40 (1988); Nancy Dowd, "Work and Family: Restructuring the Workplace," *Arizona Law Review*, vol. 32 (1990); Arlie Hochschild with Anne Machung, *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking Penguin, 1989); Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); and Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: The Free Press, 1985).

What's in a Risk?

Consider two familiar ways of describing an eight-ounce cup containing four ounces of water. We could say that the cup is half *full* or that the cup is half *empty*. Although both descriptions are true, they plainly convey quite different impressions. They color the situation differently, and so, depending upon the context, could be seen as offering different assessments and suggesting different courses of action. Nevertheless, standing behind these true but tendentious descriptions is a neutral and objective description: the eight-ounce cup contains four ounces of water.

*Instead of obscuring or distorting,
a nonneutral description may in fact
accurately convey the risk information.
Responsible risk communication
does not demand neutrality.*

While policy decisions based on tendentious descriptions naturally invite controversy, neutral descriptions help to resolve it. It's difficult to imagine a serious controversy fueled by the difference between the "half-empty" and "half-full" descriptions because the neutral description is so clearly available. Neutral descriptions help resolve controversy by distilling the information from the bias, thereby allowing decisions to have an objective basis.

This example points to a fundamental problem with describing risks. Although there are counterparts to the "half-empty" and "half-full" descriptions—e.g., descriptions of risks in terms of mortality rates or in terms of survival rates—there appears to be no counterpart to the clearly objective description of four ounces of water in an eight-ounce cup.

Several studies have shown that the unavailability of neutral risk descriptions is a fact of human psychology. Indeed, this lack may also reflect deeper issues concerning the often acknowledged difficulty of separating facts from values. Be that as it may, it is at least a fact of social psychology: people do not respond equally to alternative but logically equivalent descriptions of risk.

The lack of neutral descriptions raises a problem for one of the primary ambitions of risk analysis: to aid technological decision making by impartially evaluating technological risks. A problem in describing risks translates directly into a problem in perceiv-

ing and communicating risks, since how we perceive or communicate risks depends upon how we describe them to ourselves or to others.

In this article I shall survey just a few of the many conceptual problems in describing risks. These are not problems about how we happen to talk about risk; they are problems about our understanding of risk. They not only fuel some of the debates over risk analysis, they also reflect the role risk analysis should play in policy debates. Some of these problems reveal the conceptual roots to the unavailability of neutral risk descriptions. Other problems, I will suggest, are actually pseudo-problems: they rest on a mistaken view of what the role of risk analysis should be. That is to say, these problems are problems only if we require risk analysis to play a certain role in policy decisions, one that I believe cannot be maintained once we take seriously the lack of neutral risk descriptions.

A good place to begin is by considering what we mean by "risk." A simple characterization is *probability of harm*. Of course, there are other characterizations of risk, including risk as the magnitude of harm and risk as the expectation value of the harm (i.e., the product of the probability of harm and the magnitude of harm). We can find support in everyday speech for each of these various characterizations; but since all of them build on a prior understanding of both probability and harm, the precise definition of risk need not concern us. Whichever definition we use, we will need to examine issues raised in identifying harms.

Understanding Harm

Differences in risk assessments can often be traced to differences in which harms are to be recognized. We can distinguish "thin" from "thick" conceptions of harm. A thin conception focuses on *physical* harms, understood in terms of mortality and morbidity. Thus, on a thin conception, the harms that could result from releasing a genetically engineered organism consist of the possible physical harms: death or disease. On a thicker conception of harm, we look at a much broader range of losses and damages. Many of these might be considered *social* harms, including, for example, economic losses, social disruption, the abandonment of certain conventions and values, and the undermining of political and social institutions.

Technical risk analysis typically relies on a thin conception of harm: it focuses on the risks of death or disease. Social harms, however, are by no means insignificant or any less real. The accident at the Three Mile Island (TMI) nuclear reactor in 1979 is a case in point. As Paul Slovic has noted, not a single person died in the accident, and few, if any, cancer fatalities

are expected. Nevertheless, "no other accident in our history has produced such costly societal impacts," Slovic writes. "The accident at TMI devastated the utility that owned and operated the plant. It also imposed enormous costs (estimated at 500 billion dollars by one source) on the nuclear industry and on society, through stricter regulations, reduced operations of reactors worldwide, greater public opposition to nuclear power, reliance on more expensive energy sources, and increased costs of reactor construction and operation."

