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384 U.S. 436, *; 86 S. Ct. 1602, **; 16 L. Ed. 2d 694, ***; 1966 U.S. LEXIS 2817 Parallel citations

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No. 759

SUPREME COURT OF THE UNITED STATES

384 U.S. 436; 86 S. Ct. 1602; 16 L. Ed. 2d 694; 1966 U.S. LEXIS 2817; 10 Ohio Misc. 9; 36 Ohio Op. 2d 237; 10 A.L.R.3d 974

February 28, 1965-March 1, 1966, Argued
June 13, 1966, Decided *

* Together with No. 760, Vignera v. New York, on certiorari to the Court of Appeals of New York and No. 761, Westover v. United States, on certiorari to the United States Court of Appeals for the Ninth Circuit, both argued February 28-March 1, 1966; and No. 584, California v. Stewart, on certiorari to the Supreme Court of California, argued February 28-March 2, 1966.

PRIOR HISTORY: CERTIORARI TO THE SUPREME COURT OF ARIZONA.

DISPOSITION: 98 Ariz. 18, 401 P. 2d 721; 15 N. Y. 2d 970, 207 N. E. 2d 527; 16 N. Y. 2d 614, 209 N. E. 2d 110; 342 F.2d 684, reversed; 62 Cal. 2d 571, 400 P. 2d 97, affirmed.

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CASE SUMMARY

PROCEDURAL POSTURE: Certiorari was granted to review a judgment from the Supreme Court of Arizona for this and three other similar cases, to determine the admissibility of statements obtained from defendant, who was subjected to custodial police interrogation, and the necessity for procedures assuring that defendant was accorded his privilege under the U.S. Const. amend. V not to be compelled to incriminate himself.

OVERVIEW: The United States Supreme Court reversed the judgment of three cases, and affirmed the fourth. When an individual was taken into custody and subjected to questioning, the U.S. Const. amend. V privilege against self-incrimination was jeopardized. To protect the privilege, procedural safeguards were required. A defendant was required to be warned before questioning that he had the right to remain silent, and that anything he said can be used against him in a court of law. A defendant was required to be told that he had the right to the presence of an attorney, and if he cannot afford an attorney one was to be appointed for him prior to any questioning if he so desired. After these warnings were given, a defendant could knowingly and intelligently waive these rights and agree to answer questions or make a statement. Evidence obtained as a result of interrogation was not to be used against a defendant at trial unless the prosecution demonstrated the warnings were given, and knowingly and intelligently waived. Effective waiver required that the accused was offered counsel but intelligently and understandingly rejected the offer. Presuming waiver from a silent record was impermissible.

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LENGTH: 45240 words

Article: The Nanny Corporation

NAME: M. Todd Henderson+ **Title and author**

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Thanks to Kelli Alces, Douglas Baird, William Birdthistle, Rosalind Dixon, Bernard Harcourt, Lee Fennell, William Landes, Anup Malani, Jonathan Masur, Richard McAdams, Martha Nussbaum, Randy Picker, Eric Posner, David Strauss, Vova Shklovsky, David Weisbach, and David Yosifon for helpful suggestions. Rebecca Fike, Nicholas Lawhead, and Ruben Rodrigues provided excellent research assistance.

LEXISNEXIS SUMMARY:

... If firms see increased healthcare costs or labor costs (through lower productivity) as a result of employee smoking, they will rationally try to reduce smoking by employees, say by not employing smokers, or charging smokers sufficiently to offset the costs they are imposing on others within the firm (be they shareholders or other employees). ... In his testimony, Ford justified his programs as an earnest effort to improve the lives of his workers. ... A final possibility is that firms are risk averse, especially in light of the legal uncertainty of the rules limiting corporate nannyism discussed below, and thus are slowly deploying nanny rules to build acceptance in the labor market before moving to full internalization of costs. ... As such, if firms act out of pure paternalism (whether or not the arguments are couched in those terms or in cost-internalization ones), they will have to pay more in labor markets, without any offsetting gains. ... Information about the efficacy and efficiency of nanny rules is relayed to corporate managers much more frequently than through political elections and with much greater power than it is for politicians making similar decisions in light of managers' high-powered incentives. ... Firms use nanny rules to reduce specific costs of the firm, such as healthcare costs, labor costs, or legal risk. ... This was true in the era of company towns, when both corporate and government nannies acted similarly, and there is every indication that the things one is interested in regulating--smoking, obesity, dangerous activities--the other is as well. ... The end result is a situation in which the government must substitute second-best policies, like sin taxes and outright bans, or encourage behaviors that dramatically reduce healthcare expenditures, which the government either pays directly (for the elderly and poor) or indirectly (for everyone through the tax subsidy). ... The big issues are the sum of decision costs and error costs in the evaluation of externalities and the implementation of nanny rules; the magnitude of derivative social welfare losses, such as privacy losses; and the ability of individuals or groups to impose their own idiosyncratic (and socially wasteful) preferences on others without sufficient safeguards. ... While some of the statutes provide leeway, for example, allowing firms to charge differential insurance premiums based on tobacco use, the impact of these laws has been to significantly chill the use of nanny rules by firms. ... In addition, thirteen states prohibit employers from discrimination against or regulating individuals using alcohol during nonwork hours. ... Chief among these is the constraint provided by labor, product, and capital markets in constraining firms from overreaching, or from diverting the benefits of nanny regulations away from paying the costs imposed by the behavior in question.

HIGHLIGHT: Individuals in common pools--for example, employees in firms and citizens in a jurisdiction--want managers of those pools to act paternalistically toward others because this lowers the costs of participating in the pool. The nanny state and, increasingly, the nanny corporation are simply responding to this demand. These two can be thought of as competing in the "market for nannyism" to deliver nannyism to individuals who demand it.

