Square Peg in a Round Hole: Parenting Policies and Liberal Theory

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This Article reconsiders the way in which conflicts between parenting responsibilities and work are treated within the United States. It argues that the two different legal models applied to this conflict—Title VII of the Civil Rights Act of 1964 and the Family and Medical Leave Act—too narrowly define the interests at stake in parenting. Under Title VII, parenting protections arise only insofar as their absence can be linked to sex discrimination, while under the FMLA, parenting protections arise only in response to medical needs or crisis situations. Neither framework considers the needs of the employee, as a parent and as a person, the needs of children, and the interests of communities.

The Article seeks to explain the divergence between the current legal framework and the widespread public support for strong parenting protections. It argues that prevailing tenets of liberalism—exaltation of independence, a firm demarcation between public and private, and a neutral state—preclude more robust parenting protections. It further contends that even feminist theory, from which extensive critiques of existing parenting protections have issued, has failed to contest many of these liberal tenets. Feminist theory, while rightly arguing that parenting supports are needed for women to achieve equality, has generally failed to support parenting for the other goods realized through it, as well. This Article then urges a broader, community-oriented treatment of parenting, one that actively promotes the welfare of parents, children, and the relationships between them as collective societal goals.

I. INTRODUCTION

Newspapers, public opinion polls, and political speeches all trumpet the view that Americans strongly support children and believe in the importance of good parenting. However, Americans are, in overwhelming numbers, concerned that they are failing their children.[1] They are particularly concerned

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[1] According to a *U.S. News and World Report* poll, 83% of Americans said they thought it harder in general to be a child today than a generation ago. *See* David Whitman & Josh Chetwynd, *The Youth 'Crisis,'* U.S. NEWS & WORLD REP., May 5, 1997, at 24. According to a Knight-Ridder poll of voters, nearly three-fourths worry about how children are being raised at home. Blacks and whites, young and old, ranked lack of attention for children as the

that they have too little time to spend with their children.[2] It is therefore surprising that where parenting responsibilities conflict with work—unquestionably the activity that most limits parenting activities[3]—this groundswell of support for children and parenting has resulted in very little legal support for working parents. There is, in fact, less support than in any of 151 other industrialized countries.[4] The absence of legal support is especially

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second most important problem facing this country, following only crime. *See* Angie Cannon, *Parents Worry About Kids*, ORANGE COUNTY REG., Feb. 4, 1996, at A31.

[2] The "What Families Really Value" poll released on October 11, 1996 by the National Parenting Association of New York found unexpected unity among parents across race, gender, and income lines on naming the "family time famine" as a major concern. According to the president of the association, "[w]hat does fall out of this survey is the enormous and, I think, desperate search for more time with their children." H.J. Cummins, *Family Time More Critical Than Family Values, Parents Say*, STAR TRIB. (Minneapolis, MN), Oct. 11, 1996, at 6A. A *New York Times-CBS* poll found that "4 in 10 [teenagers] lamented that their parents sometimes or often do not make time for them." Editorial, *Tough, Vulnerable Youth*, S.F. CHRON., July 18, 1994, at A18. *See generally* William A. Galston, *Causes of Declining Well-Being Among U.S. Children*, *in* SEX, PREFERENCE, AND FAMILY 290, 293-94 (David M. Estlund & Martha C. Nussbaum eds., 1997).

Popular opinion that parents are spending less time with their children appears justified by the facts. According to a 1985 study by a University of Maryland sociologist, parents spent an average of only seventeen hours per week with their children as compared to thirty hours in 1965. *See* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY 64 (1993); *see also* Andrew Peyton Thomas, *Self Centeredness Threatens Our Society*, ARIZ. REPUB., Mar. 28, 1995, at B5 (citing study showing that parents in the United States spend less time with their children than parents in any other nation in the world—40% less time than even a generation ago).

[3] Ninety-six percent of fathers and 66% of mothers with school-aged children currently work outside the home. *See The Family and Medical Leave Act of 1993: Hearing on S.5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 103d Cong. 14 (1993) (statement of Sen. Wellstone). In all, approximately 42% of the workforce comes from families with children under age 18. *See* Thomas, *supra* note 2, at B5. More than half of the parents polled who said that they spent too little time with their children reported that they did so because they had to spend time working in order to support themselves and their families. *See* Galston, *supra* note 2, at 294.

[4] *See infra* Part II. According to a report released in February 1997 by a United Nations agency, of 152 industrialized countries, the United States ranks dead last in benefits and protections it offered to parenting. The report found that paid maternity leave is required by law in about 80% of countries surveyed, and about a third of the countries permit these leaves to last more than 14 weeks. Breaks for nursing mothers are required in more than 80 countries. Kirsten Downey Grimsley, *Study: U.S. Mothers Face Stingy Maternity Benefits; U.N. Agency Finds Disparity with Other Nations*, WASH. POST, Feb. 16, 1998, at A10. In contrast, until the passage of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1993), the United States did not guarantee any job protection at all. *See* CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3S 10 (Sheila B. Kamerman & Alfred J. Kahn eds.,

surprising given the large number of Americans who support government help in meeting children's needs.[5]

This Article challenges this curious state of affairs. I ask the reader to consider why our society appears to value parenting so much and to be so concerned about its condition, yet provides so little support for working parents. At least part of the answer, I contend, derives from contestable assumptions—about individuals, the relationships between individuals, and the role of the state—that are part of the dominant liberal philosophy in the United States.[6] These assumptions, I argue, prevent formulation of a coherent legal

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1991). Even after passage of the FMLA, the United States permits parental leave for only up to 12 weeks and continues to provide no income replacement.

