

BOOK REVIEW

A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions

NICOLE BUSBY AND GRACE JAMES

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The task of caring for dependent members of society is often regarded as lying beyond legal and political concern.¹ Instead, responsibility for care is delegated to the private family unit, where it is predominantly carried out by its female members.² Demonstrating adherence to the classical liberal values of autonomy and state minimalism, the state also expects the family unit to be economically self-sufficient, with dependency on the state being heavily stigmatized.³ Attempting to fulfil this dual role produces inevitable tensions and conflicts, as duties in the home impact on an individual's ability to undertake paid work. Historically, this was achieved through role specialization. The sexes were viewed as occupying 'separate spheres', with women primarily tasked with unpaid caregiving and domestic work in the home.⁴ In more recent decades, this has given way to a discourse of formal legal equality and a call for the state to remove any remaining obstacles to women's full participation in the paid workforce.

In this novel and path-breaking book, Nicole Busby and Grace James analyse and chart the state's various attempts over the decades, and especially following the Second

¹ See for example R. Harding, *Duties to Care: Dementia, Relationality and Law* (2017).

² See for example A. Barlow, 'Configuration(s) of Unpaid Caregiving within Current Legal Discourse in and around the Family' (2007) 58 *Northern Ireland Legal Q.* 251.

³ M. A. Fineman, *The Autonomy Myth* (2004).

⁴ J. Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' (2014) 22 *Feminist Legal Studies* 1.

World War, to reconcile and balance paid work with caregiving duties through legal regulation. In particular, the authors are concerned with ‘whose interests have been, and continue to be, promoted by the adoption of particular strategies and policies’, as well as ‘whose interests have been, and continue to be, sidelined or ignored’ (p. 2). Throughout the book, the authors employ Fineman’s influential vulnerability theory as a lens through which their historical analysis takes place.⁵ As Fineman explains, vulnerability theory involves a rejection of the dominant liberal assumptions of autonomous self-sufficiency as harmful and unrealistic, arguing instead that the human condition consists of an inescapable and universal embodied vulnerability, to which the state must respond.⁶ As Busby and James outline in the first chapter, their analysis focuses on three core components of vulnerability theory: the centrality of the ‘vulnerable subject’ (which recognizes that the human life course is marked by periods of inevitable dependency and the need for caregiving); the pivotal role of state institutions and relationships in building resilience to inevitable vulnerability; and, finally, the need for a ‘responsive state’ that responds to, rather than stigmatizes, dependency in all of its forms. The authors return to these concepts throughout the following chapters, arguing that the state’s various policies at achieving ‘work–family balance’ (WFB) over the decades are united by their failure to acknowledge the realities of shared vulnerability and dependency.

In the second chapter, the authors explore the legal treatment of women’s work. Applying the historical lens, the chapter sketches a chronology of women’s work (both paid and unpaid), from the Industrial Revolution to the present day. As the authors argue, women’s participation in the paid workforce has always been shaped and constrained by parenthood and domestic obligations in a way that men’s work has not (p. 25). This

⁵ See M. A. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale J. of Law & Feminism* 1; M. A. Fineman, ‘Vulnerability and Inevitable Inequality’ (2017) 4 *Oslo Law Rev.* 133.

⁶ *Id.* (2008).

continues, despite the prevailing rhetoric of formal equality between the sexes over the past decades.

The chapter notes the rise in women working outside the home in the post-war era, including an increasing number returning to work after having children. Since the 1960s, legal regulation has predominantly focused on seeking to remove perceived obstacles that prevented women from working outside the home. In the 1960s and 1970s, this took the form of various anti-discrimination legislation, centred largely on pregnancy and marital status. The 1980s and 1990s witnessed the rise of ‘flexible working’ policies, whereas New Labour promised to make work ‘family friendly’ at the turn of the century. However, as the authors argue, while legal regulation has aimed to facilitate women’s participation in paid work, it continues to be based around a ‘standard worker’ model, which assumes that the typical employee is unencumbered by caring obligations. There has been no sustained attempt by the state to challenge the gendered division of caregiving within the home. Care itself, as the authors note, is gender neutral, yet pervasive ideologies ensure that it is largely performed by women (p. 57). Even in the present day, women remain tied to these ideologies and are constructed as ‘other’ within the legal framework due to an inability to conform to the demands of the standard worker model. As the authors argue, ‘women’s relationship with paid work has been shaped and directed by successive generations of policymakers with very little strategic and sustained thinking about how to reconcile it with the competing demands of unpaid care’ (p. 25). Applying the vulnerability lens and echoing Fineman’s criticism of anti-discrimination measures,⁷ the authors note the inadequacy of the state’s response to women’s work. Instead, they call for a reorganization of the state and its institutions that acknowledges that ‘rather than being outside of the norms of social and economic behaviour, dependency and caregiving are inevitable constituents of the human experience’ (p. 57).

