

# Taking Dependency Seriously: The Family and Medical Leave Act Considered in Light of the Social Organization of Dependency Work and Gender Equality

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*Contemporary industrialized societies have been confronted with the fact and consequences of women's increased participation in paid employment. Whether this increase has resulted from women's desire for equality or from changing economic circumstances, women and men have been faced with a crisis in the organization of work that concerns dependents, that is, those unable to care for themselves. This is labor that has been largely unpaid, often unrecognized, and yet is indispensable to human society.*

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Dependents require care. They are unable either to survive or to thrive without attention to basic needs. Dependency needs range from the utter helplessness of a newborn infant to the incapacity of illness or frail old age. Dependency can be protracted (e.g., the extended dependency of early childhood) or brief (e.g., a temporary illness). An individual who is dependent may be able to function otherwise independently if only she is given needed assistance in limited areas, or she may be dependent in every aspect of her being, that is, utterly dependent. At some stage in the lives of each of us we face at least one period of utter dependency; and, with accident and disease forever a danger to the most independent of us, we are all, at least potentially, dependents. In our dependency, we not only require care, but require a sustaining relation with a care-giver who provides this care—for *who* does the caring is often as important as the care itself. These dependencies may be alleviated or aggravated by cultural practices and prejudices, but given the

immutable facts of human development, disease, and decline, no culture that endures beyond one generation can secure itself against the claims of human dependency. While we are all dependent on some form of care or support, at least minimally, and although dependencies vary in degree, those that involve the survival or thriving of a person cut most deeply through the fiction of a social order presumably constituted by independent equal persons.

For the past two decades, feminists have argued that this fiction is parasitic on a tradition in which women attend to those dependencies. The labor has been seen as part of their familial obligations, obligations that trump all other obligations. Women who have been sufficiently wealthy or of sufficiently high status have sometimes had the option to confer the daily labor of dependency care to others—generally other women, mostly poor and ill-situated. Poor women who have had dependency responsibilities along with paid employment have often relied on female familial help. The gendered and privatized nature of dependency work has meant, first, that men have rarely shared these responsibilities—at least with the women of their own class—and, second, that the equitable distribution of dependency work, both among genders and among classes, has rarely been considered in the discussions of political and social justice which take as their starting point the public lives of men.

As women from many different classes increasingly participate in paid employment, adequate provisions for dependency care—child daycare, care for the elderly, time for family members to care for ill children, and so on—have surfaced as a major social concern. One response has been various kinds of social legislation that provide for leaves for parents with newborn children and for workers with family members who are ill or temporarily disabled. It is no secret that among industrialized nations, the United States, in spite of its early history of equal opportunity employment legislation, is especially primitive in its response to the concerns of dependency work. At long last, in 1993, a national piece of legislation, The Family and Medical Leave Act (FMLA) (Public Law 103-3, February 5, 1993, 107 Stat., 6-29) provides for some parental leave and some leave time to take care of ailing family members. The act is a rare piece of social policy insofar as it recognizes a public responsibility for dependency care.

The standard liberal tradition that policymakers appeal to, most especially in the United States, but to varying degrees in other Western democracies as well, does not acknowledge the claims of dependency. The liberal political philosophy that supplies the idealizations and the utopian visions of which contemporary society is an (albeit poor) approximation have as little to say about dependency as do the policymakers. The result is particularly detrimental to women's aspirations to empowerment and equality. And this despite the pretensions to a gender egalitarianism in the rhetoric of Western democracies and in the presumed gender-blindness of liberal political philosophy.

This neglect suggests that the ability to incorporate dependency concerns serves as a criterion of adequacy for any theory of a just social order that purports to advocate gender equality. John Rawls's egalitarianism will serve as the case study for the adequacy of liberal philosophy in recognizing dependency concerns. Elsewhere I discuss the adequacy of Rawlsian contractual liberalism to dependency concerns in detail (Kittay, N.d.). Here I focus on the notion of social cooperation as a keystone of that theory. The egalitarian ideal informing and informed by the idea of social cooperation leaves no space for dependency concerns because it requires the idea of mutual reciprocity by cooperating members. But such reciprocity cannot always pertain to persons in a relation of dependency, that is, between dependent and care-giver. In order to include the fact of dependency and its impact on those who do dependency work, we are compelled to enlarge the concept of social cooperation to consider a form of social interaction that, without being exploitative or neglectful of the concerns of any party, does not presume equality in power and situation of all parties. In the FMLA, we find elements of the expanded notion of social cooperation I advocate. But it falls short of what the crisis requires, and its limitations can be attributed to its fundamental adherence to the liberal model that is being criticized. The inadequacy of the FMLA reveals the failure of liberal theories to conceptualize social cooperation in such a way that provides women with the gender equality they purport to endorse.

#### THE DEPENDENCY CRITIQUE OF LIBERAL EGALITARIANISM

Contemporary liberal egalitarians tend to regard gender as a morally irrelevant category and endorse the ideal of sexual equality. Feminists, however, have asked not only what it will take for women to achieve equality but have interrogated liberal understandings of the ideal itself. Some feminists have evoked both women's difference from men and women's differences among themselves.<sup>1</sup> Their *difference critiques* of equality have pointed to the implicit use of men—*more specifically white middle-class men*—as the standard against which equality is assessed. These feminists have argued that this norm is unfit for incorporating all whose identity is marked by their gender, race, class, and other socially salient difference.<sup>2</sup> Other feminists, elaborating a *dominance critique*, have underscored the power difference between men and women. Men's entrenched dominance over women means that gender-neutral, equality-based policies either fail to address issues that specifically affect women or merely preserve the relations of dominance that are already in effect.<sup>3</sup> The considerations to which I have alluded in the introductory paragraphs of this essay form still another critique of dominant views of equality. This I call the *dependency critique*.<sup>4</sup> The dependency critique maintains that by construing society as an association of equals, conceived as individuals with equal powers, equally situated in the competition for the benefits of social cooperation, one

disregards the inevitable dependencies of the human condition, thereby neglecting the condition both of dependents and those who care for dependents (see Kittay, N.d.).