The flurry of recent attempts by politicians to appear "family friendly" demonstrates the paltry scope of even the debate over support for working parents. The centerpiece of Republican efforts is the Working Families Flexibility Act of 1997, which has been passed by the House of Representatives and now appears stalled in the Senate. H.R. 1, 105th Cong. (1997); S. 4, 105th Cong. (1997). This proposal allows employees to forego overtime pay and instead take extra time worked as compensatory time. The bill, however, does not guarantee that compensatory time can be taken when the employee seeks to take it. Accordingly, it is not clear that employees will have the ability to use the leave in a manner consistent with their children's schedules. More importantly, the proposal addresses no workers besides those who have been asked to work overtime by an employer in a given week. Furthermore, it does not address any of the myriad other needs of workers who are parents.

President Clinton's proposal to aid working parents also cannot be said to take the work-and-parenting bull by the horns. In seeking to include 24 hours of yearly unpaid leave for employees to attend to children's extracurricular and educational activities, Clinton's proposal would make the current statutory protections on family leave only slightly less inadequate. *See* Family & Medical Leave Enhancement Act, H.R. 234, 105th Cong., (1997); *see also infra* Part II.B.

[5] A June 1995 poll for the Children's Coalition showed that 74% of voters agreed with the statement that "political leaders are not doing enough to help solve the problems of children." Kathleen Megan, *Dole, Clinton Go for 'Children's Vote,'* HARTFORD COURANT, Sept. 16, 1996, at A1. According to a Children's Partnership poll, nearly two-thirds of respondents said the government should play a large role in solving problems facing children. *See* Melissa Healy, *Race for Seats on the Baby Bandwagon*, L.A. TIMES, June 2, 1997, at A10. A January 1996 poll by the National Issues Convention sponsored by the University of Texas at Austin revealed that 80% of voters believe that government should help with child care issues. *See* Melissa Healy, *Sioux Falls May Represent the Future of Motherhood*, L.A. TIMES, June 17, 1996, at A12. In a recent *Newsweek* poll, 55% of parents surveyed stated that they did not believe that existing policies of government and business were supportive of families with young children. *See What Matters Most: A Newsweek Poll*, NEWSWEEK, Spring/Summer 1997 Special Edition, at 9.

[6] I use the term "liberal" to refer to the Anglo-American line of political thought stretching from John Locke through John Stuart Mill and on to such contemporary thinkers as John Rawls, whose work assumes the primacy of the individual and emphasizes respect for

framework able to cognize and support parenting and the goods associated with it.

Part II of this Article explores the limits of the law's current approach to work-and-parenting issues. In it, I argue that the two legal frameworks used to evaluate parenting issues—sex discrimination analysis under Title VII of the Civil Rights Act of 1964,[7] and the Family and Medical Leave Act of 1993 (FMLA)[8]—assume a certain view of the world and what is important within it that excludes important interests, needs, and aspirations implicated in parenting.[9] In Part III, I argue that the law's limited vision of parenting derives from our tradition of Western liberalism, the fundamentally individualistic premises of which impede recognition of the goods associated with parenting and the development of adequate frameworks for supporting parenting. In Part IV, I contend that the liberal framing of the activity of parenting has become so entrenched in the United States that it has even limited the terms of debate over parenting in feminist legal theory, the area of theory in which current parenting protections have been most thoroughly contested. Finally, in Part V, I propose

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individual rights. This use of the term is therefore broader than the use of the term "liberal" in common parlance to refer to those who hold political beliefs at the opposite end of the political spectrum from conservatives. Under my use of the term, both thinkers such as Rawls, who might qualify as liberal under common usage, and thinkers such as Robert Nozick, who might be considered a political conservative, are "liberals."

[7] 42 U.S.C. §§ 2000e-2000e17 (1994).

[8] 29 U.S.C. §§ 2601-2654 (Supp. 1997).

[9] Clearly the interests, needs, and aspirations of children, parents, and society, as well as of employees are not monolithic. Moreover, what these needs and aspirations are, and who gets to decide them, are political issues subject to interpretation and negotiation. *Cf.* NANCY FRASER, *Women Welfare, and the Politics of Need Interpretation*, *in* UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY 144–45 (1989). My point here is that, however and whatever these needs and aspirations are interpreted to be, no effort is made to include them within the existing legal framework.

Two insightful comparative scholars, Paolo Wright-Carozza and Mary Ann Glendon, have performed the intellectual spadework for this first section by pointing out that Western European countries provide greater protection to working parents, emphasize broader notions of social equality, and have laws supporting parenting that evidence far more complex normative concerns than the United States. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531, 581 (1993). This Article seeks to answer the question posed by these scholars—"Why does United States' law provide so much less support for parenting than other countries?"—by developing a detailed account of the impediments that our public philosophy poses to such protections and by attempting a reconstruction that would adequately support parenting.

a revision of the dominant liberal ideology to better support the diverse needs and aspirations at stake in parenting and the goods that can be realized through it.[10] Such a revised vision, I contend, not only better conforms with the import placed by Americans on how we, as a society, raise our children, and with bedrock democratic values on which our society rests, but offers a more productive vision for how we can and should live together.

In this discussion, I focus on America's dominant public philosophy of liberalism, on law, and on feminist theory because each influences the bounds of debate concerning work and parenting in our society. Liberalism constructs our conception of the issues at stake; law expresses this philosophy in terms of the institutional support that government will render; and feminist theory has provided the chief source of contestation of the prevailing vision of parenting depicted within the public philosophy and law. Insofar as none of these three adequately considers the needs, aspirations, and goods associated with parenting, it is not surprising that the society shaped by this conversation deals poorly with work-and-parenting issues.

