

# Anti-Essentialism and the Work / Family Dilemma

Catherine Albiston†

## PART I: *BWLJ* AS A FEMINIST INSTITUTION

### A. Memories of *BWLJ*

When I began to think about my memories of *BWLJ* in preparation for writing this piece, one small, but significant, event came to mind. During my tenure on the *Journal*, a clipping from the *New York Times* appeared on the office bulletin board. It described a talking Barbie doll manufactured by Mattel that said, among other things, “Math class is tough.”<sup>1</sup> The toll-free number for the Mattel corporation was hand written across the bottom of the article. No further instructions were necessary.

Although this example has little to do with the law, this newspaper clipping on the *BWLJ* bulletin board signifies much of what I found attractive about the *Journal* as a community. The *Journal* was a group of law students (both women and men) deeply interested in how seemingly ordinary, everyday aspects of society helped construct the meaning of gender, often in ways that we found problematic. In addition, the *Journal*'s members were collectively committed to social change – to challenging those everyday assumptions about gender that recreated stereotypes and classified women as inferior. We also shared a baseline awareness of how seemingly neutral institutions, including sometimes law school itself, rested on implicitly gendered structures that were rarely acknowledged, let alone questioned. For these reasons, the tiny *BWLJ* office was more than just a location for mobilizing opposition to the “I-hate-math Barbie.” It was also a supportive community of like-minded students that shaped our experience, and our understanding, of our law school experience.

Beyond Barbie, for me at least, *BWLJ* also provided an alternative intellectual space in which to explore emerging feminist legal scholarship, and to

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†. Acting Professor of Law, Boalt Hall, University of California at Berkeley. I am indebted to Kathryn Abrams, Kristin Luker, and Laura Beth Nielsen for their helpful comments and suggestions on this manuscript.

1. *Critics Question Barbie's Self-Esteem (Or Lack Thereof)*, N.Y. TIMES, October 2, 1992, at D3.

do so within a non-hierarchical organization. I chose to join the editorial board of *BWLJ* rather than a more general law journal because I wanted to spend my scarce extracurricular time reading scholarship about the relationship between law and inequality. *BWLJ*'s organizational structure allowed members to do just that, even from the beginning. Unlike most journals, and indeed unlike even some feminist law journals, *BWLJ* operated by consensus procedures. All members, not just article editors, were welcome (and expected) to read submissions and to help decide which manuscripts to accept. Moreover, the *Journal*'s consensus voting procedures allowed just one adamantly opposed member to block publication of a submission, even if the majority of members supported publication.

Although these procedures sometimes resulted in lengthy and sometimes frustrating editorial meetings, they also represented a deep commitment to valuing each member's contribution, regardless of her title on the masthead. Given these commitments, *BWLJ* as an organization was also a radical departure from the training in hierarchy that law school sometimes could be.<sup>2</sup> By adopting consensus procedures and a non-hierarchical editorial policy,<sup>3</sup> it rejected what some would term a particularly gendered communication style common in the law school environment.<sup>4</sup> The *Journal* instead embraced collaborative rather than competitive models of learning. This is not to say that the *Journal* assumed some universal "women's" way of communicating.<sup>5</sup> Rather, its structure allowed its diverse members the intellectual space to voice many different perspectives on legal scholarship, and to value those perspectives equally. In both form and substance, *BWLJ* provided a different model than the standard first-year fare for reading, discussing, and critiquing legal scholarship.

*BWLJ* as an intellectual community consisted of more than formal editorial meetings, however. The *Journal*'s substantive mandate to focus on underrepresented women, and especially the social context of these women's experiences, encouraged us to analyze legal reasoning within its larger social

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2. For a discussion of how legal education can subtly train students to value only certain class- and gender-based perspectives, see generally Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54 (David Kairys ed., 3d ed. 1998); Katherine T. Bartlett, *Feminist Perspectives on the Ideological Impact of Legal Education Upon the Profession*, 72 N.C. L. REV. 1259 (1994); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).
  3. This policy includes not distinguishing between the work of established scholars and that of students. See Herma Hill Kay, *Berkeley Women's Law Journal: Ten Years of Giving Voice to Underrepresented Women and Their Concerns*, 10 BERKELEY WOMEN'S L. J. 1, 5 (1995).
  4. See Guinier et al., *supra* note 2, at 3-4.
  5. I am not claiming here, for example, that *BWLJ* promotes a cultural feminist perspective that all women have a communication style different from men, and that this communication style should be valued rather than discouraged by legal education. *BWLJ* has a much more post-structuralist, anti-essentialist philosophy that rejects the idea that there exists one universal women's perspective. Instead, the journal seeks to examine the experiences and perspectives of women often underrepresented in legal scholarship in general, and in feminist legal theory in particular.

context.<sup>6</sup> As a result, I logged many lunch hours sitting on the ratty couch in the *Journal* office discussing legal issues and controversies that I might not have otherwise considered. In this way, *BWLJ* became a forum for the consciousness-raising that is central to the feminist method, but at a much more advanced and intellectual level than I had ever experienced. Katherine Bartlett describes consciousness-raising as “seeking insights and enhanced perspectives through collaborative or interactive engagements with others based on personal experience and narrative.”<sup>7</sup> Lunchtime conversations with *BWLJ*'s diverse members were all this and more; they pushed me to challenge conventional wisdom about gender and law by sharing and learning from our collective knowledge and experiences.

So far, I've relied on my memories of *BWLJ* as a way to look inward, rather than outward, to assess the *Journal*'s significance. In the larger arena of legal scholarship, however, *BWLJ* enjoys an outsized reputation in part due to its commitment to anti-essentialist frameworks, nonhierarchical organization, and advocacy for social change.<sup>8</sup> In the following sections I say more about the role of feminist law journals in general, and *BWLJ* in particular, in advancing legal scholarship. As an illustration, I draw on my own interests in law, work, and family to demonstrate how the anti-essentialist frame promoted by *BWLJ* can produce richer and more analytically satisfying legal analysis.

## B. *BWLJ* and Women's Law Journals in Legal Scholarship

*The Columbia Journal of Gender and the Law* recently sponsored a symposium to discuss whether feminist law journals were still needed, and if so, what the purpose and goals of such publications should be.<sup>9</sup> Simply raising this question, I think, shows how far feminist legal theory has progressed, for it suggests in part that perhaps feminist scholarship has become so accepted in mainstream legal journals that specialty journals might now be unnecessary. The call for symposium papers, however, generated an enormous response, clearly touching a nerve among feminist scholars about the role that feminist law journals do, and should, play in our intellectual conversations.