As the accident at TMI demonstrates, risk perceptions or assessments based on a thin conception of harm can greatly underestimate the costs associated with mishaps. This is why public concerns over biotechnology have persisted despite growing scientific assurances that genetic engineering can be done safely. It is not necessarily that the public distrusts scientists; rather, the public and the experts may be using quite different conceptions of harm.

In ways that are perhaps more dramatic than in other technologies, biotechnology tends to raise issues regarding social consequences, some of which might count as harms on a thick conception of harm. Agricultural biotechnology, for example, doesn't simply promise new, more efficient ways of producing food. It also raises questions about the value of the family farm, the centralization of food production, and the meaning of the "all natural ingredients" label. Is the loss of the family farm a harm? Should it enter into risk assessments? Environmental biotechnology doesn't simply promise new ways of cleaning and reclaiming polluted areas. It also points to previously unthinkable ways that we might be able to control the environment or control wildlife to suit our tastes, and so calls into question many of our environmental values. Is the genetic engineering of fish to produce easy entertainment for sports fishermen a harm?

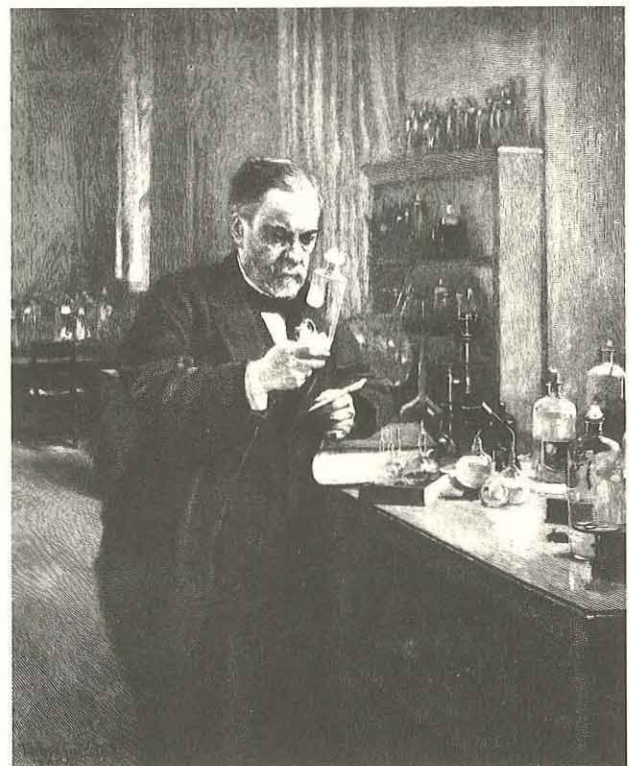
The development of biotechnology will have an impact extending far beyond the benefits of its products and the physical harms that might result from biotechnology's failure in certain cases. Indeed, many potential social harms are not the results of such failures at all; they are the possible results of biotechnology's success. In some ways, the public is more worried about biotechnology's succeeding than about its failing. Social harms, and thick conceptions of harm generally, are notoriously difficult to measure or to compare. There are so many different kinds of harm, and different kinds of harms seldom translate into different degrees of harm without distortion. For example, losing a family heirloom may be a much greater harm than the loss of anything else with the same market value. Treating the loss as merely an economic harm would misrepresent the harm the family actually suffers.

It's also important to note that thick conceptions of harm are controversial. No one disputes that death or disease is a harm. But consider the effects of biotechnology on the relations between universities and industry. Private biotech companies and public univer-

sities are developing joint enterprises, and an increasing number of university professors are pursuing research beneficial to companies in which they have a financial stake. Are the closer ties that appear to be developing between public universities and private industries a harm? Plainly, reasonable people can disagree on this matter, as they disagree about many of the candidates for social harms.

Widespread disagreement about social harms supports the claim that there are no neutral risk descriptions. A controversy over a social harm is typically not a controversy over some straightforwardly determinable empirical fact. It is a controversy over values. For example, everyone might agree that a certain development in agricultural biotechnology will lead to increasing centralization of agribusiness, and so to the demise of the family farm. Nevertheless, there could be—indeed, there is—serious disagreement about whether that development is a *harm*. A controversy like this cannot be resolved by a description of the expected social change *as a harm* because whether it is a harm is precisely what's at issue, and so such a description would not be neutral. On the other hand, any description that did remain neutral on the issue of harm would be question-begging and so could not resolve the controversy. Since there is no neutral way to describe social harms, there is no neutral way to describe the corresponding risks.

