

## Articles

# WORK AND FAMILY: RESTRUCTURING THE WORKPLACE

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"The quality of light by which we scrutinize our lives has direct bearing upon the product which we live, and upon the changes which we hope to bring about through those lives."<sup>1</sup>

Conflict between work and family responsibilities is a critical workplace issue. It arises out of a workplace structure hostile to family responsibility and caregiving work, premised upon a highly gendered division of work and family roles, and reinforced by the demands and structures of a post-industrial economy. It is rationalized by an ideology of individual choice and individual burdens which masks the nature of the structure and basis of the conflict. Women have exposed the issue and it seems to matter most to women. But we misunderstand work-family conflict if we see it only as a matter of simple removal of self-evident barriers that block women's progress toward equality. While the conflict between work and family clearly impedes women's equality, more fundamentally, it reflects the clash of essential assumptions about family, work, and their relationship to each other. It opens those assumptions, and the very definitions of family and work, to questioning and reconstruction. This conflict therefore points to structures of power and authority based not only on gender, but also on race and class. Its resolution challenges those entrenched hierarchies of power.

Nothing less than a restructuring of the workplace is necessary to resolve this conflict. The depth and complexity of that restructuring points to the importance of analysis, context, and vision. Our analytical approach, literally how we think about this issue, is critical to both the process and results of problem solving. It is my contention that we must avoid "legalistic" modes of analysis, *at least as we presently conceive of legal analysis*, because that mode of

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1. A. LORDE, *Poetry is Not a Luxury*, in *SISTER OUTSIDER* 36 (1984).

analysis saps creativity, avoids complexity, and pushes against the recognition of diversity and the creation of real choices. We must think about work and family from a pluralistic, contingent, paradoxical, and transformative analytical frame.

Essential to that analytical framework is sensitivity to context. We must be clear about the underlying assumptions and value structure of the existing framework, and the realities of the structure when viewed from the perspectives of gender, race and class. Any approach to a new structure must emerge from this understanding of the substance and operation of the existing work-family structure.

The complexity and difficulty of changing the structure should not be debilitating or limiting. Rather, the awareness of context is the key to effective policy, as well as to imagining a workplace of different assumptions and relationships. Firmly grounded in where we are, we can begin to envision a restructured workplace. That vision requires an outer framework of values to inform efforts to rethink, restructure, and transform the workplace. This expressly value-laden task requires moral argument and persuasion as the basis of social and political decisionmaking.

In this article I hope to contribute analysis, context, and vision essential to restructuring the workplace. Part I provides a picture of contemporary families, the workforce, and the workplace. It begins with a brief historical overview, and then examines the present context generally and from the perspectives of gender, class and race. It is a context of enormous diversity, upheaval, and transition in families and the workforce, in sharp contrast to the rigidity, conservatism, and traditionalism of the workplace. The workplace is largely hostile to family life, structured upon outdated assumptions about families and deeply ingrained stereotypes concerning work-family relationships. This context argues for uncovering and transforming the underlying assumptions of work, family, and the work-family structure.

Part II focuses on analysis of work-family issues. I contend that the way in which we think *about* work and family is critical. The complexity of work-family issues, the interrelation of individual needs and life choices, of community and societal values, and the rigidity of the value structure of the existing workplace structure all point to the necessity of approaching this issue with a different method of problem solving. We must work from paradox, and toward diversity and pluralistic solutions. This requires questioning everything, exposing and uncovering the values and assumptions of the existing structure, as well as re-examining our fundamental concepts of work and family.

In Part III of the article, I attempt to set out what I think are pieces of the vision of a transformed workplace. It is incomplete by design, partly because I think we have only begun to imagine the vision of what we want. But incompleteness also is essential to leaving open spaces, to resisting a simple, uncluttered, singular picture. The pieces I envision of a transformed workplace include: (1) redefinition and revaluing of family and work, including breaking down and reconstructing our view of what is public and private; (2) enhancement of diversity, celebration of difference and promotion of real choices; (3) degenderization of work-family roles, and the elimination of other

unjustifiable and impermissible choices based upon race and class; (4) elimination of dominance and the abuse of power; and (5) insuring economic independence, of families and of individuals within families.

## I. FAMILY, WORK AND THE FAMILY-WORK RELATIONSHIP

### A. History

A brief look at the history of the work-family relationship since industrialization provides some important perspective on our current context. The historical perspective shows the family's flexibility, accommodation, and support of the industrial workplace. That pattern begs the question of why it is the workplace that now must adjust, not the family.

During industrialization, the family was an active agent of change, rather than a passive bystander or victim.<sup>2</sup> The family freed its members to work in industrial enterprises, beginning with young women and children deemed less essential to agricultural production, and then shifting to men as industrial wage work became a primary source of income.<sup>3</sup> The family also instilled the bourgeois ethic of individualism critical to the growth of industrialization, as well as general socialization necessary to the organization of industrial structures and urban life.<sup>4</sup> The family's role is not surprising, in view of its interest in adapting to economic change as a matter of survival.<sup>5</sup> It may also, however, reflect the family's inherent fluidity as a social structure, constantly changing as its individual members move through their individual, but connected, lives.<sup>6</sup>

Along with this pattern of considerable adjustment and flexibility, families in some respects became more stable and uniform. Individual, voluntary control over the timing of family life cycle events contributed to family stability.<sup>7</sup> Greater state involvement in matters formerly exclusively in the family's domain, in the form of age-related requirements relating to education, child labor, and until recently, mandatory retirement, imposed more uniformity on families.<sup>8</sup>

Perhaps the most significant change for the family during the industrial era was the shift in the family's primary function from an economic to an

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2. Hareven, *Family Time and Historical Time*, in THE FAMILY 57, 58 (A. Rossi, J. Kagan & T. Hareven eds. 1978) [hereinafter THE FAMILY]. "The family not only did not break down under the impact of urbanization and industrialization; under certain circumstances, it actually helped to foster those changes." *Id.*

3. Hesse, *Women Working: Historical Trends*, in WORKING WOMEN AND FAMILIES 35, 40-46 (K. Feinstein ed. 1979).

4. B. BERGER & P. BERGER, THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND 105-36 (1983); Hareven, *supra* note 2, at 58.

5. Hareven, *supra* note 2, at 69 ("The model of family behavior which emerges from the past is one of diversity and flexibility, a kind of controlled disorder that varied in accordance with pressing social and economic needs.").

6. Hareven, *supra* note 2, at 58.

7. *Id.* at 61.

8. *Id.* at 67.

emotional unit.<sup>9</sup> This shift has been connected to the emergence of the image of the family as a private, child-centered enclave.<sup>10</sup> Family was now viewed most importantly as the center of nurture and affection, a haven and refuge from the workplace.<sup>11</sup>

Within that privatized, idealized enclave, however, sex and age role segregation increased,<sup>12</sup> and a stronger, reconstructed patriarchy emerged.<sup>13</sup> Industrialization did not bring about a more modern, less repressive, more egalitarian family form. Rather, it triggered a shift in the economic basis of domination over women and children, which was reflected in a male supremacy model with a new set of norms. Respect for parents replaced economic control of children; discouraging women and children from wage work reinforced the male economic role; and shifting instrumental education to professionals, while reserving moral education to women who were to be full time mothers, insured women's domestic role.<sup>14</sup>

Women's reinforced domestic role underscores the importance of sharpening the historical focus to examine women's work patterns, as they tell us the most about how the industrial workplace treated workers with both work and family responsibilities. The patterns reveal that essentially women were treated as marginal workers, periodically encouraged to enter the workforce to meet particular workplace needs, but otherwise expressly or impliedly limited by their ascribed family role. Women's needs and desires to work have consistently conflicted with their limited role, and their historic work patterns demonstrate a refusal to accept those limits, but also an inability to force the workplace to restructure.<sup>15</sup>

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9. *Id.* at 64. This shift in the family's primary role is reflected in the change from work and career decisions being family decisions to being individual ones. *Id.* See also M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981).

10. P. ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 401, 406, 415 (1962).

11. Hareven, *supra* note 2, at 67; Aries, *The Family and the City*, in *THE FAMILY*, *supra* note 2, at 227, 229-30, 234.

12. Hareven, *supra* note 2, at 68. Sex and age segregation in family roles were largely the invention of the nineteenth century, not a permanent characteristic of family history. *Id.* at 68-69. Age-related changes included the emergence of childhood as a period of extended dependency without workforce responsibilities, as well as the evolution of a phase of adulthood without childrearing responsibilities which constituted, on average, one-third of adult life. *Id.* at 61-62, 67-69. See also Minow, *A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 8-9 (1986). The primary sex-role change was the development of the concept of full-time motherhood. At the same time, "demographic and social factors were significantly reducing the total proportion of a woman's life actually needed for it." Hareven, *supra* note 2, at 69.

13. Gordon defines patriarchy historically as a family system where the father exerted control over all other family members based on his control of economic resources. Gordon, *Feminism and Social Control: The Case of Child Abuse and Neglect*, in *WHAT IS FEMINISM* 63, 73 (J. Mitchell & A. Oakley eds. 1988) [hereinafter *WHAT IS FEMINISM*]. This family structure defined relations between husband and wife, and parent and child. See also Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (historical discussion of family structural changes).

14. Gordon, *supra* note 13, at 74. On prehistoric society, see E. REED, *WOMAN'S EVOLUTION* (1975).

15. I exclude from restructuring protective legislation having the effect of further excluding women from the workplace, as it increased workplace limits on women. See *gener-*

The first generation of working women were drawn into the industrial workforce to supplement farm income.<sup>16</sup> By the eighteenth century, the typical working woman was young, single, and educated.<sup>17</sup> Women were sought out due to the shortage of male laborers.<sup>18</sup> By the turn of the century, immigrant women predominated in the factories, and more educated women entered into teaching or office occupations.<sup>19</sup> Black women worked in domestic employment, as they were denied factory, office and sales jobs.<sup>20</sup> Industrial jobs by the same time had become clearly gender defined, with men predominating in heavy industry and women predominating in the service sector, a pattern that remains largely unchanged.<sup>21</sup>

At the same time as this pattern emerged of gender and race segregation, and class stratification, an image or value structure developed in the late nineteenth century that justified, or even arguably pushed for, the withdrawal of women from the workplace. The Cult of True Womanhood enshrined the concept of women's place in the home and men's place in the workplace.<sup>22</sup> This was connected to the contemporaneous concept of full-time motherhood.<sup>23</sup> The

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ally J. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* (1978).

16. Sacks, *Generations of Working-Class Families*, in *MY TROUBLES ARE GOING TO HAVE TROUBLES WITH ME: EVERYDAY TRIALS AND TRIUMPHS OF WOMEN WORKERS* 15, 19 (1978) [hereinafter *MY TROUBLES*]. In colonial times, women worked to produce the essential goods of the home. Hesse, *supra* note 3, at 38. With the advent of early industrialization, women were involved in the putting out system, which still permitted them to work in the home. *Id.* at 40. The emergence of factory work drew women out of the home and into the labor market. *Id.*

17. Hesse, *supra* note 3, at 40.

18. *Id.*

19. *Id.* at 42.

20. *Id.*

21. *Id.*

22. *Id.* at 47. This was also sometimes referred to as the Domestic Code. Sacks, *supra* note 16, at 15. Woman's contribution to the family was no longer to be an economic one, but was to be her embodiment of an aesthetic idealization of "idleness, expressed positively as gentility." Hesse, *supra* note 3, at 47.

The true Woman symbolized and actualized fragility — expressed in her own virtues of piety, purity, submissiveness and domesticity . . . [thus transforming woman] from a human being into a living object of art, existing for the pleasure and pride of her husband. She was a creature of solely decorative worth, possessing a beauty which rested on her fragility, delicacy, purity and even asexuality.

*Id.*

Nineteenth century feminist thought reflects the impact of the Cult of True Womanhood. The major focus of debate was whether women were essentially the same as men, and therefore should be granted full political rights based upon their status as human beings, or whether women because of their different and virtuous sensibilities ought to be given political rights in order to bring virtue into the public domain. Kessler-Harris, *The Debate Over Equality for Women in The Workplace: Recognizing Differences*, in *WOMEN & WORK: AN ANNUAL REVIEW* 141, 144-46 (L. Larwood, A. Stromberg & B. Gutek eds. 1985). See also Minow, *Rights of One's Own* (Book Review), 98 HARV. L. REV. 1084 (1984) (reviewing E. GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* (1984)). The reach of this ideology was arguably still evident even in the early twentieth century, when the dominant feminist approach demanded recognition of women's family role. This approach led to support of protective labor legislation for women, and then an effort to extend those protections to men. Kessler-Harris, *supra*, at 147. See also J. BAER, *supra* note 15.

23. See A. RICH, *OF WOMAN BORN* (10th ed. 1986); A. DALY, *INVENTING MOTHERHOOD* (1983); Rossi, *Equality Between the Sexes*, 97 DAEDALUS 607, 615 (1964).

True Woman, according to this ideal, was unalterably sullied by continued exposure to the workplace.<sup>24</sup> The effect of adopting these ideals was to separate middle class and working class women, as the necessity to work precluded working class women from achieving the motherhood ideal.<sup>25</sup>

Despite this cultural discouragement, women took on new jobs during World War I.<sup>26</sup> Those gains were largely wiped out, however, by the Depression, as available jobs were reserved for men.<sup>27</sup> The greatest shift in women's labor market patterns did not occur until World War II.<sup>28</sup> Huge numbers of women, including married women and women with children, entered the workforce during the war. In addition, black women entered factory work during this period, often for the first time.<sup>29</sup>

After the war there was tremendous pressure on women to leave the workplace and return home.<sup>30</sup> As quickly as the workplace had restructured to encourage women to work in men's jobs, it reverted to the pre-war pattern of occupational segregation.<sup>31</sup> Despite this pressure, including outright layoffs, women did not leave the workforce; they simply shifted to other, usually lower paying, occupations.<sup>32</sup> They persisted, furthermore, despite the resurgence of the Cult of True Womanhood in the form of the 1950's "feminine mystique."<sup>33</sup> The continued growth of women's labor participation rate since the 1950's has been tied to the decline in birth rate, the scarcity of young workers, and the decrease in the age at which women have married, all combining to open options for married women who no longer had preschool children present in the home.<sup>34</sup> The most recent change in women's labor participation pattern has been the rise in the number of women with preschool-age children.<sup>35</sup> Despite

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24. Ironically, this assignment of cultural value has reversed itself to some extent, as evidenced by the concentration on professional women in the literature of many disciplines, and the artificial distinction drawn between working for money and working for psychological reasons. See Ferree, *Sacrifice, Satisfaction, and Social Change: Employment and the Family*, in MY TROUBLES, *supra* note 16, at 64-77.

25. The adoption of these ideals has been viewed by some commentators as tied to the emergence of a middle class with the economic wherewithal to emulate the upper class ideal of a "lady". See, e.g., Hesse, *supra* note 3, at 46.

26. *Id.* at 48.

27. *Id.* at 49. Kessler-Harris notes that the Depression nevertheless shook fundamental social and cultural values about work, particularly undermining the notion that families could be supported solely by a male breadwinner. The idea that if one worked hard enough, the family could survive was dispelled — no matter what men did, the economic picture remained bleak. Kessler-Harris, *supra* note 22, at 148-49.

28. Hesse, *supra* note 3, at 49.

29. *Id.*

30. R. MILKMAN, GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II 99-127 (1987); L. WEINER, FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES, 1820-1980, at 111-12 (1985).

31. A. KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 286-87 (1982); Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207 and sources cited therein.

32. Hesse, *supra* note 3, at 52.

33. *Id.* at 51. Thus, as one commentator has put it, the so-called traditional family of the stay-at-home mother and working father "is a relatively recent phenomenon growing out of particular economic and social circumstances in modern society." S. KAMMERMAN, PARENTING IN AN UNRESPONSIVE SOCIETY 9 (1980).

34. Hesse, *supra* note 3, at 52.

35. *Id.* at 54.

this pattern of steadily increasing labor market participation, there has not been any parallel shift in the distribution of women within the labor market, nor any significant market restructuring to acknowledge family responsibilities.<sup>36</sup>

What emerges from this brief historical overview are some important explanations of our current context. First, the historic accommodation of the family to the industrial workplace was purchased at the price of patriarchy, sexual domination and hierarchy. That solution is no longer legally, morally, socially, or economically acceptable.

Second, it is remarkable, indeed astonishing, that in the face of contrary cultural ideals and the burden of the dual role of family work and wage work, women nevertheless have persistently participated in wage work. Women's strong workforce participation indicates the powerful forces driving women to work against their assigned gender role.<sup>37</sup> It is equally remarkable that fatherhood has been largely relegated to an economic function and that this concept of parenting dominated the workplace without protest or challenge. The silence attests to the enduring grip of this grotesquely misshapen, limited view of parenting and the subordinate role of the family in the workplace.

Finally, there is no doubt that the family continues to adapt to workplace structure, but increasingly that adaptation is the avoidance or breakdown of family. The evidence of family "adjustment" is in the decline of the birthrate, the rise in childlessness, and the rise in the divorce rate. In other words, the demographic patterns suggest that to the extent the workplace forces a choice between work and family, family is losing.<sup>38</sup> Continuing to expect the family to adapt, therefore, may be at the price of the family, a price which (at the very least) is to the disadvantage of the workplace.

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36. "The fact that women are working in record numbers is not a new phenomenon. What has changed are the conditions and places in which they work." Levitan & Belous, *Working Wives and Mothers: What Happens to Family Life*, 104 MONTHLY LAB. REV. 26 (Sept. 1981). Today's typical woman worker spends most of her adult years, including those when she has young children, in the workforce, usually in a clerical or service job that pays poorly and provides little room for advancement, control, or decision-making. Sacks, *supra* note 16, at 15.

37. It also indicates that changing gender roles and the revival of the feminist movement came as a result, not as a cause, of this changing work pattern. See V. OPPENHEIMER, *WORK AND THE FAMILY: A STUDY IN SOCIAL DEMOGRAPHY* 28-30 (1982). This suggests that the current effort to integrate work and family is already a half century overdue — it has been occurring, but at a cost to women and to families, since the 1940's.

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[W]hile the gender ascription of career and family roles is diminishing, the roles themselves remain resistant to synthesis. Women now can become "sociological men" — persons who develop primarily their public work lives and enjoy the social power and independence that it provides — and men can become "sociological women" — persons who invest themselves primarily in their families and forfeit power and personal destiny control. But we do not appear to be developing roles and institutions that transcend these two types. The likely result is not more dual-career families, . . . but growing institutional separation of careers and families.

Hunt & Hunt, *Dual-Career Families: Vanguard of the Future or Residue of the Past*, in TWO PAYCHECKS: LIFE IN DUAL EARNER FAMILIES 41, 49-50 (J. Aldous ed. 1982) [hereinafter TWO PAYCHECKS].

### B. *The Current Context*

The current context of family, work, and the family-work relationship is a complex blend of dynamic change, tension and transformation coupled with oppressive intransigence, formalism, and resistance to difference. Families are marked by diversity and volatility amidst conditions of rapid change and complex stress. By contrast, the workplace is remarkably stagnant in its ideology and structure of the work-family relationship. The defining characteristic of the work-family relationship is conflict, in spite of the critical connection between work and family, and the essential support that families provide to the workplace.

Gender, race and class powerfully affect this general picture of family and work. The impact is so significant, the point of view so dramatically changed, that general statements about family and work without reference to gender, race and class may obscure more than they reveal. Gender impacts most strongly, defining work-family roles across race and class boundaries. Each of these factors, however, alone or in combination, powerfully determine the shape of the work-family relationship. Each perspective yields the paradox of negative, destructive, conflict-ridden roles interlaced with transformative, creative, diversified alternatives to existing work-family paradigms.

#### 1. *Families*

Most of us live in families,<sup>39</sup> but families strikingly diverse in form. Nearly three-quarters of all households<sup>40</sup> are families.<sup>41</sup> Approximately half of

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39. Family is defined by the United States Census Bureau as "a group of two persons or more (one of whom is the householder [refers to the person or one of the persons in whose name the housing unit is owned or rented]) related by birth, marriage, or adoption and residing together." BUREAU OF THE CENSUS, *HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1984*, at 228 [hereinafter *HOUSEHOLD AND FAMILY CHARACTERISTICS*]. The definition of family strongly affects for whom policy is defined, the scope of benefits, and even how we count families. The census definition is used here to obtain some statistical picture of family, but it should be noted that it leaves out, for example, those who live together and deliberately do not marry or cannot marry.

The diversity and volatility of families described in this section has given rise to concern by many over the death, breakdown, or dissolution of The Family. But as one commentator has succinctly pointed out, it is the legal ideology or definition which is dissolving: "The crisis is a legal one. It is the legal treatment of the family which is in the process of dissolution, not the family itself. . . . The function of law is to protect the living social phenomenon of the family, not the [outdated] juridical constructions around this phenomenon." Andrup, Buchhofer & Ziegert, *Formal Marriage Under the Crossfire of Social Change*, in *MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES* 32, 32-37 (1980). See also *infra* notes 302-07 and accompanying text (discussion of importance of defining family functionally as opposed to the structure of the family unit).

40. Households are defined by the United States Census Bureau as "all the persons who occupy a housing unit. . . . A household included the related family members and all the unrelated persons, if any . . . who share the housing unit." *HOUSEHOLD AND FAMILY CHARACTERISTICS*, *supra* note 39, at 227.

41. Families constitute seventy-three percent of all households; most nonfamily households are composed of one person. BUREAU OF THE CENSUS, *POPULATION PROFILE OF THE UNITED STATES 16* (1985) [hereinafter *POPULATION PROFILE*]. The number of family households is increasing, but the increase is primarily due to more single-head families, as the proportion of added married couple families declines. *HOUSEHOLD AND FAMILY CHARACTERISTICS*, *supra* note 39, at 1.



all families include children under the age of eighteen, and nearly twenty-five percent have children under six years old.<sup>42</sup>

The diversity of family structure is perhaps best illustrated by a negative: less than ten percent of American families conform to the pattern of a single, male wage earner in the paid workforce married to a stay-at-home female spouse who performs the unpaid housework and child care.<sup>43</sup> Of families with children under eighteen, approximately three-quarters are dual parent households, while over one-quarter are single parent households.<sup>44</sup> Although dual parent families still predominate, this family form has significantly declined in the past twenty years: married couples with children under age eighteen constituted forty percent of all households in 1970; by 1984, they represented only twenty-nine percent.<sup>45</sup> The concurrent rise in single parent families has been dramatic. For nearly a century, single parent families represented approximately ten percent of all households; since 1980, however, they have constituted at least twenty percent of all households, and now represent one quarter of all families with children under the age of eighteen.<sup>46</sup> It is

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42. Of all families, 49.8 percent have children under age eighteen. Bureau of Labor Statistics, *Family Earnings and Employment Data*, Daily Lab. Rep. (BNA) No. 20, at B-8 (Feb. 1, 1988). A very high proportion of families have a parent or parents in the workforce: 88.8 percent of families with children under eighteen, 87.9 percent of families with children under age six. *Id.*

This calculation of the presence of children in households may underrepresent the number, as the figure represents households with one or more of the householder's "own" children, which appears to only include birth or adopted children, not stepchildren or children with even less of a "legal" relationship to the householder. See generally Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984). The figure does not account for children of divorced parents, who might be counted twice, nor does it count as a family a divorced parent performing family functions but not designated as the primary custodial parent.

Married couples are still the predominant household type, constituting almost two-thirds of all households. HOUSEHOLD AND FAMILY CHARACTERISTICS, *supra* note 39, at 6.

43. ECONOMIC POLICY COUNCIL OF UNA-USA, WORK AND FAMILY IN THE UNITED STATES: A POLICY INITIATIVE 1 (1985) [hereinafter WORK AND FAMILY]. This is reflected on a smaller scale in a study of work-family patterns, where only eleven percent of the workforce in that study were married males with wives at home. An even smaller number, 8.7 percent, were married parents with wives at home. D. BURDEN & B. GOOGINS, BOSTON UNIVERSITY BALANCING JOB AND HOMELIFE STUDY 12 (1987) [hereinafter BU STUDY]. On changing household patterns, see generally GLICK, HOW AMERICAN FAMILIES ARE CHANGING AMERICAN DEMOGRAPHICS 2 (1984). White males also are no longer in the majority: in 1954, they comprised 62.5 percent of workforce, but by June 1984 they comprised 49.3 percent of workforce. *Id.* The statistical pattern of families is perhaps the starkest basis for arguing that existing workplace policies are designed for a numerical minority, on the basis of race and marital/employment patterns.

44. Of family groups with children under eighteen, twenty-six percent were one-parent families in 1984, compared to thirteen percent in 1970, and twenty-two percent in 1980. HOUSEHOLD AND FAMILY CHARACTERISTICS, *supra* note 39, at 3.

45. *Id.* at 2.

46. BUREAU OF NATIONAL AFFAIRS, WORK AND FAMILY: A CHANGING DYNAMIC 17 (1986) [hereinafter CHANGING DYNAMIC]. The number of single parent families nearly doubled since 1970. HOUSEHOLD AND FAMILY CHARACTERISTICS, *supra* note 39, at 3. On single parents, see S. KAMMERMAN, *supra* note 33 (study of 200 working mothers, 1976-77, in a New York City suburb). Most single parents (eighty-nine percent) are women, and most households headed by women are characterized by poverty. HOUSEHOLD AND FAMILY CHARACTERISTICS, *supra* note 39, at 5; Levitan & Belous, *supra* note 36, at 29 (one of three households headed by women is poor, compared to one of nineteen husband and wife families,

estimated that sixty-seven percent of children born in 1984 can expect to live in a one parent family for some portion of their lives.<sup>47</sup>

Another increasingly common type of family is the blended family. Remarriage after divorce is not unusual, most often within five years of divorce.<sup>48</sup> Roughly half of all women remarry during that time, and men remarry even sooner.<sup>49</sup> In 1980 there were 9.2 million households, nearly fifteen percent, in which one or both members of the married couple were previously married.<sup>50</sup> In forty percent of those households, one or both spouses had children under the age of eighteen from previous marriages.<sup>51</sup> The most common of these blended families includes the wife's children: there were 2.2 million full time stepfathers in 1980, but only 338,000 full time stepmothers.<sup>52</sup>

A significant proportion of families is totally disconnected from marriage. There has been a remarkable increase in never-married adults who maintain families with children. The proportion of non-marital births rose to twenty percent in 1983.<sup>53</sup> For women in general and even more so for women of color, parenting is increasingly not connected to marriage. Men, on the other hand, equate family with marriage, and parenting is rarely experienced outside a marital framework.<sup>54</sup> Other families operating outside the marital framework include homosexual families, for whom the marital framework is not an available legal structure, and cohabiting heterosexuals who reject the marital framework.<sup>55</sup>

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one of nine male headed families). The consequence for children is tragic: nearly one-quarter of all children in the U.S. are poor, and forty percent of those below the poverty line are children. WORK AND FAMILY, *supra* note 43, at 54.