One might respond to the question “why feminist law journals?” by asking “why not?” After all, although scholarship that focuses on environmental issues or that uses economic tools of analysis also has become accepted by mainstream

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6. See 10 BERKELEY WOMEN'S L.J. Statement of Mandate (1995).

7. Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990).

8. For example, several articles in a recent symposium on women's law journals noted *BWLJ*'s distinctive anti-essentialist mission, its nonhierarchical structure and editorial policy, and its commitment to advocacy and social change. See, e.g., Felice Batlan, *A Journal of One's Own? Beginning the Project of Historicizing the Development of Women's Law Journals*, 12 COLUM. J. GENDER & L. 430, 435-38 (2003); Twila L. Perry, *Diversity, Discourse, and the Mission of the Feminist Law Journal*, 12 COLUM. J. GENDER & L. 466, 469-70 (2003); Jane S. Schacter, *Form, Function, and Feminist Law Journals*, 12 COLUM. J. GENDER & L. 574, 577 (2003).

9. Symposium, *Why a Feminist Law Journal?*, 12 COLUM. J. GENDER & L. 407 (2003).

law journals, this does not necessarily prompt questions about whether environmental- or economics-oriented law journals are needed. Like other specialty journals, women's law journals provide a forum for more in-depth, complex, and nuanced analysis of a subset of doctrinal and jurisprudential questions than might appear in a more general focus law review. And, like other specialty journals, women's law journals like *BWLJ* promote conversation and debate among scholars working in similar fields—a chance to engage with a specialized audience already familiar with the basic tenets of feminist legal theory.<sup>10</sup>

What lurks behind this question (and perhaps what touched a nerve for the many feminist scholars who participated in the symposium) is the very real struggle of feminist legal scholars to fight perceptions that “asking the woman question”<sup>11</sup> in legal scholarship is not a legitimate and worthwhile endeavor. Although now it is much less radical to use gender as a lens through which to conduct legal analysis, this was not always the case.<sup>12</sup> Even now, publishing in women's law journals can raise questions for tenure cases,<sup>13</sup> and feminist legal scholars worry in a way I suspect environmentalists do not that specialty journals will contribute to the ghettoization and devaluation of their scholarship.

When *BWLJ* was established as one of the first women's law journals it was like many other feminist law journals, in that the editors sought to publish, and to foster, the development of rich and diverse feminist literature. What set *BWLJ* apart, however, was its anti-essentialist mandate and its commitment to moving beyond a monolithic conception of “women's” perspectives and interests. The *Journal's* publication mandate specifically states that the editors “believe that excellence in feminist legal scholarship requires critical examination of categories such as race, class, sexual orientation, and disability as well as gender.”<sup>14</sup> Thus, *BWLJ* is organized around the idea that even innovative and revolutionary feminist legal scholarship tends to make implicit assumptions that obscure the race, sexual orientation, class, and the disability statuses of women.

What difference does such a perspective make? Let me offer two examples. In her groundbreaking article about gender essentialism, Angela Harris points out that black women's perspectives on rape may be profoundly different than those of white women because of the relationship between rape and racial domination. She notes, for example, that many black women may be ambivalent about rape accusations because false accusations of rape were

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10. For a more in-depth discussion of these issues, see Katharine Silbaugh, *Proliferation*, 12 COLUM. J. GENDER & L. 462 (2003).

11. See Bartlett, *supra* note 7, at 831.

12. For example, from 1977 through 1982, the *Harvard Law Review* did not publish any article specifically about women and the law or any articles by a woman author, no matter what the topic. Batlan, *supra* note 8, at 433 (2003).

13. See Kay, *supra* note 3, at 5; Elvia R. Arriola, *Tenure Politics and the Feminist Scholar*, 12 COLUM. J. GENDER & L. 532, 533 (2003).

14. 10 BERKELEY WOMEN'S L.J. Statement of Mandate (1995).

historically used as weapons of racial oppression.<sup>15</sup> A second example is how several scholars have pushed to define reproductive freedom to include not only access to abortion but also freedom from coercive attempts to suppress or to punish the exercise of reproductive rights among less privileged women. In this context, class, race, disability status, and even sexual orientation combine with gender to shape perceptions of who is an appropriate parent. Thus, reproductive freedom is threatened when poor women of color are penalized for choosing to have children<sup>16</sup> and subjected to attempts to curtail their fertility,<sup>17</sup> when disabled women are sterilized without their consent,<sup>18</sup> and when lesbian families are denied access to new reproductive technologies otherwise available to “traditional” families.<sup>19</sup> In other words, it is a particularly privileged white, straight, middle-class perspective that presumes all women share the same perspective on rape, or that access to abortion is the only reproductive freedom worth fighting about.

Anti-essentialist perspectives may generate more contextualized, less exclusionary theories, but this is not to say that these perspectives lack their own theoretical dilemmas. It was my privilege to serve as Co-Editor-in-Chief during the *Journal's* 10th Anniversary, which we celebrated with a symposium featuring scholarship about underrepresented women.<sup>20</sup> As we noted in an introduction in that volume, the symposium raised difficult questions for anti-essentialist feminist scholars:

How can we build political coalitions and simultaneously recognize the differences among women, and even among underrepresented women? Do the very categories and identities with which we choose to identify ourselves reify and rigidify both subordination and our attempts to challenge it? How can we demonstrate that anti-essentialist analysis is central to, rather than tangential to, any legal analysis of social relations?

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15. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598-601 (1990).
  16. See generally Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).
  17. See generally Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 BERKELEY WOMEN'S L. J. 9 (1994); Catherine Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOWARD L.J. 473 (1995).
  18. See generally Roberta Cepko, *Involuntary Sterilization of Developmentally Disabled Women*, 8 BERKELEY WOMEN'S L. J. 122 (1993); James C. Dugan, *The Conflict Between “Disabling” and “Enabling” Paradigms in Law: Sterilization, the Developmentally Disabled, and the Americans with Disabilities Act of 1990*, 78 CORNELL L. REV. 507 (1993); cf. *Buck v. Bell*, 274 U.S. 200 (1927).
  19. See, e.g., Conn. Gen. Stat. § 45a-772 (2004) (requiring written request and consent of “husband and wife” before a physician may perform artificial insemination); see also Lisa C. Ikemoto, *The Infertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L. J. 1007, 1028 (1996) (noting that fertility clinics often deny lesbians and gay men access to procreative technologies).
  20. Symposium, *Looking to the 21<sup>st</sup> Century: Under-represented Women and the Law*, 10 BERKELEY WOMEN'S L.J. 10 (1995).