II. PARENTING AND THE LAW

Employees whose work and parenting responsibilities conflict generally have two different avenues of legal protection: Title VII of the Civil Rights Act of 1964,[11] and the Family and Medical Leave Act.[12] On their face, the two statutes are very different: Title VII is concerned with eliminating employment

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[10] My proposal seeks protection for the parenting relationship rather than protection for the family as an entity. Focusing on the parenting relationship has the advantage of, at least in part, avoiding extremely difficult and contentious issues about how the term "family" should be defined. *See, e.g.*, Will Kymlicka, *Rethinking the Family*, 20 PHIL. & PUB. AFFAIRS 77 (1991); Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4 (1996). In addition, focusing on the parenting relationship rather than the family as a collective entity may require a smaller conceptual leap from the dominant liberal framework, which has great difficulty conceptualizing group interests.

As I use it, the term "parenting" refers to carework by an adult within the scope of a relationship that is primary to the child. My use of the term "parenting" therefore applies more broadly than simply to those relationships in which the adult is legally considered a parent; for example, it would apply to carework in the course of a relationship between a foster parent and child. It is also compatible with carework that occurs in kinship structures in cultures that diverge from the nuclear family pattern. *See, e.g.*, CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1974).

[11] 42 U.S.C. §§ 2000e–2000e17 (1994).

[12] 29 U.S.C. §§ 2601–2654 (Supp. 1997).

discrimination from the workplace, while the FMLA provides protection for employees requiring time off work to attend to serious family needs. Yet both share certain features: they are extremely limited in the protection they provide working parents, they selectively focus on particular interests at stake in parenting at the same time as they obscure others, and they share a particular, narrow interpretation of what it means to parent.

A. *Antidiscrimination Law as a Framework*

In a society whose rhetoric is steeped in the value of families but which remains ambivalent about the value of sexual equality, it is paradoxical that the dominant legal framework through which the relation between parenting and the workplace has been negotiated is sex discrimination law. Yet because until passage of the FMLA in 1993 no other law provided protection for working parents, and because of the limited scope of the FMLA since that time,[13] those seeking protection for parenting activities have generally litigated their claims under Title VII. That Act encompasses both a general prohibition on sex discrimination in employment and an amendment, the Pregnancy Discrimination Act of 1978 (PDA),[14] which declares discrimination on the basis of pregnancy or childbirth-related conditions to be sex discrimination. The result of trying to fit the multiple needs and aspirations at stake in parenting into the antidiscrimination framework constructed by Title VII and the PDA is like the proverbial act of trying to fit a square peg into a round hole: in order to make it fit, such a large portion of the peg needs to be pared away that it becomes virtually unrecognizable.

1. *Title VII*

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of . . . sex."[15] In order to fit parenting and work conflicts into a form cognizable by the statute, the complex of needs, aspirations, and goods at stake in parenting is pared down to two specific sets of interests—those of the employer and those of the employee *as an employee*. In this regard, Title VII applies only when the employee/parent's *employment* has been or will be affected by parenting responsibilities, and then only if this

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[13] *See infra* Part II.B.

[14] 42 U.S.C. § 2000e(k) (1994).

[15] 42 U.S.C. § 2000e-2(a).

conflict can be linked to sex discrimination. Title VII does not apply when the employee/parent's *parenting* has been or will be affected by work responsibilities. Hence, Title VII excludes from consideration the importance to the employee of fulfilling child rearing responsibilities, raising well-balanced children, and being part of a healthy, happy family.[16] Further, sex discrimination law completely ignores the needs of the child in receiving adequate parenting, the needs and aspirations of the family, and the interests of communities in ensuring that their members are raised adequately.[17]

Moreover, by virtue of its limited goal of eliminating discrimination in the workplace, Title VII cannot ground any larger normative vision for the role of parenting. Sex discrimination law provides only the same level of protection to the act of parenting that it provides to other ways in which women may be disadvantaged relative to men: if all women were miserable parents and simply attended to work responsibilities while leaving their children unsupervised, the conditions of the sex discrimination framework would be satisfied. In other words, treating parenting within an antidiscrimination framework protects parenting only insofar as it is necessary to avoid discrimination. It does not support parenting because of the goods parenting makes available to parents, children, and communities, including allowing children to become healthy, competent people; parents to fulfill self-identified moral responsibilities to parent; and communities to have a sound citizenry. The problem is not chiefly that antidiscrimination law is failing to fulfill the function intended by Congress, but that its function, by nature, is limited, and that no other framework exists within United States' law that provides adequate protection to the broader spectrum of interests at stake in work-and-parenting conflicts.[18]

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[16] *See* Wright-Carozza, *supra* note 9, at 579, 581 (contrasting the "formal equality of unattached individuals within the workplace" in U.S. law with Italian law, in which "equality never stands alone as an abstract concept. Rather, it always exists in relation to a person's roles and activities: worker, parent, caring for children, developing through work, participating in social life.").

[17] *See id.* at 576–78.

[18] Yet courts are also failing to fulfill even Title VII's limited potential to protect parenting activities. Courts analyze Title VII challenges under two different frameworks of analysis: disparate treatment doctrine, which prohibits practices motivated by discriminatory intent, and disparate impact doctrine, which prohibits employment practices that are neutral on their face but have a discriminatory effect in practice. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977). Because courts have limited disparate treatment analysis to situations in which women are treated differently from men with respect to job requirements for which they are similarly situated, that doctrine is generally inapplicable to policies that are applied equally to both sexes but that disadvantage working mothers because of heavier parenting responsibilities. *See, e.g.*, EEOC v. Sears, Roebuck &

2. *The Pregnancy Discrimination Act*

Despite the clear link between parenting and women's inequality,[19] the only place in which Title VII provides any explicit protection for parenting is in the PDA. The PDA provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[20] Even here, however, the enactment takes an extremely narrow view of the interests at issue.