47. CHANGING DYNAMIC, *supra* note 46, at 17. See also WORK AND FAMILY, *supra* note 43, at 43.

48. THE AMERICAN WOMAN 1987-88: A REPORT IN DEPTH 91 (S. Rix ed. 1987) [hereinafter THE AMERICAN WOMAN].

49. *Id.*

50. *Id.* at 93. Younger divorced women have fewer economic resources and skills, and are more likely to remarry. *Id.* at 91. Whites are more likely to remarry than blacks. *Id.* at 93.

51. *Id.* That constitutes 3.68 million households, which is 5.9 percent of all family households. An average of one child was involved in every divorce in 1981. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 127 (1987).

52. THE AMERICAN WOMAN, *supra* note 48, at 93. "Full-time" means a step-parent to children solely or primarily in the physical custody of the biological or adoptive parent, so that the parenting is more than periodic or occasional. *Id.*

53. WORK AND FAMILY, *supra* note 43, at 44. Nearly twenty percent of women age eighteen to forty-four who had a child in 1984 were unmarried, an increase from fourteen percent in 1980. BUREAU OF THE CENSUS, FERTILITY OF AMERICAN WOMEN: JUNE 1985, at 1 (1986) [hereinafter FERTILITY OF AMERICAN WOMEN].

54. Although this presumes men do not parent unless they are or have been married, I do not mean to suggest that it does not happen but that the statistical patterns suggest that it is unlikely. See *supra* note 46. This may be tied to the methods of gathering statistics, but there are also strong indications that our legal and other structures supporting family discourage male parenting absent a marital connection. See Michael H. v. Gerald D., 109 S. Ct. 2333 (1989) (denial of visitation rights to biological father based on presumption that child born during marriage is the issue of marital partner does not violate due process or equal protection rights of either the biological father or the child).

55. It is difficult to estimate how many families are gay families. The continued oppression of homosexuals means it is unwise to be counted, and therefore the only statistics are

The diversity of family form is connected to dramatic changes in family structure. These include declining marriage and fertility rates, increasing divorce rates, and more non-marital children.<sup>56</sup> Marriage now generally occurs later, with seventy-five percent of men and fifty-seven percent of women age twenty to twenty-four never married.<sup>57</sup> The median length of marriage is seven years.<sup>58</sup> The skyrocketing divorce rate shows no sign of lessening, with a current rate of one in three marriages.<sup>59</sup> Two-thirds of all divorces involve minor children.<sup>60</sup> The incidence of divorce more than doubled between 1970 and 1980, rising at all socioeconomic levels, among all races, and regardless of whether the marriage included children.<sup>61</sup>

The average family size continues to decline and is now at an all-time low of slightly over three persons per family.<sup>62</sup> Families with children under eighteen average approximately two children per family.<sup>63</sup> This small average family size is attributed to increases in one person households and smaller numbers of children per family.<sup>64</sup> The annual fertility rate has declined one-half since the peak of the baby boom, with the current rate substantially below that necessary for population replacement.<sup>65</sup> Although there are no correlations between women working and divorce, or working and marriage, there is a correlation between working and fertility rates, with lower fertility rates as women's labor participation rates have risen.<sup>66</sup>

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guesstimates based on estimates of sexual preference in the general population. See Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

56. WORK AND FAMILY, *supra* note 43, at 43-45; S. KAMMERMAN, *supra* note 33, at 97. See also CHANGING DYNAMIC, *supra* note 46.

57. POPULATION PROFILE, *supra* note 41, at 19.

58. WORK AND FAMILY, *supra* note 43, at 44. The divorce rate has risen 115 percent since 1965. *Id.*

59. *Id.* The economic consequences of divorce are dramatically different for men and women. See generally Arendell, *supra* note 51; L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

60. Arendell, *supra* note 51, at 127.

61. *Id.* at 125.

62. HOUSEHOLD AND FAMILY CHARACTERISTICS, *supra* note 39, at 11. Averaging all families, those with and without children, there are .99 members under age eighteen, 1.97 members age eighteen to sixty-four, and .29 age sixty-five and over.

63. *Id.* Of families with children, the average number of children under eighteen is 1.85; of children under six, 1.35; of children under three, 1.14.

64. *Id.* at 8. See also Russell, *Inside the Shrinking Household*, 3 AM. DEMOGRAPHICS 28 (Oct. 1981); Pebley & Bloom, *Childless Americans*, 4 AM. DEMOGRAPHICS 18 (Jan. 1982) (proportion of American women who have never had a child has doubled). "The salient feature of American fertility since the mid-1970's is its relatively low and stable level." FERTILITY OF AMERICAN WOMEN, *supra* note 53, at 1. Studies examining the interrelationship between fertility and the workplace indicate that where income level is higher, and there is greater potential income loss by lengthy leave, there is more rapid return to the workplace after childbirth; also, if the worker has been employed before childbirth, the worker is more likely to return sooner; and finally, there is evidence of stronger labor force attachment where workers postponed their first birth beyond their early working years. *Id.* at 5. See also BUREAU OF THE CENSUS, *FUTURE FERTILITY OF WOMEN BY PRESENT AGE AND PARITY: ANALYSIS OF AMERICAN HISTORICAL DATA, 1917-80* (1985).

65. POPULATION PROFILE, *supra* note 41, at 8. The population will continue to grow, however, due to childbearing by the baby boom cohort, who are now in their childbearing years. Levitan & Belous, *supra* note 36, at 27.

66. Levitan & Belous, *supra* note 36, at 27.

## 2. Family-Workplace Connections

There is a strong connection between families and the workplace: eighty-five percent of the workforce lives in family units.<sup>67</sup> Over seventy percent of the workforce lives in married couple families; ten percent of the labor force lives in families maintained by women.<sup>68</sup> Marital status correlates very strongly with labor force participation, but with significantly different patterns for men and women.<sup>69</sup> Men's lowest labor participation rate is among the never married, roughly seventy percent; the rate for married and divorced men jumps to eighty percent.<sup>70</sup> For women, never married women have about the same rate as never married men; but the participation rate drops with marriage to approximately fifty-five to sixty percent. The rate for divorced women is nearly as high as that for divorced men, seventy-five percent.<sup>71</sup> In sum, marriage increases the likelihood that men are in the workforce, and married men have generally enjoyed the greatest labor market success.<sup>72</sup> Marriage

67. Klein, *Trends in Employment and Unemployment in Families*, 106 MONTHLY LAB. REV. 21 (Dec. 1983).

68. *Id.*

69. See generally BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 119-121 (1985) (employment status by marital status and sex, 1984) [hereinafter HANDBOOK OF LABOR STATISTICS]. Single men and single women have roughly the same labor participation rate, over eighty percent until age forty-five, and over seventy percent after age forty-five. *Id.* at 119. Married men and women age twenty-five to fifty-four sharply differ in their participation pattern (although note that these figures are not further subdivided for presence or absence of children): men's participation rate is over ninety-five percent until age forty-five, then drops to over ninety percent; women's rate from age twenty-five to fifty-four, in contrast, is between sixty and sixty-five percent. It is also interesting that the youngest married wives have the lowest participation rates, forty percent. *Id.* at 120. There is a very high rate of participation for widowed, separated or divorced men and women, but men's rate still exceeds that of women: for men, the labor participation rate is over ninety percent to age forty-five, then drops to eighty-five percent; for women it is consistently over seventy percent, and highest from age thirty-five to forty-four. *Id.* at 121.

Almost one quarter of the labor force are wives, while approximately thirty-five percent are husbands. Klein, *supra* note 67, at 21; BUREAU OF LABOR STATISTICS, MARITAL AND FAMILY PATTERNS OF WORKERS: AN UPDATE 2 (1983) [hereinafter MARITAL AND FAMILY PATTERNS]. Single persons account for approximately twenty-five percent of the workforce, and the balance is divorced persons. *Id.*

70. MARITAL AND FAMILY PATTERNS, *supra* note 69, at 10. The labor force participation by age and sex, in March 1981, was as follows:

	Men	Women
20-24	84.6	68.2
25-34	94.7	67.4
35-44	95.0	66.5
45-54	91.0	61.7

Never married men and women have roughly the same labor force participation rates (lower than married men, higher than married women) at the same ages. Using that rate as the standard for comparison, married and divorced men have about the same or higher participation rate. Therefore, what pulls down the general rate for males is the low participation rate of never married men. For women, on the other hand, the participation rate drops slightly for married women, and is significantly higher for divorced women. *Id.*

71. *Id.* The rate for divorced women is higher than that for married or separated women. *Id.*

72. Hayghe & Haugen, *A Profile of Husbands in Today's Labor Market*, 110 MONTHLY LAB. REV. 12 (Oct. 1987).

By most measures, married men have always epitomized labor market success. At any time, the vast majority are in the labor force working full-time, and their

decreases the likelihood that women are in the workforce and weakens their labor market position.<sup>73</sup> Divorce increases the likelihood that both sexes are in the workforce.<sup>74</sup>

Roughly half of the workforce are parents with children under the age of eighteen.<sup>75</sup> In labor participation terms, ninety-four percent of fathers and fifty-four percent of mothers of minor children are in the workforce.<sup>76</sup> Nearly ninety percent of families with minor children have at least one employed parent; almost one-quarter of all families have children under six years of age, and over eighty-five percent of those families have at least one employed parent.<sup>77</sup> The age of children has little impact on whether fathers are in the workforce;<sup>78</sup> it continues to have considerable impact on whether mothers are

earnings are generally much higher than those of other major labor force groups.

Furthermore, their unemployment rate is usually well below the national average.

*Id.* at 12. There is significant racial variation in this rosy picture, *see infra* notes 182, 192-96 and accompanying text, but the overall characterization is nevertheless generally true.

Education explains some of the difference between married and unmarried men, as husbands in all age groups are more likely to have completed high school, which makes it more likely they will be in labor force. Hayghe & Haugen, *supra*, at 12. But "whatever their age group or educational level, husbands are almost invariably more likely to be in the labor force than men in other marital-status categories." *Id.* If you control for education, experience, additional household income, and other variables, the labor participation rate of husbands still differs from other men. *Id.* at 13. These researchers argue that this

lends tacit support to the popular notion that the relatively high labor force participation of husbands may be partially motivated by the need to contribute to the economic well-being of their families and by their notions of their family role. (Alternatively, it has also been suggested that the personality characteristics necessary for marital success are also important prerequisites in the decision to participate in the labor market.)

*Id.* Husbands also are more economically successful, with lower unemployment rates, and stronger representation in higher paying occupations. *Id.* Their overall participation rate only falls with time because of dropouts in higher age ranges due to earlier retirement.

Thus, the workplace arguably is an environment best suited to husbands, or in which husbands have the greatest success. Yet men constitute less of the total labor force than thirty years ago, from a majority to approximately thirty percent. *Id.* at 17. Furthermore, only three of five men are husbands. *Id.* at 12. Thus, a focus on married men is a focus on a very distinctive portion of a minority of the workforce — a very telling argument for thinking about and planning for the workforce from a different perspective.

73. HANDBOOK OF LABOR STATISTICS, *supra* note 69, at 119; MARITAL AND FAMILY PATTERNS, *supra* note 69, at 10.

74. HANDBOOK OF LABOR STATISTICS, *supra* note 69, at 121. Divorced men and women have the highest labor participation rates, with male and female rates very close (roughly ninety percent for men and eighty to eighty-five percent for women). There is more differential for separated individuals, with men at roughly eighty-five percent, and women just under seventy percent. *Id.*

75. WORK AND FAMILY, *supra* note 43, at 4. Other known data about the workforce supports this estimate. About eighty-five percent of the workforce are from families; half of families have children under eighteen. That suggests that 42.5 percent of the workforce consists of workers from families with children under age eighteen. The proportion to bring it up to fifty percent factors in divorced non-custodial parents, who have parental responsibilities even if they are not part of a family household.

76. Hayghe, *Married Couples: Work and Income Patterns*, 106 MONTHLY LAB. REV. 26, 28 (Dec. 1983).

77. Bureau of Labor Statistics, *Family Earnings and Employment Data*, Daily Lab. Rep. (BNA) No. 76, at B-1 (Apr. 22, 1987) [hereinafter *Family Earnings and Employment Data*].

78. *Id.* at B-5. For employed fathers with children under eighteen or under six years of age, their labor participation rate remains at roughly ninety-five percent. The level of fathers'

in the workforce.<sup>79</sup> Nearly sixty percent of mothers with children under eighteen are employed, while a bare majority of mothers with children under six are employed.<sup>80</sup> Among divorced mothers, who have the highest participation rate of all mothers, eighty-three percent are employed who have children over age six, but this drops to sixty-nine percent for those who have children under age six.<sup>81</sup> One common pattern for fathers is both high labor force participation and high unemployment, as men are likely to be fathers early in their work life when they are most vulnerable to unemployment.<sup>82</sup>

The most common family types now in the workplace are dual earner or single parent families.<sup>83</sup> An estimated one-half of all children under the age of

workforce participation is largely unaffected even where the father is a single parent maintaining a family with children under age eighteen. The participation rate drops somewhat, to roughly eighty percent overall; but there is little difference between the participation rate for fathers with very young children and those with older children: fathers with children under six have an eighty percent participation rate, while fathers with children age six to seventeen have an eighty-four percent participation rate. *Id.* (table 4).

79. There now appear to be three steps in women's participation rates, which increase with each step: from birth to two years, two years to six years, and over six years. Waldman, *Labor Force Statistics from a Family Perspective*, 106 MONTHLY LAB. REV. 16, 17 (Dec. 1983).

80. *Family Earnings and Employment Data*, *supra* note 77, at B-1.

81. Johnson & Waldman, *Most Women Who Maintain Families Receive Poor Labor Market Returns*, 106 MONTHLY LAB. REV. 30, 31 (Dec. 1983). A similar pattern exists with respect to unemployment: for divorced women with children under age six, the rate is twenty-three percent; for divorced women with children over age six, the rate is fifteen percent. *Id.*

82. Hayghe & Haugen, *supra* note 72, at 13 ("Husbands with children under eighteen typically have both higher labor force participation rates and higher unemployment rates than do those without children.").

Data is rarely collected on *working fathers* because the category is presumed to be redundant. The Hayghe and Haugen study includes some data which indicate the following patterns. Roughly half of husbands have children under age eighteen. Of those who have children under eighteen in their household, roughly half have children age six to seventeen, and half have children under six years of age (children include biological, step, and adopted children). The labor participation rate is 95.6 percent for those with children under eighteen (95.6 percent); 94.7 percent for those with children over six, and 96.5 percent for those with children under six. For those husbands with no children under eighteen, the labor participation rate drops to sixty-three percent, but that includes husbands who have retired. *Id.* at 14 (table 2).

Variation by race includes significantly higher unemployment rates for black and hispanic husbands (6.9 percent for blacks, 7.7 percent for hispanics) compared to white husbands (4.3 percent) and lower overall income, reflecting the concentration of minorities in lower wage occupational categories. Wives' incomes have a significant equalizing effect on the gap between white and minority incomes, cutting the gap by at least half. The overall participation rates and unemployment rates are highest for hispanic husbands, higher than both white or black husbands. *Id.* at 14.

Interestingly, there has been a significant decline in the labor participation rate of husbands, from ninety-one percent in 1955 to seventy-nine percent in 1985-87. This is largely due to retirement, although younger husbands had more modest declines of one to four points over this time period. *Id.* at 15. It does not appear that any part of the decline is attributable to the surge in the proportion of women working, especially married women, particularly as single men's labor participation declined as well. *Id.* at 16-17. In other words, this does not reflect a phenomenon of role reversal.

The combination of men's decline in participation and the increase in women's participation means that husbands are no longer the predominant group in the labor force: in the 1950's husbands were slightly more than half of labor force participants; now, husbands are one-third of the labor force, and their share is likely to shrink still farther. *Id.* at 17.

83. WORK AND FAMILY, *supra* note 43, at 45. The most common family earning structure is now the dual earner family. Hayghe, *Husbands and Wives as Earners: An Analysis*

thirteen live in one or two parent families in which all parents are in the labor force.<sup>84</sup> As compared to traditional single earner families, dual earner families are considerably younger, have fewer children, are more educated, earn higher incomes, and are less likely to be below the poverty line.<sup>85</sup> The dominant income pattern is of a primary male wage earner with a secondary female wage earner.<sup>86</sup> Dual earner families therefore do markedly better than single earner families, but income does not double.<sup>87</sup> Single parent families, on the other

of *Family Data*, 104 MONTHLY LAB. REV. 46, 47 (Feb. 1981). The increased proportion of dual earner families is tied to many factors, but at least one clear correlation is to the need for additional income due to the decline in real family income since the mid-1970's. *Id.* at 50; Joint Economic Committee, *Staff Report*, Daily Lab. Rep. (BNA) No. 92, at A11-12 (May 13, 1986) (if women had not added to family income, it would have declined three times more than it did; even with women's contribution to family income, median family income has declined). See also Hayghe, *Dual Earner Families: Their Economic and Demographic Characteristics*, in TWO PAYCHECKS, *supra* note 38, at 27, 28; Hayghe, *supra* note 76.

84. Hayghe, *Husbands and Wives as Earners*, *supra* note 83, at 50. Most children have at least one employed parent. Hayghe, *supra* note 76, at 28. According to March 1983 figures, the patterns for children in married couple families by employment status of parents was as follows:

Children under 18, total in thousands:

White: 40,814.

Black: 3,769.

Hispanic: 3,722.

Percent with:

One employed parent or more:

White: 93.4 percent.

Black: 89.1 percent.

Hispanic: 86.0 percent.

One employed parent only:

White: 48.8 percent (father 44.2, mother 4.6).

Black: 42.2 percent (father 31.8, mother 10.4).

Hispanic: 54.2 percent (father 49.2, mother 5.0).

Two employed parents:

White: 44.3 percent.

Black: 46.9 percent.

Hispanic: 31.8 percent.

It is important to point out, however, that the full time, stay-at-home mother is a relatively recent cultural ideal that was fully realized even in its heyday only by a small proportion of the population. Thus, the change in the presence of parents in the lives of young children is more dramatic in certain economic classes. Furthermore, the change in some cases is barely noticeable, because mothers continue to work part time instead of full time, and otherwise choose work that permits the maximum time with children to the extent that is economically feasible. See Aldous, *From Dual-Earner to Dual-Career Families and Back Again*, in TWO PAYCHECKS, *supra* note 38, at 11.

85. Hayghe, *Husbands and Wives as Earners*, *supra* note 83, at 47-49.

86. Wives, on average, earned forty-six percent of the income of their working husbands; if children under eighteen are in the household, the gap widens. BUREAU OF THE CENSUS, EARNINGS IN 1983 OF MARRIED-COUPLE FAMILIES, BY CHARACTERISTICS OF HUSBANDS AND WIVES 2-3, 21-22, 24-25 (1986). The most common occupational combination is a husband employed in a precision production, craft, or repair occupation, married to a wife employed in an administrative support or clerical occupation. *Id.* at 4. The husband earns more than the wife in most dual earner families, but earns less than husbands in traditional single earner families. Hayghe, *Husbands and Wives as Earners*, *supra* note 83, at 47-49.

87. The median income of dual earner families is fifty-six percent higher than for one earner families, based on 1984 data. BUREAU OF THE CENSUS, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1984 (1986) [hereinafter MONEY INCOME]. The following provides an overall earnings picture:

1. Median family income: \$557/week.

hand, are the most economically impoverished and vulnerable families.<sup>88</sup> Primarily headed by women, they reflect women's poor workplace position.<sup>89</sup> They function without the contribution of the unpaid work of a spouse in the traditional single earner family, but with the expenses of childcare and the burden of unpaid household work.

### 3. Workplace Structure

The workplace rarely offers explicit family support to workers.<sup>90</sup> A recent survey showed that only eleven percent of all establishments with ten or more employees offer any childcare related benefits or services to their employees.<sup>91</sup> Child-related benefits are more likely to be found in the public

Black family median income: \$399/week.

White family median income: \$578/week.

Hispanic family median income: \$412/week.

2. Median family income, number of earners:

Median one earner family income: \$334/week.

Median more than one earner income: \$735/week.

3. Median family income, marital status:

Married couple family income: \$620/week.

Husband only earner: \$469.

Wife only earner: \$219.

Husband, wife, and one other: \$999.

4. Median family income and unemployment:

Family with unemployed and employed members: \$375.

Husband unemployed, wife sole earner: \$211.

Husband and wife working, one other jobless: \$745.

*Family Earnings and Employment Data*, *supra* note 77, at B-1.

88. HOUSEHOLD AND FAMILY CHARACTERISTICS, *supra* note 39, at 4. The poverty rate in 1988 for families with a female householder and no husband present was 33.5 percent; for male householders with no wife present, 11.8 percent. MONEY INCOME AND POVERTY STATUS IN THE UNITED STATES: 1988 (1989) (advance report) (press release) [hereinafter MONEY INCOME AND POVERTY STATUS].

89. See *infra* text accompanying notes 135-44.

90. See generally Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989); CHANGING DYNAMIC, *supra* note 46, at 26; S. KAMMERMAN & A. KAHN, *THE RESPONSIVE WORKPLACE* (1989).

91. *BLS Day Care Survey Shows 11 percent of Employers Offer Benefits or Services*, Daily Lab. Rep. (BNA) No. 10, at B-1 (Jan. 15, 1988). The overall patterns noted in this study, based on a summer 1987 survey, were as follows: Eleven percent of all establishments with ten or more employees offer some childcare related benefits or services to their employees; two percent sponsor day care centers, three percent provide financial assistance for child care, and the balance provide other services. A study released in January 1990 of large and medium sized firms showed twenty-two percent provide a childcare benefit; the most common was dependent care spending accounts (sixty-one percent), although on-site child care (twenty-two percent) or financial support for care (fourteen percent) was on the rise. *More Employers Offered Benefits for Child Care in 1989, Survey Finds*, Daily Lab. Rep. (BNA) No. 11, at A-1 (Jan. 17, 1990). See also E. Galinsky, *Family Life and Corporate Policies* 22 (1986) (unpublished manuscript); D. FRIEDMAN, *ENCOURAGING EMPLOYER SUPPORTS TO WORKING PARENTS: COMMUNITY STRATEGIES FOR CHANGE* 22-23 (1983); *Best Employers for Women and Parents*, Wall St. J., Nov. 30, 1987, § 2, at 23, Col. 3. For an argument that child care should be mandated under Title VII, see Fish, *Employer-Provided Child Care Under Title VII: Toward the Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 BERKELEY WOMEN'S L.J. 89 (1986).



than the private sector, in large than small establishments, and in the service sector than goods-producing industries.<sup>92</sup> Even this small number of employers offers only limited benefits which represent no major structural change.<sup>93</sup> More employers provide information, counseling or referral than on-site day care or assistance with child care expenses.<sup>94</sup> Leave policies are the least common benefit, available from only 2.1 percent of the surveyed employers.<sup>95</sup>

Benefits more commonly available in the existing workplace structure are of little aid to workers with family responsibilities. Mandatory benefits such as unemployment, social security, and worker's compensation only cover events which separate the worker from the workplace due to age, injury, or

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Maternity leave remains far from a universal benefit. A 1989 survey showed only one-third of employees are covered by unpaid maternity leave in large and medium size firms. *One-Third of Employees Covered By Maternity Leave Policies, BLS Says*, Daily Lab. Rep. (BNA) No. 64, at B-1 (Apr. 5, 1989) [hereinafter *BLS Day Care Survey*].

92. *BLS Day Care Survey*, *supra* note 91, at B-1. One particularly important factor affecting benefit policies is the size of the business and the presence of union representation. Smaller companies are far less likely to have particular benefits at all, and of the benefits they have, they are likely to be minimal packages. *THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT TRANSMITTED TO THE CONGRESS 1987*, at 137 (1987) [hereinafter *THE STATE OF SMALL BUSINESS*]. Preliminary results of a small business survey released in 1990 suggest, however, that small businesses may be implementing policies supportive of family responsibilities at a faster rate than large companies in order to attract employees from a shrinking pool of workers. *Small Firms More Likely to Have Family Leave Policies, BNA Report Says*, Daily Lab. Rep. (BNA) No. 30, at A-14 (Feb. 13, 1990). Workers are just as likely to be employed by a small employer than a large employer. Forty percent of American workers work for companies with less than one hundred employees. *THE STATE OF SMALL BUSINESS*, *supra*, at 275. It is more likely that an employee will work for a small business in the expanding service sector than in the declining manufacturing sector. *Id.* at 16.

The concerns of small businesses have captured the attention of Congress in debating family policies, particularly parental and family leave legislation. The move is generally to exclude small businesses from benefit requirements, rather than to shift the burden of financing benefits (while still providing benefits), or reconceiving of benefits as other than workplace connected.

93. For example, a large number of employers claim to have some work schedule policies aiding child care (just over sixty percent), but on closer scrutiny those policies provide very little beyond the ability to vary one's starting time or quitting time, work part-time at reduced earnings and benefits for a temporary period, or utilize vacation or sick leave for child-care related reasons. *BLS Day Care Survey*, *supra* note 91, at B-1. See also *Care of Children and Aging Relatives Cited as Key Topic in Benefit Packages*, Daily Lab. Rep. (BNA) No. 21, at A-7 (Feb. 2, 1988), a story highlighting new policies to be implemented in the coming year which exemplifies this limited approach, whereby the major new family benefits were the provision of two or three extra personal days per year to cover care of sick children or ailing elderly relatives — policies hardly sufficient to resolve even that particular problem.

During the turn of the century, companies often assumed a significant role in the family lives of their employees, even to the point of sending inspectors into homes to insure "respectability." D. FRIEDMAN, *supra* note 91, at 100. This "welfare capitalism" was criticized as paternalistic and was in fact an aberration from the traditional view of strict separation of work and family. *Id.*

94. Bureau of Labor Statistics, *BLS Reports on Employer Child-Care Practices*, News Release (Jan. 15, 1988) (tables 1-3). Interestingly, a recent opinion poll shows that seventy-one percent of Americans think employers should play the primary role in insuring provision of child care, and on or near site care is the most preferred means to provide care. *Americans Believe Primary Child Care Aid Role Lies With Employers, Poll Finds*, Daily Lab. Rep. (BNA) No. 15, at A-3 (Jan. 23, 1990) [hereinafter *Child Care Poll*].