Perhaps most importantly, how can we build our community at a time when the political climate seeks to exclude our community altogether?<sup>21</sup>

These are perennial debates for anti-essentialist theorists, and the ten years that have passed since the anniversary symposium have not resolved them. For example, more recent social constructivist feminist perspectives tend to theorize gender as a contingent social process rather than static characteristic, but these theorists still struggle to translate these more sophisticated conceptions of gender into strategies for change within a liberal legal framework. Nevertheless, scholars who work in this tradition believe that anti-essentialist perspectives bring a much more rich and nuanced analysis to feminist legal theory. For this reason, *BWLJ* plays a central role among women's law journals as a forum for sophisticated debates about the intersection of gender with race, class, sexual orientation, and disability.

## PART II: ANTI-ESSENTIALIST PERSPECTIVES ON LAW, WORK, AND FAMILY

In the remainder of this piece, I use an anti-essentialist framework to focus on a topic of my own empirical research — social policies addressing work and family issues. Feminist theorists have long struggled with how to view the work and family dilemma theoretically. Of course, legal challenges to stereotypical assumptions about women as mothers have been around at least since *Phillips v. Martin Marietta Corp.*<sup>22</sup> More recently, however, feminist theorists have expressed increasing dissatisfaction with antidiscrimination models as a solution to work / family conflicts. In the area of pregnancy discrimination, in particular, much has been said about the limitations of formal equality theories for addressing how workplace practices and structures disadvantage pregnant women.<sup>23</sup> In addition, in the last decade or so there has been a surge in scholarship about work and family,<sup>24</sup> as well as policy initiatives focused on these issues. These developments have pushed theorists to consider not only prohibitions against discrimination, but also substantive institutional reforms.<sup>25</sup>

Although this larger debate is too much to consider here, I do think that

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21. 10 BERKELEY WOMEN'S L.J. Editorial Page (1995).
  22. 400 U.S. 542 (1971) (holding that an employer's refusal to employ women, but not men, who had preschool-age children could violate Title VII).
  23. See, e.g., Nancy 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, 119-28 (1989); see generally Linda J. Krieger and Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983).
  24. Several symposia have addressed work and family issues. See, e.g., Symposium, *Law, Labor, and Gender*, 55 ME. L. R. 1 (2003); Symposium, *Still Hostile After All These Years? Gender, Work, and Family Revisited*, 44 VILL. L. R. 297 (1999); Symposium, *Legislative Approaches to Work and the Family*, 26 HARV. J. ON LEGIS. 295 (1989).
  25. See generally JOAN WILLIAMS, *UNBENDING GENDER* (2000); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335 (1993); Krieger and Cooney, *supra* note 23.

anti-essentialist perspectives have something important to say about work and family policies, especially those directed at institutional reform. In the following sections, I draw on the *BWLJ* tradition by exploring how legal reforms might take into account whose interests are highlighted and subordinated in the master narratives about work and family that seem to dominate policy discussions. In particular, I focus on two common narratives. The first is an implicit family leave narrative that underlies recent calls for paid family leave policies. The second narrative focuses on recent media discussions about working women solving the work / family conflict by “opting out” of employment to stay home and care for their children. My goal here is to show how the interests of less privileged women can be obscured in these accounts, and to suggest some institutional reforms that might help bring the interests of underrepresented women back into work and family policy debates.

### A. The Family Leave Master Narrative and Policy Priorities

On the surface, combining work and family seems to be a universal problem faced by all working women with families. Indeed, it seems as if a master narrative has begun to emerge in policy discussions about the nature of the problem and appropriate solutions. In this narrative, the nature of the problem centers on time and money. Existing policies (both government and employer) do not give women (or in some accounts, parents) enough time off from work to care for their children, both when those children are born and when they are older. Instead, women suffer penalties at work for missing work as the result of morning sickness and other complications during pregnancy, maternity leave, or the need to care for sick children or to attend important events in their children’s lives.

Moreover, what little legally-protected leave that is provided is problematic because it is largely unpaid. Unpaid leave encourages mothers, rather than fathers, to take time off because women generally make less than men and, therefore, mothers taking leave minimizes opportunity costs to the family.<sup>26</sup> In addition, some argue that unpaid leave is a useless benefit to poor women who cannot afford to take unpaid time off from their jobs.<sup>27</sup> Accordingly, from this perspective, the most pressing policy reform is to implement paid leave policies.<sup>28</sup> And, in fact, just this past summer, California implemented the first

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26. Jeremy I. Bohrer, *You, Me, and the Consequences of Family: How Federal Employment Law Prevents the Shattering of the “Glass Ceiling,”* 50 WASH. U. J. URB. & CONTEMP. L. 401, 418-20 (1996); Dowd, *supra* note 25, at 341-42.

27. BARBARA F. RESKIN & IRENE PADAVIC, WOMEN AND MEN AT WORK 163 (1994); Dowd, *supra* note 25, at 342; Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?* 17 COMP. LAB. L.J. 373, 383-84 (1996); Eva Feder Kittay, *Taking Dependency Seriously: The Family and Medical Leave Act Considered in Light of the Social Organization of Dependency Work and Gender Equality,* 10 HYPATIA 8, 23 (1995).

28. For examples of this policy focus, see Bohrer, *supra* note 26, at 418-20; Grill, *supra* note 27, at 383-84; Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical*

paid leave policy in the nation.<sup>29</sup>

I do not necessarily disagree with the essential components of this master narrative, nor do I wish to suggest that paid leave is an unworthy policy objective. Indeed, focusing on paid leave considers not only gender but also class by addressing at least some of the needs of low-wage women.<sup>30</sup> I'd like to suggest, however, that this master narrative largely (although not exclusively) focuses on the life experience and policy priorities of white, relatively middle-class working women. By doing so, it obscures dimensions of the work and family dilemma that may be experienced differently along race, class, and sexual orientation lines.

Consider, for example, the issue of who is covered by existing family leave laws. The Family and Medical Leave Act (FMLA) only applies to employers with fifty or more employees,<sup>31</sup> and therefore leaves more than half the workforce uncovered.<sup>32</sup> Many low-wage women work for smaller employers — as cooks, waitresses, home health care providers, housekeepers, childcare providers — and therefore have no access to even unpaid, job-protected leave. In addition, the FMLA protects employees who take time off to care for seriously ill parents, children, or *spouses*.<sup>33</sup> The term “spouse” does not include domestic partners; lesbian workers must therefore risk losing their job to care for a partner who may be seriously, even terminally, ill.<sup>34</sup> For these women, even *unpaid*, job-protected leave would be a significant benefit. Focusing policy reform on pay-for-existing-leave provisions without also addressing coverage issues leaves less privileged women behind.