The problem of what constitutes a harm becomes even more complicated when we broaden our perspective to an international point of view. Different nations and cultures often have different conceptions of harm because in many cases thick conceptions of harm are



tied to ethical and cultural values. For example, one country might value a particular species of animal more highly than neighboring countries do because of the role that animal plays in the country's history or folklore. That country would therefore see threats to that species as a greater harm than its neighbors would. This could easily lead to sharp disagreements between that country and its neighbors concerning the appropriate trade-offs and levels of safety if these animals are at some significant risk.

A natural response to some of these problems would be to relativize harms: harms should be described in terms of who is affected. Instead of debating, for example, whether the loss of a particular species of plant is a harm, we might simply say that the loss would be a harm for country A (e.g., a loss of income) but not a harm for country B. Unfortunately, this easy way of identifying harms makes comparing harms much more difficult.

A loss of two million dollars is plainly worse than a loss of one million dollars, but is a loss of two million dollars by country A worse than a loss of one million dollars by country B? Worse for whom? A difficulty in comparing harms directly translates into a difficulty in comparing risks.

The Importance of Neutrality

The problem of describing risks to others—of risk communication—is often framed as a problem about how informed experts should deal with an uninformed public: Given widespread ignorance of science and probabilities, how can experts inform the public about risks without provoking uninformed or irrational responses? C.J. Daggett, for example, claims that "... many people are not comfortable with mathematical probability as a guide for living. If you inform people that their risk of developing cancer from a 70-year exposure to a certain carcinogen at ambient level ranges between 10^{-5} and 10^{-7} , their response may be, 'Okay, but can I drink the water?'"

The natural response to this situation is to say that the public needs to be better educated. Nevertheless, we should realize how tendentious both this formulation of the situation and the natural response actually are. We have already noted that the range of harms identified in risk assessments can be controversial. If the difference between the experts and the public is over what possible harms ought to be considered in the assessment, then it is by no means obvious that the public is always wrong on this matter.

By the same token, the public's understanding of probabilities might be better than it appears. Although Daggett's example is intended to illustrate how people fail to understand small numbers, it might equally point to a genuine problem with applying probabilities to single cases. If the probability expresses a long-run frequency, then it says nothing about the short-run frequency, much less about the particular short run that interests me: this particular case of my drinking the water. Better education is indeed important—for everyone.

Let's consider a less tendentious formulation of the problem of risk communication: Given the problems in describing risks, how can risks be communicated responsibly? In particular, if risk descriptions are not neutral, how can risk communication be a matter of *informing*, rather than a matter of *handling*, the public?

It is tempting to believe that neutrality can be achieved through balance. If we tell all sides of the story, then the biases will cancel each other out. Unfortunately, even if we set aside the worry that this approach might do more to confuse than to inform, the attempt at balancing will not work. In the first place, telling all sides is an unrealistic demand and a dubious ideal. We don't know how many possible sides there ever are to a story, and some possible sides are just too crazy to be told. Second, implicit in talk of balance is the idea of prejudicial distance: two differing views do not balance each other if one is far more extreme than the other. But we can't know whether one risk description is more extreme than another without having an idea of where the center lies; and the lack of neutral risk descriptions means that we don't know what a central position would be. In short, if we knew what was necessary in order to balance risk descriptions, we wouldn't need to appeal to balancing in order to provide neutral risk descriptions.

Conclusion

Rather than consider other suggestions for approximating neutral risk descriptions, I want instead to take seriously the idea that there are no neutral risk descriptions. And so I want to question an underlying assumption in this discussion. Are neutral risk descriptions necessary for responsible risk communication?

An affirmative answer appears to rest on the following picture of communication: There is a clear distinction between the informational content of a message and its presentation. What is being communicated is the information, but whether the communication is successful (effective, clear, etc.) depends upon the presentation. The theoretical distinction between information and presentation can of course be obscured in practice. A message can be presented so that it appears to say more or less than it really does. Therein lies the genius of advertising and propaganda.

On this view, a nonneutral risk description obscures the informational content of the risk message because risk information itself is considered to be neutral, albeit "neutral" in a different sense. Because risk information is objective, it grounds the ideal of risk descriptions that are neutral and therefore uncontroversial. Consequently, responsible communication consists in conveying just the information. Intending to convey anything more or less would be deceptive and manipulative.