The dependency critique looks beyond women's socially prescribed differences from and subordination to men by considering the difficulties in assimilating women to the liberal ideal of equality. Its focus is on the circumstances under which the ideal was conceived and, more specifically, on the presumption that inevitable human dependencies and the consequences of such dependency for social organization are outside the political sphere for which the ideal of equality was articulated. Traditional formulations of liberal equality which originated as a challenge to feudalism posited an ideal for male heads of household. The feudalistic dependencies inherent in political hierarchy were targets of liberal thinkers such as Locke and Rousseau. Yet by positing equality for the male heads of households the dependencies of human development and frailty can remain unaddressed, at least as long as the household can accommodate these needs—an accommodation made possible by the privatized labor of women. The dependencies that cannot be banished by fiat are sustained by a social organization that creates a secondary dependence in those who care for dependents. They remain outside the society of equals insofar as they cannot function as the independent and autonomous agents of liberal theory who are presumed to be equally empowered and equally situated to engage in a fair competition for the benefits of social cooperation. For the woman who cares for dependents, the *dependency worker*, is not so situated—not as long as her responsibilities lie with another who cannot survive or thrive without her ministrations. Her attention is directed to another's needs; even her understanding of her own needs are enmeshed with the needs of a vulnerable other whose fundamental well-being is entrusted to her. And yet, within a liberal doctrine of society as a contractual agreement between equals, she should be an autonomous and independent individual. Liberalism constructed an equality for heads of households (wherein dependencies exist within the household and are attended to by women), and then counted the head of household as an *individual* who is independent and who can act on his own behalf. The equality for individuals overlays the equality for household heads, creating the illusion that dependencies do not exist and that the extension of equality to all, not only heads of households, is easily accomplished.

The illusion sustains a fiction that society is composed only of independent individuals who come together to form associations of social cooperation<sup>5</sup> and that an egalitarian notion of justice is served by considering those individuals to be free and equal (that is, self-originating sources of claims) who are equally situated and equally empowered. But social cooperation is required not only by autonomous and independently functioning individuals for the purposes of mutually improving life chances, but first and foremost for the purpose of

sustaining those who are not independently functioning, those who are not equally situated, and those who are unable to benefit from an equal empowerment. They are persons who are too young, too ill, too disabled, or too enfeebled by old age to care for themselves and to speak for themselves. These persons are our children, our parents, our siblings, our companions, and, at some points in life, ourselves. In states of dependency, we are unable to discharge the responsibilities and carry the burdens of the *equal* citizen; we have to rely on our caretaker to fulfill our basic needs; and we have no public or political voice except the voice of the dependency worker charged with articulating as well as meeting our needs. These dependencies are part of a network of interdependencies that form the central bonds of human social life. The care and attention to the vulnerabilities of dependent persons on the part of the dependency worker and the trust invested by the dependent in the dependency worker are among the most essential of social interactions.

When the fact of dependency and its social dimensions within the political conception of society is omitted, the secondary dependence of the dependency worker and the contribution of even the most dependent to the fabric of human relations is missed. The dependency worker acquires a dependence on others to supply the resources needed to sustain herself and the dependents who are in her charge. The dependency relation is a cooperative arrangement sustained by these resources, the labor of the dependency worker, and the responsiveness to care on the part of the cared-for.<sup>6</sup> The dependency worker may be unpaid, caring for familial dependents, or paid, caring for dependents in an institutional or home setting. Whether her work is done for pay or as a familial obligation,<sup>7</sup> the dependency worker attends to and voices the needs and desires of her charge in addition to, and sometimes at the expense of, her own; she assumes the same responsibilities other citizens have to each other and to themselves and assumes the added responsibility on behalf of one who cannot meet these responsibilities alone. In the distribution of burdens and benefits, most liberal egalitarian theories count each person as one. The incapacity of the dependent—to sustain her share of burdens and claim her share of benefits—and the obligation of the dependency worker—to assume the burdens of more than one and, at times, to put the benefits to her charge ahead of her own—ill-suits an economy of social cooperation presumed for an association of equals: that each will equally assume a share of the burdens and each will claim her own share of benefits. That women historically and customarily assume the role of dependency worker means that such an account of equality leaves out many women who retain their role and status as dependency workers. Because a redistribution of dependency work has too often exploited the situation of poor women, the dependency critique provides a framework for investigating theories and policies of equality across race and class as well as gender, and looks toward a more adequate understanding of gender equality.

## PRESUPPOSITIONS OF RAWLSIAN EQUALITY

Rawls identifies society "as a fair system of social cooperation" and looks for "principles specifying the basic rights and liberties and the forms of equality most appropriate to those cooperating, once they are regarded as citizens, as free and equal persons" (Rawls 1993, 27).