⁷ Fineman, *op. cit.* (2017), n. 5.

The third chapter explores how the legal WFB framework attempts to regulate how mothers and fathers can combine caregiving responsibilities with paid work. Returning to the arguments developed in Chapter 2, the authors emphasize how mothers' ability to work has always been dependent on the extent to which childcare is provided by the state, drawing for instance on the provision of state-funded nurseries during the war years, which enabled women to carry out paid work, but were later withdrawn when the state's dependency on women's paid work subsided. The authors point to the need for the law to 'challenge and attempt to overcome the underpinning stereotypical assumptions which have their roots in outdated and unsubstantiated essentialist beliefs such as the delimiting effects of pregnancy and motherhood on women's labour force participation' (p. 80). The chapter also offers an insightful analysis of men's role in the workplace, pointing to the ways in which their relationship to care is shaped by ideologies of fatherhood, which assume 'paternal absence from care' (p. 83). The authors explain that

the notion of man as breadwinner or economic provider continues to define conceptions of masculinity and expectations of good fathering ... The other assumption on which the ideology focuses is the non-resident father with his absence from the family home used as a means of limiting and penalising his engagement in care. (p. 83)

In common with Fineman,⁸ the authors critique the private family, arguing that 'the delegation of care to the family detracts from society's shared responsibility for care which should be properly discharged through the fair and equal allocation of resources by the state' (p. 89). As they argue, this must be challenged through a reframing of law and other state

⁸ M. A. Fineman, 'The Nature of Dependencies and Welfare 'Reform'' (2015/2016) 36 *Santa Clara Law Rev.* 287, at 288.

institutions around a hypothetical vulnerable legal subject who is both a caregiver and in need of care at various stages of life.

The fourth chapter centres on the impact of legal regulation on work and family balance on children's welfare, arguing that 'children's welfare is not of primary concern to those who seek to regulate working families' (p. 90). The chapter traces the change in attitudes towards children's role in society and its reflection in legal regulation, particularly in terms of outlawing child labour in the late nineteenth century. The authors note that child labour was only ended when it ceased to be necessary for society. Previously, many families had been dependent on the wages of their children. Although children's position is very different today, the authors point to the prevalence of family privacy throughout the history of legal regulation, with child welfare being predominantly seen as the responsibility of the individual family unit.

While there has been increased focus on the problem of child poverty in recent times, especially during the current period of austerity policies, the authors criticize the fact that this remains framed in terms of a failure of the family, for which paid work is posited as the answer. In the development of the legal framework, children's welfare has never occupied a central position. The state regards children as inevitably dependent and vulnerable but also as a burden and encroachment on adult autonomy. The authors argue that the lack of attention to children's welfare is illustrative of the state's tendency to prioritize adulthood and autonomous self-sufficiency. By contrast, they argue that the vulnerability approach 'positions autonomy independence and self-sufficiency as only one of a range of developmental stages that an individual passes through in the course of a "normal" life span' (p. 114). They propose greater state attention to how resilience can be built during childhood and how caregiving can be reallocated, moving away from reproducing gender inequality.

In the final substantive chapter, the authors examine the unique temporalities involved in the legal regulation of eldercare. As they note, ‘caring for an older relative who is dependent can be experienced as a “journey”, the duration or destination of which is not always clearly defined’ (p. 118). They highlight how the legal framework largely marginalizes elder care, focusing instead on childcare. The historical analysis considers pre-1940s when elderly people were expected to conform to ideals of autonomy, meaning that many were forced into working or stigmatized for their inability to do so. The authors acknowledge that the 1950s and 1960s, following the introduction of the cradle-to-grave provisions of the welfare state, represented a ‘golden age’ for older people, where the state supported them in later life. However, by the 1970s, much of this support had begun to unravel, with increasing dependence on neoliberal norms and attacks on state provision. This has continued to the present day, with a strong narrative that the individual bears personal responsibility for financial provision for old age.