This picture of communication fits with a common view of the role of risk analysis in policy debates. Most commentators agree that the *management* of risks is a political or social decision because it turns on society's goals and what trade-offs are deemed acceptable. Risk management should therefore be as controversial as

any other political matter. The role of risk *analysis*, however, is to help rationalize public debate over risk management. First we determine what harms we are likely to face; then we debate what actions we ought to take. How could it be otherwise? If we disagree about the harms, any debate about actions would be at cross purposes and so hardly open to a rational resolution. Thus, the requirement that risk descriptions be neutral is part of a picture in which the information about the risks is above the fray. Although there can be controversies over risk information, these are controversies over technical matters, *not* political or social controversies.

These views cannot be maintained if we take seriously the idea that risk descriptions aren't neutral. The lack of neutral risk descriptions suggests that risk information itself is nonneutral. Instead of obscuring or distorting, a nonneutral description may in fact accurately convey the risk information. Responsible risk communication does not demand neutrality.

Note, for example, that many descriptions of the risks associated with drunk driving, drugs, or certain sexual activities are hardly neutral. They are often full of graphic details couched in alarming language. Not only is providing such descriptions sometimes not seen as irresponsible, providing anything less alarming could be seen as irresponsible. The point can be stated generally: Suppose you have two alternative risk descriptions, each equally supported by the available evidence, but one more alarming than the other. Which description you use to communicate the risks should depend upon whether you believe the risks are alarming. Acting otherwise would be irresponsible.

(While a number of details need to be spelled out, students of Hume may recognize this proposal as an attempt at a "skeptical solution" to the earlier skeptical doubts raised about risk descriptions.)

Of course, this point is not a license for misleading descriptions. If you know that the audience will draw what you believe are false or unsupported conclusions from the risk description, then the audience is being misled—manipulated rather than informed. In that case, the risk description is hardly a proper alternative to one that doesn't mislead.

Nevertheless, risk analysis is a controversial matter. Even if a communication doesn't mislead, it will still be controversial. But that is what we should expect—and foster. Once we acknowledge the nonneutrality of risk information, we begin to see describing risks—and so, communicating risks—for what it is: not something that occurs prior to the public debate, but rather part of that debate. Risk communication is part of risk management.

— Robert Wachbroit

This article has been condensed and adapted from "Describing Risk," chapt. 16 in Morris A. Levin and Harlee S. Strauss, eds., *Risk Assessment in Genetic Engineering* (New York: McGraw-Hill, 1991). The sources cited are: P. Slovic, "The Perception and Management of Therapeutic Risk," 1989 (unpublished paper presented to the Royal College of Physicians); C.J. Daggett, "The Role of Risk Communication in Environmental Gridlock," in V.T. Covello, D.B. McCallum, and M.T. Pavlov, eds., *The Role and Responsibility of Government and Non-Government Organizations* (New York: Plenum, 1989).

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Affirmative Action and Fairness

I began by talking about four white men: David Duke, Brian Weber, William Bradford Reynolds, and George Bush.

David Duke has been much in the news of late. A former Klansman, a former leader of a white supremacist party, a purveyor of neo-Nazi literature, and now a representative in the state legislature, Duke took 40 percent of the vote in the 1990 senatorial primary in Louisiana—40 percent of the vote, 60 percent of the white vote. The main theme of his campaign: the injustice of affirmative action, the need for civil rights for whites. He tapped into something deep. He touched a nerve.

It is federal courts who for twenty years have created or sustained the various parts of affirmative action, including the occasional use of quotas. Why have they done this?

Brian Weber is also from Louisiana. In the 1970s he worked at a Kaiser Company chemical plant. That plant, like industry in general in the South, had a segregated work force. All of its black employees were relegated to a handful of unskilled jobs. There were none in the high-paying craft occupations. Moreover, given the company's rules and practices, little was likely to change. Kaiser hired craft workers by going outside the plant, using a regional labor market in which almost all workers trained in the crafts were white. The chemical workers' union and the company agreed to a plan to change things: the company would henceforth train its own craft workers instead of hiring from the outside, and it set up an on-the-job training program, admitting plant workers into the program from two lists—a white list and a black list. For every white worker admitted, one black worker would be admitted—until 30 percent of the craft workers at the plant were black. An explicit racial criterion. A quota.

In Brian Weber's eyes, this was unjustified reverse discrimination. He brought suit in federal court, and in 1979 the Supreme Court found in favor of the company.

There is a real irony in Weber's lawsuit. Weber himself was an unskilled worker at the plant. Had the company maintained its practice of going to outside markets for craft workers, Brian Weber would never

have risen very far within the plant. The new program meant that he now had a chance to advance himself; he only had to wait his turn. No matter. The racial preferences in the program touched a nerve. They weren't tolerable. They had to go.