95. *Child Care Poll*, *supra* note 94, at B-2. It is notable that an overwhelming eighty-one percent of surveyed Americans believe employers should be required to provide family

lack of employment. The model is based on temporary, short term job disruption, or retirement, and provides no protection for job security.<sup>96</sup> It is a structure designed to support a male breadwinner, not a male or female parent who is more than an economic parent.<sup>97</sup>

The same primary wage earner, male breadwinner presumption underlays the fringe benefit structure. Fringe benefits for full time workers generally include health and life insurance, a private retirement plan, and paid holidays and vacations.<sup>98</sup> Without denying the critical importance of these benefits to families, they nevertheless are primarily oriented to short-term job disruption or retirement. They provide little in the way of ongoing flexibility to deal with family responsibilities. The average child, for example, will have six colds or upper respiratory infections *per year*.<sup>99</sup> Sick leave benefits, however, usually apply only if the employee is sick, not if a child or other family member is sick and requires care.<sup>100</sup> Additionally, the average entitlement is only fifteen days per year.<sup>101</sup>

Other time benefits also are generally tied to the individual,<sup>102</sup> and except for personal leave cannot be used to take care of the needs of others.<sup>103</sup> Both paid and unpaid leave or extended personal leave are uncommon.<sup>104</sup> Paid time off is very limited, averaging ten holidays per year and vacation time of nine days after one year, sixteen days after ten years and twenty-one days after

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leave, and a majority believe leave should be paid. *Employers Should Provide Unpaid Leave, Vast Majority of Polled Americans Say*, Daily Lab. Rep. (BNA) No. 26, at A-1 (Feb. 7, 1990).

96. Dowd, *supra* note 90, at 101 n.76.

97. This underlying presumption is particularly evident in the unemployment and welfare systems. See Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983); Pearce, *Toil and Trouble: Women Workers and Unemployment Compensation*, 10 SIGNS 439 (1985).

98. BUREAU OF LABOR STATISTICS, *EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS*, 1986, at 2-4 (June 1987). Small businesses have a significantly different benefit picture. Only fifty-five percent of firms with less than one hundred employees provide health care; life insurance, twenty-nine percent; pension, sixteen percent; disability, nine percent. Leave time is also significantly reduced: only fifty-eight percent of small businesses provide vacation, and only thirty-six percent provide sick leave. THE STATE OF SMALL BUSINESS, *supra* note 92, at 254. The reasons for this differential pattern of benefits include profitability factors, less unionization of small businesses, higher costs and less flexibility in choosing benefit plans, and fewer tax incentives than those available to larger businesses.

99. M. NEIFERT, DR. MOM: A GUIDE TO BABY AND CHILD CARE 289 (1986). Infants commonly have diarrhea during their first year, and most children also have at least one ear infection prior to entering school.

100. Sick leave is provided to not quite half of all employees, and for most of them means a set number of days for illness each year; twenty-four percent of employees have only sickness and accident insurance; twenty-five percent of employees have both. *EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS*, *supra* note 98, at 2.

101. *Id.* Disability benefits similarly are limited to the employee, and while they commonly provide a longer benefit period of up to twenty-six weeks, they usually do not guarantee job security. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699, 710-13 (1986). Disability plans therefore provide limited income replacement but no guarantee of a return to work.

102. The only exceptions to this are military leave, funeral leave and jury duty leave. *EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS*, *supra* note 98, at 2.

103. *Id.*

104. *Id.* at 5. Paid personal leave is a benefit for about one-quarter of all workers, and is far more common for white collar than blue collar workers. The average amount of leave ranges from one to five days, or an average of 3.7 days per year. *Id.*

twenty years.<sup>105</sup> By comparison, the average child annually is out of school eighty-three days during holidays and vacations, exclusive of weekends.<sup>106</sup>

The basic schedule and wage structure is no more supportive of families. The scheduling of work is remarkably inflexible and standardized. The vast proportion of jobs require a five-day, forty-hour work week.<sup>107</sup> Only fourteen percent of all wage and salary workers work on flexible time schedules.<sup>108</sup> Most jobs are performed during day hours, but fifteen percent of work involves shift work, most commonly an evening shift.<sup>109</sup> Most workers begin their day between seven and nine a.m. and end their day between four and six p.m., with eight to five the most common hours.<sup>110</sup>

A significant proportion of jobs barely provide a minimal income sufficient for a primary or sole wage earner to support a family.<sup>111</sup> Yet jobs are more plentiful in those industries that pay the least.<sup>112</sup> Over half of the workforce are paid hourly rates,<sup>113</sup> and just over ten percent of all hourly

105. *Id.* at 2. Paid holidays average ten per year; paid vacations average 8.8 days at one year's service, 15.8 days at ten years' service, and 20.6 days at twenty years' service. *Id.* at 5.

106. The average number of school days in the United States is 178 days. When weekend days are subtracted, that yields the eighty-three day figure. UNITED STATES DEPARTMENT OF EDUCATION, OFFICE OF EDUCATION RESEARCH & IMPROVEMENT, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 1989, at 139 (1989).

Some school districts have considered shifting to year-round schools, based on pedagogical considerations and/or to relieve overcrowding. Approximately 600 schools in 1989-90 followed a twelve-month schedule. Stover, *Should Schools Plow Under the Old Agrarian Calendar?* 176 AM. SCH. BOARD J. 37 (Oct. 1989). See generally Gitlin, *Year-Round School*, 98 INSTRUCTOR 16 (Aug. 1988); Ballinger, *Rethinking the School Calendar*, 45 EDUC. LEADERSHIP 57 (Feb. 1988). Changing the calendar alone does not remove all conflicts with parents' work schedules, as students still have more holidays than their parents, and the daily schedule of school is considerably shorter than the average full time work day.

107. EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS, *supra* note 98, at 5. For an overview of work schedule data, see generally Flaim, *Work Schedules of Americans: An Overview of New Findings*, 109 MONTHLY LAB. REV. 3 (Nov. 1986).

108. Daily Lab. Rep. (BNA) No. 153, at B-1 (Aug. 8, 1986).

109. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS DERIVED FROM THE CURRENT POPULATION SURVEY: A DATABOOK 740 (Sept. 1982) (Supp. 1984) [hereinafter LABOR FORCE STATISTICS]. See also Finn, *The Effects of Shift Work on the Lives of Employees*, 104 MONTHLY LAB. REV. 31 (Oct. 1981).

110. Mellor, *Shift Work and Flexitime: How Prevalent Are They?*, 109 MONTHLY LAB. REV. 14 (Nov. 1986).

111. This is evident if you compare poverty level income, certainly the most minimal of necessary income levels, to average weekly earnings. The poverty level for a family of four in 1986 was \$11,203 (roughly \$215/week, 52 weeks); for a family of three, \$8,737 (roughly \$168/week, 52 weeks). BUREAU OF THE CENSUS, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1986, at 38 (1987). In 1986 it was estimated that the average amount of money needed to raise the income of families above the poverty level was approximately \$4,400 per family. *Id.* at 7. The average weekly earnings for goods-producing jobs in 1989 was \$429.27; the average for services jobs was \$306.11. 113 MONTHLY LAB. REV. 71 (Apr. 1990) (table 17).

112. Service sector jobs outnumber goods-producing jobs 3 to 1. BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS, Vol. 34, No. 10, at 88 (Oct. 1987). The leading industries in terms of jobs in the service sector are services, retail trade, and government, respectively. *Id.*

113. Mellor & Haugen, *Hourly Paid Workers: Who They Are and What They Earn*, 109 MONTHLY LAB. REV. 20 (Feb. 1986). Hourly workers are slightly more likely to be women than men, but men are generally paid higher hourly rates and the higher paid hourly jobs are more likely to be held by males and whites. *Id.* at 20-23.

workers make minimum wage or less.<sup>114</sup> Not surprisingly, paid overtime is worked by a large proportion (40.4 percent) of full time workers.<sup>115</sup> The proportion of jobs adequate to support a primary or sole wage earner diminish when sex and race are factored in. Women can expect to earn substantially below men in every occupational category, on average thirty percent less.<sup>116</sup> Blacks and hispanics can expect to earn approximately twenty to twenty-five percent less than whites.<sup>117</sup>

Finally, the workplace culture is not supportive of family responsibilities.<sup>118</sup> The workplace culture continues to operate upon an unarticulated male breadwinner standard. This is fundamentally a standard of separation of work and family. It is reflected in managerial attitudes, employee evaluations, the definition of job functions, and standards for promotion or bonuses.<sup>119</sup> This cultural value structure is a major source of work-family conflict and of the resistance of the workplace structure to its resolution.<sup>120</sup> It is a more serious problem in many respects for working parents than the "objective" structural constraints of the workplace.

#### 4. Work-family conflict

Given these pictures of family, the workforce, and the structure of the workplace, in the context of the historical relation between work and family, it should not be surprising that the conflict between work and family responsibilities is pervasive and serious. Between one-third and one-half of working parents, or one-quarter or more of the workforce, report nearly daily conflict between their work and family roles.<sup>121</sup>

As I have argued elsewhere,<sup>122</sup> the nature of that conflict is complex. In its most physical, mechanical sense, it is conflicts of time.<sup>123</sup> These include daily schedule conflicts as well as the clash between the occupational cycle of the workplace and the life cycle of the family and individual family

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114. *Id.* at 23-25.

115. LABOR FORCE STATISTICS, *supra* note 109, at 745 (Supp. 1984). See also Carr, *Overtime work: An Expanded View*, 109 MONTHLY LAB. REP. 36 (Nov. 1986).

116. LABOR FORCE STATISTICS, *supra* note 109, at 745 (Supp. 1984). Average weekly earnings for women were \$309. Both sexes are likely to be working in occupations only with workers of their gender, and even within companies, they are likely to be rigidly sex segregated by the organizational structure. Rhode, *supra* note 31, at 1208-1212; Dowd, *The Metamorphosis of Comparable Worth*, 20 SUFFOLK U.L. REV. 835, 835-36 (1986); Albelda, *Occupational Segregation by Race and Gender, 1958-1981*, 39 INDUS. & LAB. REL. REV. 404, 405 (1986).

117. LABOR FORCE STATISTICS, *supra* note 109, at 745 (Supp. 1984). Average weekly earnings for blacks in 1987 were \$301; for Hispanics, \$284. *Id.*

118. This seems to be the case even in progressive companies, and even where some sensitization to the issue has begun. See, e.g., *Merck Wins Points With Responsiveness*, Wall St. J., Nov. 30, 1987, § 2, at 23, col. 4. See generally R. KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

119. Dowd, *supra* note 90, at 96-100.

120. See *infra* notes 129-31 (discussion of conflict generated from work culture value structure).

121. WORK AND FAMILY, *supra* note 43, at 51; BU STUDY, *supra* note 43, at 25; Galinsky & Hughes, *Work and Family: Research Findings and Models for Change*, 25 ILR REP. 13 (1987); E. Galinsky, *supra* note 91, at 16. For a more extensive look at the nature and levels of work-family conflict, see Dowd, *supra* note 90, at 84-109.

122. Dowd, *supra* note 90.

members.<sup>124</sup> Furthermore, this is a conflict between the critical psychological and social role of caregiving and nurturing,<sup>125</sup> and the devaluation of caregiving work as women's work.<sup>126</sup> Most essentially, work-family conflict involves fundamental clashes of psychological, cultural, and ideological values.<sup>127</sup> The conflict of values relates intimately to views of appropriate roles.<sup>128</sup> It arises from fundamental conceptions of self and a shift in our ideals and visions of those selves.<sup>129</sup> The consequences of those conceptions of roles are not simply personal, but also are the basis for the perceptions of appropriate roles in the workplace culture.

### C. Gender, Class and Race

To see this general picture of work-family structure and conflict as complete would obscure the significance of gender, class and race. Gender, class and race are powerful determinants, too powerful to ignore, of family, work, and the family-work relationship. They frame the way we actually experience family and work. Each of these factors must constantly be kept in view in examining family, work, and the family-work relationship.

#### 1. Gender

If you are a woman, family is definitional, as much so as biology. It is the contingency, the possibility of family, as well as the scope of actual family responsibilities, that so strongly affects women's sense of time and self, and others' view of women's lives and potential. While connected to women's biological role of bearing children, the critical role of family is primarily based on women's social role as primary or sole parents. Nevertheless, women are viewed, and feel, that they take on family responsibilities automatically, "naturally": this is not a matter of choice. It is foremost a caretaking role. Women care for their partner, their children, their parents, and/or their partner's parents.<sup>130</sup>

123. *Id.* at 84-85.

124. *Id.*

125. Bonnar, *Work and Poverty: Exit From an Ancient Trap by the Redefinition of Work*, in *THE FUTURE OF WORK* 67, 72-77 (D. Gil & E. Gil eds. 1987).

126. Deanne Bonnar defines caregiving work as "the reproduction and physical care of people," and argues that to view this as "love, duty, or biological destiny" instead of work has created female household impoverishment. *Id.* at 67. I have some unease about calling caregiving work. Work connotes obligation and economic reward, although it also connotes purposeful, valued activity. Caregiving may certainly be done as waged work, but it may also be done without economic motive, as a gift rather than as a contract. My difficulty with the notion of caregiving work is in part with calling it work, as that term has traditionally been understood.

127. Dowd, *supra* note 90, at 92-99.

128. *Id.* at 92-95. "[P]arents learn, consciously or not, that the job and the family can require diverse modes of being. There are differences in role, in pacing, in focus, in the amount of feedback one receives, in the way one expresses feelings or acts as an authority. Some parents develop techniques, even ritual ways of behaving, to help them bridge these differences." E. Galinsky, *supra* note 91, at 9.

129. Dowd, *supra* note 90, at 99-100. "In all the issues that employed parents face, expectations — images, conscious or not, of the way things are supposed to go or people are supposed to behave — are a powerful factor." E. Galinsky, *supra* note 91, at 20.

130. If you are not heterosexual, your family role is much more difficult, likely to be hidden, and unsupported structurally, socially, or in any other way. See generally Polikoff,

The presence of family dramatically changes women's lives, especially economically, even more so than marriage.<sup>131</sup> Increasingly, if you are a woman, family is tied to children, but not to marriage. It is also likely that you will experience parenthood as a single parent, for all or some part of your parenting experience.<sup>132</sup> Furthermore, as long as you raise children as a single parent, you will likely do so without sufficient economic support from your sexual or marital partner or ex-partner, or from the state.<sup>133</sup> As a single parent, most women will be poor: one of three households headed by women is below the poverty line, compared to one of nineteen married couple families, and one of nine male headed families.<sup>134</sup>

If you are a woman, your role as (actual or potential) mother is viewed as inconsistent with work. Work is always secondary to family. The term "working mother" exemplifies these assumptions.<sup>135</sup> This is so despite the fact that the increasing presence of mothers in the workplace,<sup>136</sup> and the even

*This Child Does Have Two Mothers*, 78 GEO. L.J. 459, 462-64 (1990); Law, *supra* note 55, at 190-92; Note, *Gay Parenting: Myths and Realities*, 9 PACE L. REV. 129, 139-50 (1989).

131. Women show a pattern of substantial earnings decline correlated to presence of children under age eighteen. BUREAU OF THE CENSUS, EARNINGS IN 1983 OF MARRIED-COUPLE FAMILIES, BY CHARACTERISTICS OF HUSBANDS AND WIVES 24-25 (table 5B) (1986). With respect to the age and presence of children, forty-six percent of working wives had no children under eighteen at home; of those with children present, mean earning levels varied by presence of children and age of children: earning level was low when children were under six, even lower if the children present were mixed in age between those under and over six, and earning levels were highest when all children are over six. *Id.* at 24.

The long-term impact of this is seen in the economic impoverishment of a substantial proportion of older women. *House Aging Panel Summarizes Suggestions for Improving Income Levels of Older Women*, Daily Lab. Rep. (BNA) No. 99, at A-6 (May 24, 1989). This is compounded by the operation of Social Security and the tax laws, which discourage older workers from employment, especially disadvantaging older women. See generally Herz & Rones, *Institutional Barriers to Employment of Older Workers*, 112 MONTHLY LAB. REV. 14 (Apr. 1989); *Government Tax Policies Force Older Workers to Retire*, Daily Lab. Rep. (BNA) No. 130, at A-11 (July 10, 1989).

132. This is a product of both higher divorce rates and increased non-marital childbirth, WORK & FAMILY, *supra* note 43, at 43, so that an estimated two-thirds of all children will live with a single parent during their childhood. HOUSEHOLD AND FAMILY CHARACTERISTICS, *supra* note 39, at 3. Usually that will be a single mother, as women head ninety percent of single parent families. *Id.* at 5. The growth of families maintained by women has exceeded the growth in married couple families and families maintained by men. POPULATION PROFILE, *supra* note 41, at 17.

133. The common characteristic of female-headed families is that they are poor. Levitan & Belous, *supra* note 36, at 29. Failure to pay child support, job segregation and consequent low wages, and declining welfare payments all contribute to single mothers' poverty. See Arendell, *supra* note 51, at 123; A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 289 (G. Jaynes & R. Williams eds. 1989) (thirty percent decline in real value of welfare benefits since 1973) [hereinafter A COMMON DESTINY].

134. Levitan & Belous, *supra* note 36, at 29. See also MONEY INCOME, *supra* note 87; BUREAU OF THE CENSUS, CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1984 (June 1986).

135. This is also arguably reflected in the term "working woman." The assumptions are that usually women do not work, that household work isn't "real" work, and that women should not be or ordinarily are not present in the workplace.

136. The first influx of women into the labor force was married women over thirty-five with grown children or no children; the second wave was the growth in the wage work of women with young children. Unlike preceding generations, most mothers no longer leave the workforce when they bear children, and do not remain out of the workforce to raise children. S. KAMMERMAN, *supra* note 33, at 8-10.

stronger labor force commitment of women maintaining families,<sup>137</sup> flatly contradict these assumptions. Over half of all mothers work;<sup>138</sup> and over eighty percent of women maintaining families work full time.<sup>139</sup> Nevertheless, women maintaining families have a hard time staying in the workforce.<sup>140</sup>

The workplace presents only a narrow range of choices to women. Only a limited number of occupations welcome women into their ranks, and nearly always at the cost of low pay or pay below their worth, little or no advancement, and part time rather than full time work.<sup>141</sup> Two of every five women work in one of ten occupations; three of every five are in occupations seventy-five percent or more female-dominated; and all on average earn only sixty-four percent of male wages.<sup>142</sup> The small proportion permitted to enter the majority of occupations dominantly or exclusively held by men are likely to be steered into less advantageous jobs or specialties, be paid less, promoted less, and given fewer managerial positions of power, decisionmaking, and prestige.<sup>143</sup> Regardless of whether women work in female or male dominated

137. Johnson & Waldman, *supra* note 81. The rate of labor participation for women who maintain families is close to that of married couple families and families maintained by men. The following figures represent the proportion of each type of family with members in the labor force:

Married couple families:

- 84.7 percent one member in workforce.
- 46.6 percent both husband and wife in workforce.

Families maintained by women:

- 75.5 percent one member in workforce.
- 55.7 percent householder in workforce.

Families maintained by men:

- 89.1 percent one member in workforce.
- 70.8 percent householder employed.

Bureau of Labor Statistics, *Family Earnings and Employment Data*, *supra* note 77, at B-1 (table 2), B-4. See also Shank, *Women and the Labor Market: The Link Grows Stronger*, 111 MONTHLY LAB. REV. 3 (Mar. 1988).

138. Recent figures from the Bureau of Labor Statistics indicate that among families with children under age eighteen, 61.4 percent include mothers working outside the home; in households with children under age six, 54.1 percent of mothers worked outside the home. Bureau of Labor Statistics, *Number of Two-Earner Families Rose in Last Year*, BLS Reports, Daily Lab. Rep. (BNA) No. 147, at B-9 (July 31, 1990).

139. Johnson & Waldman, *supra* note 81, at 31. See also UNITED STATES COMMISSION ON CIVIL RIGHTS, A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN 15 (1983).

140. This is evidenced by women's high unemployment rates. Johnson & Waldman, *supra* note 81, at 31. The unemployment rate is twenty-three percent for mothers with children under six, fifteen percent for mothers with children of school age. This is twice as high as mothers in married couple families. *Id.*

141. Roughly sixty to seventy percent of all workers would have to change occupations in order to equalize the sexual division of labor. Bielby & Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOC. 759, 760 (Jan. 1986). See also Albelda, *supra* note 116, at 405; Waldman, *supra* note 79, at 16. There is an enormous legal literature on the theory of comparable worth; for a sampling, see Dowd, *supra* note 116.

142. WOMEN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR, TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS 54, 69 (1983). Of the ten occupations, all are in the retail trade and service sectors. *Id.* at 54. See also Rhode, *supra* note 31, at 1209; Hartman, Roos & Grieman, *An Agenda for Basic Research on Comparable Worth*, in COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH 3-4 (H. Hartmann ed. 1985).

143. Job segregation is extremely high within individual establishments. Bielby & Baron, *supra* note 141, at 775-788. There has also been very little improvement in the earnings gap between men and women. BUREAU OF THE CENSUS, MALE-FEMALE DIFFERENCES IN

occupations, they are likely to experience harassment, including the threat of rape, due to their sex.<sup>144</sup>

Finally, if you are a woman who works and is part of a dual-parent family, your paid work role is unlikely to change your traditional responsibility for the unpaid work of the household and childcare.<sup>145</sup> Rather than readjustment of household roles, women can commonly expect simply addition of the work role to their household role. Any reduction in women's household role is simply from doing less; very little reduction is from redistribution of responsibilities.<sup>146</sup>

In contrast, if you are a man, work is definitional: it is the measure of men's value.<sup>147</sup> Work includes the full range of occupations, although

WORK EXPERIENCE, OCCUPATION, AND EARNINGS: 1984, DATA FROM THE SURVEY OF INCOME AND PROGRAM PARTICIPATION, HOUSEHOLD ECONOMIC STUDIES 1 (Aug. 1987).

For some specific examples, see *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (accounting); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (banking); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (law).

Many women who have entered traditionally male occupations have done so only with the aid of affirmative action. See M. WALSHOK, *BLUE COLLAR WOMEN; PIONEERS ON THE MALE FRONTIER* (1981); Law, *Girls Can't Be Plumbers*, 24 HARV. C.R.-C.L. L. REV. 45 (1989).

144. A 1988 survey indicated forty-two percent of female workers experienced sexual harassment in the workplace. Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMEN 69, 71 (Dec. 1988). The disincentives to complaining of harassment are severe; only five percent of those harassed file complaints. *Id.* The threat of harassment is a powerful deterrent to doing men's work; the price of being a "pioneer" or a token is simply too high. Sandroff, *supra*, at 72. Sexual harassment thus perpetuates occupational segregation.

A rape claim was included in the landmark case of *Meritor v. Vinson*, 477 U.S. 57, 60 (1986). It was not treated as the basis *per se* for a sexual harassment claim, but only as evidence of a hostile workplace environment. Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1726-27 (1980). The threat of rape, and the lack of its prosecution, has been particularly real for black women in the workplace. Harris, *Race & Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598-99 (1990). See generally C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); S. ESTRICH, *REAL RAPE* (1988).

145. Dowd, *supra* note 90, at 85-86.

146. J. PLECK, *WORKING WIVES, WORKING HUSBANDS* 15-23 (1985); Pleck, *The Work-Family Role System*, in *WOMEN AND WORK: PROBLEMS AND PERSPECTIVES* 101, 104 (R. Kahn-Hut, A. Daniels & R. Colvard eds. 1982). One feminist commentator bluntly explains this as tied to "the essential fact of housework from the beginning. Which is that it stinks." J. PLECK, *supra*, at 16. Although there has been some change in men's domestic role, it has primarily come in the area of childcare, not housework. See, e.g., BU STUDY, *supra* note 43, at 17. This pattern crosses cultural lines; in Sweden, for example, the redistribution of family work has occurred primarily in childcare. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311, 318 (1989).

147.

[W]ork is a good thing for man. . . . It is not only good in the sense that it is useful or something to enjoy; it is also good as being something worthy, that is to say, something that corresponds to man's dignity, that expresses this dignity and increases it. . . . Work is a good thing for man — a good thing for his humanity — because through work man not only transforms nature, . . . but he also achieves fulfillment as a human being and indeed, in a sense, becomes 'more a human being.'

Pope John Paul II, *Laborem Exercens*, 27 CATH. LAW. 1, 15 (1981). See also Williams, *supra* note 90, at 823 ("Men are raised to believe they have the right and responsibility to perform as ideal workers."). See generally Gilbert & Rachlin, *Mental Health and Psychological Functioning of Dual-Career Families*, 15 COUNSELING PSYCHOLOGIST 7, 15 (1987); Note, *Fathers and Families: Expanding the Familial Rights of Men*, 36 SYRACUSE L. REV. 1265,



preferably not "women's work."<sup>148</sup> Work is primary; family must be sacrificed for work. Fathers have always been presumed to work; indeed, we have no concept of a "working father" because such a term would be redundant. Men's labor force participation is highly correlated with marriage and children, peaking at ninety-five percent for men with children under age eighteen.<sup>149</sup>

If you are a man, family means primacy and power, centered in the concept of family as hierarchy and man's role as that of family head. Men can expect family roles to be sharply unequal, with men performing little of household or caregiving tasks.<sup>150</sup> The male role is primarily economic, and only very secondarily psychological: fathers are economic parents.<sup>151</sup> Men take care of their families by contributing income while women do the actual caretaking of the family.

To the extent men do caretaking, it is viewed as extraordinary and praiseworthy, as long as it does not interfere with their primary wage work role. The emotional, psychological, caretaking side of men's family life often is hidden, particularly from employers, except in times of extreme stress. Only under extraordinary circumstances can caretaking be revealed, and then not necessarily without consequence.<sup>152</sup>

1268 (1986); Sagi & Sharon, *Costs and Benefits of Increased Paternal Involvement in Childrearing: The Societal Perspective*, in FATHERHOOD AND FAMILY POLICY 220, 226 (M. Lamb & A. Sagi eds. 1983); Russell & Radin, *Increased Paternal Participation: The Fathers' Perspective*, in FATHERHOOD & FAMILY POLICY, *supra*, at 156-63. Sometimes men's value is measured by sports, instead of work. See Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549, 551-54 (1989).

148. While women are concentrated in a few occupations, men work in a far greater range of occupations that are gender-mixed or in which men are gender dominant. Mellor, *Investigating the Differences in Weekly Earnings of Women and Men*, 107 MONTHLY LAB. REV. 17-19 (June 1984).

149. Hayghe, *supra* note 76. See also Bureau of Labor Statistics, *Family Earnings Up by Nearly 5% in Year; Drop Reported in Families with Jobless Member*, Daily Lab. Rep. (BNA) No. 76, at B-1 (Apr. 22, 1987).

150. Dowd, *supra* note 90, at 85-86. For a fascinating look at a different paradigm, see D. EHRENSAFT, PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN (1987).

151. See *supra* note 146. See also McCant, *Cultural Contradiction of Fathers as Nonparents*, 21 FAM. L.Q. 127 (1987); THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (M. Lamb ed. 1981).