Now expand the perspective a bit further to question whether obtaining (paid) time off is the most pressing dilemma for working women who become pregnant. Many working-class women face barriers at work long before they need leave because they work in industrial settings, around dangerous chemicals, or are required to engage in heavy manual labor. For these women, at least two problems arise. First, some women lose their jobs early in their pregnancies

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*Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 53 (1994); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 154 (1998); *Mother's Day: More than Candy and Flowers, Working Parents Need Paid Time-Off*, Issue Brief, Spring 2002, Clearinghouse on Int'l Developments in Child, Youth and Fam. Policies, available at <http://www.childpolicyintl.org/issuebrief/issuebrief5.htm> [hereinafter *Mother's Day*]; *State Paid Leave Initiatives in 2004 and Prior State Legislatures: Making Family Leave More Affordable*, Nat'l P'ship for Women and Families, available at <http://www.nationalpartnership.org/portals/p3/library/PaidLeave/StateRoundUp2004.pdf>.

29. CAL. UNEMP. INS. CODE §§ 3300-3306 (Deering 2005).

30. See, e.g., Dowd, *supra* note 25, at 341-43.

31. 29 U.S.C. § 2611(4) (2005).

32. Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LAB. REV., September 2001, 17, 20. Both Waldfogel and Kittay call for family leave legislation that covers more workplaces. See *id.* at 20, Kittay, *supra* note 27, at 23.

33. 29 U.S.C. § 2611(13) (2005).

34. See 29 C.F.R. § 825.113 (defining “spouse” to mean husband and wife). California extends some protections to domestic partners. See, e.g., CAL. LAB. CODE § 233 (Deering 2005).



because their employers believe it is inappropriate for them to continue to work while pregnant, even though they are able and willing to work. A second problem arises when pregnant women who could continue to work with minor adjustments in their job responsibilities find that their employers are unwilling to make those adjustments, and lose their jobs as a result.

Existing legal protections are imperfect tools for addressing these kinds of problems. The Pregnancy Discrimination Act at least theoretically protects pregnant women who are able to work from protectionist employers who do not think that they should,<sup>35</sup> although determining whether a pregnant woman is “able” to do a particular job can invite protectionist stereotypes from both employers and the courts.<sup>36</sup> And, although courts have held that disparate impact theories apply to workplace policies that disproportionately burden pregnant women,<sup>37</sup> these challenges have had more mixed results.<sup>38</sup> Women who, because of pregnancy, are temporarily unable to perform their jobs as those jobs are currently structured continue to find themselves in a difficult position.

Although the Family and Medical Leave Act changes employers’ unilateral control over work schedules and attendance requirements, it does little to help

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35. *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987) (holding that placing a pregnant worker on mandatory unpaid leave when she remained able to perform her job violated Title VII); *EEOC v. Corinth, Inc.*, 824 F.Supp. 1302 (N.D. Ind. 1993) (holding that firing a pregnant waitress who was able to work violated Title VII); *EEOC v. Red Baron Steak Houses*, 47 F.E.P. 49 (N.D. Cal. 1988) (holding that terminating a pregnant worker because the manager believed pregnant cocktail waitresses were “tacky” violated Title VII).
  36. *See, e.g., Int’l Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991) (rejecting employer policy that excluded fertile women from jobs manufacturing batteries); *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309 (11th Cir. 1999) (discussing employer’s termination of nurse’s assistant who requested help lifting a particularly heavy patient during her pregnancy); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 368 (4th Cir. 1980) (collecting and discussing contradictory judicial opinions regarding airlines that imposed mandatory leaves for pregnant flight attendants, sometimes immediately upon knowledge of pregnancy); *deLaurier v. San Diego Unified School Dist.*, 588 F.2d 674 (9th Cir. 1978) (discussing employer imposed mandatory pregnancy leave policy for school teachers).
  37. *See Abraham v. Graphic Arts Int’l Union*, 660 F.2d 811, 818-20 (D.C. Cir. 1981) (holding employer’s ten-day leave limitation had a disparate impact on women because they could become pregnant); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 651-655, 658 (N.D. Ill. 1991) (granting summary judgment against an employer because the employer’s policy of denying long-term sick leave to first-year employees disproportionately affected pregnant women).
  38. *Compare Garcia v. Woman’s Hospital of Texas*, 97 F.3d 810, 813 (5th Cir. 1996) (holding statistical evidence was not required to bring a disparate impact challenge to a job requirement of heavy lifting if all or substantially all pregnant women would be advised by their obstetricians not to engage in heavy lifting) *with Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 583-84 (7th Cir. 2000) (dicta suggesting disparate impact challenges to strict absenteeism policies that did not allow for morning sickness would be an impermissible argument that employers “excuse pregnant employees from having to satisfy the *legitimate* requirements of the job” (emphasis in the original)), *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 860-62 (5th Cir. 2002) (categorically refusing to extend the *Garcia* rule to restrictive absenteeism policies), *and Armstrong v. Flowers Hosp. Inc.*, 33 F.3d 1308, 1316-17 (11th Cir. 1994) (rejecting a disparate impact challenge to an employer policy requiring pregnant health care workers to work with potentially infectious patients). Note that many of these later disparate impact decisions are difficult to square with the earlier decisions in *Abraham* and *Warshawsky*, *supra* note 37.

pregnant women who are forced out of their jobs even though they could work with minor accommodations. For example, in *Harvender v. Norton Co.*,<sup>39</sup> the plaintiff, a lab technician, was asked by her employer to provide a note from her doctor indicating she should be protected from chemical exposure. A significant percentage of her job duties did not involve working around chemicals, and the plaintiff testified that for weeks at a time she would not be involved in lab work involving chemicals.<sup>40</sup> In addition, the plaintiff testified that she never requested a change in her duties during her pregnancy.<sup>41</sup> Nevertheless, rather than allow the plaintiff to determine for herself whether to continue working, her employer placed her on involuntary FMLA leave when she was two months pregnant and notified her she would be terminated if she did not return to work once her twelve weeks of FMLA leave expired.<sup>42</sup> The plaintiff alleged that placing her on involuntary FMLA leave even though she had not requested leave or a change in job duties violated the FMLA. The court found for the employer, noting that at least some of plaintiff's work involved using chemicals, although the court did not inquire whether simple precautions were available that might limit the plaintiff's exposure. The court reasoned that although the FMLA provides pregnancy disability leave, it does not require employers to structure work so that pregnant women can continue working during their pregnancy.<sup>43</sup>

Reform strategies that extend beyond time and money would protect these less-advantaged women better. For example, California law requires employers to transfer pregnant women to less strenuous or less hazardous duties at their request with supporting documentation from their doctor.<sup>44</sup> Legal reforms such as this require specific, substantive modifications to how work is structured. In this way, they avoid debating whether gender neutrality requires employers to change a taken-for-granted, institutionalized work standard typically built around men's experience. Although the FMLA is a first step toward institutional reform, more inclusive reforms are needed to protect working-class women, disproportionately women of color, who work in physically demanding jobs and industrial settings.