Nor, for George Bush, is the mere threat of preferences in favor of blacks or women acceptable. In October 1990 he vetoed the new Civil Rights Act, which would have clarified certain standards of proof in civil rights lawsuits. His objection was that these standards of proof made it hard for firms to defend themselves against charges of discrimination. Consequently, some firms might be tempted to avoid discrimination charges by using quotas—giving racial or gender preferences to make sure their work forces had the right racial or gender profile. This possibility was enough to cause the president to reject the bill.

Why Quotas Are Anathema

What is it, though, that makes a program like Kaiser's intolerable? What makes the mere risk of preferences unacceptable? Why is the Q-word anathema? That question brings me to the last man I'll talk about, William Bradford Reynolds. Reynolds headed the Office of Civil Rights in the Department of Justice during the Reagan Administration, and was that administration's leading spokesman on affirmative action and against quotas.

The debate about preferential treatment, he said, is between those (like himself) who believe in *equality of opportunity* and those who believe in *equality of results*. Those who *oppose* preferential treatment believe in individual rights and a colorblind, genderblind society. Those who *support* quotas believe in group rights and dividing up social benefits by race and gender. That's the way Reynolds put it.

Putting the matter this way is politically effective for opponents of affirmative action. Individual rights, equality of opportunity, success through effort and merit, reward because of what you do, not who you are—these values are as American as apple pie. Opposing preferential treatment isn't opposing racial and gender justice; it's just opposing an alien philosophy, an un-American ideology.

There may well be people who support preferential treatment because they believe in equality of results

This article is adapted from a talk given to undergraduates at Ithaca College and Rider College, as part of debates on affirmative action in which the author was assigned the role of advocate.

for its own sake, because they believe in group rights, or because they want a society shaped around color and gender. But the federal judges of this country are certainly not among those people, and it is federal courts who for twenty years have created or sustained the various parts of affirmative action, including the occasional use of quotas and preferences. Why have they done this? By their own account, to *prevent* discrimination and *secure* equality of opportunity.

Reynolds says that using racial and sexual preferences to end discrimination is nonsense; the way to end discrimination is not to discriminate in reverse but simply to *stop discriminating*. Exactly—if we can. If we can stop discriminating. That's the rub. And that's the problem courts ran into.

Can't We Just Stop Discriminating?

It takes more than good will and good intentions not to discriminate. It takes capability as well, and that may be hard to come by. To see what I'm talking about, let's look back at a company like Kaiser after the Civil Rights Act of 1964 outlawed discrimination in employment. The company may have employed no blacks at all. The sign in the window said: "No blacks apply." Now, how does the company comply with the law and stop discriminating? It takes the sign out of the window and says, "If blacks apply and meet all requirements, we will hire them." And suppose it is sincere. Is that enough?

Look at how other aspects of company policy may work. Suppose the company only advertises its jobs by word of mouth. It posts job openings on the bulletin board and lets the grapevine do the rest. Then few blacks will ever hear of openings since all the workers

are white—a fact reflecting, of course, the company's past discrimination. A company policy not itself designed to keep blacks out nevertheless does exactly that. Or suppose that the company requires each applicant to provide a letter of recommendation from some current or former employee. All the current and former employees are white, so this policy, too, is going to exclude blacks. Taking the sign out of the window changes nothing at all.

This is what courts encountered when they began adjudicating civil rights cases in the 1960s. Because the system of discrimination had been so thorough and in place for so long, it was like the child's spinning top, which keeps on spinning even after you take your hand away. Ordinary business practices let a firm's prior discrimination keep reproducing itself—and that reproduction, whether intended or not, is *itself* discrimination. So concluded a unanimous Supreme Court in the landmark 1971 case *Griggs v. Duke Power Company*. In order to comply with the law, businesses must look at all parts of their operations—job classifications, work rules, seniority systems, physical organization, recruitment and retention policies, everything—and revise, where possible, those elements that reproduce past discrimination. That's the core idea of affirmative action, as it was born in the early 1970s from the experience of courts trying to assure non-discrimination and equal opportunity, and as extended through federal rules to all recipients of government contracts and funds.

Make a plan (these rules say) that establishes a system for monitoring your workplace and operations; that changes procedures and operations where you see they may have discriminatory impact; and that predicts



what your work force would look like were you successfully nondiscriminating, so you will have some measure of the success or failure of your efforts.

Those are the basic elements of affirmative action. They are surely reasonable. Even William Bradford Reynolds accepted most of this. Why is there ever a need for more? Why is there ever a need actually to impose racial or gender quotas? Or to risk their being adopted by firms?