152. One father who requested a four-day workweek for one year at the birth of his third child related this reaction to his changed schedule: "All of a sudden, my dedication seemed to be in question. My decisions, routine decisions, memos, day-to-day things, were being scrutinized more closely. . . . [T]here were a number of subtle intimations that what I was doing was disrupting office routines." *The Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits, Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 69 (1987) (statement of David Spiegel). See also Hulbert, *Confessions of Sensitive Men*, 194 NEW REPUBLIC 31, 33-34 (Jan. 27, 1986); Sagi & Sharon, *supra* note 147, at 248; Russell & Radin, *supra* note 147, at 155. Using the legal environment as an example, see Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263, 1273 (1982); Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251, 263 (1989); Leeds, *Maternity Leave for Fathers*, Part I, 55 N.Y. ST. B.J. 32 (Feb. 1983); Leeds, *Maternity Leave for Fathers*, Part II, 55 N.Y. ST. B.J. 15 (Apr. 1983). For an excellent overview of the caselaw in this area, see Note, *supra* note 144.

If you are a man, caretaking, even economic caretaking, is a matter of choice, not of obligation, particularly if children are conceived outside of marriage. Although legal structures and obligations seem to suggest otherwise, men often do not consider themselves responsible economically, and certainly not for actual caretaking, of their children. As actual caretakers men are frequently secondary or not present at all. Even as economic parents, many men assume that role only while married, and ignore it after divorce or where no marriage has ever occurred.

For both women and men, work and family roles are extremely powerful and confining. The work-family relationship is a well-defined, interconnected set of roles that perpetuates men's dominance over women and limits both women's and men's psychological and social roles.

## 2. Class

While gender defines work and family roles so strongly as to make them feel biologically ingrained, class<sup>153</sup> strongly influences the capability to achieve or change roles, and to deal with the conflicts roles create. More fundamentally, class means the survival of families. Class analysis exposes the failure to achieve minimal social support for a significant proportion of families, the reproduction of shattered work-family relationships for the poorest families, and the virtual abandonment of children, who constitute the fastest growing segment of those in poverty. Class focuses attention on the structure of the workplace, particularly the occupational structure, and its contribution to work-family conflict. It points to issues of power and hierarchy. It defines who has the power to name and describe work-family roles. Class reveals the underlying premises of the distribution of economic resources across the work-family relationship, resting upon a structure characterized by the devaluing of unwaged work, and the perpetuation of gender and race inequality.

The clearest, most direct impact of class on family is on the ability to sustain the work-family relationship. The poverty rate for families in 1988 was 10.4 percent; half of our poor are either children under eighteen or elders over age sixty-five.<sup>154</sup> A significant proportion of poor households are working

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153. Within the concept of class, of differentiation by income level, there are several further distinctions which make a difference in work-family relations. Class may include those unemployed in the wage labor market, or not participating in the wage labor market; the working poor, e.g., those families who have one or more full or part time worker who nevertheless are at or below the poverty line; and blue collar workers, not all of whom are poor, but who commonly hold jobs which are characterized by greater hierarchy, control, and more workplace rigidity.

For a discussion on the various definitions of class, see W. FORM, *DIVIDED WE STAND: WORKING-CLASS STRATIFICATION IN AMERICA* 4-8 (1985). Form particularly notes the divergences within the working class, particularly between the traditional working class, e.g., blue collar/skilled workers, mostly white male, and the "new" working class of unskilled or low skilled service workers, which include more women and minorities. *Id.* at 255-57. See also Tanner & Cockerill, *In Search of Working-Class Ideology: A Test of Two Perspectives*, 27 SOC. Q. 389, 400 (1986) (working class consciousness is segmented/ambivalent, not solely tied to work structure or political socialization).

154. MONEY INCOME AND POVERTY STATUS, *supra* note 88. See also Danziger & Gottschalk, *Work, Poverty, and the Working Poor: A Multifaceted Problem*, 109 MONTHLY LAB. REV. 17-18 (Sept. 1986). The most important factors connected to the poverty rate among workers, according to two researchers, are family relationships and education. "Family struc-

poor: nearly fifty percent of poor householders were in the workforce in 1988.<sup>155</sup> Among these families, the connection to the workforce is strong, but the ability to earn sufficient income to support the family is difficult.<sup>156</sup>

Lack of sufficient income means not simply conflict between work and family, but the breakdown of the work-family relationship.<sup>157</sup> For the working poor, that breakdown is largely ignored. This perhaps is tied to the continuing presumption that sufficient wage work exists that provides adequate support for a single earner or dual earner family. But an increasing proportion of jobs, and particularly jobs in the growth sectors of the economy, are largely inadequate to support a family.<sup>158</sup> For the welfare poor (some of whom are among the working poor), the breakdown of the work-family relationship is arguably caused, and certainly exacerbated, by the functioning of the welfare system. The state is intrusive, but never sufficiently supportive,<sup>159</sup> often stigmatizing and patronizing, but most often it simply recreates and perpetuates the breakdown of work and family. Historically, this has been accomplished by prohibiting support where a potential male breadwinner was in the household.<sup>160</sup> Currently, the reformed welfare system has established the purported goal of workforce re-entry, but without adequate support structures

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ture largely determines the number of potential wage earners, and education is the best predictor of earnings." Klein & Rones, *A Profile of the Working Poor*, 112 MONTHLY LAB. REV. 3, 4 (Oct. 1989), reprinted in 215 Daily Lab. Rep. (BNA) No. 215, at D-1, D-2 (1989). Women who maintain families have the highest poverty rates, tied primarily to family responsibilities; black poverty rates are strongly tied to low educational attainments. *Id.*

155. MONEY INCOME AND POVERTY STATUS, *supra* note 88. Over sixteen percent of all heads of poor households work year round, full time. *Id.* A 1989 study based on 1986 figures indicates the pattern is significantly different, however, for male and female heads of poor households: 25.4 percent of male householders, but only 8.3 percent of female householders, worked year round full time. Littman, *Reasons for Not Working: Poor and Nonpoor Householders*, 112 MONTHLY LAB. REV. 16-17 (Aug. 1989) (table 2).

156. Littman, *supra* note 155, at 20.

157. The more marginal your income, the more essential that any unpaid or low paid time away from work be minimized. Thus, lower income women have a high rate of workforce participation and a low rate of job interruption for childbearing. STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 386 (1989); Haythe, *Married Couples: Work and Income Patterns*, in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, FAMILIES AT WORK: THE JOBS AND THE PAY 11, 12-13 (1984).

158. Danziger & Gottschalk, *supra* note 154, at 18. Klein & Rones, *supra* note 154, at 2, 5. Real earnings have declined during the past two decades by twelve percent. *Most American Workers See Real Earnings Decline Amid Restructuring of Labor Force*, Daily Lab. Rep. (BNA) No. 18, at C-1 (Jan. 26, 1990). During the same period, the income gap between rich and poor households has widened, as has the racial earnings gap. *JEC Panel Finds Income Distribution Has Grown More Unequal During Current Economic Expansion*, Daily Lab. Rep. (BNA) No. 91, at A-8 (May 12, 1989); *Private Study Shows Income, Earnings Gap Widened Between Blacks, Whites During 1980's*, Daily Lab. Rep. (BNA) No. 202, at A-9 (Oct. 19, 1988). The tax burden on poor families also is high in an absolute sense, and has increased over the past decade, now representing, on average, 10.1 percent of income. Danziger & Gottschalk, *supra* note 154, at 20.

159. In two-thirds of the states, the maximum welfare grant is less than fifty percent of the poverty line. In no state can a family climb over the poverty line without other income, yet the welfare system rigidly restricts the amount of income permitted before discontinuing benefits. Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577 (1988). One report indicates that Social Security has been the most effective government program at reducing poverty, primarily among the elderly. *Social Security to Bridge Gap in Income*, N.Y. Times, Dec. 28, 1988, at A1, col. 1.

160. Law, *supra* note 97, at 1254-55.

and without reference to the limited opportunities (measured by income) in the workplace.<sup>161</sup>

As dramatic as is the impact of income on families, even more dramatic is its effect on children. Indeed, the economic lens of a class perspective brings children sharply into focus. Children are the largest, and fastest growing, age segment of the poor.<sup>162</sup> One out of every five children live in poverty; that is expected to rise to *one of every four* children by the year 2000.<sup>163</sup> Beyond the moral bankruptcy of this statistic is the economic stupidity it represents: childhood investments in health and education, for example, reap both immediate and long-term societal benefits.<sup>164</sup> Conversely, the lack of support for children quickly takes its toll. "By the time they reach kindergarten, [children who have experienced poverty] will already be falling behind through no fault of their own."<sup>165</sup> The accident of one's class of birth is allowed to be determinative, under the guise of viewing our society as classless and fluid and the assumption that each individual has a roughly equal starting place in the opportunity structure. It is an accident that is particularly tolerated for minority children. As one politician has bluntly acknowledged, "We do care about some children. Majority children. It is minority children — not only but mostly — who are left behind."<sup>166</sup>

Class analysis also exposes the impact of the occupational structure on work and family. Class strongly affects the structure of work. Highly com-

161. Diana Pearce calls this new stage of welfare the "workhouse without walls." Pearce, *Women, Work, and Welfare: The Feminization of Poverty*, in WORKING WOMEN AND FAMILIES, *supra* note 3, at 103, 113. See also J. SANDERS, STAYING POOR: HOW THE JOB TRAINING PARTNERSHIP ACT FAILS WOMEN 119-20 (1988); *Pulling Families Out of Welfare Is Proving to Be an Elusive Goal*, N.Y. Times, Apr. 2, 1990, at A1, col. 1. "Making the transition permanently from welfare recipient to worker is becoming increasingly difficult because of the way in which income disregards work." Pearce, *supra*, at 116. Income problems are exacerbated by the inadequacies of child support. See Denton, *Child Support Enforcement and Welfare Reform*, in WELFARE REFORM 49, 50 (J. Denton ed. 1988). For one interesting alternative, see Bergmann, *A Fresh Start on Welfare Reform*, CHALLENGE 44 (Nov./Dec. 1987) (Wisconsin child support system).

162. Braveman, *supra* note 159, at 577. The problem is particularly acute for very young children in female-headed households. In 1986, *ninety-six percent* of children under age six in female-headed households were poor. Litman, *supra* note 155, at 20.

163. Braveman, *supra* note 159, at 581, 584. See also FORD FOUNDATION, THE COMMON GOOD: SOCIAL WELFARE AND THE AMERICAN FUTURE: POLICY RECOMMENDATIONS OF THE EXECUTIVE PANEL 10-11 (1989). Using the imagery of looking through a hospital nursery window, the report predicts life prospects of newborn babies as follows:

Forty-two percent of the white babies will live with a single mother by age eight, and most of these infants will experience a major spell of poverty during that time. Eighty-six percent of the black babies will live with a single mother by age eight, and most will be poor during most of that time. . . . The large number of unlucky babies will experience a childhood lacking in the essential requirements for good health, physical safety, and proper mental and social development.

164. FORD FOUNDATION, *supra* note 163, at 11.

There is no more important contradiction in social policy than this: From child-development research we now know that the first few years of life play a crucial role in shaping a person's lifelong mental, emotional, and physical abilities. And yet it is for this stage of life that we seem to make our social investments most grudgingly and tolerate the greatest deprivation.

*Id.* at 10.

165. *Id.* at 11.

pensated work may require extensive time, although sometimes when and where the time is expended is more flexible. Blue collar work generally means control by the worker of total work time, but not of the time during the day that work is done nor the place where it is performed.<sup>167</sup> The hierarchy of work determines one's power and control, and thus to a great degree one's perception of choices and ability to respond to the demands of work-family responsibilities.<sup>168</sup>

The class perspective re-emphasizes the importance of connecting the workplace to family.<sup>169</sup> Joan Acker argues that class includes not only relations of production, but also relations of distribution, "sequences of linked actions through which people share the necessities of survival."<sup>170</sup> Workplace structure is intimately tied to family structure, according to this view, and to gender roles. The essential reproduction of the working class is accomplished by distribution of a family wage through male wage earners to female dependents who reproduce and care for the family.<sup>171</sup> "The wage . . . is both an aspect of production and a mechanism of distribution."<sup>172</sup> Sex segregation and the wage gap make sense in this system of distribution as reinforcement of women's

166. Moynihan, *Introduction*, in WELFARE REFORM, *supra* note 161, at xi.

167. Blue collar and lower income jobs are rigidly time structured, with little use of flextime as an alternative. See generally Flaim, *supra* note 107; Smith, *The Growing Diversity of Work Schedules*, 109 MONTHLY LAB. REV. 7, 9 (Nov. 1986). Control of time does not always exist: mandatory overtime, or the need to work a second job, significantly affects control of time.

For an example of the high time demands of professional jobs, see ABA YOUNG LAWYERS DIVISION, A REPORT ON THE STATE OF THE LEGAL PROFESSION 5-6 (1984) (in 1984, eleven percent of the surveyed lawyers worked over 240 hours per month; forty-four percent worked over 200 hours per month).

168. On women in blue collar jobs, and their perception of their choices, see M. WALSHOK, *supra* note 143, at 206, 208 (1981). "[T]he traditional failure of girls and young women to clearly articulate an occupational direction and a vocational 'game plan' is as much a function of limited opportunities as it is of seeing paid employment as something to be combined with, or secondary to, marriage and a family." *Id.* at 117. On power, empowerment, and choices in a blue collar framework, see Morgen & Bookman, *Rethinking Women and Politics: An Introductory Essay*, in WOMEN AND THE POLITICS OF EMPOWERMENT 3 (A. Bookman & S. Morgan eds. 1988).

169. The separation of family from work is notable in historic and current class-based analysis. See, e.g., Zaretsky, *The Place of the Family in the Origins of the Welfare State*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 188, 215 (B. Thorne & M. Yalom eds. 1982) [hereinafter RETHINKING THE FAMILY]; Acker, *Class, Gender, and the Relations of Distribution*, 13 SIGNS 473, 474-77 (1988).

170. Acker, *supra* note 169, at 478. Acker acknowledges that her analysis does not include race, nor does it differentiate among women. She suggests that including race may require a different analysis. *Id.* at 480 n.25. While clearly the analysis would change, her insight about distribution remains valuable.

171. See also Bookman, *Unionization in an Electronics Factory: The Interplay of Gender, Ethnicity, and Class*, in WOMEN AND THE POLITICS OF EMPOWERMENT, *supra* note 168, at 176 ("To understand the impact of class, one must look beyond women's relationship to the production process as it occurs in the workplace. Class also affects the nature and scope of woman's subordination in the family and often the possibilities and limitations placed on her participation in her community.").

172. Acker, *supra* note 169, at 480. "'Sending out' is important: there is a radical split between household and work place, yet the resources upon which the household depends come from participation in production outside of itself." Rapp, *Family and Class in Contemporary America: Notes Toward an Understanding of Ideology*, in RETHINKING THE FAMILY, *supra* note 169, at 171.

economic dependency, which is critical to the distribution system.<sup>173</sup> This system hides and devalues housework, eliminating it from our very definition of work, and gendering it so as to limit responsibility for it to women.<sup>174</sup> Acker also contends that this system is breaking down in late capitalist societies due both to the decline in the high-wage male jobs sufficient to provide a "family wage," and the breakdown of the transfer of the wage from men to women.<sup>175</sup> The consequences of the breakdown in the distribution system fall most heavily on women because of their disadvantaged status in both the work and family structure; men are affected solely because of a shift in the income structure, which they may pass off by limiting their wage-sharing with women and children.

At the same time, the dependent position of women does not leave them totally powerless to shape their lives. Blue collar women, for example, have created within this system a valued place for both work and family different from that of upper income professional women, one which both accepts and resists the distribution structure and its assumptions.<sup>176</sup> "[B]oth freedom and oppression are inextricably mixed in both family and factory."<sup>177</sup> This suggests a model of combining work and family in a way that concedes the differences between wage work and house work but permits the combination of the two.<sup>178</sup>

Finally, class controls the image of family and of the work-family relationship.<sup>179</sup> The dominant images are those of the middle class, even when the middle class itself can no longer attain the image. The shift in the middle class from a male single earner family to a dual earner family has triggered much of the recognition of work-family conflict. Blindness to the experience of other

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173. Acker, *supra* note 169, at 481.

174. Hartmann, *The Family as the Locus of Gender, Class and Political Struggle: The Example of Housework*, 6 SIGNS 366 (1981).

175. Acker, *supra* note 169, at 496.

176. Ferree's summary of West German research suggests that assumptions that working class women are powerless, unattached to their work, and would prefer to be at home, are unsupported. Ferree, *Between Two Worlds: German Feminist Approaches to Working-Class Women and Work*, 10 SIGNS 517 (1985) [hereinafter *Between Two Worlds*]. Ferree also contends that feminist consciousness, characterized as support for equal rights and changing sex roles, is more dependent on employment than class. This belies the presumption that working class women are necessarily more traditionalist or that this is a class-based characteristic. Ferree, *Working Class Feminism: A Consideration of the Consequences of Employment*, 21 SOC. Q. 173, 175 (1980).

177. Ferree, *Between Two Worlds*, *supra* note 176, at 535.

178. *Id.* at 526-27, 533. "Women who seek to mitigate the strain of participating in two different work systems organized on two different sets of principles often seek out marginal positions . . . and then find that these alternatives are economically penalized. Yet to give up their interest in such alternatives would be to accept the very norms and values of capitalism that penalize them, just as giving up all interest in paid employment would be an accommodation to patriarchy." *Id.* at 535.

179. On the class bias in the literature, and the lack of studies on blue collar families, see Walshok, *Occupational Values and Family Roles: Women in Blue Collar and Service Occupations*, in WORKING WOMEN AND FAMILIES, *supra* note 3, at 63, 69; P. ROBY, WOMEN IN THE WORKPLACE: PROPOSALS FOR RESEARCH AND POLICY CONCERNING THE CONDITIONS OF WOMEN IN INDUSTRIAL AND SERVICE JOBS (1981); M. KOMAROVSKY, BLUE-COLLAR MARRIAGE (1962); M. WALSHOK, *supra* note 143. On the bias against blue collar women in research on working women, see Ferree, *Between Two Worlds*, *supra* note 176, at 519-20.

classes ignores a history of work-family relations in working class families that offers important insights.

### 3. Race

Race is an identifier of particular work-family relationships that reflect the consequences of structural racism as well as a unique congruence with class and gender. The general patterns previously sketched of work and family reflect the dominance of the white majority. Viewed from the perspective of racial minorities, the work-family patterns are significantly different. The minority perspective teaches much about the consequences of a structure hostile to work-family relationships.<sup>180</sup> Family has been subject to persistent, serious strain reflected in both successful survival and a constant undertow toward disintegration. Work, if available at all, has often been menial and poorly paid, with sharply limited opportunities. The consequences of these patterns are particularly well documented for black families.<sup>181</sup>

If you are black, family and work patterns differ dramatically from those of whites.<sup>182</sup> Black households are roughly equally divided among single parent and married couple households, whereas the married couple family still predominates among whites.<sup>183</sup> The dramatic increase in single parent families

180. The race perspective, as with gender and class, suggests both positive and negative lessons. Dodson calls this "reflective analysis":

- (a) focus on socialization of black families as the process which brings together individual, cultural group(s), and society in a dynamic interactive process;
- (b) account for the impact — positive and/or negative — of the relative unavailability of maximum social, economic, and political societal resources to black families and;
- (c) account for the environmental reality that black families are forced to use relatively minimal resources to effect a socialization process and product which allows individuals to function in two social realities of the United States — a nonblack world of consistent, sufficient social support and a black world of fluctuating scarcity of resources.

Dodson, *Conceptualizations of Black Families*, in *BLACK FAMILIES* 23, 33 (H. McAdoo ed. 1981) [hereinafter *BLACK FAMILIES*]. The positive perspective is poorly documented, as noted by one commentator, with respect to parenting models drawn from black families. Peters, *Parenting in Black Families with Young Children: A Historical Perspective*, in *BLACK FAMILIES*, *supra*, at 211.

181. See generally *BLACK FAMILIES*, *supra* note 180; *THE BLACK FAMILY: ESSAYS AND STUDIES* (R. Staples ed. 3rd ed. 1986) [hereinafter *THE BLACK FAMILY*].

Several commentators have noted recognizable stages in the research on black families and the view of the black families: from the initial view of the 1965 Moynihan Report regarding black families as dysfunctional families; followed by reaction in the 1970's which stressed the positive aspects of black families; and a third phase in the 1980's, focusing on socioeconomic analysis. Staples, *Preface*, in *THE BLACK FAMILY*, *supra*; Dodson, *supra* note 180, at 23-24. For historical perspective and changes in historical analysis, especially regarding the impact of slavery, see Genovese, *The Myth of the Absent Family*, in *THE BLACK FAMILY*, *supra*, at 29-33; Staples, *The Setting*, in *THE BLACK FAMILY*, *supra*, at 2-3.

182. See generally *A COMMON DESTINY*, *supra* note 133.

183. *HOUSEHOLD AND FAMILY CHARACTERISTICS*, *supra* note 39, at 2. Married couple families constitute thirty-seven percent of black households, compared to sixty-one percent of white households; single female parent households constitute thirty-one percent of black households, compared to nine percent of white households; single male parent households are four percent of black households, compared to two percent of white households. *Id.* Black wives have historically been more likely to work than white or hispanic wives, and black families are more likely to be multi-earner families. Nevertheless, black families have had lower family incomes and higher unemployment than whites. Hayghe, *supra* note 76, at 26. The rate

has been most pronounced in the black community. While the overall number of families maintained by women increased ninety percent from 1970-1985, the number of families maintained by black women *more than doubled* over the same period.<sup>184</sup> Although in absolute numbers more whites than minorities maintain families headed by women, proportionately more minority women are single heads of families.<sup>185</sup> This has significant consequences for black children, because of the likelihood that a single head of household will be poor.<sup>186</sup>

The structure of family, its definition, includes markedly different variations from white families. If you are black, the size of your family tends to be larger than the average white family.<sup>187</sup> Men may be present in the family as fathers but not as husbands, and only within the constraints permitted by state structures such as the welfare system.<sup>188</sup> Most significantly, the support

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of labor participation by black wives has been unaffected by the presence of young children, reflecting the necessity of the income of black wives and the inability of black men to find work. *Id.* at 26-27.

184. FACTS ON UNITED STATES WORKING WOMEN, WOMEN'S BUREAU, Fact Sheet No. 86-2 (1986). The rise in female-headed households as a proportion of black families is a recent historical phenomenon, dating from this century. Brewer, *Black Women in Poverty: Some Comments on Female-Headed Families*, 13 SIGNS 331, 334 (1988). The reaction and interaction of black families to urbanization, the welfare system, social and economic discrimination, among other factors, seem to have contributed to this shift in family structure. *Id.* at 335.

185. Sixty percent of all black families are maintained by a single parent. S. KAMMERMAN & A. KAHN, *MOTHERS ALONE* 8-9 (1988) [hereinafter *MOTHERS ALONE*]. See also Johnson & Waldman, *supra* note 81, at 32.

186. Over fifty percent of black children are in single parent households. *MOTHERS ALONE*, *supra* note 185, at 8-9. An estimated eighty-six percent of black children are likely to spend some portion of their childhood in a single parent family, compared to forty-two percent of white children. A COMMON DESTINY, *supra* note 133, at 523. In 1986, two-thirds of all blacks in female-headed families in 1986 were poor. *Id.* See also Moore, *Policies Affecting the Status of Black Children and Families*, in BLACK FAMILIES, *supra* note 180, at 278.

187. Blacks and hispanics both average larger families than whites, with hispanics averaging the largest families. HOUSEHOLD AND FAMILY CHARACTERISTICS, *supra* note 39, at 78, 81, 84. In summary, the differences are as follows:

Percentage of Families:			
	White	Black	Hispanic
Family size:			
2	41.23	33.4	23.9
3	23.2	23.8	23.1
4	21.4	20.3	24.2
5	9.2	11.6	14.8
Number of children under age 18:			
1	20.3	23.0	22.8
2	18.8	20.0	23.9
3	6.7	10.0	13.1

*Id.*

188. Stack, *Sex Roles and Survival Strategies in an Urban Black Community*, in THE BLACK FAMILY, *supra* note 181, at 96.

Black families, then, unlike most families in the dominant culture, have subscribed to attitudes and values which include (1) commitment to employment in the labor force for women as well as men; (2) egalitarian relationships between husband and wife within the marriage; and (3) recognition that women who marry and bear children cannot necessarily expect to raise children to adulthood in an intact family . . . and therefore there is acceptance within the Black community of single-parent status, whether by choice or by chance. . . .



structure tends to be more extended. Black families reflect kinship networks and support mechanisms not strictly tied to marriage and parental relations.<sup>189</sup> Family is sometimes extended, to kin and friends, and is not necessarily limited by blood or marriage.<sup>190</sup> There are various explanations for this structure,<sup>191</sup> including different concepts of family inherited from African models;<sup>192</sup> the

Peters & deFord, *The Solo Mother*, in *THE BLACK FAMILY*, *supra* note 181, at 165 (citations omitted). The acceptance of the single parent family may simply indicate the black community has accepted what may be evolving as a common norm for American families. *Id.* at 166. It also must be viewed against the backdrop of the extended kin structure. "Instead of interpreting instances of marital instability as prima facie evidence of family instability, it should be realized that the fragility of the conjugal relationship could be a consequence or corollary of the stability of the consanguineal family network." Sudarkasa, *Interpreting the African Heritage in Afro-American Family Organization*, in *BLACK FAMILIES*, *supra* note 180, at 50 (emphasis in original).

189. Helmbold, *Beyond the Family Economy: Black and White Working-Class Women During the Great Depression*, 13 *FEMINIST STUD.* 629, 634; Brewer, *supra* note 184, at 332-33; Sudarkasa, *supra* note 188, at 37; McAdoo, *Patterns of Upward Mobility in Black Families*, in *BLACK FAMILIES*, *supra* note 180, at 167.

Studies of the black family have been particularly concerned with combating the assessment of its disintegration by pointing to its distinctive features and to flaws in the disintegration analysis, particularly its assumption of a particular family model as "normal." As Helmbold, *supra*, points out, the different history of black and white families has also shaped the focus of study: for white families, recent analysis, especially feminist, has been directed at valuing the unpaid work of the housewife, and making home and family life visible and valuable. For black women, however, their economic contribution has always been a given, and therefore the focus has been on the family, as either pathological or simply an alternative structure.

190. Family is thus seen, according to Carol Stack, as a "domestic network":

In this view, the basis of familial structure and cooperation is not the nuclear family of the middle class, but an extended cluster of kinsmen related chiefly through children but also through marriage and friendship, who align to provide domestic functions. This cluster, or domestic network, is diffused over several kin-based households, and functions in individual household composition do not significantly affect cooperative arrangements.

Stack, *supra* note 188, at 88. As Stack further points out, the concept of family is an overlapping one, varying based on where people sleep, eat, or otherwise spend their time — so that one individual may have several families. *Id.* at 89. This brings to mind Representative Patricia Schroeder's definition of family as "the place where they have to let you in at night." Address by Representative Patricia Schroeder, Suffolk University Lowell Lecture Series (Apr. 28, 1989). Stack's perspective suggests there may be a few places where you can get in.