Widening the analytical frame still further, one might also interrogate the implicit model of work / family relations that underlies antidiscrimination laws and the relatively stingy family leave provisions in this country.<sup>45</sup> The goal of these policies is to facilitate women's full participation in the labor market by

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39. 4 Wage & Hour Cas. 2d 560 (N.D.N.Y. 1997).

40. *Id.* at n. 1.

41. *Id.*

42. *Id.*

43. *Id.*

44. CAL. GOV. CODE § 12945(b)(3) (2005).

45. The United States lags far behind most industrialized countries both in the amount of time and the amount of compensation it provides for family leave. The average paid leave across most advanced industrialized countries is 16 weeks, and the average total leave time, including both paid and unpaid time, is one and one half years. See *Mother's Day*, *supra* note 28.

requiring equal access to employment and by providing limited job-protected leave for pressing family needs such as a seriously ill child or a new baby. These laws may improve women's access to work, but they do little to ameliorate conflicts between work and the everyday demands of caring for children because they continue to presume, with only minor exceptions, that workers do not have ongoing caretaking responsibilities at home. As a result, these policies tend to perpetuate the opposition between work and caregiving, treating them as separate and mutually exclusive roles.

One consequence of this approach is that many women with families who continue their full engagement in the labor market hire replacement labor to care for their children (hence the "full commodification" moniker sometimes given to these policies).<sup>46</sup> But in the market for childcare, typically it is relatively privileged middle-class women who hire working class women to perform their caretaking labor.<sup>47</sup> This strategy leaves low-wage working women who cannot afford to purchase childcare on the market with few desirable choices for caring for their own children, particularly if they are single parents and the sole breadwinners for their families. As Evelyn Nakano Glenn notes, the market for domestic labor enables middle-class women to meet the conflicting standards of work and family norms while simultaneously denying the identities of their domestic workers as mothers in their own right.<sup>48</sup> Note also the global dimensions of this dynamic: American working women increasingly rely on immigrant domestic workers, often undocumented and almost always women from poorer countries, to meet their care needs.<sup>49</sup> This strategy creates a globalized division of domestic labor among women along class and racial lines

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46. See generally WILLIAMS, *supra* note 25.

47. Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1, 7 (1992); Doreen J. Mattingly, *The Home and the World: Domestic Service and International Networks of Caring Labor*, 91 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 370, 372 (2001); Rhacel Salazar Parreñas, *Migrant Filipina Domestic Workers and the International Division of Reproductive Labor*, 14 GENDER & SOCIETY 560, 562 (2000).

48. Glenn, *supra* note 47, at 32; see also Mattingly, *supra* note 47, at 373, 377-78 (documenting how domestic workers, who are unable to purchase care for their children on the market, must draw on networks of family and friends to meet their care needs). Thus, the global dimension of the full-commodification strategy extends not only to domestic workers themselves, but also to their extended families (including children) who pitch in as well. All of this labor is supported (and appropriated) through the relatively low wages earned by domestic workers. In addition, because these networks tend to be ethnically and racially homogeneous, this invisible aspect of full commodification reinforces racial inequality. *Id.* at 373.

49. Mattingly, *supra* note 47, at 370-71; Parreñas, *supra* note 47, at 561, 568. Mattingly argues that the recent expansion of paid household work and the concentration of immigrant women in this occupation stem from two factors: more mothers entering the workforce coupled with reductions in social welfare policies around the world. She notes that "[t]he growing numbers of professional women in developed countries contributes to the demand for domestic work, and the absence of state support for social reproduction and the pressure on women to earn wages push many women to move to other countries to find work in the service economy." Mattingly, *supra* note 47, at 372.

and helps cement the second-class status of noncitizen, working women.<sup>50</sup> Thus, the full commodification solution to work / family conflict recreates class and race domination by relying on low-wage women, who are disproportionately women of color, to meet the care needs of more privileged working women. In addition, because full commodification does little to challenge the traditional gendered division of labor in the family, it helps maintain the work structures and gendered family roles that created the problem in the first place.<sup>51</sup>

Addressing this dilemma requires more than just a minimal expansion of time off for those already covered by the FMLA. It also requires a fundamental rethinking of who should be entitled to (and be taking) that time, what kinds of circumstances should justify time off, and even whether the taken-for-granted time demands of the American workplace, rather than the pressures of family responsibilities, are driving the problem. California again is in the vanguard of family policy in that it protects workers for some more ordinary caretaking responsibilities; California law requires employers to allow workers to use some accrued sick leave to care for sick children without risking reprimand or termination.<sup>52</sup> However, even this relatively generous provision does little for workers (typically low-wage workers) who do not accrue sick leave, nor does it encourage a more gender-neutral sharing of caretaking responsibilities.<sup>53</sup> Again, finding a solution requires grappling with how current work practices and gender inequalities reinforce not only each other but also race and class privilege, and

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50. *Id.*; Parreñas, *supra* note 47, at 577. Undocumented workers are particularly vulnerable if they have children and cannot risk deportation. Note also that undocumented workers cannot access even the minimal support that the United States welfare system provides for caring work. See Mattingly, *supra* note 47, at 379, 380. See also Abigail B. Bakan and Daiva K. Stasiulis, *Making the Match: Domestic Placement Agencies and the Racialization of Women's Household Work*, 20 SIGNS 303, 307 (1995) (arguing that institutions, including placement agencies, that help place domestic workers also perpetuate stereotypes that construct immigrant women as less than full citizens, both in terms of their legal status and in terms of their racial and class characteristics).

51. Nakano Glenn, *supra* note 47, at 17, 33-34; Parreñas, *supra* note 47, at 577-78.

52. CAL. LAB. CODE § 233(2005). This statute also allows employees to use accrued sick leave to attend to the illness of a parent, spouse, or domestic partner. *Id.*

53. It may be, however, that the gender-neutral sick days policy does encourage more participation by fathers if fathers are more likely than mothers to be in jobs that grant paid sick leave. See Arne L. Kalleberg, *Part-time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 774, 783-84 (1995) (noting that part-time workers are less likely to have paid sick leave, and that part-time workers are disproportionately women). One example of a policy that does encourage somewhat gender-neutral caretaking is Sweden's family leave policy. Swedish families are entitled to up to 18 months of leave, but the act also includes a father's month requirement, which requires the father to take at least 30 days of parental leave or the parents lose their entitlement to parental allowance for that month. A summary of the policy is available at [http://www.ilo.org/public/english/employment/gems/eo/law/sweden/l\\_plas.htm](http://www.ilo.org/public/english/employment/gems/eo/law/sweden/l_plas.htm). See also Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?* 17 COMP. LAB. L.J. 373, 375 (1996). Although Sweden's policy does not require equal sharing, it does at least promote the idea that both women and men have caretaking responsibility for young children. Of course, because the FMLA provides individual rather than family benefits, those benefits too are in a sense "use it or lose it" for each worker, including fathers.

then finding a way to break that mutually constitutive relationship.