First, in keeping with the broader antidiscrimination framework of which it is a part, the PDA pares down the issues at stake. It considers only the *employment* interests of the pregnant employee by focusing on her ability or inability to work. It does not consider the broader range of goods realized

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Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); Record v. Mill Neck Manor Lutheran Sch. for the Deaf, 611 F. Supp. 905 (E.D.N.Y. 1985); Barnes v. Hewlett-Packard Co., 846 F. Supp. 442 (D. Md. 1994).

Disparate impact doctrine, in prohibiting employment practices that have a discriminatory effect on women, could in theory challenge job requirements that disadvantage working parents based on the disadvantage they cause to women. Yet in practice, courts have repeatedly refused challenges to such job requirements. *See, e.g.*, Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1156 (7th Cir. 1997) (holding that disparate impact analysis was inappropriately applied to plaintiff's claim that termination of part-time workers in the course of reduction in force disadvantages working mothers; plaintiff failed to show that the reduction in force was a "particular employment practice within the meaning of Title VII" rather than "an isolated incident"); Barrash v. Bowen, 846 F.2d 927, 932 (4th Cir. 1988) (holding that although policy denying women parental leave to breastfeed children "would have an adverse impact upon young mothers wishing to nurse their babies for six months, . . . that is not the kind of disparate impact that would invalidate the rule, for it shows no less favorable treatment of women than of men"); *see also* Wallace v. Pyro Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990) (similar); Maganuco v. Leyden Community High Sch. Dist. 212, 939 F.2d 440, 444 (7th Cir. 1991) (holding disparate impact doctrine inapplicable to maternity leave policy because plaintiff failed to present sufficient statistical support); Armstrong v. Flowers Hosp., Inc., 812 F. Supp. 1183, 1191–92 (M.D. Ala. 1993) (holding that hospital policy requiring pregnant and non-pregnant nurses to treat AIDS patients does not violate disparate impact doctrine despite higher risks to pregnant women of treating AIDS patients); *Sears, Roebuck & Co.*, 628 F. Supp. at 1285 (holding disparate impact doctrine inapplicable because plaintiffs failed to identify specific, facially neutral policies that disadvantaged women).

[19] *See generally* Nancy E. 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, 87–89 (1989) (discussing the economic impact of parenting responsibilities on mothers).

[20] 42 U.S.C. § 2000e(k).

through parenting for the employee, children, and communities. Thus, in the *only* portion of federal antidiscrimination law that explicitly considers issues relating to parenting, the *only* feature of parenting deemed appropriate for legal cognizance is the mother's ability or inability to work, rather than the goods contributed by parenting to parents, children, and the community.

Second, the PDA protects only the medical aspects of pregnancy. A pregnancy-related condition is limited to "incapacitating conditions for which medical care or treatment is usual and normal."[21] All non-medical circumstances that accompany pregnancy and childbirth are excluded from consideration under the statute.[22]

Third, the PDA requires no accommodation for pregnancy and childbearing unless such accommodations are made for other medical conditions. The PDA therefore rejects the notion that the act of bringing children into the world is an activity for which a greater level of protection or support should be required than for medical conditions that lead to similar levels of ability or disability to work. As the Supreme Court stated in *Wimberly v. Labor and Industrial Relations Commission*,[23] under the PDA, "the State cannot single out pregnancy for disadvantageous treatment, but it is not compelled to afford preferential treatment."[24]

3. *The Limits of Antidiscrimination Law*

a. *Limited Focus:* Johnson Controls *and* Maganuco

International Union, UAW v. Johnson Controls, Inc.,[25] highlights the limitations of the antidiscrimination approach to work-and-parenting issues. In

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[21] *Wallace*, 789 F. Supp. at 869; *see also* Cooper v. Drexel Chem. Co., 949 F. Supp. 1275, 1279-80 (N.D. Miss. 1996).

[22] *See* H.R. REP. NO. 95-948, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753 ("[I]f a woman wants to stay home to take care of the child, no benefits must be paid because this is not a medically determined condition related to pregnancy."); *see also* Piantanida v. Wyman Center, Inc., 116 F.3d 340, 342 (8th Cir. 1997) ("[A]n individual's choice to care for a child is not a 'medical condition' related to childbirth or pregnancy. . . . An employer's discrimination against an employee who has accepted this parental role . . . is therefore not based on the gender-specific biological functions of pregnancy and childbearing . . . .").

[23] 479 U.S. 511 (1987).

[24] *Id.* at 518; *see also* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (holding that PDA does not "require employers to offer maternity leave or take other steps to make it easier for pregnant women to work") (citations omitted).

[25] 499 U.S. 187 (1991).

that case, employees of defendant Johnson Controls, a battery manufacturer, challenged a company policy excluding all women from jobs involving actual or potential exposure to lead, except those whose infertility was medically documented. The company had instituted the policy to respond to the risks of fetal hazards caused by lead exposure. Plaintiffs claimed that the policy violated Title VII's prohibition on actions that discriminated based on sex. The employer, in response, argued that although its exclusionary policy treated women differently from men, the policy was lawful because it fell under Title VII's bona fide occupational qualification (BFOQ) exception. That exception permits employment practices that discriminate based on sex if they are "reasonably necessary to the normal operation of that particular business or enterprise."[26]

In ruling for the plaintiffs, the United States Supreme Court declared that the BFOQ exception applied only to a worker's ability or inability to perform the job in question, and could therefore not cognize possible harm to the fetus from lead exposure. According to the Court: "[e]mployment late in pregnancy often imposes risks on the unborn child, . . . but Congress indicated that the employer may take into account only the woman's ability to get her job done."[27] The interests of communities also cannot be cognized in this equation: "No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential element of battery making."[28] Moreover, the Court held, the "welfare of the next generation" could play no part in assessing the lawfulness of this policy.[29] Having discarded this broader range of concerns from the statute's consideration, the Court cast the issue in terms of parental autonomy, declaring the employer's policy unlawful, because "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them."[30]

The needs, aspirations, and goods at stake in the intersection between work and parenting are complex. They include, among others, parents' aspirations to bear healthy children, the economic needs of workers and their families, workers' interests in working in the job of their choosing, women's interest in sex equality, the community's interest in healthy children, and the employer's interest in an efficient workplace. Of this number of interests, the Court ruled

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[26] 42 U.S.C. § 2000e-2(e)(1).