191.

The major disagreement has focused on whether or not Black families differ from non-Black families in any way other than the formers' greater level of poverty. One view has held that Black families are what they are simply because they are poor; if poverty was removed, then there would be a convergence of values and structure between all families. Another view is that poverty, plus the experience of slavery and Reconstruction, have left an indelible mark on families that has existed to the present. Still another view is that Black families are unique because of the remnants of African culture that have been maintained and have adapted to discrimination.

McAdoo, *Preface*, in *BLACK FAMILIES*, *supra* note 180, at 10-11.

192. Sudarkasa, *supra* note 188, at 37. West African community and family organization, the social context of most slaves, emphasized consanguineal ties, as opposed to the European emphasis on conjugal ties. These consanguineal ties emphasized the importance of cores "formed by adult siblings of the same sex or by larger same-sex segments of patri- or matrilineages." *Id.* at 41. Far greater importance was attached to these cores than to marital pairs. "Marriage in Africa was a contractual union which often involved long-lasting compassionate relationships, but it was not expected to be the all-encompassing, exclusive relationship of the Euro-American ideal type." *Id.* at 44. "Interpersonal relationships within African families were governed by principles and values . . . of respect, restraint, responsibility, and reciprocity.

limits and adaptations of families arising out of slavery;<sup>193</sup> and the consequences of poverty.<sup>194</sup>

If you are part of a dual parent family, it is likely that both parents are in the workforce.<sup>195</sup> The presence of two earners, however, does not insure even minimum economic success. The rate of poverty in black families is remarkably constant regardless of whether the household is headed by a woman or is shared between a woman and a man.<sup>196</sup> Ten percent of all black children in poverty are in dual parent families.<sup>197</sup>

The lack of significant difference between two parent and single parent families points to the marginal position of black men in the labor market, evidenced by their high rate of unemployment, underemployment, and discouragement from workforce participation.<sup>198</sup> If you are young, black, and male,

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Common to all these principles was a notion of commitment to the collectivity. The family offered a network of security, but it also imposed a burden of obligations. . . . [I]n their material form, these obligations extended first and foremost to consanguineal kin." *Id.*

193. See Genovese, *supra* note 181, at 30. For another perspective on the paradoxes of the slave heritage, see Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988).

194. Stack, *supra* note 188, at 88.

195. There is a higher incidence of dual earner families among blacks than among whites or hispanics. Hispanics have the highest percentage of traditional earner families, while blacks have historically had larger numbers of dual earner families. Haythe, *supra* note 76, at 33.

196. Zinn, *Family, Race and Poverty in the Eighties*, 14 SIGNS 856, 862 (1989).

A two-parent family is no guarantee against poverty for racial minorities . . . . [T]he long-term income of Black children in two-parent families throughout the decade was even lower than the long-term income of non-Black children who spent most of the decade in mother-only families: 'Thus, increasing the proportion of Black children growing up in two-parent families would not by itself eliminate very much of the racial gap in the economic well-being of children; changes in the economic circumstances of the parents are needed most to bring the economic status of Black children up to the higher status of non-Black children.'

*Id.* at 862 (quoting Hill, *Trends in the Economic Situation of U.S. Families and Children, 1970-1980*, in AMERICAN FAMILIES AND THE ECONOMY (R. Nelson & F. Skidmore eds. 1983) (emphasis added)). Two other notable patterns are that the families in poverty change year to year, and motivation has little to do with which families are in poverty. *Id.* at 857.

Those families in poverty are inadequately served, if at all, by existing public support policy. "[L]arge segments of the low-income black population in this nation are not being reached by most of the major government income transfer programs for the poor and jobless." Hill, *Multiple Public Benefits and Poor Black Families*, in BLACK FAMILIES, *supra* note 180, at 276. See also Leashore, *Social Policies, Black Males, and Black Families*, in THE BLACK FAMILY, *supra* note 181, at 280; Bernstein, *Since the Moynihan Report*, in THE BLACK FAMILY, *supra* note 181, at 16-17.

197. A COMMON DESTINY, *supra* note 133, at 284 (figure 6-3). This is despite the fact that on average, black two parent families have three times the income of black single parent families. *Id.* at 525. This points to the confluence of race and gender wage gaps. Geschweder & Carroll-Seguín, *Exploding the Myth of African-American Progress*, 15 SIGNS 285, 297-98 (1990). Of all black children, forty-three percent lived in families below the poverty line in 1986. A COMMON DESTINY, *supra* note 133, at 523. The comparable figure was sixteen percent for white children in families below the poverty line. *Id.*

Zinn argues that the explanation lies in a structural analysis, focusing on three factors: transformation in the economy and labor force; changes in marriage and family life, and the increasing isolation and segregation of the underclass in the cities. Economic shifts have accelerated marginalization of blacks; the economic decline, and particularly its impact on male unemployment, have had great impact on family structure; and the concentration of the underclass has occurred because of, ironically, the breakdown of rigid housing segregation and the opening of limited employment opportunities. Zinn, *supra* note 196, at 864-67.

198. This pattern and the consequences of black male joblessness has been powerfully articulated by William Julius Wilson. W. WILSON, THE TRULY DISADVANTAGED: THE INNER

you have the bleakest job prospects. The broad array of occupational choices available to men in general is simply not ranged in front of you.<sup>199</sup> Race overcomes the gender privilege, except for a small number of middle class blacks. If you are a black man, therefore, you will have difficulty creating a marital family, because you cannot fulfill the dominant male economic provider role.<sup>200</sup> At the same time, the lack of gender advantage, coupled with some employment success, supports a pattern of egalitarian relationships in black dual earner families.<sup>201</sup> Patriarchy weakens only for a racial price.<sup>202</sup>

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CITY, THE UNDERCLASS, AND PUBLIC POLICY 81-92 (1987) [hereinafter THE TRULY DISADVANTAGED]. See also A COMMON DESTINY, *supra* note 133, at 534, 537-40.

199. Center for the Study of Social Policy, *The "Flip-Side" of Black Families Headed by Women: The Economic Status of Black Men*, in THE BLACK FAMILY, *supra* note 181, at 232-38.

200.

'[T]he institutional decimation of Black men' is a gender phenomenon of enormous magnitude. It affects the meanings and definitions of masculinity for Black men, and it reinforces the public patriarchy that controls Black women through their increased dependence on welfare. Such gender issues are vital. They reveal that where people of color 'end up' in the social order has as much to do with the economic restructuring of gender as with the economic restructuring of class and race.

Zinn, *supra* note 196, at 873.

Black men . . . have received two conflicting messages. . . . One . . . is 'to become a man means that you must become dominant, aggressive, decisive, responsible, and in some instances, violent in social encounters with others.' A second message received by young Black males . . . is 'You are Black and you must not be too aggressive, too dominant, and so on, because the *man* will cut you down.'

Franklin, *Black Male-Black Female Conflict: Individually Caused and Culturally Nurtured*, in THE BLACK FAMILY, *supra* note 181, at 106, 109.

201. Cazenave points out that "economically secure black men have the greatest ability to challenge traditional and repressive masculine roles." Cazenave, *Black Men in America: The Quest for "Manhood"*, in BLACK FAMILIES, *supra* note 180, at 176, 183. He also indicates that:

[I]n controlling for the combined effects of race and class, one researcher found more similarities among black working-class men, white middle-class men, and black middle-class men than differences. All tend toward egalitarian relationships with their wives. It is the extremely patriarchal working-class white male who is atypical and who serves as the standard against which working-class black families are judged.

Cazenave, *supra* note 201, at 182. See also Staples, *Race and Marital Status: An Overview*, in BLACK FAMILIES, *supra* note 180, at 173:

Unlike the white family, which was a patriarchy and sustained by the economic dependence of the female, the Black dyad has been characterized by more egalitarian roles, and economic parity. . . . The system of slavery did not permit Black males to assume the superordinate role in the family constellation, since the female was not economically dependent on him. Hence, relationships between the sexes were ordered along sociopsychological factors rather than economic compulsion to marry and remain married. This fact, in part, explains the unique trajectory of Black male/female relationships.

At the same time, Staples notes that the concepts of ideal gender roles of black men are very traditional; these ideal roles simply conflict with what is possible under current structural conditions. Staples, *Changes in Black Family Structure: The Conflict between Family Ideology and Structural Conditions*, in BLACK FAMILIES, *supra* note 180, at 21. See also Heiss, *Women's Values Regarding Marriage and the Family*, in BLACK FAMILIES, *supra* note 180, at 186, 197. Nevertheless, this may be one of the ways in which minority family patterns harbingers changes in majority culture, and suggest valuable insights. As one scholar notes:

Innovations in life-styles, including family life-styles, often develop among minority populations in the society before they are adopted by the majority. Such

If you are a black woman, the price of some freedom from patriarchy is the likelihood of experiencing family without a marital partner, and poverty.<sup>203</sup> Black women's labor market position is no worse than that of white women, but the gender disadvantage is magnified by the racial disadvantage and lack of gender counterbalance of black men. Black women have had a high rate of work force participation throughout this century, and their work life has generally not been punctuated with extended time periods away from paid work for childrearing.<sup>204</sup> The greatest change in black women's employment patterns has been diversification of employment away from domestic employment, but that diversification has been limited to integration of white women's occupations.<sup>205</sup> The long history of labor force participation by black women suggests patterns of work and family conflict and accommodation; the factor of high male economic marginalization skews the family picture in a way not experienced by many white women except in exceptional economic

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innovations may not be recognized when the way of life of the majority is looked upon as the 'ideal type' and the behavior of others is considered deviant.

Willie, *The Black Family and Social Class*, in *THE BLACK FAMILY*, *supra* note 181, at 224.

202. One of the strongest deviancy claims about the black family, and one especially blunt and revealing of the interplay of race and gender roles, comes from the infamous Moynihan Report: "*Ours is a society which presumes male leadership in private and public affairs. The arrangements of society facilitate such leadership and reward it. A subculture, such as that of the Negro American, in which this is not the pattern, is placed at a distinct disadvantage.*" Moynihan, *The Tangle of Pathology*, in *THE BLACK FAMILY*, *supra* note 181, at 5-6 (emphasis added).

203. "Adaptation to structural conditions leaves Black women disproportionately separated, divorced, and solely responsible for their children. The mother-only family structure is thus the consequence, not the cause, of poverty." Zinn, *supra* note 196, at 868. See also Spanier & Glick, *Mate Selection Differentials Between Whites and Blacks in the United States*, in *THE BLACK FAMILY*, *supra* note 181, at 114. This has interesting consequences when comparing life satisfaction patterns of blacks as compared to whites. Those who perceive themselves the lowest in well-being among whites are the separated and divorced; in contrast, among black women, "[t]he impact on life satisfaction of having a husband appears to be minimal, except for those who have never had one . . . or those who have recently lost one. . . . Those who have had a husband, but who lost him or left him . . . are as satisfied as are the currently married." Ball, *Marriage: Conducive to Greater Life Satisfaction for American Black Women?*, in *THE BLACK FAMILY*, *supra* note 181, at 136, 140.

204. Black women have been more attached to the labor force than white women, as reflected in the low rate of work interruption for familial reasons among black women, forty-four percent, as compared to white women, sixty-seven percent. The mean proportion of time away from work, as a proportion of labor participation, is eighteen percent for black women, compared to thirty-three percent for white women. The comparable rate for black men is thirty-five percent, more than double the rate for white men. BUREAU OF THE CENSUS, *LIFETIME WORK EXPERIENCE AND ITS EFFECT ON EARNINGS* 1 (1984). Two commentators recently re-emphasized the distinctive position of black women in the labor market and the importance of their contribution to family support, which has been significantly beyond that of white women. Geschweder & Carroll-Seguín, *supra* note 197, at 290-94. They concluded that contrary to the view that the races are economically converging, they will further separate due to the inability of black women to match the family income contribution of white men or white women, coupled with the worsening of the economic position of black men. *Id.* at 298-99.

205. The occupational position of black and white women has significantly converged over the past twenty-five years. Albelda, *supra* note 116, at 405-06. In 1958, one-third of nonwhite women worked in domestic occupations; by 1981, that had dropped to one-twentieth. *Id.* at 406. Nonwhite women, however, primarily entered women's occupations, integrating the occupations in which white women worked. The gender segregation index remained virtually the same, although the widest dissimilarity was between white men and nonwhite women. *Id.* at 406.

downturns.<sup>206</sup> And while racial disadvantage for black women is not as marked in the workplace, it is arguably reflected in the family, as black women, compared to white women, are likely to have more children to support, to be never married, to be younger, to not have another earner in the household, and to have less education and job skills.<sup>207</sup> This disadvantages black women not because achieving the "traditional" family form is desirable, but because the alternative family forms which black women are likely to experience are not the product of diversity or choice, and are inadequately supported.<sup>208</sup>

Thus, one of the most complex lessons from the race perspective is the difference in gender roles. Gender roles are constructed differently because of the most common situation of black men and black women. Black women come closest, in a sense, to the (white) male work-family ideal, in that they must operate in both worlds, and are the primary or sole wage earner, fulfilling the economic provider role. They differ, of course, in that the job market to which they have access is extremely limited, even when viewed from the

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206. "What appears to be distinctive about the economics of black family life is that the difficulties of tying work and family together in a way that consistently cushions the private sphere are accentuated by welfare-state capitalism." Brewer, *supra* note 184, at 337. "Apparently, the welfare state has generated a tension between work and family life that appears to undermine family stability for some sectors of the black population." *Id.* at 338. "[W]hatever the causal ordering, a private sphere was made economically possible for white families under industrial capitalism. . . . The same relationship between work and family has not been shaped by concerns about preserving the private sphere of black life." *Id.* at 339.

Lois Helmbold has vividly demonstrated the tie between family structure and economics, noting the similarity of white and black family problems during the Depression. Helmbold, *supra* note 189, at 629.

The paradoxical impact of the work role on black women has been greater independence, but also a reactionary critique of that very independence in public policy:

Labor . . . has been a distinctive characteristic of black women's social roles. It has earned us a small but significant degree of self-reliance and independence that has promoted egalitarian relations with black men and active influence within the black family and community. But it also has had costs. . . . [E]mployers, and not black women, still profit the most from black women's labor. *And when black women become the primary or sole earners for households, researchers and public analysts interpret this self-sufficiency as pathology, as deviance, as a threat to black family life.*

King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42, 48 (1988) (emphasis added).

207. Johnson & Waldman, *supra* note 81, at 32. See also Hacker, *American Apartheid*, 34 N.Y. REV. BOOKS 26 (Dec. 3, 1987). Nearly sixty percent of black children are born out of wedlock and almost sixty percent of black families are headed by women. Comparatively, the rate of black teenage births and single parenthood have stayed constant or declined, while the rates for whites have increased. *Id.* at 26. Black men are less likely to marry than whites, regardless of income levels. *Id.* at 27. Black single mothers are more likely to have two or more children than white single mothers. *Id.* at 28. Employment prospects continue to be more favorable for black women than black men. *Id.* at 29. Residential segregation, by race and class, and the consequent social isolation, is most strongly felt by race and class. *Id.* at 33. Hacker's thesis is that the instability of black families is tied to social segregation by race and class, which encourages early pregnancy, single parenthood, and low father responsibility. *Id.*

208.

It is common for Black women to have received two messages. One message states, 'Because you will be a Black woman, it is imperative that you learn to take care of yourself because it is hard to find a Black man who will take care of you.' A second message . . . is 'your ultimate achievement will occur when you have snared a Black man who will take care of you.'

Franklin, *supra* note 200, at 106, 109.

broader range of jobs available during the past forty years. Black men as a group fail as often as succeed at the work role ascribed to men. They are closest to the (white) female work-family model, unvalued and undervalued in the workplace and at home (since they are not worth marrying). Black men nevertheless offer the only non-economic role model for fatherhood, maintaining ties with their children even when they contribute little or nothing to their economic support. Furthermore, they commonly participate in a more egalitarian division of household tasks and roles, premised on the historic economic necessity of team effort in black dual earner families.

A second critical lesson from the race perspective is the model of extended kin and non-marital, non-blood connected concepts of family. The functioning of these family patterns testifies to both the extraordinary adaptability necessary in order to survive within the structures of racism, as well as the long-term consequences of work-family stress. It is a concept of family that emphasizes function over form or formality.

Finally, the race perspective underscores what black feminists call the "multiple jeopardy" of the oppressions of gender, class and race.<sup>209</sup> This recognizes the interlocking nature of these oppressions. It requires the careful examination of their relation to each other, including both the cumulative impact when they coincide, and the oppressions within each structure or category.

## II. LAW AND WORKPLACE STRUCTURE

What does law have to do with this? The assumptions and values that are the basis for the existing work-family structure get locked into the structure in a variety of ways, both formal and informal, of which law is one. Law reinforces and reflects the division of work and family responsibilities, and also shapes the structure of work and family responsibilities.<sup>210</sup>

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209. King, *supra* note 206, at 47. See also Collins, *The Social Construction of Black Feminist Thought*, 14 SIGNS 745 (1989); Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 SOC. PROBS. S14, S19 (Dec. 1986). Two recent collections of the works of black feminists, and insightful critiques of white feminists are Harris, *supra* note 144, and Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989).

210. There are myriad examples of the role of law. For example, the legal rules governing property division and maintenance at divorce incorporate a number of assumptions about work and family. Maintenance, by shifting from permanent alimony to rehabilitative alimony, requires a return to wage work, thus devaluing and denying the choice of full time childcare, even when children have special or extraordinary physical or mental needs. Furthermore, maintenance essentially ignores the consequences of housework and childcare for the ability to secure wage work. See Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193, 1200-02, 1208-13 (1988). As Baker has noted, the shortcomings of the structure are perhaps epitomized by its goal of "rehabilitation": "The homemaker's job is not respected. Homemakers, therefore, must be 'rehabilitated,' not compensated or made whole. The term 'rehabilitation' implies that the woman has been doing something of very little value." *Id.* at 1202 n.34.

Property division at divorce is similarly flawed by its refusal to deal with the long-term consequences of doing unwaged family work, thus particularly compounding the gender and class factors in the existing work-family structure. Gendered patterns of work-family responsibilities are reinforced by failing to attach sufficient value to non-waged contributions to family assets, as well as refusing to recognize the serious, often irreversible consequences, under the

The primary role of the law in the work-family relationship has been non-intervention, correlated with a strong tradition of protection of the family

current workplace structure, of choosing to do family household and caregiving work. Class patterns are reinforced by the refusal to order long-term restructuring of wealth to prevent long-term or permanent economic disadvantage for the caregiver or dependent spouse. See Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 696-97, 706-23, 730-39 (1990).

The property rules at divorce therefore ignore the consequences in the workplace of particular work-family choices, while virtually mandating that both marital partners take on "equal" work-family roles despite a prior history of different roles. Interestingly, some of the custody rules at divorce arguably push in the opposite direction, toward favoring, as the primary or sole custodial parent, the parent who is able to construct a work-family relationship that looks most like a traditional patriarchal family. See Atkinson, *Criteria for Deciding Child Custody in Trial and Appellate Courts*, 18 FAM. L.Q. 1, 19 (1984); Boyd, *Child Custody, Ideologies, and Employment*, 3 CAN. J. WOMEN & L. 111, 120-22 (1989); Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237 (1982). Mothers are favored as the primary caregiver, but only to the extent they replicate the caregiver role as constructed within a traditional marriage. Fathers continue to be disfavored as primary parents, although they may overcome that disadvantage, particularly if they have a stepmother or housekeeper that reconstructs the traditional work-family relationship. At the same time, the importance given to factors of economic stability disfavors the traditional caregiver and again pushes toward a required work-family role. See Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 721 (1983); Polikoff, *supra*, at 237.

Employment laws similarly shape and reinforce work-family structure. Perhaps the most blatant example is the treatment of pregnancy under many states' unemployment laws, which essentially treats pregnancy as incompatible with work and denies benefits to workers who lose their jobs due to pregnancy. When combined with the lack of maternity leave, or the lack of job-protected leave, the consequence is the starkest example of requiring a choice between work and family. See Radford, *Wimberly and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy*, 63 N.Y.U. L. REV. 532, 607-08 (1988). The reinforcement of the existing structure of work and family also is reflected in the Social Security benefit structure which, like the property division principles in family law, ignores the consequences and costs of household and caregiving work and provides better security to male breadwinners than dependant female homemakers. See Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 276-85 (1989). The failure to value domestic production, coupled with a significantly smaller benefit for dependants than for wage workers, reinforces the value of the market and perpetuates the disadvantages associated with family work. *Id.* at 278-81.

The definition of employee status, upon which virtually all the benefits of labor and employment law attach (minimum standards, employee rights, etc.) excludes not only unwaged domestic work, but also a good deal of the waged work that is flexible enough to permit a combination of work and family. See Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C.L. REV. 709 (1986). Even for those within the legal definition, the benefits attached to employee status provide little direct support to family, see *supra* notes 90-106 and accompanying text, and invite comparison to the favored tax treatment, for example, of pensions and health insurance, versus the minimal tax policy support for childcare, parental leave, or other family support policies. Finally, the definition of employee is designed to maintain the existing structure by denying participative action, while reinforcing a hierarchical, contentious structure. Gould, *Reflections on Workers' Participation, Influence and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 383, 386-87 (1989).

In all of this, the law acts not only in particular substantive ways to reinforce and shape work-family structure, but as an ideology which may either (or both) liberate and constrain restructuring of the workplace. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1381-87 (1988).

against the power of the state.<sup>211</sup> But as Frances Olsen argues, this non-intervention model masks the state's actions supporting the existing patriarchal family structure by protecting it against interference.<sup>212</sup> Linda Gordon ties the state's non-intervention policies to concepts of male supremacy — the view of the family as man's territory and intervention as challenge to that authority.<sup>213</sup>

The noninterventionist role of the state is tied to the failure to conceive of family policy, much less work-family policy, coupled with the refusal to recognize the ways in which public policy implicitly adopts a family policy by indirect support of the existing structure. Law reinforces the existing work-family structure in a variety of ways apart from what might be viewed as expressly family policy. For example, the coverage of labor and employment policies reinforces a definition of work which is limited to wage work, and presumes and favors a singular work pattern. The law has made only limited inroads into occupational segregation, and shields significant conduct and institutional structures from scrutiny or legal liability.<sup>214</sup> Minimum wage laws

211. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). See generally *Schneider, Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835 (1985); *Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983). This includes particularly strong protection of marriage against interference. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Intervention in the family to protect children, however, sometimes is justified, whether to protect the child from parents or in recognition of their rights. *Minow*, *supra* note 12, at 8-14. Increasingly, moreover, the Court has indicated it will permit the State to intervene to proscribe the exercise of reproductive rights regardless of the impact on personal choice and family stability. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Olsen, The Supreme Court 1988 Term: Comment, Unraveling Compromise*, 103 HARV. L. REV. 105, 118-21 (1989). At the same time, the Court does not require the State to protect children from known severe abuse, *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), nor does it require that the state educate children, or provide them with decent housing, financial support or medicine. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28-39 (1973) (education); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (housing); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970) (welfare); *Maher v. Roe*, 432 U.S. 464, 469 (1977) (medicine). For a different vision of federal constitutional guarantees, see *Hogin, Equal Protection, Democratic Theory and the Case of the Poor*, 21 RUTGERS L.J. 1, 59-65 (1989). The constitutional basis for affirmative rights, if they are to be recognized at all, may only be found in state constitutions. See *Braveman*, *supra* note 159.

212. *Olsen, The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 837, 848 (1985). Olsen argues that the state has traditionally played a very limited role in both the market and the family and used the ideologies of each to legitimize or fail to deal with discrimination. *Id.* at 1528. Even where reform has been attempted, the state has dealt with family and market separately, not as interrelated structures. *Id.* at 1529.

The privileging of the patriarchal family is symbolized by the state's special solicitude for marriage and disapproval of cohabitation. See generally *Kandorian, Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829 (1987).

213. *Gordon*, *supra* note 13, at 63-79.

214. Litigation challenging occupational segregation has been circumscribed by the limitation of comparable worth wage discrimination cases to instances of intentional discrimination, making proof of wage discrimination or sex segregation extremely difficult. See *American Nurses' Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986); *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985). Furthermore, the courts' acceptance of the market as a non-discriminatory wage mechanism eases the defense of such actions. *American Nurses' Ass'n*, 783 F.2d at 719-20; *AFSCME*, 770 F.2d. at 1406-07.



impose the least economic burden for labor classified as low skill or marginal, rather than insuring sufficient income for family support.<sup>215</sup> The strong defense of property and the view of the employment relationship as primarily one of contract minimizes regulation of employment and limits the responsibilities of employers.<sup>216</sup>

Family law compounds this non-interventionist pattern by its emphasis on the ethic of private responsibility for family. This is clearly evident in the legal

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Discriminatory conduct is also shielded by intensified requirements for demonstrating intentional discrimination and the increased difficulty of bringing a cause of action involving non-intentional conduct. *Ward's Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (shifting the burden to the plaintiff to disprove the business necessity of policies challenged under disparate impact theory); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (limiting section 1981 actions to only those involving the formation of the employment contract; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (requiring clear causal connection between specifically identified employment practice or aspect of complex employment practice and strong statistical showing of disparate impact). It also is shielded by reading procedural requirements narrowly, such as the Court's application of Federal Rule of Civil Procedure 23 on class actions to prohibit "across the board" attacks on employment structures. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). Finally, the Court sometimes removes an entire piece of the employment structure from scrutiny, as it has virtually done with seniority systems. *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977); *Lorance v. AT&T*, 109 S. Ct. 2261 (1989). See generally Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C.L. REV. 943 (1984).

One notable exception to this pattern of limitation of inroads in the labor market is the recently enacted AMERICANS WITH DISABILITIES ACT, Pub. L. No. 101-336, 104 Stat. 327 (1990), which significantly expands the civil rights of handicapped persons.

215. The most recent amendment to the minimum wage, effective April 1, 1990, raised the minimum wage level for the first time in over a decade. FAIR LABOR STANDARDS AMENDMENTS OF 1989, Pub. L. No. 101-157, 103 Stat. 938 (1989) (amending 29 U.S.C. 201 et. seq.). The level is still, however, below the poverty line. The minimum increased to \$3.80/hour as of April 1, 1990, and will rise to \$4.25/hour as of March 31, 1991. 103 Stat. 938, section 2. The statute also permits payment of a subminimum training wage of eighty-five percent of the minimum wage to teenage workers for a maximum of ninety days. *Id.* at section 6.