It took federal law that mandated tearing up the sidewalks at nearly every intersection in this country to jar us into realizing that many of the problems people in wheelchairs faced lay in the fact that we had made a world that excluded them.

Because sometimes it takes strong measures for us to see how to do what it is needed to secure the reality of equal opportunity, not just its form. If we've built a whole world around discrimination, then many of the ways the world discriminates may not be visible to us even when we go looking. We may not be able to see all the ways our business practices exclude women and blacks from the workplace or detract from their performance there until the workplace is actually changed by having women and blacks in it. And one quick way of changing the composition of the workplace is through quotas.

Courts have sometimes—not often—resorted to quotas when they were convinced that an institution was simply not capable of identifying and changing all the features of its practices that discriminate. Often the quotas have been imposed on companies or municipal agencies whose own histories showed them completely unwilling to make anything but token changes. But sometimes they've been imposed where the sheer inertial weight of company culture and organization convinced the court that the company would never be able to find "qualified" minorities or women, no matter how hard it tried. The culture itself had to be changed by putting minorities and women in the roles from which they had been excluded.

Here is where the real issue lies. It is about the nature and sweep of discrimination. Do we think discrimination is a relatively *shallow* or a very *deep* phenomenon? Do we think discrimination is *transparent* or *opaque*? The answer need not be a flat yes or no. Perhaps in some places discrimination is shallow, in some places deep; in some circumstances transparent, in others opaque. If discrimination is shallow and transparent, then modest affirmative action should be enough to cure it: we look for, find, and eliminate practices that are

reproducing the effects of past discrimination. But if discrimination is deep and opaque, then we may not be able to find it even when we look, and more robust forms of affirmative action may be necessary. We may need rather sharp assistance to *see* the way our practices work to exclude and oppress. We may need to be shocked or shaken out of our old habits, to have our consciousness raised.

This, I think, is the heart of the controversy about affirmative action. The difference is not that some people want equal opportunity and some want equality of results, that some believe in individual rights and some believe in group entitlements. The difference is that some think discrimination is always transparent and shallow while others think it is—sometimes, at least, in some sectors or institutions—deep, enduring, and opaque.

The Land of the Giants

To drive home this point about the opacity of discrimination and how it can subvert good will and good intentions, I ask you to go through some experiments with me. Start with a simple fantasy. Imagine we were suddenly all transported to the land of the Giants. They would be puzzled and wonder what in the world to make of us; and in short order they would probably conclude that, though we were like them in many ways, still we were quite incapable, incompetent, *inferior* creatures—for although we have our charming side, we really can't manage to do well even the simplest tasks in Giant Land. We just don't measure up. Perhaps it's just our nature to be helpless, the Giants conclude. We must have been some unfortunate quirk in God's creation.

But we would know that the problem does not lie in us, it lies in the fact that everything in Giant Land is built to the scale of Giants. That world is built for Giants and of course we don't do well in that world—but give us back the world built for us and see what we can do! We can even outperform Giants!

What's my point? It's that the Giants see *their* world as *the* world. They just naturally measure us against it, so they see the problem to be in *us*.

This is just fantasy, you say, and besides, the Giants wouldn't have been so dense. If you think not, then turn to a second example—a real one.

Twenty-five years ago, we tended to think that people in wheelchairs couldn't do much. It was a shame they were in wheelchairs—it wasn't their fault—but it meant that they were incapable of doing what most of the rest of us did. They were very limited in their mobility, thus not qualified for most jobs. And so they were excluded. Left out. Omitted.

Why did we think that? Not because we disliked people in wheelchairs. It was because, when they had trouble performing operations we do easily, we naturally attributed the trouble to *them*—to *their* condition—because we just took the world as it was for granted. And how was that world? It was a world of *curbs*. Curbs everywhere.

Now, curbs are not supplied by nature. The world of curbs was made—made by and for us, the walking, running, jumping types. It took federal law that mandated tearing up the sidewalks at nearly every intersection in this country to jar us into realizing that many of the problems people in wheelchairs faced lay not in them but in the fact that *we* had *made* a world that excluded them, and then, like the Giants, had assumed *that* world was *the* world.

Unavoidable Unfairness

The world of Giants—the world of curbs—the world of whites and men: imagine, if you will, a world built over a long time by and for men, by and for whites. In that world there would be a thousand and one impediments to women and blacks working effectively and successfully. That world and its institutions would be suffused through and through with inhospitality to blacks and women—just as Giant Land was inhospitable to us little people, and Curb World was inhospitable to wheelchair people. Imagine that world—or do we have to imagine it? That's the world we still live in, isn't it?