The chapter discusses the problems involved with excessive state paternalism, arguing that ‘although superficially appealing in that it appears in the first instance to accept that the state has a responsibility towards the members of its older citizens ... it positions old age as a “separate category of human existence”’ (p. 144). The state’s attitude towards the elderly illustrates the tendency to prioritize autonomous adulthood, ignoring the inevitable temporal phases of the human condition. As Grear has argued, the ideal ‘autonomous liberal subject’ underlying law and policy represents a mere snapshot of the human life course.⁹ The state expects its citizens to be self-sufficient, meaning that dependency arising in older age is often stigmatized, despite its inevitability. The authors conclude the chapter by pointing to the need

⁹ A. Grear, ‘Vulnerability, Advanced Global Capitalism and Co-Symptomatic Injustice: Locating the Vulnerable Subject’ in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds M. A. Fineman and A. Grear (2013) 41.

for a broader commitment to supporting older people or carers whose capacity to engage in paid work might be limited.

The concluding chapter calls for a commitment to resilience to universal inherent vulnerability. The authors stress that this can only be achieved through the reordering of the state's institutions. These needs to be focused around a hypothetical vulnerable subject and needs to acknowledge dependency 'not as an unexpected anomaly or an exception to the normalised state of autonomy but as an inevitable and positive consequence of the human condition' (p. 155). The book concludes that the vulnerability perspective is the key to ensuring that common interests can be met through the future regulation of work and families.

Busby and James' book is likely to be of significant interest to feminist labour law and family law scholars and provides a highly engaging analysis of how law has sought to manage the tensions arising between the family and paid work in recent history. It illustrates that, despite significant legal measures to ensure formal workplace equality, women continue to participate in the workforce on a different basis to men. In addition, the book forms an important contribution to the growing body of work that encompasses vulnerability theory. Fineman's rejection of neoliberal assumptions about personhood, as well as the traditional identity-focused 'solutions' of formal legal equality, forces a new and radical approach to law reform, with which this book engages directly.

Legal history as a tool for feminist scholarship and activism is fast gaining traction as a way to 'challenge, and ultimately transform our understanding of the past and present, and indeed the future'.¹⁰ In particular, Auchmuty and Rackley point out that the dominant narrative of the law's seamless progress often obscures the realities of feminist struggles for

¹⁰ R. Auchmuty and E. Rackley, 'The Case for Feminist Legal History' (2020) *Oxford J. of Legal Studies* 878, at 879.

reform.¹¹ This point can also be seen Busby and James' book, which disrupts the belief that women have now achieved workplace equality and that any remaining differences are due to women's individual choices.¹² The charting of the history of WFB policies highlights the ebbs and flows of trying to achieve balance, rather than a smooth and linear progression towards equality. While progress may be made on some fronts, this is susceptible to being scaled back if the political climate changes. For example, the past decade's austerity politics and cuts to public services have eroded some of the progress achieved at the end of the twentieth century. It is also rapidly becoming evident that the COVID-19 pandemic is having a disproportionate negative impact on women's work. This therefore underscores Auchmuty and Rackley's point that 'while no one would argue that there has been no progress in relation to the position of women over the last 100 years or so, feminist legal history reminds us that this progress has been uneven, unequal and incomplete'.¹³

The book's combination of historical analysis with the vulnerability lens illustrates that the different WFB policies over the past century are united in their failure to recognize the inherently vulnerable human condition. Throughout the book, Busby and James emphasize the inadequacy of formal legal equality approaches, which are based on the autonomous liberal subject as the norm. This also echoes Fineman's rejection of narrowly formed categories of identity that fail to take into account the fragility of the human condition and its temporal course.¹⁴ Women's equality at work cannot be won purely through attention to narrowly defined circumstances in which they can be seen as needing additional protections, such as during pregnancy or child rearing. For instance, a legal system that offers protection against sex discrimination but simultaneously fails to provide for older age

¹¹ Id.

¹² This is an argument made by R. Deech, 'What's a Woman Worth?' (2009) 14 *Family Law* 1140.

¹³ Auchmuty and Rackley, op. cit., n. 10, p. 900.

¹⁴ M. A. Fineman, 'Feminism, Masculinities, and Multiple Identities' (2012/2013) 13 *Nevada Law J.* 619.

remains inadequate and reflects the liberal tendency to disregard periods of inevitable dependency or bodily decline in favour of the permanently strong body of the liberal subject. In this way, it is evident that, despite the very significant inroads made towards ending sex discrimination during the 1960s and 1970s, inequalities remain, as this was done on a piecemeal basis and with the goal of the unburdened standard worker in mind. An aim to enable increasing numbers of women to conform to the standard worker model is an impossibility, since society would be unable to function without all of the unpaid caring activity that is currently largely concealed within the private family unit. Instead, the vulnerable subject, throughout the life course, must form the centre of any legal or policy reform. It is only through paying attention to this that any genuine balance can be found.

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