### B. The Opt-Out “Revolution” and the Rhetoric of Choice

Now, I’d like to turn to a second narrative that sometimes frames the work / family dilemma: “opting out” of paid labor and the rhetoric of choice. One recent example of this narrative is an article by Lisa Belkin that recently appeared in the *New York Times Magazine*,<sup>54</sup> in which Belkin asks, among other things, “Why don’t women run the world?”<sup>55</sup> Her controversial answer is, “maybe they don’t want to.”<sup>56</sup> Belkin argues in the article that an “opt-out” revolution has begun in which women, including elite, highly-educated, and accomplished women, are choosing to leave the workplace to become stay-at-home moms.<sup>57</sup> Why? According to Belkin, women (unlike men) are realizing that their children are more important than working crushing, 80-hour weeks in corporate law firms.<sup>58</sup> Belkin even resorts to research on primates to suggest that perhaps this gender difference is hard-wired.<sup>59</sup>

Belkin’s article generated a wave of response and critique in print and across the Internet as feminists heaved a collective sigh of frustration. The critiques are many and the titles — “There They Go Again,”<sup>60</sup> “Clueless in Manhattan,”<sup>61</sup> “Post-Feminist Swill Redux,”<sup>62</sup> — reflect anger at Belkin’s casual disregard of data and logic in recreating familiar gender stereotypes. Some point out that Belkin fails to cite statistics to support her thesis and that, in fact, empirically she is wrong.<sup>63</sup> Others note that Belkin draws broad generalizations about “women” based on a few interviews of elite women similar to herself.<sup>64</sup> Still others take issue with Belkin’s biological argument that mothers opt out of the workplace because they are genetically driven to protect their children. They note that this claim assumes that for women, but apparently not for men, earning a decent salary does not constitute taking care of their children.<sup>65</sup> One writer

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54. See generally Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Katha Pollitt, *There They Go Again*, THE NATION (Nov. 17, 2003), available at <http://www.thenation.com/doc.mhtml?i=20031117&s=pollitt> (last visited Mar. 28, 2005).

61. Joan Walsh, *Clueless in Manhattan*, Salon.com, (Oct. 27, 2003), available at [http://www.salon.com/mwt/feature/2003/10/27/belkin/index\\_np.html](http://www.salon.com/mwt/feature/2003/10/27/belkin/index_np.html) (last visited Mar. 28, 2005).

62. Susan J. Douglas, *Post-Feminist Swill Redux*, IN THESE TIMES (Nov. 17, 2003), available at [http://inthesetimes.com/comments.php?id=446\\_0\\_3\\_0\\_M](http://inthesetimes.com/comments.php?id=446_0_3_0_M) (last visited Mar. 28, 2005).

63. Douglas, *supra* note 62; Pollitt, *supra* note 60; Judith Stadtman Tucker, *The Least Worst Choice: Why Mothers ‘Opt’ Out of the Workforce*, The Mothers Movement Online, at [http://www.mothersmovement.org/features/mhoodpapers/worst\\_choice/least\\_worst\\_choice1.htm](http://www.mothersmovement.org/features/mhoodpapers/worst_choice/least_worst_choice1.htm) (last visited Mar. 24, 2005).

64. Pollitt, *supra* note 60; Walsh, *supra* note 61.

65. Douglas, *supra* note 62.

even perceptively points out how Belkin's article is part of a larger historical trend in which "stories about women advancing into new, nontraditional roles, and stories about women going back to traditional roles . . . coexist, though perhaps not too happily, side by side."<sup>66</sup>

The most compelling critiques of Belkin, however, take on what Joan Williams calls the "republic of choice" – the pervasive rationale that women are free agents rationally acting on their individual preferences when they voluntarily choose to leave the workplace to care for their children.<sup>67</sup> Here is a second master narrative about work and family that bears a closer look: the idea that it is something endogenous to gender, rather exogenous in the workplace and in society, that drives the opt-out choice. This personal choice narrative implicitly constructs women as less committed workers likely to forgo advancement or to exit the workplace because they are "naturally" driven to choose their family over their job.

The narrative that women (but not men) "choose" not to advance because they prefer family responsibilities over paid employment is not just an outdated stereotype irrelevant in an era of antidiscrimination legislation. It has very real consequences when courts grapple with what constitutes sex discrimination under Title VII. For example, *Sears* successfully advanced this narrative as a defense against claims that it discriminated against women in the hiring and promotion into commission sales positions.<sup>68</sup> To explain the gender disparities among its commission salespeople, Sears called upon a feminist historian to testify that historically, women have subordinated paid labor to family responsibilities and that therefore women were unlikely to want, or to succeed in, positions requiring after-hours, full time work.<sup>69</sup> Despite that fact that the majority of applicants for these positions were women, this argument prevailed.

Courts have also interpreted existing laws in ways that rely on the rhetoric of choice to avoid any scrutiny of how workplace practices and norms can help exclude women with family responsibilities from the labor market. For example, in *Armstrong v. Flowers Hospital Inc.*,<sup>70</sup> the court affirmed summary judgment for an employer who fired a pregnant home health care nurse when she refused to care for a HIV-positive patient who had been diagnosed with cryptococcal meningitis.<sup>71</sup> The plaintiff had gestational diabetes, which can weaken the immune system, and thus was concerned about caring for a patient at risk for opportunistic infections during her first trimester.<sup>72</sup>

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66. Cathy Young, *Opting Out: The Press Discovers the Mommy Wars, Again*, ReasonOnline, at <http://reason.com/0406/co.cy.opting.shtml> (Jun. 2004) (last visited Mar. 28, 2005).

67. WILLIAMS, *supra* note 25, at 134. See also *id.* at 36-39 (discussing constrained choice); Douglas, *supra* note 62 (debunking the idea of free choice).

68. EEOC v. Sears, 839 F.2d 302 (7th Cir. 1988).

69. For an excellent discussion of this aspect of the *Sears* case see Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665 (1992).

70. 33 F.3d 1308 (11th Cir. 1994).

71. *Id.* at 1309-10.

72. *Id.* at 1310.