Free and equal persons come together in the initial situation to choose principles of justice they can accept when they do not know their own status in life, their own conception of the good, their own particular dispositions and psychological propensities, and to what generation they belong. In *Political Liberalism* Rawls again characterizes the modeling of the equality of citizens: "To model this equality in the original position we say that the parties, as representatives of those who meet the condition, are symmetrically situated. This requirement is fair because in establishing fair terms of social cooperation (in the case of the basic structure) the only relevant feature of persons is their possessing the moral powers . . . and their having the normal capacities to be a cooperating member of society over the course of a lifetime" (Rawls 1993, 79). He speaks of the "representation for equality" as "an easy matter" of situating the parties to the original position symmetrically to one another and describing them identically. And yet in this easy and seemingly transparent move, so much is presumed.

First, *all* citizens are idealized as "fully cooperating members of society *over the course of a complete life*" (Rawls 1980, 546; emphasis mine). Rawls continues, "The idealization means that everyone has sufficient intellectual powers to play a *normal* part in society, and no one suffers from *unusual* needs that are *especially difficult* to fulfill, for example *unusual and costly medical requirements*" (1980, 546; emphasis mine).<sup>8</sup> The theory is constructed for the "normal" situation and only afterwards made to accommodate *unusual* circumstances. But if the normal situation is not that of a fully functioning person who is a cooperating member throughout his or her lifetime, if we are instead all potential dependents and the "unusual" needs are an inevitable feature of any human community, and if these needs demand dependency workers constrained in the degree of their full cooperation as *independent* citizens, then the idealization does not merely grease the wheels of the Rawlsian construction but renders it of questionable value in providing a theory that will deliver justice for dependents and dependency workers.

Second, the symmetry that Rawls posits for the representatives in original position is bound to a notion of persons as *free* and equal. For a person to be free means here, in part, to view oneself as a "self-originating" or "self-authenticating source of valid claims." But can the dependency worker be seen as "a self-originating source of valid claims"? She is as likely to put forward the claims of her charge as she is to put forward her own. Furthermore, there is often no clear separation between claims that she makes on her own behalf and those

that originate with the charge—even though the conflict between these sets of claims can sometimes be palpable. If there is an important notion of freedom for the dependency worker, it is often one that recognizes the bond she shares with her dependent, even as it recognizes her own independent personhood.

Third, equality requires a measure. In Rawls's theory the comparative measure of interpersonal well-being is the index of primary goods, a list of goods that all persons require if they are to be able to realize their own conception of the good, given the moral powers that we have as free and equal persons. Rawls's moral powers do not include the responsiveness to vulnerability needed for care; nor do they include the good of being cared for when we become dependent or having the support we require to care for another if another becomes dependent on us. Consequently, the centrality of dependency in human life, and the concomitant value of human relationship and care in a relationship are absent from the list of primary goods.

Fourth, Rawls, building on Hume, identifies the "circumstances of justice." These are the circumstances under which the constitution of a society of free and equal persons who cooperate in the benefit and the burdens of social organization takes place. Missing from these is the circumstance of human development that incurs a period of dependency for each of us, a period during which we are unequally situated relative to those who are independent.<sup>9</sup>

Last, a sense of justice depends on an acceptance of a conception of social cooperation. Rawls writes of "the equally sufficient capacity (which I assume to be realized) to understand and to act from the *public conception of social cooperation*" (Rawls 1980, 546; emphasis mine). It is this notion of social cooperation that I explore here.

#### THE RAWLSIAN CONCEPTION OF SOCIAL COOPERATION

Social cooperation, writes Rawls, involves "fair terms of cooperation," not "simply . . . coordinated social activity efficiently organized and guided by publicly recognized rules to achieve some overall end" (1993, 300). That is, along with coordinated self-interested activity—what Rawls calls the *rational*—social cooperation demands a sense of what is fair—what Rawls calls the *reasonable*.

If they are both rational and reasonable, dependency concerns ought to be included within the features of a well-ordered society reflected in the public conception of social cooperation. To insist that it is reasonable to expect that the social order consider the care of dependents follows directly from the observation that any society into which we are born and expect to live out our lives contains those who are dependent and thus unable to realize any of their moral capacities—much less survive or thrive—independently. Only if a human society exists under especially hard conditions would we exempt its



members from the moral responsibility to care for its dependents. Thus it is reasonable to expect that a well-ordered society is one that attends to the needs of dependents and whatever else that necessitates.

Furthermore, we can argue for the rationality of each individual—acting in their own self-interest—to choose principles that would include such concerns among the terms of social cooperation, for given the developmental nature and the fragility of human life, it is likely that dependency will touch each of our lives in some form. Whether we find ourselves dependent or needing to care for a dependent, it is rational to suppose that we would wish to be cared for or to be provided the resources by which we can provide care.

Although the inclusion of dependency concerns within a conception of social cooperation is both reasonable and rational, the mention of such are not to be found. The acknowledgment of “normal health care” (1993, 21; emphasis mine), covers some dependency concerns, but leaves out the daily care of infants and young children—which are not *health* care—and prolonged illness or states of diminished independence (e.g., a handicapping condition), which arguably are not conventionally understood as “normal” health care.

Rawls has many times acknowledged limits to his theory and expressed hopes that the theory could be extended, but the omission of dependency concerns is a result of the characterization of social cooperation—a characterization which it is the goal of this essay to identify and dispute. “Fair terms of cooperation,” according to this view, articulates “an idea of reciprocity and mutuality: all who cooperate must benefit, or share in common burdens, in some appropriate fashion judged by a suitable benchmark of comparison” (Rawls 1993, 300). The point is made still sharper when Rawls writes, “Those who can take part in social cooperation over a complete life, and who are willing to honor the appropriate fair terms of agreement are regarded as equal citizens” (1993, 302).