[27] 499 U.S. at 205 (citations omitted).

[28] *Id.* at 203–04.

[29] *Id.* at 206–07.

[30] *Id.*

that *only* the employers' interest in efficiency, and women's interests in autonomy and sex equality were cognizable by Title VII.

The Court's failure to consider the broader range of concerns at stake prevented consideration of alternatives that might accommodate this broader range of concerns, including sex equality. Under the antidiscrimination framework applied here, employers are required to allow women to stay in jobs that pose fetal hazards so long as such jobs are open to men. Under a broader framework, other solutions might have been required. For example, consideration of parents' and society's interest in the well-being of present and future children, in addition to sex equality interests, might have resulted in requiring that the employer offer women and men who might bear children the opportunity to transfer into safer jobs with equal pay and at least equivalent working conditions.

Furthermore, the Court framed even the two interests it deemed cognizable in contestable ways. First, in its refusal to consider harm to fetuses on the ground that this might violate parental autonomy, the Court construed parental autonomy as an interest that precluded legal involvement. It failed to recognize that allowing individuals to determine the welfare of their children and future children need not be inconsistent with legal support: if individuals decide that it is not in their future children's interest to be exposed to lead, judicial insistence that employers accommodate such decisions would further rather than hinder parental autonomy.[31] Instead, the Supreme Court's insistence that parents make and act on determinations privately forces parents to make decisions from a range of employment options that all may be unacceptable to them precisely because these options are formulated without taking children's welfare into account.[32]

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[31] I do not address here the difficult issue of how the law should frame injuries to fetuses who later become born children. A burgeoning literature attempts to deal with and to reconceptualize the fetus's legal position in ways that do not infringe on women's autonomy. *See, e.g.*, Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990) [hereinafter *Rethinking Motherhood*]. I note here only that, under *Johnson Controls*, whether this harm is conceived in terms of harm to communities' interests in healthy children, the parents' interest in healthy children, the interests of the fetus that is later born, or any combination of the three, it cannot be cognized under employment discrimination law. In my view, insofar as the interests of the fetus are conceptualized separately from the interests of the woman, in almost all cases, the woman will be in the best position to determine the interests of the fetus and to balance these interests against other relevant interests. *See, e.g., id.*

[32] The importance of the issues excluded by the antidiscrimination framework is driven home by the inane scope of the debate between the majority and the minority opinions in

In addition, in limiting the antidiscrimination inquiry to securing women equal terms and conditions of employment, the Court abstracted women's interests in equal employment from the rest of their lives. The exclusion of women's aspirations and responsibilities in bearing and rearing children requires women to deal with these factors by leaving their jobs, if these factors are to be considered at all. Thus, while *Johnson Controls* may in theory seem a victory for women,[33] when conceived in terms of women's lived reality, which for many include aspirations and commitments involving childbearing and child rearing, the Court's blinkered definition of women's interest in equality ultimately perpetuates women's subordinate status in the workplace.

My point here is not to argue that *Johnson Controls* was wrongly decided given the limited framework of inquiry provided by antidiscrimination law or that sex equality concerns should not have weighed strongly—or even have been the determinative factor[34]—in assessing the permissibility of the company's policy.[35] I argue here only that other interests should have been accommodated in addition to the autonomy and sex equality interests, as they

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Johnson Controls. Neither side disputed that the statute did not cognize harm to employees in their roles of persons who might wish to bear children, to future children, or to communities of which these injured children might one day be a part. Instead, the debate centered only on whether the statute cognized financial harm to the employer from tort suits brought on behalf of children injured by fetal hazards. *See* 499 U.S. at 208–11; *id.* at 213–15 (White, J., concurring in part and concurring in the judgment); *id.* at 223–24 (Scalia, J., concurring in the judgment). Severe economic harm to an employer caused by a tort suit, the Court tells us, may be cognizable under Title VII. Severe harm to fetuses, however conceptualized legally, *see supra* note 31, that would later serve as the basis for such tort suits cannot be.

[33] And, indeed, it has been hailed as a victory for women by a number of commentators. *See, e.g.*, Amy S. Cleghorn, *Justice Harry A. Blackmun: A Retrospective Consideration of the Justice's Role in the Emancipation of Women*, 25 SETON HALL L. REV. 1176, 1203–05 (1995); Renee I. Solomon, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 AM. J.L. & MED. 411, 421–22 (1991); Sheryl Rosensky Miller, *From the Inception to the Aftermath of* International Union, UAW v. Johnson Controls*: Achieving its Potential to Advance Women's Employment Rights*, 43 CATH. U. L. REV. 227–78 (1993).

[34] Indeed, plaintiffs presented compelling evidence of sex discrimination by demonstrating that although the company excluded only women from positions involving lead exposure, that exposure also posed a risk to the fetus through the father's sperm, a risk against which the company's policy did not guard. *See Johnson Controls*, 499 U.S. at 198, 221–22. Because of its narrow framework of consideration, the Court used this evidence to justify allowing women in their childbearing years into jobs involving lead exposure, rather than to seek alternatives that would prevent exposing men, women, and their possible future children to lead exposure.

[35] Neither do I contend that the company, rather than the government or women, themselves, was the appropriate decisionmaker in developing fetal protection policies.

were framed by the Court.