In advancing her disparate treatment argument, the plaintiff claimed that the adverse impact she experienced was “the difficult choice forced on a pregnant employee who is confronted with the inflexible policy HCS enforces,”<sup>73</sup> explicitly referencing how the workplace policy created her dilemma. She also presented expert testimony that pregnant women are more susceptible to contagious diseases and that there is a risk that contagious diseases communicated to the mother will harm the fetus.<sup>74</sup> The court was unimpressed, noting that while Title VII prohibits employers from deciding for a pregnant woman what course is best for her, it does not require that an employer make alternative work available.<sup>75</sup> The “choice,” the court reasoned, was hers: “She may choose to continue working, to seek a work situation with less stringent requirements, or to leave the workforce. In some cases, these alternatives may, indeed, present a difficult choice. But it is a choice that each woman must make.”<sup>76</sup>

At no time did her employer consider changing its policy to accommodate her pregnancy, and the court rejected the argument that a disparate impact challenge to a policy such as this was possible.<sup>77</sup>

The rhetoric of choice tends to frame the work and family conflict as a private dilemma rather than a matter for public policy.<sup>78</sup> As a result, courts remain reluctant to accept legal interpretations that make explicit the connection between family hardship and rigid employer policies. One example of this is *Upton v. JWP Businessland*,<sup>79</sup> in which a divorced single mother challenged her employer’s decision to fire her when she refused to work long hours because she was needed to care for her son.<sup>80</sup> When she accepted the job, her employer told her that her hours of work would be 8:15 a.m. to 5:30 p.m. and that she would need to work late only one or two days per month.<sup>81</sup> When her employer later demanded that she work as late as 10:00 p.m. every evening as well as Saturdays, she refused and was fired.<sup>82</sup>

The plaintiff advanced a novel legal theory, arguing that her employer terminated her employment in violation of public policy, citing Massachusetts’s public policy of protecting families and promoting the best interests of children.<sup>83</sup> The court rejected this argument by locating the conflict in this case in the plaintiff’s personal circumstances, not in the structure of work:

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73. *Id.* at 1315.

74. *Id.* at 1315-16.

75. *Id.*

76. *Id.* at 1315.

77. *Id.* at 1317.

78. See MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 40-44 (2004).

79. 682 N.E.2d 1357 (Mass. 1997).

80. *Id.* at 1358.

81. *Id.*

82. *Id.*

83. *Id.* at 1359.

There is no public policy which mandates that an employer must adjust its expectations, based on a case-by-case analysis of an at-will employee's domestic circumstances, or face liability for having discharged the employee. . . . Liability to an at-will employee for a discharge in violation of public policy must be based on general principles, and not on the special domestic circumstances of any employee.<sup>84</sup>

Of course, it is not simply the plaintiff's personal circumstances, but the interaction of those circumstances with the unquestioned structure and norms of her workplace that brought about her termination. The presumption that this plaintiff's circumstances were special or exceptional in some way is not only empirically indefensible,<sup>85</sup> but also shows the dominance of the ideal worker norm.<sup>86</sup> That norm is the unspoken premise of the institutionalized employment contract that workers have no caretaking responsibilities at home. Nevertheless, in both these cases, the court locates the problem squarely within the private circumstances and choices of women, rather than the institutional context within which they live and work.

The rhetoric of choice helps obscure how institutions constrain the alternatives from which women must make their choice. Indeed, critics of Belkin's article point out that the women she interviewed explicitly said that they left their jobs because they asked their employers for more family-friendly work schedules and were turned down.<sup>87</sup> The rigid structure of work makes the "choice" they would prefer — spending a little less time at work and a little more time with their children — categorically unavailable. Belkin never questions whether employers should be allowed to structure work to force an absolute choice between family and job, or why a "free market" economy does not produce flexible yet appropriately-paid (and appropriately valued) positions for these educated, talented women. Nor does she ask why these women, rather than their husbands, are the ones to stay home. (Remember, these are women able to command six-figure salaries.) Perhaps it is because employers continue to view men who take time off to participate in family life with suspicion,<sup>88</sup>

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84. *Id.* at 1360 (citations omitted).

85. The proportion of traditional families in which one spouse works and the other is a home has decreased dramatically since 1940. Dual earner and single-parent headed households as a proportion of all families have similarly increased dramatically during this time. See Howard V. Hayghe, *Family Members in the Workforce*, MONTHLY LAB. REV., Mar. 1, 1990, at 16.

86. For discussions of the gendered nature of the ideal worker, see CAROLE PATEMAN, THE SEXUAL CONTRACT 131 (1988); WILLIAMS, *supra* note 25, at 2-3; Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 316, 318 (1994).

87. Douglas, *supra* note 62; Pollitt, *supra* note 60.

88. Several studies have shown consistent and widespread employer hostility toward male workers taking parental leave. For example, one study found that 63% of large employers considered it unreasonable for a man to take any parental leave at all, and another 17% considered a reasonable leave to be no longer than two weeks. See Martin H. Malin, *Fathers*



whereas the master narrative about gendered choice leads employers to expect, and in some cases encourage, women to exit.<sup>89</sup> Thus, the alternative narrative here is not how women “choose” to exit work for family responsibilities, but how the institution of work constructs both the available choices and the meaning of gender to recreate stereotypical family roles for both women *and* men.

The critique goes deeper than this, however. The other question that Belkin fails to ask is to whom is the choice to “opt out” available? Belkin’s generalized rhetoric of choice, based on a few extremely privileged women with high salaries, builds a universal master narrative on the experiences and available choices of upper-class, white, straight women. Belkin notes in passing (and in parentheses) that although fewer educated white women than educated white men are working full time, “the numbers for African-American women are closer to those for white men than to those for white women,” but then goes on to generalize nonetheless. How are we to understand this statistic for black women? If one rejects the pernicious interpretation that seems to follow from Belkin’s thesis that these women care less for their children than white women do, constrained choice seems to be one possible explanatory factor here.

The opt-out narrative assumes a set of baseline conditions unlikely to be met in many, if not most, families. As one critic points out, “for most single-parent and dual-earner families, reducing or forgoing one parent’s wages in the interest of ‘putting family first’ is not a realistic option.”<sup>90</sup> Opting out assumes a particular family structure, and a particular class privilege, that Belkin leaves largely unacknowledged. Women partnered to other women (who, because of discrimination, do not earn as much as men), single-parents, and women in working class families where both parents struggle to make ends meet have even more constrained choices than the privileged Princeton graduates Belkin interviews.

And here is the rub. The master narrative that Belkin promotes does more than simply perpetuate gender stereotypes by suggesting that women who choose not to adopt traditional gender roles within the family care less for their children than those who do. This narrative also implicitly condemns those women who are economically unable to “opt-out” to care for children for not meeting these gendered norms.<sup>91</sup> Nor does Belkin ever acknowledge that “opting out” does not

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*and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39-40 (1998).

89. Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC’Y REV. 11, 35 (2005).

90. Tucker, *supra* note 63.

91. Nor should we assume that all women believe that staying home is the most desirable option even when it is economically possible; even Belkin’s subjects suggest they would have stayed in their jobs if the work environment could be made more family friendly. Interestingly, ongoing research by Dawn Dow suggests important variation in how white women and women of color view and respond to work / family issues. Dow finds that working women of color tend to view their roles as workers and as mothers as complementary, rather than in conflict. In addition, women of color were more likely to cite

have the same cultural meaning across race and class lines. For mothers who receive public assistance, opting out is not viewed as virtuous conformity with biological imperatives, but as lazy opportunism. Indeed, while some may applaud the choice of Princeton-educated women to stay at home, there is far less support for stigmatized poor, single mothers, and particularly women of color, to make the same choice.

Belkin's framing of the problem also helps to dissipate the demand for institutional reform by locating the solution to the work / family dilemma in the choices of women, even when no desirable choice is available. This lack of meaningful social policy reform is perhaps most damaging to the women for whom "opting out" is just one more hypothetical "choice"—like affordable childcare, flexible work schedules, and fairly-compensated part-time work—that does not realistically exist. Legal reforms to make these options reality are unlikely to happen as long as the master narrative of choice remains the dominant discourse.

### C. Institutional Reform and Anti-Essentialist Perspectives

As feminist legal theorists analyze work and family policies, they have begun to reveal the hidden, structural nature of the work and family problem – the gendered nature of institutions. With this theoretical understanding, have come structural policy solutions, such as the Family and Medical Leave Act<sup>92</sup> and California laws<sup>93</sup> allowing workers to use sick time to care for sick family members. These structural approaches offer some advantages over antidiscrimination measures based on formal equality. For example, by reforming institutions directly, these policies no longer leave it up to courts to determine whether a particular institution discriminates on the basis of gender. This thwarts Kafkaesque reasoning such as the idea that somehow pregnancy is not gender-related because the world consists of "pregnant women and nonpregnant persons."<sup>94</sup> In addition, institutional reforms can help avoid reifying the meaning of gender because they focus on the institution itself, rather than on whether a particular employment practice disadvantages women as a group.

Note that institutional reform efforts are not the same as "accommodation" of work to "women's special needs." Indeed, framing the work / family problem as a need for "accommodation" of women on the grounds that "work" as an

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race than gender as an obstacle to advancement at work. Women of color in her study also expressed concern about the potential race and class subordination that flowed from certain child care choices. See Dawn Dow, *Constructing the Identities of Mother and Worker: Family and Work-Life Practices and Beliefs of African-American Mothers Employed in Professional Careers* (2005) (abstract of unpublished empirical findings) (on file with author).

92. 29 U.S.C. § 2611 (2005).

93. See, e.g., CAL. UNEMP. INS. CODE §§ 3300-3306 (Deering 2005).

94. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

institution is “gendered” is a dangerous strategy because it merely moves the reification of gender back one step. What I mean by this is that both antidiscrimination and accommodation approaches treat “work” and “gender” as preexisting social categories out there in the social world. An alternative model might examine how work and gender are mutually constitutive categories, and how institutions help reinforce that mutually constitutive relationship. For example, to the extent work as an institution presents limited choices for combining paid labor and family labor, it helps channel the choices of both women *and* men in ways that recreate traditional gender roles.

An institutional reform approach such as the Family and Medical Leave Act by focusing on substantive reform of the institution itself alters the mutually constitutive relationship between work and gender in a way that may change the meaning of both. One might predict, for example, that as more workers begin to use family leave, taking time away from work for family responsibilities may become normalized. To be sure, cultural and institutional pressures may continue to encourage gendered patterns of leave taking, but some men want to and do take leave.<sup>95</sup> Legally protecting and legitimating those choices at least provides the space for workplace norms and individual attitudes about leave to change. Changing these meanings may open up less gendered and more varied ways of combining work and family in which both men and women can combine paid labor with care work. In short, if legal reforms make more institutional options available, opting in and opting out may no longer be the only viable alternatives for workers with care responsibilities.

Although institutional reform strategies are promising, feminist theorists must be mindful of how policy debates can assume a particular construction of the work / family dilemma that leaves underrepresented women behind. Thus, not only paid leave, but also broader coverage of leave laws is needed. Similarly, not only family leave, but also modifications of dangerous working conditions for women who work in industrial setting or who perform manual labor are needed. We must also recognize who cares for children in a full-commodification strategy for solving the work / family dilemma. Regardless of who stays at “home,” be it mother, father, or nanny, paid labor as it currently is structured leaves little room for workers to participate in their family’s lives in a meaningful way, and shifting the burden to less privileged women does little to undermine the structural constraints that give rise to the problem.

Rather than transfer the burden to less privileged women, reforms that change the institutional structure of work, such as reducing the normative full-

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95. In fact, the “take up rate” of leave taking by American men to care for new babies compares favorably with some other industrialized countries, and is similar to that for women. See Waldfogel, *supra* note 32, at 21; *Mother’s Day*, *supra* note 28, Table 2. See also Knussman v. Maryland, 272 F.3d 625, 627-630. (4th Cir. 2001) (describing a successful action brought by a state trooper who was denied leave to care for a newborn child and told that he could not qualify for leave unless his wife was “in a coma or dead”).

time work schedule to thirty hours per week<sup>96</sup> or requiring pro rata pay and benefits for part-time workers,<sup>97</sup> are needed. Another institutional reform that would aid many families is to decouple health insurance and retirement benefits from hours worked. Policies such as Sweden's use-it-or-lose-it father's month<sup>98</sup> that reward more equitable sharing of caretaking between partners may also help, but we must also expand the definition of "family" in family policies to include domestic partners and their children. Reducing the demands of work and increasing more equitable sharing of caretaking are likely to lessen the ways in which the full-commodification strategy recreates class and race inequities along gender lines. Finally, policies must recognize that some families have only one available parent and provide institutional support for that parent's caretaking rather than constructing her caretaking as an illegitimate refusal to work.

The key insight that flows from the kind of anti-essentialist perspectives promoted by *BWLJ* is that work as a social institution organizes both workplace and non-workplace aspects of social life, and does so in a way that rests on, and recreates, inequalities based on not only gender, but also race, class, and sexual orientation. For this reason, changing the institution of work itself may offer the best chance for developing a range of choices for workers across the spectrum to combine work and family.

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96. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1957 (2000).

97. See Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 466-67 (1998).

98. See generally Grill, *supra* note 53.