But this understanding of social cooperation leaves out many persons. The second quotation cited in the preceding paragraph even suggests that Rawls does not extend *citizenship* to those who are permanently and so sufficiently incapacitated that they cannot be expected to restrict their freedoms in relevant ways<sup>10</sup> or to participate and so reciprocate in relevant ways. But why should the contingent fact that someone is born, let us say, sufficiently mentally disabled necessitate his or her exclusion from citizenship? There are some political activities the mentally disabled may not be able to engage in—for example, they may be incapable of enough political understanding to vote—but surely they need to receive the protections of political justice all the same.<sup>11</sup> The temporarily dependent can defer reciprocating until the individual regains full capability. But during our period of dependency we cannot reciprocate. Those who restrict their liberty, or use their labor, resources, or energy on our behalf cannot be repaid by us as long as we remain dependent. We may or may not be able to reciprocate at some future time, but the labor expended on our



behalf cannot be so expended on the condition that we will reciprocate: a child may not reach maturity; an ill person may die; a now needy and elderly parent may not have been an adequate provider or nurturer. Who then is to reciprocate the efforts of the caretaker?<sup>12</sup> Unless the needs of their caretakers are to be met in some other form of reciprocity, the only available moral characterizations of the caretaker's function is as exploitation or supererogation. When we consider relations of dependency, we see that they are not characterized as social cooperation according to fair terms of cooperation, and those whose social relations are defined by the dependency relation then fall outside the bounds of social cooperation as understood by Rawls's characterization.

Relations of dependency may be excluded from the discussion either because (1) they are not appropriately characterized as pertaining to *political* justice or (2) they pertain to political justice but not to a theory that holds that justice is fairness.<sup>13</sup> Is it then appropriate to exclude the dependent and the dependency worker from a fully adequate conception of social cooperation? First, if political justice is to express the principles of a well-ordered society, then it seems that dependency concerns do fall within the scope of political justice. A society that does not care for its dependents or that cares for them only by unfairly exploiting the labor of some cannot be said to be well-ordered any more than a society that enslaves part of its population. I cannot see how any thoughtful reflection would yield an opposing insight. Second, if the "fair terms of cooperation" are identified as the reasonable and the rational, then I have already shown that it is both reasonable and rational to consider dependency matters in formulating principles of justice for a well-ordered society. Furthermore, if we reorient our political insights so that we see the centrality of human relationship to our happiness and well-being, and we recognize dependency relations as foundational human relations, then it becomes obvious that such concerns are among the basic motivations for creating a social order, and that a just social order must concern itself with what fairness requires for both dependents—who, even in their neediness, contribute to the ongoing nature of human relationships—and the one who cares for dependents—whose social contribution is invisible when dependency is thought to be outside the social order. If our reflective judgments confirm that those who are dependent (whether temporarily or permanently) ought to be appropriately cared for, and if those reflections focus on the importance of the central human bonds that form around dependency needs, then a society is well-ordered only if it offers adequate support to dependents and those who care for them in relations of dependency.<sup>14</sup>

#### SOCIAL COOPERATION AS *DOULIA*

If fairness obtains only for those who are themselves fully functioning, have normal capacities, and are in social interactions with others who are similarly

endowed, then even if we insist that dependency concerns have a political dimension, justice as fairness will not pertain to dependency concerns. This idea of fairness and social cooperation is grounded on a notion of reciprocity alien to those in dependency relations. But if social cooperation can be seen to involve a second sort of interaction (similar to, but distinct from, the reciprocal interaction among those equally situated and equally empowered), then there is a way we can expand the conception of justice as fairness. Cooperation between persons where intergenerational needs are to be met will illustrate the point. When we consider the Family and Medical Leave Act, we see how it incorporates, to a limited degree, an expanded notion of reciprocity and social cooperation.

Families in modern industrial and urbanized societies are often not grounded in a community and often live far from other family members. Periods in which some family members are stressed by special dependency cares are particularly difficult. These are the stressful times that the FMLA is meant to alleviate. The situation of the postpartum mother who is caring for her newborn is especially interesting. Her need is most acute directly after childbirth when her infant is utterly dependent and her own body requires healing and rest—even for the production of her infant's food. Traditional societies sometimes mark this period as a time when the mother is entitled to special privileges and care. Contemporary mothers in the United States have had to make do with very inadequate provisions. At least until the enactment of FMLA (which as we will see only applies to some, not all, workers), the father (if present) has rarely been released from his employment, regardless of employment status; the mother is often pressured to return to paid employment as soon as possible, a situation alleviated but not fully remedied by FMLA; friends and relatives, whose assistance is not an option in FMLA, since it defines family narrowly, are rarely available to help and less so since so many women are now in the paid work force; and paid help, for those who can afford help, is the "baby nurse." Generally, however, it is not the baby who needs a nurse; the recuperating mother is normally capable of caring for the baby only if someone helps her take care of herself and her other duties. Adapting a strategy found in a number of traditional cultures, some have instituted a form of caretaking whereby the postpartum mother is assigned a postpartum care-giver, a *doula*, who assists the mother, and at times relieves her.<sup>15</sup> *Doula* originally meant slave or servant in Greek, but it is appropriated here to mean a person who renders a service to another who renders service to a dependent. A *doula* is not provided for in the FMLA, nor am I arguing here that it be provided. But I want to reflect on the principle embodied in the person of the *doula* and in the practice which we will call *doulia*.<sup>16</sup>