The Seventh Circuit Court of Appeals decision in *Maganuco v. Leyden Community High School District 212*,[36] also demonstrates the manner in which law pares down the issues at stake in the work-and-parenting context. In that case, Rebecca Maganuco, a schoolteacher, presented a PDA challenge to a leave policy that would not allow her to combine a period of paid sick leave and unpaid maternity leave in order to take a year off from work following the birth of her child. The collective bargaining agreement between the school and the teachers provided for both kinds of leave, but required her to choose between them. The Seventh Circuit rejected Maganuco's claim on the ground that the PDA "is limited to policies which impact or treat medical conditions relating to pregnancy and childbirth less favorably than other disabilities."[37] Because Maganuco sought time off from work to parent, rather than solely as a result of a physical disability relating to pregnancy and childbirth, the court held that her claim was not cognizable under the PDA.

Maganuco demonstrates the disadvantage that the narrow focus of antidiscrimination law can have not only for society and for children, but even for the very interest that the scheme would seem most likely to protect—sex equality.[38] By requiring parents to choose between the welfare of their children and a job that is not required to take this welfare into account, in our gender-structured society, it is generally women who leave the paid labor force in order to ensure their children's well-being.[39]

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[36] 939 F.2d 440, 443–45 (7th Cir. 1991).

[37] *Id.* at 444.

[38] Indeed, as a number of feminist legal theorists have noted, it is only because the law assumes a male standard for a worker that it could avoid requiring substantive protections for the accommodation of parenting responsibilities: the law clearly assumes that others besides workers (i.e., mothers) are taking care of children. *See, e.g.*, Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1597 (1991).

[39] *Armstrong v. Flowers Hosp.*, 812 F. Supp. 1183 (M.D. Ala. 1993), *aff'd*, 33 F.3d 1308 (11th Cir. 1994), also illustrates the way in which the *Johnson Controls* approach redounds to the detriment of women. In that case, the court rejected a pregnant hospital employee's claim that she should not be required to care for an AIDS patient due to the increased exposure to infections that employees experienced in the treatment of AIDS patients. The plaintiff contended that such exposure posed a greater risk to pregnant employees than to non-pregnant employees. The court, relying on *Johnson Controls*, upheld the employer's right to apply the policy to pregnant employees. According to the court, *Johnson Controls* required employees, not employers or the court, to respond to fetal hazards: "The [Supreme] Court held specifically that, in the context of action being taken by the employer, it is the woman's decision to make as to whether or not to subject the fetus to harm." *Id.* at 1191–92. In other words, pregnant employees may respond to fetal hazards by

b. *Interpretive Choices*

Protection for parenting is not only limited by restrictions inherent in the application of sex discrimination law to an area that implicates broader concerns. Parenting protection is also limited by the manner in which courts interpret the act of parenting. Chief among these interpretations is the judicial construction of parenting activities as a "choice." In *Barrash v. Bowen*,[40] the Fourth Circuit expressed this interpretation through contrasting the (in its view, justifiable) medical leaves for those "suffering extended incapacity from illness or injury" to the (in its view, less justifiable) leaves for "young mothers *wishing* to nurse their babies for six months."[41] Similarly, in *Armstrong v. Flowers Hospital*,[42] the court used the concept of choice to dismiss a challenge to the termination of a pregnant nurse for her refusal to follow a policy requiring her to care for patients with AIDS. Plaintiff sought to challenge the policy based on the higher risks that such work might pose to pregnant women than other employees. In the court's words, it was not the hospital's policy that caused the plaintiff's termination but rather the "*conscious decision* of the plaintiff to refuse to do her job."[43] By the same token, the court in *Maganuco* construed the plaintiff's challenge as "dependent not on the biological fact that pregnancy and childbirth cause some period of disability, but on a . . . schoolteacher's *choice* to forego returning to work in favor of spending time at home with her newborn child."[44] Courts then use this interpretation of parenting to deny legal protection to women on the ground that they could have "chosen" not to parent or, alternatively, could have "chosen" to parent in a manner that did not hamper work responsibilities. In doing so, they restrict considerations of children's welfare to private decisions by parents.

Refusing to accommodate parenting activities on the ground that parenting is a "choice" begs a number of questions. In the first place, it does not consider how the range of available options affects choice. As Justice O'Connor recognized in *Planned Parenthood v. Casey*,[45] the law orders both thinking and

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quitting their jobs.

[40] 846 F.2d 927 (4th Cir. 1988).

[41] *Id.* at 931–32 (emphasis added).

[42] 812 F. Supp. at 1183.

[43] *Id.* at 1191 (emphasis added).

[44] Maganuco v. Leydon Community High Sch. Dist. 212, 939 F.2d 440, 444 (emphasis added).

[45] 505 U.S. 833 (1992).

living through the choices it makes available to individuals.[46] In failing to require that such considerations be considered by law, courts force parents to decide between two unpalatable outcomes—their job and economic security for their children versus the emotional security and, often, physical safety of their children.

Moreover, using the parenting-as-choice interpretation to deny legal support evades the question of whether, even accepting that interpretation, society has some interest in and responsibility to children once parents have "chosen" to bear them. The accident that befell Jessica McClure, the toddler who fell down an abandoned well when she was playing in her aunt's backyard, springs to mind. Dozens of rescue workers participated in her rescue as the nation watched in concern. Failure to help because her parents "chose" to bear her would have been unthinkable. Once born, she was a human to whom the obligation to help was owed. Employment law, however, considers the possibility of legal protection for parenting to be negated by the determination that parents have "chosen" to bear a child.