216. The protection of property is particularly evident in the Supreme Court's cases on picketing. *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607 (1980); *Teamsters v. Vogt, Inc.*, 354 U.S. 284, 460 (1957); *Hughes v. Superior Court*, 339 U.S. 460 (1950). For the historic and current development of protection of employer's economic interests over workers' participatory role, individually or collectively, see generally Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-41*, 62 MINN. L. REV. 265 (1978); Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984); Beatty, *Labour Is Not a Commodity*, in *STUDIES IN CONTRACT LAW* 326-30, 331-35 (B. Reiter & J. Swan eds. 1980). Although the development of wrongful discharge doctrine in many jurisdictions has significantly changed the scope of employer responsibility, it has done so only at the fringes, in the extreme cases where there is general agreement or moral outrage at the unfairness of employer conduct. It does not establish a relational requirement during the employment relationship and certainly there is no obligation to accommodate to private interests, as opposed to sometimes being required to accommodate to certain public or social interests by not being permitted to discharge an employee when those interests are implicated. See generally Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. REV. 631, 640-47, 649-57 (1988). Thus, it is unimaginable that a wrongful discharge claim could be premised on failure to accommodate to the employee's family responsibilities.

By subjecting the employment relationship primarily to contract law, the law intervenes most strongly (but not very much) at contract formation and in the event of a breach. It leaves contract performance largely unregulated, and apart from the doctrines of unconscionability,

treatment of child support and child custody. Child support until quite recently operated primarily through private enforcement, rather than state intervention. Even when the state does intervene, it is not to provide an alternative or supplemental basis of support, but only a power structure to enforce private agreements.<sup>217</sup> Child custody rules commonly reinforce the sexual division of labor by refusing to recognize changing work-family relationships or the barriers single parents (whether they are the primary, joint, or occasional custodian) face operating within the existing workplace structure.<sup>218</sup>

Beyond this largely non-interventionist role, the law has sometimes been purposefully used as an instrument of family policy. But to the extent the state has engaged in explicit family policy, it has been marked by gendered assumptions, racial impact, and intrusion into lower class families.<sup>219</sup>

Affirmative family policy is a relatively recent phenomenon in Western industrialized countries, dating only from the 1930's and 1940's.<sup>220</sup> The first phase of family policy was tied to economic and demographic concerns.<sup>221</sup> The second phase, in the 1960's, focused on income inequality and income redistribution and coincided with the expansion of social services to include income transfers, health care, education, housing, and employment.<sup>222</sup> A third phase began in the 1970's in response to changes in the labor market and labor market participants.<sup>223</sup> In the current phase of family policy the relation between work and family has finally emerged as a critical issue, and the model for new policies most often is androgynous and gender neutral.<sup>224</sup>

Despite this recent shift toward egalitarianism, the hallmark of family policy traditionally has been starkly gendered policies. Family policy sup-

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duress, and undue influence, does not deal with issues of power imbalances at the time of contracting, or during the course of performance.

217. A recent alternative, the Wisconsin child support system, is described in Bergmann, *supra* note 161, at 45-50. Sweden provides another example of an alternative structure, with a high rate of child support, acknowledged paternity, and supplemental state assistance. Dowd, *supra* note 146, at 321.

218. The courts reinforce this division by using factors to determine the "best interests" of the child which in the context of the gendered work and family structure are hardly neutral, e.g., economic stability, flexibility of schedule, childcare arrangements, and availability of a two parent home. See Boyd, *supra* note 210; Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Polikoff, *supra* note 210; Sheppard, *Unspoken Premises in Custody Litigation*, 7 WOMEN'S RTS. L. REP. 229 (1982). On the special barriers faced by single parents, see generally MOTHERS ALONE, *supra* note 185; D. BURDEN, SINGLE PARENTS AND THE WORK SETTING: THE IMPACT OF MULTIPLE JOB AND HOMELIFE RESPONSIBILITIES, FAMILY RELATIONS 35 (1986); G. GRIEF, SINGLE FATHERS (1985). On the weight given to various factors, see Lowery, *The Wisdom of Solomon: Criteria for Child Custody from the Legal and Ethical Points of View*, 8 L. & HUM. BEHAVIOR 371 (1984); Reedy, Silver & Carlson, *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75 (1989); Atkinson, *supra* note 210.

219. See generally Rapp, *supra* note 172, at 168; Boris & Bardaglio, *Gender, Race, and Class: The Impact of the State on the Family and the Economy, 1790-1945*, in FAMILIES AND WORK 132 (N. Gerstel & H. Gross eds. 1987).

220. Kammerman, *Fatherhood and Social Policy: Some Insights From A Comparative Perspective*, in FATHERHOOD AND FAMILY POLICY 23, 26 (M. Lamb & A. Sagi eds. 1983).

221. *Id.* 26-27. See also Dowd, *supra* note 146 (evaluating Swedish and French work-family policies).

222. Kammerman, *supra* note 220, at 27.

223. *Id.*

ported men in their economic, breadwinner role, and women in their emotional, caretaking role.<sup>225</sup> Women were the primary beneficiaries of social assistance and welfare, under the assumption that they should not, or could not, work, and deserved support in order to raise dependent children.<sup>226</sup> Men, by comparison, were the primary beneficiaries of unemployment assistance, when they were deemed not at fault for their failure to fulfill the breadwinner role.<sup>227</sup>

This general pattern is clearly evident in the American social assistance system.<sup>228</sup> In the welfare system, most of the sexism was express, articulated in support of the traditional family and reflecting the traditional undervaluation of the work of caring for children and the household. It reinforced the discriminatory features of the existing labor market and thereby made it difficult for the welfare recipient to obtain waged work, while simultaneously refusing to value childcare. As Sylvia Law points out, at base it was designed to perpetuate traditional roles and dominance: "Ultimately federal welfare and labor policy can most reasonably be understood as serving to protect the dominance of men in the wage market and in the home. The controlling assumption is that marital stability, and the family itself, depend upon male economic dominance; if women support themselves and their children through waged work, family stability will be undermined."<sup>229</sup>

This explicitly gendered structure trapped women into a particular, stereotyped role without valuing or providing support for the nurturing, parenting role. At the same time, the structure virtually prohibited men from nurturing and parenting because it limited them to the breadwinner role and penalized them for their presence in the family if they were unable to fulfill their economic role. More recently, the system shifted to require mothers to

224. *Id.* at 28, 30-31. Although the model may be gender neutral, in fact many of the European models are highly gendered. Dowd, *supra* note 146, at 324-28, 336-37, 339-44.

225. Kammerman, *supra* note 220, at 29.

226. *Id.*

227. *Id.*

228. See generally Blaydon & Stack, *Income Support Policies and the Family*, in *THE FAMILY*, *supra* note 2, at 147-61; Boris & Bardaglio, *supra* note 219. Sylvia Law has exhaustively analyzed the historic and current policies which underlie the welfare system. See Law, *supra* note 97.

229. Law, *supra* note 97, at 1251-52. Historically, welfare was designed to provide support for those determined to be unemployable, and when originally enacted that was defined to include the handicapped and disabled, and women and children without men to support them. *Id.* at 1252-53. It was assumed that women should not work, and that those responsible for childcare could not work. *Id.* at 1253. Until the 1960's, federal policy explicitly supported the notion of the need for mothers to be at home caring for children by actively discouraging mothers from working. At the same time, federal policy also punished the father unable to work, or the welfare mother who became involved with a man by cutting off welfare payments. The presence of a man in the household presumptively meant that a breadwinner was present, and welfare support was not necessary. *Id.* at 1256-59. The limited programs designed to get welfare recipients back into the workforce were directed almost exclusively toward men. *Id.* at 1260. Beginning in the late 1960's, welfare policy shifted toward the goal of imposing work requirements on welfare recipients, without providing the support for women to enter and succeed in the workforce, or valuing as an alternative the work of childcare. *Id.* at 1261, 1286, 1313, 1333.

fulfill an economic role, but without the support to permit minimal success within a market structure hostile to working parents.<sup>230</sup>

Less explicitly, but no less effectively, the unemployment system is structured on gendered assumptions.<sup>231</sup> Again, it is the model of the male breadwinner and the female housewife/caretaker that underlies the system, only the focus of unemployment is, by its very nature, upon the breadwinner. The goal of the unemployment system has been to provide support when the breadwinner is temporarily unemployed through no fault of his own.<sup>232</sup> The system is designed to provide benefits to full time workers who have a significant connection to the labor force, but who have lost their jobs due to the evils of employers.<sup>233</sup> The system historically excluded women because of their different pattern of labor force participation and because it viewed women's income as secondary.<sup>234</sup> Women's labor force participation pattern disadvantaged them due to part time employment, interrupted employment, and job segregation in occupations sometimes not covered by the system, or that failed to pay sufficiently high wages for women to meet eligibility requirements.<sup>235</sup> Thus, despite women's consistently higher unemployment rates, they have received benefits less often and at a lower rate.<sup>236</sup>

Just as law has helped to create and reinforce the existing work-family structure, it inevitably will be part of restructuring the work-family relationship.<sup>237</sup> To the extent work-family issues become public discourse, the law will have an impact on the substance of the discourse, and therefore the power to shape policy. In part this is because some of the solutions will inevitably be legislative. But more importantly, law contributes much to our social and moral concepts, both in setting goals and in defining boundaries. We frame things in terms of whether "its legal" or "I have a right to. . . ." Equality, freedom, choice, diversity, are all concepts the law defines. As concepts

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230. *Id.* at 1338. Although Law focuses on the inequities of this income replacement structure, her analysis overlaps work and family issues where the system adopts as a value the integration of those two roles by recipients who are largely female and who must make it in a work world premised on masculine assumptions. For other evaluations of the welfare system and welfare reform, see WELFARE REFORM, *supra* note 161; Ehrenreich, *What Makes Women Poor*, in FOR CRYING OUT LOUD: WOMEN AND POVERTY IN THE UNITED STATES 18-28 (R. Lefkowitz & A. Withorn eds. 1986); THE TRULY DISADVANTAGED, *supra* note 198, at 93-95, 104-106, 132-64; A COMMON DESTINY, *supra* note 133, at 531-33. For a powerful view of the functioning of the existing system, see White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990). On the inadequacy of funding and the difficulties of creating an alternative structure, see *Pulling Families Out of Welfare Is Proving to Be an Elusive Goal*, N.Y. Times., Apr. 2, 1990, at A1, col. 1.

231. Pearce, *supra* note 97, at 242-43.

232. *Id.* at 441.

233. *Id.* at 441-43.

234. *Id.* at 439, 443.

235. *Id.* at 444-56. Women were disqualified due to their inability to meet earnings requirements, *id.* at 451, leaving work for what was classified as "domestic quits," *id.* at 452-53; and the same domestic reasons made it difficult to meet "available/able/willing" to work requirements. *Id.* at 455. It is also important to note that just as quitting work for domestic reasons was deemed voluntary, so too was a quit due to sexual harassment deemed voluntary. *Id.* at 454.

236. *Id.* at 450.

237. See Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1282-1318 (1983); Bell, *Foreward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Rhode, *supra* note 31, at 1208.

critical to work and family issues, who controls the definitions and how they are constructed to apply to work and family are essential.

The necessity, in restructuring work and family, is to make explicit the assumptions and values that underlie our restructuring, and to constantly ask ourselves where we want to go. We must begin by examining the way we think *about* work and family. In the next section, I suggest an analytical approach and some parameters for measuring efforts to restructure the workplace. These parameters are intended to be suggestive, not inclusive; indeed, we should be wary of creating new frameworks or categories when the difficulty is in seeing beyond our existing universe.

### III. THEORETICAL APPROACH

#### A. *Way of Thinking, Method of Analysis*

The way in which we think about work-family conflict, or more accurately, the way in which we attempt to resolve the problem of work-family conflict, is critical.<sup>238</sup> We must avoid singular solutions, unidimensional visions, simplistic rules or models. In order to do that, we must resist the method of problem solving and thinking that is distinctively legal: identifying issues or questions drawn from a factual context, and then setting up dichotomies, posing contradictions that must be resolved, and finally designating a single "winner" at the end of the analysis.<sup>239</sup> To the contrary, it is critical that we accept contradiction, paradox, pluralism, and difference as descriptive and inevitable, and use them to get beyond them. This is important not only because there is no value in searching for a singular solution, other than the appeal of simplicity, but also it perpetuates a tradition of ignoring issues of gender, race and class in order to impose male, white, middle and upper class notions of work and family roles.

Our way of thinking about work and family is particularly important with respect to two issues: defining and relating important parts of any new structure, and avoiding a single model of a transformed workplace. The conceptualization of work, family, parenting, and the best interests of children involve fundamental moral and social issues that lie at the heart of work-family

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238. Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS 621, 621 (1987) ("It seems increasingly probable that Western culture is in the middle of a fundamental transformation: a 'shape of life' is growing old.").

239. This focuses on a different part of legal analysis and structuring than the critique of legal rights. See generally *A Critique of Rights*, 62 TEX. L. REV. 1363 (1984) (symposium); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984). Rights analysis conforms to the individualistic way of conceptualizing legal problems that has been criticized. See, e.g., Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1159, 1161 (1986). Thinking in terms of rights, however, is a familiar means to an end, and thus may be a useful tool. See, e.g., Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987). Wholesale rejection of rights analysis and liberal jurisprudence has been particularly criticized by minority scholars. See, e.g., Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King Jr.*, 103 HARV. L. REV. 985 (1990); *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987); Crenshaw, *supra* note 210.

issues. The rethinking of those core elements, and the vision of what could be, need not be limited to one "right" view; indeed, that is precisely what should be avoided.

This does not mean that no moral choices or decisions can be made, that everything is equal and relative. Rather, our thinking about this issue and the search for new solutions should be consciously plural, at the same time that we identify overall goals of a new structure. We may define the frame of the picture, but what is contained within it should be limited only by our imagination.

It is a basic insight of feminist analysis that our analytical categories, our means of problem solving, our underlying assumptions and value structure, reflect the dominance of males and the masculine ideal in our society.<sup>240</sup> This means at least two things. Our basic concept of humanity, of its core problems, desires, dilemmas, thoughts and feelings, is dominantly masculine.<sup>241</sup> The masculine ideal of self is overwhelmingly concerned with autonomy, with protection from and separation from others, who threaten the vitality, creativity, and essential humanity of the individual.<sup>242</sup> Second, defined by that concept of self, problem-solving focuses on preserving autonomy, and therefore requires posing problems as requiring solutions where only one individual wins, where the solution is defined always, in some sense, in terms of its impact on individual autonomy. It is not surprisingly hierarchical, rights-oriented, and linear.<sup>243</sup> Most significantly, it splits thinking into dichotomies, requiring the choice of one "side" to resolve problems, and then objectifies the result.<sup>244</sup>

As Robin West points out, the masculine vision of humanity infuses and dominates jurisprudence.<sup>245</sup> West argues that both liberal jurisprudence and Critical Legal Studies (CLS), the major critique of liberal jurisprudence, are infused with a "masculine" view of humanity that revolves around autonomy

240. Part of the focus of feminist scholarship has been the uncovering and exposure of male-infused, male-dominated thinking masquerading as neutral, objective theory. See, e.g., E. REED, *SEXISM AND SCIENCE* (1978); C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984). For a recent, comprehensive overview of feminist method and substance, and claims of truth, see Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

241. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4-13 (1988). The concept in mythology of the life journey is also dominantly a male perspective. J. CAMPBELL, *THE HERO WITH A THOUSAND FACES* (2d ed. 1968). I am indebted to Kate Nace Day for pointing out this connection between jurisprudence and Western mythology.

242. West, *supra* note 241, at 4-12; C. GILLIGAN, *supra* note 240, at 160-63. Gilligan's contrast between male and female voices is described in the resolution of a robbery issue by Amy and Jake. *Id.* at 25-39. While Gilligan's conclusions regarding the description of male and female moral selves have been criticized, her critique of psychological theory as infused with male stereotypes has been accepted and expanded. *Id.* at 5-23.

243. Flax, *supra* note 238, at 621-22. "[W]hat has become most problematic in our transitional state [is] how to understand and (re-)constitute the self, gender, knowledge, social relations, and culture without resorting to linear, teleological, hierarchical, holistic, or binary ways of thinking and being." *Id.* at 622 (emphasis added).

244. Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000-03 (1985); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1385 (1986).

245. West, *supra* note 241, at 2, 58-60.

and individualism, or what she labels the "separation thesis."<sup>246</sup> The liberals value autonomy, and see annihilation or frustration of that autonomy as the evil; CLS values community, and sees alienation and isolation as the harm.<sup>247</sup> Feminist theory, she argues, reflects a "connection thesis," that is, the fundamental human condition is relation and connection to others.<sup>248</sup> Cultural feminists value this connection and exalt feminine values, and see harm in separation and isolation; radical feminists view connection as intrusion, invasion, and value the creation of a separate identity.<sup>249</sup>

All these accounts of human nature are true, West argues;<sup>250</sup> they simply describe different types of contradiction. But contradiction is inherent in being human. "We have contradictory desires and values because our essential human condition — physical separation from the collectivity which is necessary to our identity — is itself contradictory. It is that essential human condition which carries the seeds of our twin fears of alienation and annihilation, as well as our twin desires for autonomy and attachment."<sup>251</sup> What has been missing from our jurisprudence, which reflects our conception of what it is to be human, is the feminine side or expression of contradiction, a different sense of what is valued and what is feared.<sup>252</sup>

What this suggests, among other things, is the importance of the way we think about problems. What is particularly limiting in a legal approach to issues of work and family is the inclination to subject them to a problem solving structure that produces overly simplified, singular answers that obscure rather than illuminate the real issues and value choices that support a particular family and work structure. Simplification and singularity are the result of a legal process that encourages organizing facts in terms of issues viewed only from paired adversarial positions that must be resolved in favor of one position. Both the framing of the analysis in terms of dichotomies, and the required resolution in favor of one position, rather than including the merits of both positions, contribute to this result.

Problem-solving by creating dichotomies can particularly obscure issues of power and knowledge. As Clare Dalton points out, using the example of contract doctrine, key doctrinal dichotomies of public/private, objective/subjective, form/substance, and the doctrinal favoring of one side of those dichotomies, fail to deal with issues of power and knowledge in contract rela-

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246. *Id.* at 2-3.

247. *Id.* at 12-13.

248. *Id.* at 2-3, 14.

249. *Id.* at 15, 36.

250. *Id.* at 53.

251. *Id.* at 51.

252.

These . . . are the differences between the 'human beings' assumed by legal theory and women. . . . The human being, according to legal theory, values autonomy and fears annihilation, while at the same time he subjectively dreads the alienation that his love of autonomy inevitably entails. Women, according to feminist theory, value intimacy and fear separation, while at the same time longing for individuation which their fear of separation precludes, and dreading the invasion which our love of intimacy entails. The human being assumed or constituted by legal theory precludes the woman described by feminism.

*Id.* at 42.

tionships.<sup>253</sup> Patricia Collins also argues that dualistic thinking is a potent intellectual framework with significant political consequences, seeing it as "a philosophical linchpin in systems of race, class and gender oppression."<sup>254</sup> As applied to work and family issues, this suggests that the dichotomies used to separate them hide dominance issues connected to gender, class and race. Focusing on one side of the dichotomy diverts attention from the connected nature of the relationship, and its structure as a related and overlapping system of dominance enforced by intricate and complex power relationships. For example, the separation within legal doctrine between labor and family law strongly reinforces the refusal to see life roles as interconnected. The tendency of law to categorize work-family conflict as women's issues similarly diverts attention from the interrelation of male and female gender roles, as well as the connected and distinctive interplay of gender, race and class.<sup>255</sup>

Another consequence of dichotomy is the myth of objectivity.<sup>256</sup> As Ann Scales observes, "Feminist analysis begins with the principle that objective reality is a myth. It recognizes that patriarchal myths are projections of the male psyche. The most pernicious of these myths is that the domination of women is a natural right, a mere reflection of the biological family."<sup>257</sup> Scales argues that if we accept the current structure as neutral and objective, then we misunderstand sexism as irrationality, deviance from an otherwise proper and justifiable structure, rather than as a pervasive structural premise.<sup>258</sup> We also reinforce a method of analysis and of knowing strongly influenced by the

253. Dalton, *supra* note 244, at 1000-01.

254. Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, *supra* note 209, at S20.

One fundamental characteristic of this construct is the categorization of people, things, and ideas in terms of their difference from one another. . . . Another fundamental characteristic of this construct is that difference is not complementary in that the halves of the dichotomy do not enhance each other. . . . A third and more important characteristic is that these oppositional relationships are intrinsically unstable. . . . [T]he inherently unstable relationship is resolved by subordinating one half of each pair to the other. . . . Dichotomous oppositional differences invariably imply relationships of superiority and inferiority, hierarchical relationships that mesh with political economies of domination and subordination.

*Id.*

255. An example of the product of this way of thinking is the recently vetoed federal parental leave statute authorizing twelve weeks of unpaid family leave for the birth or adoption of a child, or the serious illness of a family member. FAMILY AND MEDICAL LEAVE ACT OF 1990, H.R. 770, 101st Cong., 1st Sess. (1990). It is a statute isolated from other clearly connected issues, such as the availability of quality, affordable childcare, and wholly unresponsive to gender, class and race inequities, particularly by its lack of wage replacement. The limited time frame for leave at best provides a job security right for those who can afford to take leave, to be exercised for a period of time useful primarily to recover from childbirth, but inadequate for the nurture and care of a child or the well-being of a parent. It is better than nothing, but not much. Its value structure is the reinforcement of the existing work-family structure, putting work first and dealing with work-family conflicts in only a minimal way. The danger is that the cloak of objectivity will be wrapped around this effort, that this will be viewed as the best we can do and a just result, thereby deflecting any further policy efforts.

256. Scales, *supra* note 244, at 1376-80.

257. *Id.* at 1378.

258. *Id.* at 1382. "The injustice of sexism is not irrationality; it is domination. Law must focus on the latter, and that focus cannot be achieved through a formal lens. Binding ourselves to rules would help us only if sexism were a legal error." *Id.*



power and position of the speaker, which refuses to acknowledge that position, while claiming power from its purported, but false, neutrality.<sup>259</sup>

The most fatal consequence of dichotomized thinking, however, is that the choice of one side of the dichotomy denies paradox, contradiction, ambiguity, complexity, difference, and relational solutions.<sup>260</sup> It is a fundamental feminist insight to expose and explore a different way of thinking that values paradox and contradiction, emphasizes relational thinking, values connection and community, and remains anchored and sensitive to context.<sup>261</sup> One value of those insights is to explode the myth of the singular solution, to accept the existence of paradox and contradiction, and to begin to work toward pluralistic, difference-celebrating solutions.<sup>262</sup> "Feminist theories, . . . should encourage us to tolerate and interpret ambivalence, ambiguity and multiplicity as well as to expose the roots of our needs for imposing order and structure no matter how arbitrary and oppressive these needs may be."<sup>263</sup>

The recognition and confrontation, but not resolution, of paradox is essential and positive, because to end the paradox, to choose, is to accept the

259. But there are other ways of knowing and other relationships between the holder of knowledge and the community, including what Patricia Collins calls "taken-for-granted knowledge" and the use of call-and-response, the distinctive dialogue of the black community. Collins, *The Social Construction of Black Feminist Thought*, *supra* note 209, at 763.

The feminist challenge to neutrality/objectivity seems to provoke the most defensive reaction throughout the academy. The real challenge that feminists pose, however, is the consequence of the exposure of non-neutrality. The examination of claims of knowledge for bias when those claims are made within a social context of privilege and oppression seems simply essential. Then and only then can the value of that particular perspective be weighed. The exposure of bias is not certain, not inevitable, in all thought. Where it exists, it does not seem to automatically render the claim of knowledge, the argument raised, the position taken, as useless. Rather, it suggests that motives and effects must be re-examined, and the process of valuing is inevitably socially constructed. See generally Minow, *The Supreme Court 1986 Term Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

260. I would also argue that the very process of thinking in dichotomies is the problem here. See Olsen, *supra* note 13, at 1578:

When I speak of transcending the male/female dichotomy, I have in mind creating a new referential system for relating men and women to the world, a systemic departure from the ordinary image of male and female as correlatives. . . . [i]t means radically increasing the options available to each individual, and more importantly, allowing the human personality to break out of the present dichotomized system.

Olsen defines dichotomy as a significant aspect of experience that is divided sharply between two categories that are mutually exclusive but together account for the entire aspect. *Id.* at 1498 n.1.

261. See generally Dowd, *supra* note 90; Minow, *supra* note 259; Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979); West, *supra* note 241; Finley, *supra* note 239; Schneider, *supra* note 239; Law, *Equality: The Power and Limits of the Law* (Book Review), 95 YALE L.J. 1769. My critique of the legal way of thinking is separated from the process of identifying and revaluing what has been associated with women as the feminine side of experience and values. The method and the substance are, however, strongly connected; thus, it is difficult not to have values creep in here.

262. See WHAT IS FEMINISM, *supra* note 13, at 3 (discussing one of the trends of feminist thought as its fluidity and diversity, the lack of a singular view, which is both a source of strength and of political weakness). "All the varieties of feminism contain at their heart a paradox — requiring gender consciousness for their basis, their political rallying cry is the elimination of gender roles." *Id.*

263. Flax, *supra* note 238, at 643.

existing structure.<sup>264</sup> Noticing and explicating paradox challenges hierarchy and existing values and structures. "We cannot order a paradox or fit it into a hierarchy. The articulation of paradox leaves traditional categorizations bereft of their sharp lines, and thus calls into question their very meaning. Paradox refuses to let us rest in the illusion of a compartmentalized order; it forces us to rethink our position by alerting us to another position that is irreconcilable with our own."<sup>265</sup>

As Elizabeth Schneider's work suggests, the key is not to eliminate dichotomies, but rather to think of them as defined by, and interacting with, each other, in a transformative way. This is to use dialectics, or "the idea of the process, connection, and opposition of dualities, for subsequent change and transcendence. . . . The dialectical process is not a mechanical confrontation of an opposite from outside, but an organic emergence and development of opposition and change from within the 'moment' or idea itself."<sup>266</sup> A dialectical view, argues Schneider, permits an assessment of strengths and weaknesses of concepts, rather than requiring a wholesale acceptance or rejection of a particular approach.<sup>267</sup> It carries the practical consequence of permitting the use of concepts that may carry some risks, that are not "pure," but may nevertheless be powerful and empowering.<sup>268</sup> The concept of choice, for example, is essential to work-family policy, to be sensitive to the diversity and range of families and work environments, to permit people to control their lives, and to recognize and destroy the structures that make current choices about work and family illusory rather than real. Yet choice must be used very carefully, as the illusion and ideology of choice is a critical prop to existing structural inequities and the acceptance of those inequities by the very people disadvantaged by them.<sup>269</sup> Dialectical thinking does not see the use of the concept of choice as an either-or issue, but rather as an opportunity to use what is of value while exposing and resisting current ideology and its harmful consequences.

The further development of this way of thinking is that suggested by black feminists, which goes beyond the critique of dualism to thinking in multiple terms.<sup>270</sup> Deborah King calls this "multiple consciousness," which

264. Cole, *Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59, 83 (1985).

265. *Id.* at 82.

266. Schneider, *supra* note 239, at 599.

267. *Id.* at 610.

268. *Id.* See also Minow, *supra* note 12 (attempting to transform rights); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (attempting to transform equality).