Let us extend the idea of a *doula* beyond one who provides a service to the postpartum mother, so that it describes those who attend to the needs of those who attend to another who is utterly dependent upon them (whether tempo-

rarily or permanently). In so doing we displace both the relation of servant and served and the traditional relation of reciprocity among equals as models of cooperative activity and put at the center a relation of *nested dependencies*. These nested dependencies link those who help and those who require help to give aid to ones who cannot help themselves. Extending the notion of the service performed by the doula, let us speak of "doulia" to indicate a concept by which service is rendered to those who become needy by virtue of attending to those in need, so that all can be well cared for.<sup>17</sup> The form of social cooperation that emerges from the relation between the doula, the mother, and the infant is captured by the colloquial phrase "What goes round comes round" when it is used to describe a form of cooperation often engaged in by members of poorer communities:<sup>18</sup> I, as a member of the community, help another who requires my help, with the expectation that someone in the community, not necessarily the individual whom I helped, will come to my aid if and when that is required.

This notion of social cooperation is not as far from the Rawlsian project as it may at first seem. Rawls understands that society is an association that persists through generations and that our efforts to pass the world on to the next generation without depleting its resources—a responsibility entailed by the "just savings principle"—is not reciprocated to us by those we benefit. The "chronological unfairness" to which Rawls refers resembles the cooperative idea embodied in doulia. And indeed, both the savings principle and doulia are consequences of the facts of human development and generation: as the benefit of the previous generation passes through us to the next and so on, the care a mother bestows on her child calls not only for reciprocation from the adult child but also for the grown children to care appropriately for a future generation.<sup>19</sup>

But how, one might ask, does this private interaction of mother, infant, and doula translate into a public conception of social cooperation? For this we need a public conception of doulia. To urge that the well-being of dependents *and* their caretakers *and* the relation itself between caretaker and dependent must be seen as requirements of public understanding of social cooperation, I invoke the fact that dependency is inherent to the human condition, that it often marks our most profound attachments, that care of a dependent morally obliges the dependency worker to give a certain priority to the welfare of her charge, and that the constitution of dependency relations is such that the parties are of necessity unequal. That is, it is the responsibility of the public order to ensure that a dependent has a caretaker, that the dependency relation is respected, and that the caretaker is adequately provided for so that her dependency work does not in turn deplete her. Without a broadened conception of reciprocity and a suitably modified sense of fairness, the dependency worker and dependent cannot be embraced within the bonds of social cooperation and accorded their full moral worth as equals in a well-ordered society.

In the next section, I argue that to the extent that the FMLA recognizes the dependency responsibilities of those engaged in paid employment and accepts a public responsibility to assure that those in a relation of dependency have adequate care and can give adequate care, it identifies social cooperation in the enlarged sense of *doulia*. Where it restricts leave time and opportunities, and where it limits resources allocated to those in relations of dependency, it reverts to the traditional liberal model.

#### READING THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The FMLA is, in many ways, emblematic of the sort of legislation and social policy that is required to meet dependency needs of paid workers. It permits up to twelve workweeks of unpaid leave within any twelve-month period for one or more of the following reasons:

- (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
- (C) In order to care for the spouse, or son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee. (Public Law 103-3—Feb. 5, 1993, 107 Stat. 9)

This law expressly recognizes the dependency relations that I have argued are so grievously ignored in much political theory. And it recognizes the importance of acknowledging some of the demands of dependency not only of the employee herself, but those of the individuals who depend on her. Given that the United States has had no provisions set by law to address the needs of paid employees with such concerns, the Family and Medical Leave Act is an immensely important piece of legislation.

But the law is relatively limited in its scope and in the real benefits it provides, and so its contribution to fair equality for all is circumscribed. I suggest that the limitations are traceable to an ideology of reciprocity and equality that continues to push dependency concerns back into the domain of the private, that is, to a conception of dependency concerns which still fails to recognize the extent to which addressing these needs is a matter of the social cooperation required for a well-ordered and just society.

Among the limitations of the act are the following: leave is unpaid; employers with less than fifty employees are exempt from the FMLA; and the FMLA construes family in relatively traditional terms. Let us look at the "Findings

and Purposes" of the FMLA, and then return to consider if these bear on the limitations of the act.

(a) FINDINGS.—Congress finds that—

- (1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
- (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;
- (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;
- (4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;
- (5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and
- (6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are that gender. (Public Law 103-3, 107 Stat. 6-7)

First among the findings is that the number of single-parent households and two-parent households in which the parent(s) all work has significantly increased. The fact that this counts as a finding for a bill such as the FMLA is indicative of the way in which the breakdown of the sexual division of labor on the male side of the divide—expanding the paid labor force to include more women—is putting pressure on de-genderizing the female side of the divide—the largely private and unpaid care for dependents. This is the first significant step in understanding that dependency concerns need to be a part of the public understanding of social cooperation: that decisions to undertake dependency care cannot remain matters of private decision making with only private consequences, but belong within the public arena.

The second finding serves to recognize the nonfungibility of many dependency relations—e. g., the need of a sick child to have a parent attending her—but also moves retrogressively in the direction of the privatization of dependency care by suggesting that the importance of early child rearing and care of family members who have serious health conditions is for “the development of children and the family unit” rather than for the general welfare of the nation and so a public feature of social cooperation.