Consider a nonsmoker and a smoker who work for a firm. The nonsmoker wants the firm to take steps to reduce the incidence of smoking or charge the smoker the costs he imposes on the firm, since otherwise the nonsmoker pays for them. Paying, or cross-subsidizing, is bad for the payor not only because he is potentially sacrificing something by not engaging in the behavior (and yet paying for it in part) but also because it may encourage inefficient levels of production of the behavior in question.

Contrary to rights-based accounts, nannyism by firms is generally not premised on malice, invidious discrimination, or exploitation of unequal bargaining power between managers and employees. It is, in fact, inevitable in cases where third parties bear some costs of others' behavior. For example, the current healthcare model puts most of the costs on third parties, namely firms and the government, so we should expect each of these types of organizations to provide nannyism to reduce these costs. If firms see increased healthcare costs or labor costs (through lower productivity) as a result of employee smoking, they will rationally try to reduce smoking by employees, say by not employing smokers, or charging smokers sufficiently to offset the costs they are imposing on others within the firm (be they shareholders or other employees). The government will or should act the same when it pays. Government programs to reduce smoking or obesity are obvious examples of this, and as the government (or firms) pays more of the cost of bad behavior, we should expect more nannyism from it.

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Seeing nannyism as a natural consequence of our current welfare system (either corporate- or state-based) allows us to recast the debate about nannyism. In effect, firms and the government are both providers of nanny rules in what we might call a "market" for nannyism. Both providers in this market offer nanny rules in response to demand for them from individuals in common pools, be they political jurisdictions, firms, or insurance pools. These individuals, who pay more (or accept less) than they otherwise would, demand rules to force fellow employees or citizens to bear their own costs to avoid compelled cross-subsidies of costly behavior. The government can satisfy this demand with statutes proscribing certain behaviors, providing information to effect voluntary changes in behavior, or imposing taxes to force cost bearing. Firms can do all of these things too, although they may have slightly different names. Accordingly, we can think of the government and firms competing to deliver nannyism, which is demanded by individuals. Politicians compete to offer these rules to be reelected, to attract campaign contributions, and to maximize their utility. Managers do the same, but, given the constraints of the markets in which they operate, are generally directed to acting in ways that align their interests (making money) with those of shareholders.

[*1520]

This positive account of nannyism is a necessary (but currently missing) foundation for the normative analysis of this subject in which other scholars engage. We cannot answer the normative question of whether firms should be engaging in nannyism without knowing why they are doing it. The positive account consists of five parts that track the outline of this Article.

footnote

Part I examines the economic case for nannyism, which tells us the reasons firms are increasingly engaging in regulation of employee behaviors that are considered by some to be private. The answer is the elimination of cross-subsidies and the forced internalization of externalities imposed on fellow members of common pools. Importantly, this is the same reason governments regulate individuals' behaviors, like smoking.

Part II describes the history of corporate nannyism, which tells us how these rules are deployed in practice, whether they are used for good or bad reasons, and whether they are checked by market forces. The key takeaway from this brief history is that corporate nannies act predominantly in cases in which employee conduct increases firm costs, and that labor markets provide a strong check on firm overreaching. Corporate nannyism is thus not pure paternalism (meaning an attempt to alter one's preferences solely for one's own good), but rather a more benign attempt to force individuals to bear their own costs. This was true even when labor markets were much less liquid than today. **[*1521]**

Part III compares the advantages of corporate nannyism with state nannyism, which will tell us whether we should, in the marginal case, prefer nanny rules from state or corporate actors. There are reasons to believe corporate nannies are superior to their state analogs in some cases. For instance, corporate policies are subjected to more instantaneous feedback from labor markets, which reduces overreaching but also helps solve information problems in ways likely to reduce the sum of decision and error costs. This Part also shows that there is no theory under which the state or firm will always be superior at imposing nanny limitations on behavior.

Part IV surveys the regulatory environment for using nanny rules to alter individuals' behavior. The government is not only a provider of nanny rules, but it also regulates firms in providing these rules. This regulation has the potential to distort efficient outcomes unless it is premised on legitimate advantages of states in providing nannyism. This Part shows that many existing court cases, statutes, and rules stand in the way of an efficient market for nannyism. For instance, the law generally makes it more difficult to charge employees for the costs their behaviors impose on others than to fire or refuse to hire employees who engage in these costly behaviors. This means firms have reason to externalize the costs of particular behaviors, like smoking, by not hiring smokers, rather than reduce the smoking of employees through monetary incentives. This result works at cross purposes with our model of highly-subsidized employer-based health insurance. As one CEO has puzzled: "Why aren't the American employers dealing aggressively with these issues of wellness" when they are the ones footing the bill? ¹⁰

And, finally, the normative questions about whether corporate nannyism is socially beneficial and suggestions for policy responses. On the normative issues, thinkers from John Stuart Mill to Milton Friedman assert that the state has no business interfering in private decisions, like whether to eat trans fats, bungee jump, or smoke. ¹¹ Friedman famously said: "I don't think the state has any more right to tell me what to put in my mouth than it has to tell me what can come out of my **[*1522]** mouth." ¹² This Article puts these issues largely aside, since the premise of these objections assumes that others are not bearing costs from what is going into Friedman's mouth. In a world with third-party paying, there is inevitably nannyism. In light of this, the relevant question is only whether we should favor one nanny over another, which is just another way of asking how the market for nannyism should be regulated.

In terms of policy, the argument that there exists a market for nannyism and that firms have potential advantages in its efficient delivery bears not only on the wisdom of the existing regulations that may distort the market, but also on the

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