Isn't it plausible that strong measures may be needed to change it? Are those strong measures, if they in-

volve racial or gender preferences, unfair to white men? Of course they are. Well, doesn't that settle the matter? It would if we could always be fair without sometimes being unfair. Does that sound puzzling?

Think a moment. What are our options? Consider the civil rights bill George Bush vetoed, and threatens to veto again. If we set high burdens of proof on businesses, some of them may resort to quotas—and that's unfair discrimination. But if we don't set high standards, some businesses won't make the necessary effort to change practices that still hinder blacks and women—and *that's* unfair discrimination. Sometimes we may be faced *only* with the choice of risking unfairness in one direction or risking it in another. Sometimes we may have no choice except to impose one unfairness or allow another to persist. Then what do we do?

President Bush vetoed the civil rights bill because it created the risk of quotas. Does he believe, then, that vetoing it creates no risks that some blacks and women will continue to be discriminated against, or is the unspoken premise this: that the risk of victimization is tolerable if the victims are not white men?

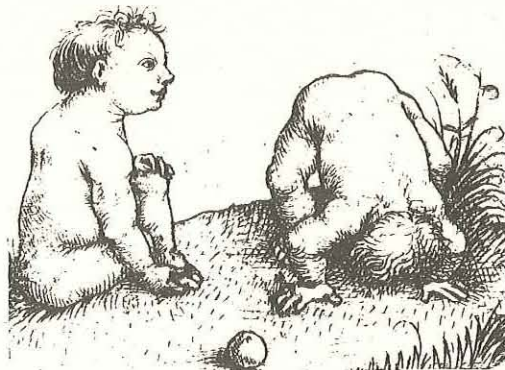
—Robert K. Fullinwider

Protecting Children, Born and Unborn

If the courts speak for the American people, then the American people must be deeply ambivalent about children. Granted, some of the ambivalence might stem from metaphysical uncertainty. After all, when courts are expected to rule on everything from actual children, to the potential children that are fetuses, to the potentially potential children that are spermatozoa or unfertilized eggs, it's natural to flounder. But even with regard to a single metaphysical category, such as potential children, we seem to be inconsistent. And so, one suspects, the inconsistency comes less from metaphysical floundering than from moral conflict—from a conflict of values that reflects, among other things, the mixed feelings and incompatible beliefs we have about children.

Take, for example, the recent Supreme Court decision in *Automobile Workers v. Johnson Controls*. Johnson Controls, a battery manufacturer, had barred all women except those with medical proof of infertility from jobs that exposed them to high levels of lead. The stated reason for the ban was benign: the company wanted to protect the future children of its employees.

The UAW filed suit, claiming sex discrimination under Title VII of the Civil Rights Act, and the Supreme Court ruled in favor of the union. "The bias in Johnson Controls' policy is obvious," said Justice Blackmun, delivering the opinion of the Court. "Fertile men, but not fertile women, are given a choice as to whether



they wish to risk their reproductive health for a particular job."

Advocates of women's rights applauded, albeit with a certain hesitation. What a triumph to have the same choice that men do, yet what a burden when one must choose between holding a decent job and risking her reproductive health.

The greatest interest of the Court's decision, however, lay in its general rejection of employers' fetal protection policies. "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents," Blackmun wrote. And what

"It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."

holds for employers apparently also holds for the courts: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."

Considering the Court's decision in *Webster v. Reproductive Health Services*, along with the bitter fights over abortion it has triggered in state legislatures, it comes as news that women have such vast freedom to choose their reproductive roles. Factor in the recent trend toward state intervention in pregnancy, and the picture becomes even more confusing. Courts have allowed hospitals to detain pregnant women and have themselves ordered such detention to protect the fetus. Courts have ordered not only blood transfusions but also cesarean sections over women's objections. In one case, a judge even sentenced a woman convicted of an unrelated crime to a jail term in order to ensure that her fetus would not be exposed to drugs.

Though not all cases like these involve drug addicts—in fact, quite a few are connected with religion—the increase in state regulation of women's conduct during pregnancy surely results in part from spreading alarm over drug abuse. Indeed, many of these efforts have focused on the arrest and prosecution of pregnant women under existing child abuse or narcotics distribution statutes. But how do state efforts to protect the fetus from drugs jibe with the *Johnson Controls* decision? Why is a woman free to decide whether her future child will be exposed to lead but not whether he will be exposed to cocaine?