The third finding points to the need for policies that avoid pitting job security against parenting demands. Both job security and parenting are regarded as matters that are important for the well-being of individuals. The law recognizes the importance of the state in assuring both goods to those individuals who may be torn between competing concerns, and so it establishes a responsibility of public institutions to assure that individuals can fulfill dependency responsibilities as well as job-related duties, and that the burden of dependency work must sit not solely on the shoulders of those who undertake these obligations.<sup>20</sup> But how far does it go? Not very far. The leave is unpaid and the exemption for employers of fewer than fifty persons is not insignificant. There is no acknowledgment of public responsibility to assure job security, given parental responsibility for children. Why should parenting responsibilities be privileged with respect to job security? The basis for securing such a privileged relation is tenuous indeed, as the law's limited scope indicates.

It is here that a public conception of *doulia* needs to be brought into play—the reciprocity of *doulia*. More than “accommodation” is required. Accommodation presumes the situation of employment as it is now; accommodation neither challenges concepts of what counts as part of the economy nor employment conditions that presume privatized dependency arrangements. To acknowledge the contribution of those engaged in dependency work to the larger society—the contribution to the continuity, stability, and resources of society—means that the larger society has an obligation to support dependency work. Supporting dependency work means relieving the dependency worker of some of the costs and burdens of responsibility for the care of dependents. The argument from a public conception of *doulia* is that *fairness* demands that business or government—whatever public institutions are appropriate—carry some of the costs of dependency work so that dependents within our society can be properly cared for without exploiting dependency workers.

The fourth finding, which addresses the inadequate job security for workers with serious or prolonged health conditions, is an acknowledgment of the vulnerability to dependency that is shared by all employees.

The fifth and sixth findings are of special interest, for they acknowledge the inequity that results from the gender-specific nature of much dependency work. That work has occupied the female side of the sexual division of labor. The fifth and sixth findings call our attention to the failure of efforts to bring about gender equality on the side of the sexual division of labor traditionally occupied by men when the labor on the other side of the divide—the side traditionally occupied by women (see Hadfield 1993) remains the sole, and unsupported, responsibility of women. The justification for the bill that can be garnered from findings five and six is an equality argument, an inference sustained by the fourth and fifth stated purposes of the bill (see below). But

until we reconstrue equality and political conceptions such as justice and social cooperation, and until it becomes a public priority to refashion sensibilities accordingly, the FMLA cannot alter the gender-structured nature of dependency concerns nor can it move us sufficiently in the direction of understanding that dependency work cannot be privatized and genderized without violating justice and equality.

Now let us now look at the "Purposes" of the act. I reproduce these in full: (b) PURPOSES.—It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause. (Public Law 103-3, 107 Stat. 6-7)

The purposes of this act recognize "national interests in preserving family integrity." But the act does not identify what about family integrity is important for the national interest, and so it cannot count anything but a limited set of traditional structures as family. The purpose stated in (3) is to "accomplish the purposes described in (1) and (2) in a manner that accommodates the legitimate interests of employers." But if there are national interests in preserving family integrity, why should (1) and (2) not trump the interests of employers? And if they don't, what are the consequences?

In the light of the reading of the "Findings and Purposes," let us consider what I have listed as the limitations of the act. First, the leave is unpaid—all twelve weeks of permissible leave time are unpaid. To take off from work to attend a sick child then remains a luxury, or a factor moving one closer to impoverishment. Not only is the United States one of the last industrialized countries to have a family leave policy, it is also the only one in which the



leave is entirely unpaid.<sup>21</sup> One of the purported findings to which the act is addressed is the increase in the number of single-parent households. But how many single-parent employees can afford to be without pay for three months of the year? How are they supposed to put food on the table of a sick and needy person? One need not argue that the full twelve weeks ought to be paid, but surely some of that time needs to be paid leave—by law, not merely by the goodwill of some employers who provide paid leave—if it is to have a substantial impact on the practices of single-parent households—which now constitute one-fourth of all households.<sup>22</sup>

Second, employers with fewer than fifty employees are exempt from the family leave policy. But employees in companies with fewer than fifty employees make up a very large portion of the American work force. In fact, they make up the *majority* of the work force.<sup>23</sup> That means that a majority of paid employees in this country are not covered under the FMLA! What is clear, again, is that heeding dependency concerns is not viewed as a general responsibility. These can be trumped by the employers' needs—benefits for whom are not only thought to be personal but also to be part of the economic well-being of the wider public—and nothing is put in place to meet the putatively *personal* demands of the employee, even when family integrity is identified as a "national interest." Dependency care is not counted as part of the economic structure; it does not figure into the Gross National Product.

Third, the FMLA construes family in relatively traditional terms. Although *parent* includes not only biological parents but also any individuals who have stood in *loco parentis*, and the term *son or daughter* is defined as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a parent standing in *loco parentis*," the term "spouse" is restricted to husband or wife, leaving out nonmarried adults who are cohabitating, gay and lesbian families, extended families, and so forth. Contrast this with the "nurturance leave" proposed by feminist legal theorist Nadine Taub (1984, 85), which argues for nurturance leaves for any adult members of a household. If the stress in our policies is to support dependency relations because the fabric of social structure is founded on the maintenance of such relations, then the relations themselves and not the social institutions in which they have traditionally been lodged ought to become the focus of our concern.