At the core of this perspective, according to Schneider, is paradox. "The recognition of paradox, of the seeming contradiction of two opposites that are really interconnected, is critical to the dialectical perspective I am suggesting." Schneider, *supra* note 239, at 611.

269. Martha Fineman has powerfully demonstrated the grip of ideology and the importance of examining who controls the definition of critical concepts and how they impact on an unequal society, most recently with regard to child custody. Fineman, *supra* note 218. See also Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789.

270. See, e.g., A. DAVIS, *WOMEN, RACE & CLASS* (1981); B. HOOKS, *AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM* (1981); B. HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984); G. JOSEPH & J. LEWIS, *COMMON DIFFERENCES: CONFLICTS IN*

encompasses the recognition of "multiple jeopardy": "Most applications of the concepts of double and triple jeopardy have been overly simplistic in assuming that the relationships among the various discriminations are merely additive. . . . Such assertions ignore the fact that racism, sexism, and classism constitute three interdependent control systems."<sup>271</sup>

Multiple consciousness is essential to thinking about work and family. The nature of work-family conflict is paradox: it is a women's issue, fundamentally affecting the real equality of women. But it is also a men's issue, reflecting the confined role of fathering. It is a gender issue, intimately tied to constructs of sex-associated roles within the family and the market. It is also an issue far beyond gender, that embraces and reflects ethnic and racial differences, societal and institutional racism, and the hierarchical, divisive consequences of a post-industrialist capitalist economic system.<sup>272</sup> The challenge for legal thinking and problem solving is to move away from line-drawing and side-choosing, to learn how to work from multiple consciousness toward diverse, encompassing solutions.

The means of resolving work-family issues must proceed from multiple consciousness toward a different vision of work and family. Most importantly, it must allow for an infusion and transformation of our sense of humanity and its connection to both work and family. It does not mean removing values and moral decisions from the analysis. It is inevitable and necessary that we acknowledge the value structure and assumptions that underlie the approach I am suggesting. It is also critical that we explicitly acknowledge a value structure that imposes limitations or sets goals for work and family policy. In order to begin, we first have to expose what is there.

### ***B. Questioning Everything: Exposing the Assumptions and Value Structures of the Existing Structure***

Thinking from multiple consciousness pushes toward exposing the inter-related pieces of work-family structure. The fundamental source of conflict is the values and assumptions of the structure and their reflection of particular patterns of power and domination. In order to avoid replicating those patterns, it is essential that they be exposed. It is also essential to explode the myth of the neutrality and objectivity of the structure, which so strongly contributes to the sense of individual responsibility and burden that prevents agitation for change.<sup>273</sup>

The first step is exposure. This must include continued analysis of the sources of conflict, the interconnection between the various layers and mani-

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BLACK AND WHITE FEMINIST PERSPECTIVES (1981); Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

For recent critiques of mainstream feminist legal theory for its racial bias, see Kline, *supra* note 209; Harris, *supra* note 144; E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

271. King, *supra* note 206, at 47.

272. Dowd, *supra* note 90, at 110-19.

273. To the extent we remain convinced that family issues are personal and *not* political, the focus of problem-solving is individual and problems are viewed as unique, or even one's "fault." If we see the personal as political, then we view the problem structurally and the solu-

festations of conflict, and particular sensitivity to the diversity of families and workplace patterns affected by the work-family structure. These patterns of conflict must be considered from the perspectives of gender, class and race. Patterns of power and dominance pervade both work and family structures. The interlocking nature of that pattern of oppression must be exposed. The analysis must also focus on how this operates as a connected structure, particularly the ideology that reinforces the actual structures. For example, how do the ideologies of privacy, choice, and freedom function amidst a conflict-ridden, unequal structure which disserves the vast majority of children and families?<sup>274</sup>

Exposure of the existing context may also reveal positive models, alternative structures, or healthy relationships. The available research exploring the impact of the work-family structure upon disadvantaged groups suggests some intriguing perspectives beyond the white, male, middle-class perspective that dominates the ideology of work and family. For example, the extended kin networks of the black community; the functional definition of family among working class, working poor, and poor families; and the networks of women workers connecting work and family all suggest alternatives created out of limited choice-making. This requires both assessing victimization but also acknowledging the power that the victims have exercised.

This suggests a final issue from the process of exposing, analyzing, and questioning the current context. The exposure of the gendered, racist, and classist nature of the structure imply the necessity of its destruction, grounded upon fundamental notions of equality and justice that require the elimination of artificial and debilitating constraints and supports. It also presumes the prevention of the reinstitutionalization of these patterns in the work-family structure. But would any of the existing structure remain, either materially or in the sense of underlying assumptions, if power could be confined, or empowerment succeed? In other words, is there any value in what we have identified as "male", "white," or "middle/upper class?" Can you utilize concepts from the existing system and infuse them with new meanings?<sup>275</sup> This is to question whether existing principles or values, viewed through the lens of this process of exposure, can be the means to envision and restructure work and family.

### *C. Transformation: Difference, Integration, Transformation*

Where does this way of thinking lead? Exposing and rethinking work and family leads to transformation of the existing structure. The beginning of that transformation will come from difference analysis, from the elimination of singular standards, the rejection of false neutrality, and the search for means to enhance diversity.

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tions as grounded in social consciousness and community organizing for political structural change.

274. See text accompanying notes 46-136.

275. This is maybe to ask whether the concepts or values could, or should be, separated from the context of domination in which they have been used.

### 1. *Lessons from difference analysis*

The value of difference analysis is that it shows what has been left out and thereby begins to indicate what is absent from the current workplace structure. It also identifies a set of values and a different perspective that has been associated with women, and argues for the value of that perspective. By extension, it argues for the inclusion of all excluded, silenced voices.

The issue of difference is rife with paradox, with what Martha Minow calls the dilemma of difference: whether to make it matter, or whether to ignore it as insignificant or dangerous.<sup>276</sup> I think we have to accept the paradox and use both sides of it. We need to take what has been left out and use it either to add to or to transform dominant viewpoints, while recognizing that this different perspective is as flawed as the dominant one, as it too is the product of patriarchy. Second, I would argue against a "women's" perspective as a replacement, both because of its flawed, imperfect origins and because that seems to perpetuate the same sense of hegemony and hierarchy that is a major flaw of the existing structure.<sup>277</sup> The greatest lesson of the difference debate is the necessity of devising means to accept, incorporate, and expand the structure to include and value difference.<sup>278</sup> Pluralism should be a critical goal of a new structure — a means to exalt difference, not to punish it.

The issue of difference has bedeviled the feminist movement.<sup>279</sup> It is the question of whether women and men are fundamentally the same, or whether

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276. Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157 (1985). Minow deconstructs the dilemma as including two essential concepts. First, it encompasses the dichotomies of equality/sameness vs. difference/stigma/inequality/deviance. This dichotomization encourages the separation of individuals and obscures the possibility of equality despite many differences. *Id.* at 159-60. Secondly, in this concept of equality and difference, there is a presumed standard against which sameness is measured, and against which one defines different. *Id.* at 204. Minow argues that one can prevent associating difference with stigma and deviancy by focusing on the relationship in which difference is created, so that the dilemma or problem of difference is shared, rather than located (and in a negative way) with the object defined as different. *Id.* at 206-08. As she acknowledges, the dilemma is not changed but it is shared, and the focus is on the problem of stigma. *Id.* at 206. See also Minow, *supra* note 259; Minow, *Making all the Difference: Three Lessons in Equality, Neutrality, and Tolerance*, 39 DE PAUL L. REV. 1 (1989).

277. On the dangers of essentialism, see Harris, *supra* note 144; on questioning the concept of women's voice, or its description, and the danger of the abuse of that concept, see Williams, *supra* note 90.

278. Littleton, *supra* note 268.

279. Most recently the issue of difference has arisen in two contexts. First, the issue of pregnancy, and the inadequacy of existing equality analysis to deal with this fundamental, definitional difference between men and women, raised the issue of biological difference. See Dowd, *supra* note 101, at 715-20 (describing the positions on maternity leave generated by the *Cal Fed* case). As difficult as the issue of pregnancy is, it is an "easy" question of difference because it is so neatly defined. Requiring that workplace policies and structure assume and incorporate the existence of pregnancy and its consequences seems "fair" because it is simply a characteristic of some members of the workforce.

On the other hand, the second context in which the question of difference has arisen is far more complex, far reaching, and troublesome. This is epitomized by the work of Carol Gilligan, whose work *In a Different Voice*, *supra* note 240, touched enormously powerful intellectual and emotional convictions and feelings about the different cultural context and moral voice of women. Gilligan argued that scholars of moral development had constructed a hierarchy of developmental steps that reflected underlying value assumptions that are distinctively male while ignoring another moral voice which she identified as feminine. "One voice speaks about

by biology, but even more significantly, by culture, women are fundamentally different. Those who celebrate women's difference often view women's values and culture as "better," but a separate and devalued better as compared to the male ideal and lived reality.<sup>280</sup> We cannot lose sight of, and must articulate, what has been left out and use it to reassess what is there. But we must also acknowledge that both the dominant and different voices are limited by the structure of patriarchy. Each may have some value, but both are essentially handicapped by the perversion of domination, the corruption of the gender hierarchy of power. To exalt the different voice is to lose sight of its origin; that is, to elevate it in a new hierarchy or argue for separatism accepts that voice — a voice developed in the culture of domination.<sup>281</sup> It leaves out the possibility of imagining what the voice would sound like in the absence of patriarchal structure.<sup>282</sup>

Change requires alliances that must move across and get beyond difference, while remaining constant in the process of transformation. The political consequences of exalting women's separate, distinctive voice may be the political right wing's cooptation of issues of work and family and the reimposition of separate spheres, or their support in the guise of equal support of this

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equality, reciprocity, fairness, rights; one voice speaks about connection, not hurting, care and response." DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 44 (1985) (presentation of Carol Gilligan) [hereinafter *Feminist Discourse*]. Because only one voice was identified, the male voice, it was equated with the human voice.

Beyond her critique and exposure of the values underlying the theoretical constructs of developmental psychology, Gilligan described and made visible this alternative voice, which she identified through women's articulation of moral dilemmas. It is a voice which most significantly values the web of connection, relationships with others, looking for solutions in which all can win, rather than seeing moral dilemmas as choices between individuals that requires the designation of the superiority of the rights of one over another. C. GILLIGAN, *supra* note 240, at 64-105. Because Gilligan found this voice by listening to women, and because the value structure of this voice reflects feminine stereotypes, Gilligan is often viewed as exposing women's voice. But Gilligan has pointed out that both sexes appear to have both voices; the difference is in the degree to which they focus on one voice, and the tendency in both sexes to feel compelled to focus on one voice. *Feminist Discourse, supra*, at 47 (presentation of Carol Gilligan).

Gilligan has been critiqued for her methodology, her results, and the potential for abuse of her basic insight. Nevertheless, Gilligan's work is emblematic of two trends. First, it removes the mask of objectivity and exposes the value structure behind theory as dominated by a male model, male values, and the support of patriarchy. But the greatest impact of her work has been in exposing the hidden, devalued different voice, and thereby revaluing, empowering, and exalting that voice.

280. For two historical treatments of this issue, see Delmar, *What is Feminism?*, in WHAT IS FEMINISM, *supra* note 13, at 8-33; Cott, *Feminist Theory and Feminist Movements: The Past Before Us*, in WHAT IS FEMINISM, *supra* note 13, at 49-62.

281. Catherine MacKinnon has critiqued the concept of the different voice as being the voice of the victim. *Feminist Discourse, supra* note 279, at 20, 26, 27, 75. I agree with the fundamental observation of the context of the voice, although I am unwilling to accept the connotation of powerlessness.

A single different voice also raises the problem of essentialism, of assuming all women have the same voice or that their voice is always most strongly affected by gender. Harris, *supra* note 144, at 585-90.

282. There are lessons to be learned from examining the historical record for parallels in other major shifts in intellectual perceptions that involve a massive shift in values and conceptions when the structure and sense of limits changed. Another way of breaking out and seeing

separate, distinctive culture. For example, efforts to relax home work rules to permit women to combine work and family roles, and efforts to support stay-at-home mothers in federal childcare legislation have been couched in terms of support of women and their life choices.<sup>283</sup> Yet the home work revisions perpetuate the devaluation of childcare by seeing it as something that can be combined with "real" work, and the tax benefits are without regard to the serious burdens the tax structure disproportionately imposes on women, particularly single and minority women.<sup>284</sup> Judith Stacey persuasively argues that the emergence of pro-family, you-can't-do-it-all, post-feminist exaltation of mothering contains a common thread of foregoing or abandoning the critique of power and dominance that utilizes, in part, difference analysis, coupled with the convergence of personal issues of struggle.<sup>285</sup> Stacey stresses the political dangers of emphasizing difference and the glorification of mothering. "Instead of celebrating the feminine, we need to retain a vital tension between androgynous and female-centered visions. We need to recognize contradiction and to apply a critical perspective that distinguishes between giving value to traditionally female qualities and celebrating the female in a universalistic and essentialist manner."<sup>286</sup>

Joan Williams demonstrates the potential for abuse of the notion of a different voice as simply constituting the re-emergence of the ideology of domesticity, with its implications of separation and devaluation.<sup>287</sup> Williams strongly disagrees with the description of gender associated with feminists who have claimed a distinctive women's culture. More significantly, she critiques this position as avoiding confrontation with capitalist practice.<sup>288</sup> "The whole

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things differently is by the use of creativity and imagination, qualities of thinking largely discouraged for lawyers.

283. On home work, see Boris, *Homework and Women's Rights: The Case of the Vermont Knitters, 1980-1985*, 13 SIGNS 98 (1987); International Labor Organization, *Homework*, 8 ILO CONDITIONS OF WORK DIGEST (1989). On federal childcare tax proposals, see Liebman, *Evaluating Child Care Legislation: Programs, Structures and Political Consequences*, 26 HARV. J. ON LEGIS. 357, 383 (1989).

284. Boris, *supra* note 283. On tax inequities for women, see the recent report by Arthur Lyons and Helene Colvin sponsored by the Coalition of Labor Union Women, *WOMEN AND CHILDREN FIRST: AN ANALYSIS OF FEDERAL TAX POLICY* (1990).

285. Stacey, *Are Feminists Afraid to Leave Home? The Challenge of Conservative Pro-Family Feminism*, in *WHAT IS FEMINISM*, *supra* note 13, at 219.

The germinal insight of feminist thought was the discovery that 'women' is a social category, one that has subordination at its core. Sexual politics was a form of direct struggle against this social construction, a form of struggle against the systemic, structural subordination of women. Reflecting the ambiguous, dual meaning of the word 'sexual', feminist sexual politics has included efforts to transform gender and sexuality both in the public sphere and individually in the 'privacy' of our kitchens and bedrooms. For many, this politicization of intimate relationships, particularly of female-male relations, was the most explosive and threatening aspect of feminist sexual politics, and it is this form of sexual politics in particular that conservative pro-family feminists reject in an attempt to avoid all forms of direct struggle against male domination.

*Id.* at 221.

286. *Id.* at 237.

287. Williams, *supra* note 90, at 819-22.

288. *Id.* at 802. "I stress that, though I am not denying the existence of gender, I am denying the validity of the description of women's voice that Gilligan has provided. In particular I reject Gilligan's core claim that women are focused on relationships while men are not." *Id.* at 819. "[D]omesticity's critique does not compel its followers to confront capitalist practice and

point of critiquing capitalism is to challenge the way in which wealth is created and distributed. Domesticity's critique is designed to evade the central issue of whether society should be transformed."<sup>289</sup> Even worse, Williams points out, this critique or voice can be used to claim that women simply make different choices because of a different set of values.<sup>290</sup>

The concept of a distinctive female culture may be debilitating rather than liberating, furthering oppression instead of destroying it.<sup>291</sup> What starts as radical exposure of the existing structure, articulating the hidden/lost voice, can be coopted, devalued, as a softer voice that can be ignored.<sup>292</sup> It also separates women from men, when political realities make it necessary for women to ally with men for political transformation — after all, they hold the power.<sup>293</sup>

This is not to reject the different voice, but to reject its potential for separation or elevation. The insight to be gained from difference analysis is the development of the values exposed by it, and the transformation of the existing structure. The different voice can be devalued and minimized by seeing it as only a woman's voice — the need is to get beyond that by universalizing the ethic of care and redefining the ethic of justice.<sup>294</sup> In other words, having discovered gender difference in values and the approach to moral issues, this formerly hidden voice should be separated from gender, if it has meaning and usefulness.<sup>295</sup>

to change it. Instead, an abiding tenet of domesticity is that women's aversion to capitalist virtues makes them 'choose' home and family." *Id.*

289. *Id.* at 821. Williams argues that the critique of work as gendered inevitably is a critique of capitalism, and that the goal should be not to re-gender the workplace, but to remove gender and re-evaluate workplace practice and structure. *Id.* at 821, 836-40. I would agree that one of the goals of workplace restructuring should be degenderization, meaning the elimination of the organization of work and family on gendered terms, as well as the elimination of the structures and values of work deemed "male," not simply because they are gendered, but because they are oppressive, harmful, and should not be valued. It is less clear whether this can be done without being conscious of gender or even engaging in gendered affirmative action/restructuring.

290. Williams illustrates this potential by examination of the infamous *Sears* case. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). *Id.* at 816-21. See also Milkman, *Women's History and the Sears Case*, 12 *FEMINIST STUD.* 375 (1986).

291. See Hantzis, *Is Gender Justice a Completed Agenda?* (Book Review), 100 *HARV. L. REV.* 690, 703 (1987) (reviewing E. LENZ & B. MYERHOFF, *THE FEMINIZATION OF AMERICA: HOW WOMEN'S VALUES ARE CHANGING OUR PUBLIC AND PRIVATE LIVES* (1985)).

292. This distinction, and what can be the consequences of this approach, are exemplified in recent efforts to find feminine values in classical republican theory. What may have started as a valuable inquiry — whether there are values in our constitutional history that can be drawn upon for feminist thought, or to demonstrate that certain ideals are already within the range of voices already recognized in our public value structure, and therefore feminist thought is not a radical departure from existing value and traditions — might be read as legitimization of historical views of ideals of community and connection where women were excluded from the political community. See Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543 (1986).

293. Hantzis, *supra* note 291, at 699.

294. See, e.g., Tronto, *Beyond Gender Difference to a Theory of Care*, 12 *SIGNS* 644, 646 (1987).

295. *Id.* To see this perspective as feminist in the sense of exclusive to women or only for women, is bad for three reasons: the link between this voice and gender is by no means conclusive; it is strategically problematical; and it recreates ethics tied and limited to gender. This



Difference analysis thus suggests two things. One, it epitomizes the paradoxical, contradictory nature of work and family — and the necessity to accept that and not get mired in looking for or deciding to accept one side of the paradox. It also means that difference requires a theory of pluralism rather than a new standard to replace the male oriented standard. Second, the articulation of hidden, different voices, and their contrast to the existing structure, then leads to integration or transformation, if one rejects separatism. Transformation should be the goal.

## *2. The dialectic and transformation*

Those seeking to transcend difference bring competing visions of integration and transformation out of the difference debate.<sup>296</sup> The integration perspective argues that women's values and perspectives be added to the workplace, or, sometimes, that the values dominant in work and family must infuse both.<sup>297</sup> We should work toward another vision, a vision of transformation, the notion of a dialectic, that would take what has been left out and create a new structure that is not merely the sum of two parts, but a different, transformed structure.

The integration approach is premised upon the idea that if you add male and female value structures together, you will have the whole, the entire universe, a healthy family culture and a healthy workplace culture. While the infusion of woman-associated values in the workplace makes sense, the converse does not — nothing is gained by infusing male-associated values in an already dominantly patriarchal family structure. Second, this approach assumes that the two voices, male and female, and the two value structures, work and family, describe the totality, and the problem is essentially one of redistribution. The underlying assumption of a complete universe seems to be fundamentally flawed, or the exposure of the operation of gender and of patriarchy has not taught us very much. It also obscures and devalues other patterns premised on race and class. But even if viewed solely as a gender perspective, it seems to combine two flawed, partial, corrupted perspectives. The point is, if we have created value structures premised on domination and hierarchy, those structures may yet contain valuable aspects, but their growth and evolution has been stunted. If we accept that universe (the universe of the total of these two views) then it seems we incorporate the consequences of domination and accept that limitation. We forget the insight about power and reinstitutionalize it based on our new set of assumptions.

These two value structures, stripped bare and clearly seen both for the concepts they contain that hold the potential for rethinking, reconstructing, revaluing, and for the flaws and limitations imposed by the context of patri-

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seems to be the same conclusion that Joan Williams has reached; after this article was drafted, her insightful analysis reaffirmed many of my conclusions.

296. Most recently, see Williams, *supra* note 90, at 822-36 (a rejection of men's traditional life patterns entails a fundamental challenge to the structure of wage labor); Abrams, *supra* note 90, at 1190 ("The next phase of the struggle for gender equality in the workplace must be to expose the partiality of these debilitating norms and structures, and insist that they be modified to reflect the perspectives of women.").

297. See Finley, *supra* note 239, at 1165-68, 1182; Law, *supra* note 261, at 1776; Littleton, *supra* note 268, at 1303, 1312, 1332-34; Kessler-Harris, *supra* note 22, at 155-57.

archy, can be a beginning of a dialectic whose goal is transformation beyond the boundaries of existing structures. As Carol Gilligan argues, including or using previously silenced voices could lead to transformation of moral discourse, and the creation of new values and parameters, instead of simply adding the voices to achieve an androgynous result, or adding the different voice as a separate voice to the mainstream.<sup>298</sup> She uses the example of two young children arguing over whether to play pirate or neighbor; they finally decide to play the pirate who lives next door. The decision reflects not a choice between two options, but the creation of a new game:

The inclusion of two voices in moral discourse, in thinking about conflicts, and in making choices, transforms the discourse. It is no longer either simply about justice or simply about caring; rather, it is about bringing them together to transform the domain. We are into a new game whose parameters have not been spelled out, whose values are not very well known. We are at the beginning of a process of inquiry, in which the methods themselves will have to be re-examined because the old methods are from the old game.<sup>299</sup>

It is so hard to imagine a non-gendered vision of work and family, but that must be an essential goal of the dialectic leading to transformation. The concept of transformation does not mean the exclusion of the existing value structure, or of the different voice. Rather, it envisions a non-gendered voice and structure, the exclusion of all oppressions of the existing structure, to something we have not yet imagined. That we cannot see it should not be troublesome if, from our existing framework, we can define some parameters of a new structure.<sup>300</sup>

#### IV. PIECES OF THE VISION OF A RESTRUCTURED WORKPLACE

The difficulty of imagining a restructured workplace is indicative of the strength of the status quo, and the assumption that the current structure and values are natural, objective, neutral and unchallengeable. At the same time, the lack of vision may be a strength, encouraging the development of a perspective with less unnecessary boundaries and categories.

Nevertheless, it is possible to begin to articulate some of the goals, characteristics, and values of a restructured workplace. Some of this is easier to state in negative terms, eliminating, or prohibiting elements of the existing

298. *Feminist Discourse*, *supra* note 279, at 45.

299. *Id.*

300. It seems sometimes the best we can do is define negatively, that integration is not enough or should not be the limit; rather, that it is only a beginning. This also acknowledges the necessity of some agreed goals or the critique will lead to an indeterminate end. At the same time, can particular goals be embraced while remaining true to the values of pluralism/paradox/context?

It is also critical that any vision be both rooted and grand, not "utopian" as Ursula LeGuin has pointed out, but rather "mundane." As she describes it: "'Bound to earth' says my pocket dictionary, and 'concerned with the ordinary.' Not an unworldly word like utopia, 'noplacement,' it comes from *mundas*, Latin for 'world,' and it stays there, on earth, of the world, here. Very physically and spiritually here." LeGuin, Book Review, 6 WOMEN'S REV. BOOKS 8 (Feb. 1989) (reviewing J. GRAHN, *MUNDANE'S WORLD* (1988)).

structure. Some of this infuses existing values with a different construction. And, some of this attempts to think and problem solve in unfamiliar ways.<sup>301</sup>

It is difficult to set this out. Any order seems to imply priority, or a certain logic. But, instead, all of these pieces are important, yet only fragmentary. They are best thought of as existing or being spoken simultaneously, rather than in sequence. Thus, it must be emphasized how interconnected and equivalent each piece is.

It is also important to emphasize that what is outlined here is not conclusive or complete, but rather is only a beginning. It nevertheless is tied to the basic assumption that in rethinking work and family we are restructuring around fundamental value judgments. This is an effort to articulate some of the values underlying a new structure, even as the goal is to permit and strengthen the absence of the confines of a singular structure.

### *A. Redefining Fundamental Concepts: Family, Work, and the Public-Private Distinction*

#### *1. Family*

The most fundamental values are our conceptions of work and family, the role and value attached to each and their relation to each other. This assumes both the ability of the family to survive and perpetuate itself, and the value of family. The likelihood of survival is supported by families' adaptiveness despite the enormous strain of the existing work-family structure. The value of family as a central social, political, cultural structure is too strong to realistically question. This does not mean unquestioning acceptance of relationships within the family, or ignoring the negative, brutalizing, oppressive, and destructive sides of family. Instead it rejects the radical critique of family.<sup>302</sup>

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301. There is also the hope of using existing concepts as transformative tools. See *supra* note 239. Deeply embedded values are strategically powerful means to structure change. These values can be used while redefining their terms, changing our vision of ourselves. Privacy, liberty, diversity, and equality are concepts that can be utilized and reconceptualized as the fulcrum of change. A new vision of community must be tied to an existing sense of self, of real potential.

302. Radical critique has focused on the family as currently structured and idealized, and concludes that deemphasizing or abolishing the family is necessary. One commentator summarizes the critique as follows:

Women's subordination is linked to The Family as a specific household arrangement *and* as an ideology. Within households that resemble The Family in composition, boundedness, and division of labor, women are excluded from gaining direct access to valued resources such as income, recognized and status-giving work, and political authority. They are economically dependent on their husbands; their unpaid work at home is generally burdensome and devalued; and the work of mothering is done in relative isolation, to the detriment of both mother and child.

Thorne, *Feminist Rethinking of the Family: An Overview*, in *RETHINKING THE FAMILY*, *supra* note 169, at 4. The Family is defined here as "a collectivity of specific persons (presumably 'nuclear' relations) associated with specific spaces ('the home'), and specific affective bonds ('love') . . . [and assumes] a particular sexual division of labor: a breadwinner husband, freed for and identified with activities in a separate economic sphere, and a full-time wife and mother." *Id.* See also Bridenthal, *The Family, The View From a Room of Her Own*, in *RETHINKING THE FAMILY*, *supra* note 169, at 225-35; M. POSTER, *CRITICAL THEORY OF THE FAMILY* (1978).