There are two easy answers. First, most of the women affected by the *Johnson Controls* ban were not

pregnant. Some had even made a firm decision not to become pregnant. So the comparison is largely between pregnant women and potentially pregnant women, or perhaps between potential children (conceived but unborn) and only potentially potential children (not even conceived). Second, the *Johnson Controls* case had to do with employment discrimination. The women involved weren't seeking exposure to lead: they wanted decent jobs, and lead exposure was simply a risk they were willing to run in order to have those jobs. Since the craving for a decent job, unlike the craving for cocaine, benefits society, and since federal law prohibits sex discrimination in employment, women's rights presumably took precedence over the rights of fetuses and hypothetical fetuses.

Alas, this superficial consistency masks a deeper ambivalence. On the one hand, we want to prevent harm to "innocent" third parties—and while we may have our doubts about adults, and even teenage children, we certainly regard the unborn as "innocent." On the other hand, we tend to see the parent-child relationship as both private and privileged. The law doesn't permit me to give my neighbor's child a swat on the bottom, but I am well within my rights in giving my own child a swat, for my own child is *my* child.

Much of John Locke's *First Treatise of Government* goes to show that parents do not, and cannot, *own* their children. If they did, he argues, then every human being would be born into slavery. With the exception of a few diehard libertarians, most of us would surely agree with Locke: our children are not our *property*. Yet we do feel intensely proprietary about them; we have rights with regard to our children that we have with regard to no other human beings; and if they want to escape our control, they may even need to petition a court for "emancipation." Our rights as parents, then, even if not the rights of property owners, should not be taken lightly.

As a society, our desire to protect the innocent pulls us in the direction of fetal protection. *Johnson Controls* notwithstanding, we take an active interest in protecting the unborn. The state's interest in potential life has been declared so "compelling"—to use the language of *Roe v. Wade*—that state law may even prohibit all but medically necessary abortions in the third trimester of pregnancy. The irony, and tragedy, is that parental rights and privacy seem to prevail once the child is actually born.

In this regard consider the Supreme Court's decision in *DeShaney v. Winnebago County*, a suit brought by four-year-old Joshua DeShaney and his mother under the Due Process Clause of the Fourteenth Amendment. Joshua's parents were divorced; he lived with his father, who beat the boy severely. County social workers received repeated complaints about the abuse (especially from hospital personnel), and they had reason to believe the complaints justified. Nevertheless, they did not remove the child from his father's custody. Joshua's father finally beat him so badly that the boy suffered serious, irreversible brain damage. (In all likelihood, he will have to be confined to an institu-

tion for the rest of his life.) The DeShaney suit claimed that the county's failure to act deprived Joshua of "his liberty interest in bodily integrity," in violation of his rights under the Due Process Clause.

The Supreme Court held that "nothing in the language of the Due Process Clause requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." A person has no right to governmental aid, not "even where such aid may be necessary to secure life."

How odd: The state claims, *and exercises*, the right to protect fetuses from the women carrying them; yet when a toddler is beaten so severely by his father that he needs repeated hospitalization, the state does nothing. The toddler has no right to expect protection, the state no obligation to provide it. In his *DeShaney* dissent, Justice Blackmun condemned the "sterile formalism" that led to this interpretation of the Fourteenth Amendment. "Like the antebellum judges who denied relief to fugitive slaves..." he wrote, "the Court today claims that its decision, however harsh, is compelled by existing legal doctrine."

The DeShaney case, when considered together with the growing trend toward state intervention in pregnancy, raises troubling questions. Is the state's interest in potential children more "compelling" than its interest in actual children? Is the fetus "innocent" in some way that a four-year-old isn't? If we, as a society, care so much about children that we will intervene in a woman's pregnancy, why don't we move more decisively to protect children—children who are already born and breathing?

To say that a toddler has no constitutional *right* to our protection is hardly an answer. Neither does a fetus. Perhaps we should think a bit less about children's legal rights and a bit more about our own moral obligations.

— Bonnie Kent

Sources used in preparing this article include: *Roe v. Wade*, 410 U.S. 113 (1973); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *DeShaney v. Winnebago County*, 489 U.S. 189 (1989); *Automobile Workers v. Johnson Controls*, 111 S. Ct. 1196 (1991); "Rethinking (M)Otherhood: Feminist Theory and State Regulation of Pregnancy," *Harvard Law Review*, vol. 103, no. 6 (1990).

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