The decisions or situations from which these dependency relations result may appear to be private decisions between the parties involved—decisions between parties which do not devolve obligations on third parties. But there are some social institutions which appear to be formed by private decisions between the parties involved and which nonetheless induce obligations in third parties.<sup>24</sup> Marriage is such an institution. The private decision another and I make to be a married couple means that socially and legally certain actions are binding on my employer, my landlord, hospitals, insurance agencies, the IRS, and so on. In an analogous fashion, the private decision to take

on the work of dependency and to form a dependency relation with a charge ought to induce third party obligations to support the dependency worker in his or her care for the charge. In the case of marriage, the binding obligations are part of a larger societal interest in maintaining the institution of marriage. Recognition of its legal and social status means that the existence of a connection between two individuals is acknowledged.

A major reason, however, to recognize such institutions is that they are the loci of the care and sustenance of dependents. The relation of dependency is morally and socially still more salient and fundamental than marriage, and so forms the very ground of this feature of the marriage relation. But the social technology of traditional marriage and family makes the dependency worker and charge within the nuclear family vulnerable to the vicissitudes of the marriage arrangement and vulnerable in a relation of (to use Amartya Sen's term) "cooperative conflict."<sup>25</sup> The claim on third parties to support and help sustain the dependency relation, independent of a particular arrangement such as marriage, has morally the stronger claim. This claim is realized in the public obligation of social cooperation I have called *doulia*. The argument for such *doulia* transcends the institution of marriage as traditionally understood and family arrangements sanctioned by traditional marriage and biological relation. Its basis is the undertaking of care, and responsibility for care, and the dependency to which the caretaker then becomes vulnerable.

The FMLA is an example of the legislative and policy directions in which the dependency critique urges us, but it remains still all too firmly grounded in a conception of society primarily constituted by those who are healthy, autonomous adults, who, as Rawls would have it, are "fully functioning" and for whom justice requires the reciprocity of those equally situated. We need to shift our vision and see society as constituted by the nested dependencies that require a concept of justice between persons who are equal in their connectedness but unequal in their vulnerability and for whom a notion of *doulia*—of caring for those who care—is central.

The arguments in this essay have been directed at demonstrating that the Rawlsian and the liberal account of social cooperation is at best incomplete and at worst inadequate, and that legislation such as the FMLA falls short of meeting the needs of dependency demands as long as it remains within a framework which is represented in the Rawlsian account. The claim here is that a society cannot be well-ordered, that is, it cannot be one in which all its members are sustained and included within the ideal of equality, if it fails to be a society characterized by care. For a society to be characterized by care, we need something other than the affirmation of the importance of family integrity. We need structures that will assure that dependency work, whether done in families or other social institutions, can be carried out under non-exploitative conditions. What is required is that the public understanding of social cooperation include respect for the importance of caring for one another

and the value of receiving care and giving care. It then becomes a matter of political justice for basic institutions to *make provisions for and facilitate satisfactory dependency relations*. The only assurance that both dependents and dependency workers are well cared for and can benefit from an egalitarian ideal is the inclusion of enabling conditions and resources for care through the social institutions that reflect the public understanding of social cooperation. For a well-ordered society, therefore, to instill in its citizens a sense of justice and a sense of what is right, it must also be sensitive to our vulnerability to dependency and to the vulnerability of those who attend to dependents.<sup>26</sup> Rawls speaks of the need to give priority to the basic liberties and points out that even when the political will does not yet exist to do what is required (as it does not in the society in which we live), "part of the political task is to help fashion it" (1993, 297). The possibilities of the FMLA and its shortcomings indicate that it is no less the case that since the political will to imbue citizens with such a sensitivity and sense of priority for care does not yet exist, "part of the political task is to help fashion it."

## NOTES

I thank the editors of this special issue and the anonymous reviewers for their suggestions. I also thank Lisa Conradi for her comments at the Conference on Feminism and Social Policy, the audience at the session for their remarks, and members of the New York City Society for Women in Philosophy Research Group in Ethical, Social and Political Philosophy for their helpful discussion of an earlier draft.

1. The literature is extensive. I mention but a few discussions of difference feminists. See Allen (1987); hooks (1987); Kay (1985); Littleton (1987); Minow (1990); Scales-Trent (1989); West (1987); Williams (1982, 1985); Wolgast (1980).

2. bell hooks (1987) asks, "Since men are not equals in white supremacist, capitalist, patriarchal class structure, which men do women want to be equal to?" The point stressed by a number of feminists and captured by hooks is that the striving for equality on the part of the largely white and middle-class women's movement presumes an egalitarianism into which women can integrate themselves. In Kittay (N.d.), I call this the "heterogeneity critique." It speaks to a heterogeneity among women not acknowledged in demands for sexual equality. Because the heterogeneity critique is aimed less at any particular formulation of equality than at a prevailing formulation of sex equality which masks intragender inequalities, inequalities that result from race, class, sexual orientation, age, and disabilities, as well cross-gender inequalities, it is orthogonal to the other critiques. The force of the heterogeneity critiques emerges with special poignancy when one looks at the racial complexion of dependency workers in countries blighted by racial inequity.

3. Catharine MacKinnon is the main exponent of this view (1987, 1989).

4. Several feminist theorists have regarded the work of liberal political philosophers with an eye toward issues of dependency without articulating the dependency critique. Those who have done so have spoken of "the need for more than justice," as Baier (1987) entitles one work expounding this theme (see also Baier 1985, 1986). Others, such as

Patemen (1988) and Held (1987a, 1987b) have shed light on the unacknowledged gender considerations that undergird a social contract engaged in by men. The work of Okin (1979, 1989a, 1989b) brings the historical and contemporary neglect of women's involvement in dependency to the forefront of her political considerations. Okin has been the most articulate, yet sympathetic critic of the influential political theory of John Rawls on matters that concern familial dependency relations. Tronto's (1993) work bringing the notion of care into the arena of political theory may also be seen to be a contribution to the dependency critique.