Valuing family means valuing things associated with women. The ethic of care and connection is central to family, the ethic of feeling. There is also the priority of the dependent, and the valuing of life. The valuing of others is not economic, but social, even though it may have economic consequences. Valuing family above all means valuing children.<sup>303</sup>

Critical to valuing family is a noneconomic sense of value. There is no doubt that family serves an economic function, by supporting its members and preparing them for the workforce. The support of family can clearly be justified in economic terms, as a good investment. But we sacrifice something essential by commodifying family, by seeing its value only in those terms. Throughout the interface of work and family this issue of valuing arises, as does the need to define value in terms other than material, economic quantification.

Inextricably intertwined with this task of articulating the value of family, and of valuing family in non-economic ways, is the definition of family. That definition has enormous importance because it determines not only who will be included and benefitted by public policy designed to restructure work and family relationships, but also what our picture or vision of this basic societal unit will be. *Family must be defined functionally.* It is what family does, rather than what it looks like, that is at the heart of the valuing of family. A starting point for that functional definition is that family

is a system, a support network. Its main purposes are to: act as the root of self-esteem, provide basic need fulfillment, collect and communicate information, provide an ideological belief system, provide validation and reinforcement, act as the root of motivation (for achievement such as education or work), and finally, be a place for rest and recuperation.<sup>304</sup>

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303. I do not mean to exclude elders by this statement. Rather, I mean to focus on the nature and value of the bond to children and their value to community as well as to family. Children are dependent in a different way than are elders, that may justify special solicitude. The moral/ethical/social justifications differ: for children, it is their total dependency and enormous potential contribution to society. For elders, the social justifications are much more weighted by past responsibilities and contributions. They differ, then, in terms of the justification for social connection and care, even as they are on a continuum of dependency and emotional connection.

The prospect of a multigenerational family and the patterns of eldercare may, however, be a fertile area for transforming traditional concepts of family structure and patterns of care, as both sons and daughters have parents who may need care, and caregiving responsibility need not be confused with false biological determinism that seeks to justify gendered caregiving roles for children. See generally Horowitz, *Sons and Daughters as Caregivers to Older Parents: Differences in Role Performance and Consequences*, 25 GERONTOLOGIST 612 (1985); Brody, *Patterns of Parent-Care When Adult Daughters Work and When They Do Not*, 26 GERONTOLOGIST 372 (1986); Stoller, *Parental Caregiving by Adult Children*, 45 J. MARRIAGE & FAM. 851 (Nov. 1983); Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1985); K. DYCHTOWALD, *AGE WAVE: THE CHALLENGES AND OPPORTUNITIES OF AN AGING AMERICA* (1989); ISSUES FOR AN AGING AMERICA: EMPLOYEES & ELDERCARE: A BRIEFING BOOK (M. Creedon ed. 1987); BUREAU OF NATIONAL AFFAIRS, *EMPLOYERS AND ELDERCARE: A NEW BENEFIT COMING OF AGE* (1988); OPINION RESEARCH CORP., *WORKING CAREGIVERS REPORT MARCH 1989* (1989).

304. I am indebted to Mindy Fried, formerly of the Massachusetts Women's Legislative Network, and a founder of the Family Policy Working Group, for providing me with this definition, which is from Gail Christopher, the director of F.A.M.I.L.I.E.S., a Chicago-based

A functional definition of family is essential to include within work-family policy the broad array of social structures that serve as family and reject the necessity or value of a singular notion of family structure. Family must include the context from which we currently operate: a range of structures including single parent and dual parent, married and unmarried, homosexual and heterosexual, nuclear and extended, biological and adoptive, and first and blended families. To define family by its form is to ignore this diversity of shapes. Definition by form also reinforces preferences of gender, race and class to the extent that the favored form continues to be the nuclear family.<sup>305</sup>

A functional definition is a practical recognition of the role of family in relation to work and the community: it is not to organize people in identical, identifiable groups, but rather to nurture, care, and socialize family members. At the same time, this would permit the critique of family, the recognition that it can be an oppressive, destructive structure.<sup>306</sup> There must be a recognition of individual rights or entitlements against or within the family, and apart from family. This is necessary to insure that those individuals, particularly children, in families that are not functioning or are abusive, are reached and supported. It also guarantees that basic social supports are not limited to family, that one need not have this connection in order to obtain social support. The valuing of family is not meant to undercut individuals, or impose a tyranny of family; individuals should be entitled to basic economic support and survival even if they are outside a family network.<sup>307</sup>

## 2. Work

Redefining work is as essential as redefining family. It is connected to the redefinition of family, in the recognition that the functions of family include the unpaid work of housekeeping and child care, and care of other

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organization which works with families living in public housing developments to support their ability to function as an effective unit.

There are some indications of a more flexible definition of "family" in the context of several zoning decisions, *Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989) (holding that definition of family as not more than four unrelated persons living together is unconstitutional under state due process clause); *Glassboro v. Vallorosi*, 117 N.J. 421, 568 A.2d 888 (1989) (upholding injunction barring enforcement of zoning ordinance, finding ten students living together have the generic character of a family), and in the legal recognition of domestic partners as the basis for employment-related entitlements. *San Francisco Board of Supervisors Approves Domestic Partners Ordinance*, 101 DAILY LAB. REP. A-1 (May 26, 1989).

305. American marital and divorce patterns suggest an ongoing struggle against patriarchal family structure, even when that is at the price of severe economic sacrifice. L. WEITZMAN, *supra* note 59. Commitment to a functional definition of family may avoid proping up hierarchical, patriarchal family structure. The support of function, however, should not hide or sanction oppression. This connects the definition of family with elimination of gender, race, and class inequities.

306. In other words, this is an acceptance of the radical critique but not its conclusion that turning away from family is the solution. See *supra* note 294. It is critical that family not be mystified or idealized, that family support include acknowledgment of breakdown, violence, and abuse.

307. Thus, family is not to be the qualifier for social support, but rather is a social institution that should be supported as one of value for individuals that should not be a singular focus to the detriment of individuals functioning without family who need and merit social, community support. This may mean using household as a less value-laden term, but it also means taking care of those without households, such as homeless people.

dependents. A fairly extensive literature has made visible the non-wage work of the household.<sup>308</sup> It has further been recognized that both capitalist and socialist post-industrial societies fail to provide for and support caregiving work.<sup>309</sup> That work must be performed and valued. The dilemma is how to value the work without locking in the gendered structure of those who currently perform family work; and how to value it enough that, in conjunction with changes in power relations and roles, men will take on that which has been traditionally viewed as "women's work." Part of the process of redefinition is to avoid gendering types of work and to value family work in economic and noneconomic terms.

Under our current system, wage labor is the only work that is economically valued. It is valued not only by the payment of wages, but also by the connection of key benefit structures to the paid workforce.<sup>310</sup> The entire structure of labor and employment law is tied to the notion of work as encompassing only paid market work, as employment within a capitalist system, rather than as work in both the family and work sectors. The valuing of family work requires a restructuring of basic benefits to include all those who work, not just those in the paid workforce.<sup>311</sup> We need to go beyond this, however, to recognize the value of family work so that the doing of such work is valued and recognized in the market work sphere. This requires looking at family and work as connected — not inseparable, but connected — rather than as separate spheres that compete with each other and are in fundamental conflict. Part of the challenge is devising ways that doing family work does not result in loss of market position. Part of that can be accomplished by the inclusion of family work in the benefit sphere; but that would not reach the intangible value loss of on-the-job networking, subjective impressions, etc. Another part is permitting and valuing interconnection in the work culture, including recognizing the whole self of the worker, and removing the source of much work-family conflict by permitting its resolution or the means, if necessary, to do family work without market work consequences. At the same time, family work must be valued on its own, not solely for its market connection.

One difficulty in redefining the concept of work is how to value family work without commodifying it. Yet, commodification, or insuring economic independence, is vital to guarantee that those who engage in family work do not sacrifice economic independence or accept domination in exchange for care or the ability to provide care. Another serious problem with commodifying family work is finding a means to do so that does not reinforce the existing gendered division of family work. Proposals to wage caregiving work are most vulnerable on that basis, as they would reinforce women's position in the home. That is not a sufficient basis to abandon valuing family work — rather,

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308. See DiLeonardo, *The Female World of Cards and Holidays: Women, Families, and the Work of Kinship*, 12 SIGNS 440, 441 (1987).

309. Bonnar, *Women, Work and Poverty: Exit from an Ancient Trap by the Redefinition of Work*, in *THE FUTURE OF WORK*, *supra* note 125.

310. See *supra* notes 90-106 and accompanying text (discussion of benefit structure). See also M. GLENDON, *supra* note 9, at 91-96 (discussing replacement of family by state in critical areas of individual welfare).

311. One possibility would be to extend labor and employment laws to cover and protect all those who work, rather than just those who are paid for their work.

it suggests that there must be a concerted effort to degenderize the allocation of family and market work, and prevent the reinstitutionalization of that gendered division. To achieve that will require a willingness to restructure on both the work and family side of the work-family relationship. That will require that we seriously rethink the traditional refusal to deal with aspects of both work and family, but particularly of family, under the rubric that to do so violates the public/private distinction.

### 3. *The Public-Private Distinction*

The public/private distinction divides and separates those aspects of individual and community social, economic and political life that the state can reach. That which is public may be the focus of social policy; that which is private must be protected from state or other intervention.<sup>312</sup>

Achieving a redefinition of the relation between work and family, allowing flexibility and diversity in that relationship while eliminating domination and oppression between and within those structures, requires the breakdown or reconstruction of the public/private distinction. The maintenance of public/private distinctions has two consequences for work and family. First, it means addressing work and not family, because family is dominantly viewed as private. Second, it also means excluding some aspects of work, to the extent that they are deemed private. It is a vital concern of theory, then, to break down or reconstitute the public/private split. As David Kairys notes,

The public-private distinction lies at the core of people's acceptance of the status quo, even though it seems so easy to choose other, more humane options that could make this country a better place. The public-private distinction divides life into two spheres. There is the public person, the citizen, who has the right to speak and to vote. In this public sphere, society recognizes total equality, complete democracy, and absolute freedom. . . . The private sphere includes nearly all economic activities, the environment, and the decisions that most affect people. Here there is no equality, *and we glorify that fact*. Private inequality is the American way: one can get as rich as one can get while others sink into hopeless poverty. *Inequality in the private sphere is not scorned, rather it is praised and glorified as a positive aspect.*<sup>313</sup>

So strong and fundamental is this concept, this division, that it may be more realistic to reconstruct the notion of what is public and private, and simply make the line-drawing more contextual.<sup>314</sup> The potential for resistance

312. See generally Olsen, *supra* note 13; K. O'DONOVAN, *SEXUAL DIVISIONS IN LAW* (1985).

313. Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 259 (1984). See also Finley, *supra* note 239. For an examination of the concept of public/private in Western thought, see J. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMAN IN SOCIAL AND POLITICAL THOUGHT* (1981).

314. J. ELSHTAIN, *supra* note 313, at 6, 322.

comes from the notion of family autonomy which is tied to the concept of a private sphere.<sup>315</sup>

I would argue that the division between public and private needs both to be attacked and maintained. It must be attacked where it prevents dealing with oppressive hierarchies and the perpetuation of dominance in power relations. The inequities of gender, race and class should not be protected by the shield of labeling them private. This is to be distinguished from maintaining differences of gender, race and class. The touchstone is the issue of power and achieving basic economic/social maintenance. The private must be maintained, however, in order to foster individual, internal control, decision-making, life choices, and to promote and support the diversity of individual and family choice. To the extent that law reaches beyond what has been considered private, it may act as a constraint on action, an external pressure toward a new structure. Where the private line is drawn, however, law can act as a support for the maximum range of individual choice and freedom by supporting diversity and pluralism.

For example, law could recognize and include, by not intruding into or evaluating, the full range of family forms under laws relating to families such as welfare, child custody, and adoption laws. This would be justified as a means to support children within the wide range of forms that function as healthy families. Respecting this zone of privacy by active support of the full range of family forms could contribute to diffusing the privileging of the patriarchal nuclear family. On the other hand, law could more actively intervene to prevent and sanction the abusive manifestations of gender, race or class power, including familial spouse and child abuse, and workplace race and sex harassment. Here, instead of privileging what is claimed as private, our knowledge of the persistence of oppressive hierarchies should support a presumption that a claim of physical or psychological violence is true, and probably reflects deeper structural problems. The shifting position of the public/private line would depend, therefore, on achieving empowerment while eliminating oppression.

Public and private must be rethought in a different sense with respect to individual and social responsibility. Family has been overwhelmingly viewed and experienced as a realm of individual responsibility, despite its acknowledged social value and connection. That ideal of individual responsibility hampers collective action and the development of public policy which recognizes family as a social responsibility as well as a social value.<sup>316</sup>

This means valuing connection and community, within families, between family and community, family and work, family and state, while continuing to value individual rights and liberties.<sup>317</sup> This is not the valuing of majority, of

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315. See Warren, *How Radical is Liberalism?* (Book Review), 82 MICH. L. REV. 761, 761 (1984) (reviewing J. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* (1983)).

316. On the concept of social parenting, see Knode, *Two or Three Things About the Women's Movement*, Interview with Ellen Willis, L.A. Weekly, April 24-30, 1987, at 18. Science fiction writers, in envisioning future or ideal societies, commonly include social parenting and exclude marriage — eliminating social possessiveness and the view of relationships as property. See, e.g., U. LEGUIN, *THE DISPOSSESSED* (1974).

317. See Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338 (1986) (the radical thread of feminism is its focus on community).



collective strength or vision. It is the valuing of the relation *between* individuals, between groups for the purpose of support, growth, care, and nurturance. This relational valuing looks to function rather than form; it encourages and values relationships that contribute to individual growth and care. For example, this might include support of non-biological relationships that benefit children;<sup>318</sup> expanding the network of caregivers; bringing education and information about family into the workplace; and generally encouraging collective social support rather than state support.<sup>319</sup>

The challenge is accomplishing this without the danger of imposed community, conformity, or smothering connection. It is the challenge of working from paradox, and the necessary vigilance against the re-establishment of a singular, oppressive standard by the appropriation of a neutral concept. That may be done in part by strong adherence to the value of diversity.

### **B. Enhancing Diversity**

Diversity is the consequence of thinking from and beyond paradox, and of recognizing and valuing difference. It is in part a recognition of the context from which we operate, particularly in terms of the variety and richness of family forms and their interrelation with work. The range and volatility of family structure requires a restructuring that provides a place for family, regardless of form. Rather than focusing on a singular model, diversity requires both inclusion of the family forms we know and movement away from form as a determinant. Recognition of that diversity is essential to the development of meaningful work-family policy.

It also is a critique of the existing structure, dominated by a vision confined to a nuclear family with a sole male breadwinner. That vision not only does not work well for the families which it purports to represent, but leaves out the vast proportion of families who range within a variety of forms and structures tending toward change and movement rather than stability and predictability. The workplace, designed around a static, singular model, simply does not work for most families. The answer is not to reconceptualize a new family form to compete with the conservative "traditional" nuclear family. It is to question the value and usefulness of a singular, particular model, and what interests are served by enforcing conformity to a preferred structure of family and work. Diversity requires attention to the disproportionate disadvantages of family forms that do not fit the existing ideal.

Valuing diversity and difference as an end, not simply as the context from which we start, ensures empowerment and choice.<sup>320</sup> It rejects the

318. See Bartlett, *Rethinking Parenthood*, *supra* note 42.

319. There is a potential model here in extended kin networks of the black community. See *supra* notes 189-94 and accompanying text.

320. The ultimate value of a cacophony of voices may be its creativity: "playful pluralism, responsive to the possibilities of multiple critical schools and methods, but captive of none, recognizing that the many tools needed for our analysis will necessarily be largely inherited and only partly of our own making." Kolodny, *Dancing Through the Minefield: Some Observations on the Theory, Practice, and Politics of a Feminist Literary Criticism*, in *THE NEW FEMINIST CRITICISM* 161 (E. Showalter ed. 1985). Ann Scales sees pluralism as the key to difference: "When our priority is to understand differences and to value multiplicity, we need only to

singular model as an expression of power and dominance. Family policy historically has imposed white middle class models of family on society at large. That model incorporates and perpetuates structures of gender, race and class in a singular concept of family and work. Celebrating diversity removes the favored status of one particular model, and ensures support for the broadest range of structures and choices. It means being particularly sensitive to the context of gender, race, and class from which we start.<sup>321</sup> This not only takes the diversity of families and work into account to achieve goals (contextual diversity), but also supports the value of different models and choices (normative diversity).

There may be a basis for celebrating difference and encouraging diversity in concepts of individual rights and religious toleration.<sup>322</sup> What I mean here, however, goes beyond toleration.<sup>323</sup> The tolerance model, even the individual rights model, still presumes the existence of a dominant structure, constrained from asserting its full power only by the requirement of grudging acceptance or toleration of another position, view, or structure, or minimal respect for individual rights despite superior power. The diversity that I mean would not permit the maintenance of a dominant model. It would require conscious support of diversity while undercutting any aggrandizement of power or privilege to a particular model or structure. The challenge would be to state that principle in other than equality terms. Equality language presupposes a standard against which to measure likeness.<sup>324</sup> The principle of diversity that I am suggesting focuses on empowerment and choice, instead of likeness.

This focus on empowerment and choice might draw from existing concepts of freedom and liberty. The goal, though, would not be to permit deviance but to eliminate dominance. This is captured to some extent by Habermas' concept of "ideal speech," described as follows:

to reach a new truth/reality "within a social frame of uncoerced communication. . . . This dynamic process includes but is not merely interpretation, the drawing out of a hidden meaning; instead, it implicates both subject and analyst (or political thinker by analogy) in the construction or reconstruction of truths whose trajectory aims toward the future." This means that political discourse aimed at the construction of new meanings, at enabling subjects to become more intelligible to themselves, must take place

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discern between occasions of respect and occasions of oppression." Scales, *supra* note 244, at 1388.

321. See *supra* notes 130-209 and accompanying text (discussion of gender, race and class perspectives on work and family).

322. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

323. See Minow, *Making All the Difference*, *supra* note 276, at 12 ("To be meaningful, tolerance similarly requires us to expose the unstated norm or starting points, as well as to challenge our own points of view. Only then can we guard against the ignorant trampling of others' rights under the ostensible guise of tolerance."). There is also a basis for celebrating difference in concepts of free speech and privacy. See generally D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

324. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

within a arena in which human speech or discursive reflection is undominated, uncoerced, unmanipulated.<sup>325</sup>

Diversity would foster policies which maximize the ability to choose. This concept's development may be able to draw on the positive implications of multiple consciousness, thinking in layers. Instead of policy or law acting as a constraint, it would be drafted to permit a range of choice. The challenge is whether law can accommodate this principle, or whether law essentially is at odds with diversity, because law pushes toward the establishment of a single standard. Perhaps because the diversity envisioned here is not limitless, it is possible to encompass it within a legal framework. The more difficult legal issue may be how to reach power, when law is commonly an instrument of power, and even incorporating diversity as a principle requires an act of power.

### C. Unacceptable Choices and Dealing with Dominance

The value of diversity, the celebration of difference, does not mean that anything goes. One of the principal values of diversity is its potential for undercutting power and dominance. Clearly that is not for the sake of preserving, in the guise of choice, gendered, racist, or classist "choice." That means eliminating the organization and structure of work and family on these bases from a restructured workplace, and preventing their re-emergence as a determinant of individual roles in the work-family relationship.<sup>326</sup>

The connection between gender, race and class as factors in the existing work-family structure is the pattern of power relationships. The restructured workplace must confront and defuse the oppressive use, concentration or attribution of power, whether based on these factors or others.<sup>327</sup> We must also imagine and begin to construct work and family relations that do not concede unnecessary power or reinforce dominance.

The constraint of power is basic to our notions of individual freedoms.<sup>328</sup> But this is not solely the constraint of power, because that assumes the legitimacy of power, and of hierarchy. It is instead the diffusion of power, by undermining hierarchy.<sup>329</sup> It combines the concept of empowerment with the

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325. J. ELSHTAIN, *supra* note 313 (quoting J. HABERMAS, LEGITIMATION CRISIS (1975)). Habermas also suggested that there can be undominated discourse and that it will produce agreement on values through the notion of "intersubjectivity", described by David Cole as follows: "At a minimum, it refers to an understanding between two subjects. Ideally, it envisions an agreement reached without domination and free of the constraints of false consciousness. . . . [I]ntersubjectivity affords a ground for the validation of social norms, and an affirmation of the possibility of social change." Cole, *supra* note 264, at 62 n.15.

326. It seems easiest here to define this negatively, eliminating features of the existing work-family structure. If those were eliminated, can we imagine what it would look like? It means not having choices constrained by these factors, and not having the choices available structured with gender, race, and class assumptions implicit or explicit.

327. Another basis for dominance is sexuality/sexual preference. See Law, *supra* note 55; Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (A. Snitow, C. Stansell & S. Thompson eds. 1983).

328. It is also the basis of much of our labor and employment law, and family law.

329. Essential to undermining hierarchy is conceiving of a non-hierarchical structure:

The ability of people to challenge sharply unequal social relations is always conditional on their ability to reject dominant definitions of these relations and to develop alternative ones. Political action depends, in other words, on ideas about

goal of a different form of organization and relationship between these two spheres of life.<sup>330</sup>

The impetus for those with power to reform the work-family structure is largely economic. Indeed, this has been the basis for implementing policies internationally.<sup>331</sup> It has not been commitment to social reform, but rather the needs of the market, that has pushed the enactment of family policy. The demographics of the American labor force require that those most disadvantaged by existing power relations benefit from efforts to recruit them into the workforce.

The models for limiting power under existing labor and employment law are individual rights and collective action. Both are adversarial, confrontational, and recast the hierarchy rather than eliminate it. The challenge for the law is to devise more effective means to reach and diffuse power relations.<sup>332</sup> This presumes the reconstruction of the public/private split to permit more intrusion into private market areas in order to reach power relations. It also requires dealing with power relations and hierarchies in the family as well as the market.

#### *D. Economic Independence*

At least one of the bases of oppressive power is economic dominance. That dominance is most keenly felt by the economically dependent and/or disadvantaged. That is a clear message from gender, class and race perspectives. A transformed work-family structure must insure sufficient economic support for families to achieve independence. This should be justified not only as a means to undercut oppressive power and dominance, but also to insure some floor of equal opportunity, and to guarantee sufficient minimal support for the family to perform its functions. Economic support also is essential as a basic guarantee of fairness for children: a child's opportunities should not be determined by the accident of birth into economic sufficiency.

This economic floor must be sufficient for the family to perform its basic caregiving and nurturing function. That requires a level of support well above the current welfare and unemployment systems. It also contemplates a support structure that is economic in the broadest sense, tied not only to concepts of minimum income, but also to integration in the economic structure rather than isolation in the urban underclass. This requires a comprehensive approach that includes housing, basic benefits, income, educational structures, job training and retraining, and economic development.

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what is right and what is wrong, about what is possible and what impossible. The exercise of power from below also depends on the development of a measure of solidarity, on the ability of people to act in concert, often in the face of efforts by dominant groups to arrange institutional life so as to inhibit solidarity. Ideology and solidarity are thus the twin building blocks of popular power.

Cloward & Piven, *The Welfare State in an Age of Industrial Working Class Decline*, 56 SMITH C. STUD. SOC. WORK 132 (1986).

330. This means a different sense of politics, more akin to that described as community based/relational, as in Ackelsberg, *Communities, Resistance, and Women's Activism: Some Implications for a Democratic Polity*, in WOMEN AND THE POLITICS OF EMPOWERMENT, *supra* note 168, at 297, or participatory pluralism, as outlined in Hogan, *supra* note 211, at 25-65.

331. Dowd, *supra* note 146, at 346-47 and sources cited in n.2.

332. See Klare, *The Labor-Management Cooperation Debate*, *supra* note 216.

This economic floor must not only guarantee the family's ability to function, but also insure and promote economic independence. The price for the family should not be dependency on the state, nor dependency within the family. A family allowance system, providing direct income support as an entitlement to all families, would reflect support for the role and importance of the family, while recognizing the economic system's inadequacy to insure sufficient income for families.<sup>333</sup>

Indeed, the notion of family support, and the necessity of providing it, is tied to the economic consequences of the current job structure. It is difficult for a single wage-earner, much less a single parent, to earn a sufficient wage to rise above the poverty level in many jobs.<sup>334</sup> Projected new jobs, moreover, are concentrated in the low wage labor market. Even if the patterns of gender and race segregation in the workforce were eliminated, therefore, a significant percentage of workers would be unable to support a family singly or in combination with another wage worker because there are not enough jobs, indeed a declining number of jobs, that provide sufficient income. Absent a major restructuring of jobs, this will require supplementary support for families dependent upon secondary labor market jobs for their source of income and benefits. The support structure must incorporate this problem of underemployment, or insufficient income, along with the problem of unemployment.

The economic support structure must also support the valuing of family work and caregiving. That requires restructuring jobs to permit and encourage family work, by shortening the workweek, encouraging flexibility in the workplace, and other strategies. Paid caregiving work must be adequately compensated, if necessary by wage supports, in the same fashion that we currently finance price supports for certain commodities deemed essential. It also means valuing family work, both economically and otherwise. The economic distribution system must be restructured not merely to insure sufficient income supply to all families but also to reject the sexual division of labor and its consequences. This cannot be done without valuing family work and providing those who perform family work with access to independent, economically sufficient income. Economic valuing should lead us to consider waging family work or valuing it for tax purposes; insuring that critical benefits are an entitlement to all who work, not just those who do wage work; and incorporating family work into private and public pension systems. Non-economic valuing of family work should consider the various relationships between market and family work drawn particularly from working class experience,<sup>335</sup> as well as the alternative models presented for market work by family work.

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333. Dowd, *supra* note 146, at 325, 332 (discussing family allowances in European context). See also THE TRULY DISADVANTAGED, *supra* note 198, at 152-53 (discussing use of family allowances in American context).

334. See *supra* text accompanying notes 111-16, 158.

335. See Ferree, *Between Two Worlds*, *supra* note 176, at 527-33, who has suggested that neither a return to full time housework nor replacement of housework by paid housework is viewed as the best alternative in many of the studies that she reviews. Rather, what is suggested is a different combination of family work and wage work.

## SUMMARY

In summary, my own as yet imperfect and limited vision of work and family requires trying to think differently in order to see differently; thinking from context, using paradox, and accepting complexity to seek transformation. It sees diversity as a fundamental value, built upon the elimination of the oppressions of gender, race and class, while valuing the differences of gender, race and class. Within a different relationship of work and family it includes a redefinition and re-valuing of family and work; a restructuring of the public/private line; the elimination of dominance and hierarchy; and the assurance of economic support of families and children by the real valuing of family. Among its goals are real equality, real choice and a real celebration of difference. The vibrancy, joy and caring in my own family is the basis of my hope for all families. I hope for a day when a vision of caring, compassion and connection is not limited or unrealistically idealistic, but rests at the core of the relation of family and work.