Again the consequence of such an approach for sexual equality issues is apparent. Joan Williams aptly summarizes the situation by stating that "[i]n the work/family context, the rhetoric of choice masks a gender system that defines childrearing and the accepted avenues of adult advancement as inconsistent and then allocates the resulting costs of child rearing to mothers."[47] In this way, as noted by Frances Olsen:

> [a]ntidiscrimination law promotes market individualism and promises each individual woman that she can win success in the market if only she chooses to apply herself. It obscures for women the actual causes of their oppression and treats discrimination against women as an irrational and capricious departure from the normal objective operation of the market, instead of recognizing such discrimination as a pervasive aspect of our dichotomized system.[48]

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[46] *See id.* at 855.

[47] Williams, *supra* note 38, at 1596.

[48] Frances E. Olsen, *Family and Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1552 (1983); *cf.* Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281, 1312–13 (1991). Professor MacKinnon states:

> Social custom, pressure, exclusion from well-paying jobs, the structure of the marketplace, and lack of adequate day care have exploited women's commitment to and caring for children and relegated women to this pursuit which is not even considered an occupation but an expression of the X chromosome. Women do not control the circumstances under which they rear children, hence the impact of those conditions on

The system is therefore both brilliant and ironic with respect to women. In contrast to the past facial exclusions of women from the work world, women are now supposedly free to work outside the home but are neither relieved of the domestic responsibilities assigned them by social roles nor accommodated with regard to these responsibilities at work. When women are forced to leave work to accommodate these domestic responsibilities, they are deemed to have made a "choice" and to have only themselves to blame. The ideology of choice therefore privatizes and individualizes a system of subordination and then uses the notion of consent to justify it.[49]

B. *The Family and Medical Leave Act*

The sole exception to the limited vision of parenting found in sex discrimination law derives from the relatively newly passed Family and Medical Leave Act and its state counterparts. Unlike antidiscrimination law, the FMLA sets a solid floor beneath which positive protection for parenting may not fall: covered employees are entitled to up to twelve weeks of aggregated annual leave, after which their jobs are guaranteed back to them. Moreover, the prefatory language to the Act states that it seeks protection of a broader range of interests than are cognized under Title VII. The preamble to the FMLA recognizes the importance of the "development of children and the family unit"; the needs of "fathers and mothers [to] be able to participate in early child rearing" without being forced "to choose between job security and parenting;" the national interest in preserving "family integrity;" and the goal of equal opportunity for men and women.[50]

Yet the support to parenting actually afforded by the FMLA is minor. The twelve weeks of leave that it allows constitutes only a fraction of the time necessary to raise sound children. Moreover, the FMLA provides for no wage replacement during that time. As a result, the majority of employees cannot afford to make use of the leave.[51] In addition, the statute applies only to

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their own life chances.

Id.

[49] Indeed, Carole Pateman argues that liberal theory idealizes contract—the epitome of the legal embodiment of the ideal of choice—in order to justify relations of subordination. *See* CAROLE PATEMAN, THE SEXUAL CONTRACT 31-32, 39-76, 116-18, 154-56, 179-80 (1988).

[50] 29 U.S.C. § 2601 (Supp. 1997).

[51] *See* Pat Swift, *Lobbying for the Next Steps in Family Leave*, BUFFALO NEWS, May 17, 1997, at C7 ("According to the Family Leave Commission, 64% of eligible employees who needed family or medical leave stayed on the job because they could not afford to lose

employees who work for companies with fifty or more employees. This provision restricts coverage to only five percent of companies and forty percent of the workforce.[52] The majority of private sector employees—roughly forty-one million—are not protected.[53] Finally, the FMLA confines the conditions of leave to care for children to circumstances involving the birth or adoption of a child, or to situations involving a severe medical emergency. Children who need care at other times are, apparently, left to fend for themselves. As pointedly stated by the court in *Kelley v. Crosfield Catalysts*:[54]

> The Act clearly does not provide qualified leave for every family emergency. A call from a police station or from school authorities, a minor ailment that keeps a child home from school with no help immediately available, or a personal crisis in the life of a child or a parent may cause a severe conflict for an employee between work and family responsibilities. None is covered by the FMLA . . . . The legislative history makes it clear that the Act is intended to reach four situations: to provide leave relating to the birth of a child or to the adoption or initial foster care of a child by one not his or her parent, to care for a seriously ill child, spouse, or parent, or to attend to the employee's own serious health condition. The statute provides minimal protection in those circumstances . . . .[55]

Ironically, the protections accorded under the FMLA largely ignore the broad interests discussed in the Act's preamble. In limiting the events eligible for leave to the birth or adoption of a child or the serious illness of dependents, and in confining its protection to a period of twelve weeks, the FMLA generally protects periods involving the physical vulnerability of mother or child. At bottom, the FMLA, like the PDA, is premised on a medical model rather than one that protects a broader concept of parenting. The ease with which employment law cognizes medical needs stands in sharp contrast with its

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income.").

[52] *See* Wright-Carozza, *supra* note 9, at 570.

[53] *See* Swift, *supra* note 51, at 70.

[54] 962 F. Supp. 1047 (N.D. Ill. 1997).

[55] *Id.* at 1048; *see also* S. REP. NO. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30 (stating that Congress sought to exempt "minor illnesses which last only a few days and surgical procedures which typically do not require hospitalization and require only a brief recovery period"); The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.113 (1997) ("[L]eave to provide 'child care' would not ordinarily qualify as FMLA leave if the child is not a newborn (in the first year of life after birth)."); Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238, 246 (E.D. Pa. 1994) (holding that a child's ear infection is not a serious illness triggering mother's coverage by FMLA).

treatment of other issues implicated in the parenting relationship.

The law here does not simply create a hierarchy of interests in which medical needs are privileged over other interests; instead, it completely disregards other needs, deeming medical needs the *only* ones worthy of legal protection.[56] The FMLA takes no account of the fact that it requires far more than twelve weeks to raise a child, that children need substantial amounts of care, that most parents will be working during that time, and that the majority of parenting will be performed under conditions not triggered by the medical requirements of the FMLA. Thus, for most parents and almost all the time, employers can require them to work long hours, to travel, and deny them breaks to breast-feed children.