5. See Young (N.d.) for an interesting discussion of a false ideal of independence in understanding citizenship.

6. Tronto (1993) points out that caring is an activity that requires several stages for its completion: caring about, caring for, response to care. We may note that the person cared for need be only potentially responsive in order for her to be a part of a dependency relation.

7. I thank John Baker for suggesting that I make explicit my view that the dependency critique is meant to hold for dependency workers whether they voluntarily take on that task or whether they are perform burdened with it.

8. Rawls repeats a similar statement in *Political Liberalism*: "The normal range is specified as follows: since the fundamental problem of justice concerns the relations among those who are full and active participants in society, and directly or indirectly associated together over the course of a whole life, it is reasonable to assume that everyone has physical needs and psychological capacities within some normal range. Thus the problem of special health care and how to treat mentally defective are set. If we can work out a viable theory for the normal range, we can attempt to handle these other cases later" (Rawls 1993, 272 n. 10; emphasis is mine).

9. Each of the above points, as well as a discussion of social cooperation are elaborated in Kittay (unpublished).

10. In *A Theory of Justice*, Rawls writes: "The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to the restrictions have a right to a similar acquiescence on the part of those who have benefitted from their submission" (Rawls 1971, 112).

11. I thank Susan Okin for valuable discussion on this point.

12. It needs to be pointed out that the paid dependency worker is often paid not by the dependent, but by someone who stands in a relation of guardianship or stewardship to the dependent.

13. "How deep a fault this is must wait until the case itself can be examined," says Rawls and reminds us that political justice needs to be complemented by additional virtues (1993, 21).

14. When we look back to *A Theory of Justice*, we see that for Rawls the problem appears to be how to have strangers cooperate. Friends and intimate associates, so the supposition goes, cooperate because they have ties of sentiment. But consider, when a mother acts toward a child through ties of sentiment, many of her own needs—often including the need to earn an income—go unattended unless she has intimate ties to someone who is willing to cooperate and attend her needs. That is, her ties of sentiment provide little in the way of societal cooperative efforts that suffice to sustain her and her children. (Furthermore, the assumption that the mother's cooperative behavior toward her children are motivated by parental ties of sentiment makes a puzzle of the apparent frequency with which men so often feel less obligated by ties of sentiment to provide for

their children when no longer involved with the mother—U.S. fathers currently owe mothers \$24 billion in unpaid child support, according to the *Report of the Federal Office of Child Support Enforcement* [1990]). It is just such a precarious dependence on ties of sentiment on the part of those (women mostly) who do dependency work, especially when it is unpaid—that leave them (again, women for the most part) so vulnerable to exploitation, (male) domination, and poverty. It is such precariousness that makes her inclusion in the political sphere so tentative.

15. See Aronow (1993). One of the doulas “recalls arriving at home late morning to find mothers who haven’t eaten or dressed. ‘They are so concerned that the baby is O.K., they forget to take care of themselves’ ” (Aronow 1993, 8).

16. I wish to thank Elfie Raymond for helping me search for a term to capture the concept articulated here.

17. See Stacks (1974) for a discussion of this ethic in the African American community. What Stacks describes as “swapping” is more like a one-to-one reciprocal arrangement than what I am trying to characterize by *doulia*. However, it resembles *doulia* insofar as reciprocity is deferred and is geared to the meeting of needs as they arise rather than as payment qua tit-for-tat exchanges.

18. This is a phrase Rawls borrows from Alexander Herzen. See Rawls (1971, 291).

19. I do not mean to suggest that we have a duty to *have* children because we have been cared for, but that we owe to any children we may have a quality of care at least as high as the care we received. And furthermore that the care bestowed on us is, in fact *reciprocated*, through care to the next generation.

20. That burden can be measured, in part, in economic terms. Estimates of the costs to workers of not having a parental leave only are \$607 million versus approximately \$110 million as based on the more generous leave policies of earlier versions of the act (Spalter-Roth and Hartmann 1990, 42). The cost is greatest to those least able to bear these costs, namely workers with the lowest incomes, with African American men doing worse than white men, white women doing worse than white men, and African American women doing worse than white women (Spalter-Roth and Hartmann 1990, 2833). See Spalter-Roth and Hartmann (1990) for a detailed analysis. It is curious that in speaking of the cost of meeting dependency needs, the cost to businesses is seen as a public concern, while the cost to the workers who bear the major burden is regarded a private concern.

21. Ellen Gilensky, Families and Work Institute, personal communication with author, New York City, 1 August 1994.

22. On the morning of the day I was to read this paper at the Feminist Theory and Social Policy Conference held at the University of Pittsburgh, the public radio station announced on its news program that in Pittsburgh the figure was one-third of all households.

23. Only 44 percent of women workers and 52 percent of men workers are covered by the current act which exempts employers with fewer than fifty employees (see Spalter-Roth and Hartmann 1990, 44).

24. This idea can be found in Kaplan (1993).

25. Sen (1990) has argued this point with respect to certain third world countries. Borrowing from the work of Okin (1989) and others, I extend Sen’s argument to apply to traditional marriage within the industrialized world as well (Kittay N.d.).

26. See Goodin (1985) for a very useful discussion of our obligations to protect those who are vulnerable.

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