In summary, current protection for the act of parenting, insofar as parenting conflicts with work requirements, is confined to two different statutory enactments, neither of which provides support for important needs and aspirations at stake in parenting or the goods that can be realized through parenting. Under Title VII, parenting protections are forced into a sex discrimination model that can cognize only the worker's interest in her job. This model is individualistic, premised on voluntarism, and ignores the broader implications of work-and-parenting issues. Under the FMLA, parenting protections are forced into a medical model that cognizes serious medical needs but not broader needs for care and affords legal protection only in crisis situations.

III. LIBERAL THEORY AND PARENTING

What has prevented the development of a legal framework that can adequately support the complex of needs and aspirations implicated in parenting, despite the general public support for parenting protections? I argue

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[56] The model created a paternalistic system in which a physician, rather than the parent or potential parent, defines the needs that are legally cognizable. *See, e.g.*, Burnette v. Vanguard Plastics, No. 95-1489-STR, 1996 U.S. Dist. LEXIS 18808, at *3 (D. Kan. Nov. 22, 1996) (holding plaintiff's testimony that she could not perform job functions insufficient because unsupported by medical evidence). In this regard, the statute adopts a similar approach to that applied to abortion in the case of *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the Supreme Court framed the issue of abortion as a medical decision to be determined between a pregnant woman and her physician rather than in terms of a woman's own right to choose. *See id.* at 153 (finding that pregnancy involves factors that "the woman and her responsible physician necessarily will consider in consultation"). It is interesting that paternalistic formulations were adopted in these two areas of law—parental leave and abortion—both of which are perceived to be utilized by women. Both the Supreme Court and Congress seem to suggest that women need assistance and supervision in decisionmaking.

here that the answer derives in part from a particular view of the world that is widely shared within the United States—by members of Congress responsible for passing laws, by judges who interpret laws, by theorists who analyze them, and by citizens who hold such beliefs even while they support broader parenting policies. This world view is composed of a loosely related set of beliefs that derive from, in Charles Taylor's words, "a family of theories of liberalism that is now very popular, not to say dominant, in the English-speaking world."[57]

According to this world view,[58] society is composed of a collection of discrete, autonomous individuals engaged in the pursuit of diverse, equally acceptable plans of life.[59] The state's role in this scheme is to prevent incursions on individuals' liberty to pursue their individual life plans, rather than to further any particular vision of the good life.[60] Under this view, individuals have no obligations to one another unless they freely consent to them. Several features of this account prevent the law from grasping and supporting the fundamentally social and interdependent nature of parenting.

A. *The Autonomous Individual*

The conception of the individual that forms the core of liberal theory has difficulty taking into account the fundamental levels at which persons are linked

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[57] Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* LIBERALISM AND THE MORAL LIFE 159, 164 (Nancy Rosenblum ed., 1989).

[58] As Thomas Spragens insightfully argues, a depiction of liberalism such as the one presented here divests liberalism of much of its richness and complexity by ignoring its historical context. *See* Thomas A. Spragens, Sr., *Communitarian Liberalism*, *in* NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 37 (Amitai Etzioni ed., 1995). My description of contemporary liberalism does not contest Spragens's historical account. Moreover, I present an oversimplified picture of the beliefs held today. Clearly, there will be some variation with regard to beliefs—some individuals will hold some but not all of these beliefs, others will hold none. Nevertheless, I believe that the account presented in this article accurately captures a core of ideas held by the vast majority of Americans, despite the fact that their own lives and some of their other beliefs may contradict this liberal ideology.

[59] *See, e.g.*, John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987); *see also* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

[60] *See, e.g.*, Ronald Dworkin, *Liberalism*, *in* PUBLIC & PRIVATE MORALITY 112 (Stuart Hampshire ed., 1978) (arguing that liberal society is one that embodies no particular views regarding the ends of life; society, instead, is united around a procedural commitment to treat people with equal respect).

together. Liberal theory envisions an individual's identity as complete within itself and as separate from both the identity and the interests of others.[61] Attachments and obligations, therefore, do not alter the essence of individual identity. Instead, because liberal theory conceives of the individual as, in Michael Sandel's word, "unencumbered," these attachments and obligations, including to children, must be considered the product of choice (since individuals, by definition, are autonomous and therefore must engage in such relationships and assume such responsibilities only by their own free will).[62] Thus, under liberal theory, relationships should be conceived of in the same way and entitled to the same level of protection as other lifestyle choices made by individuals.

This view of the autonomous individual cannot take account of the fundamental nature of the bond that many parents feel with their children. For many, the parenting relationship is a constitutive part of their identity.[63] It

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[61] *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 12 (1996).

[62] Discussions of pregnancy vividly illustrate liberal theory's need to rest obligation to others on "choice." Many opponents of abortion, although grounding their opposition on the claim that the fetus is "a life," are still willing to permit abortions for victims of rape and incest because these women did not "choose" to engage in the intercourse that led to their pregnancy. Under the same rationale, theorists have asserted that pregnant women have obligations to refrain from conduct harmful to the fetus based on their "choice" to carry a fetus to term and not to obtain an abortion. *See, e.g.*, John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 438 (1983) ("The mother has, if she conceives and chooses not to abort, a legal and moral duty to bring the child into the world as healthy as is reasonably possible."); *id.* ("Although she is under no obligation to invite the fetus in or to allow it to remain, once she has done these things she assumes obligations to the fetus that limit her freedom over her body."); *see also* Margery W. Shaw, *The Potential Plaintiff: Preconception and Prenatal Torts*, *in* GENETICS AND THE LAW II, at 225, 228 (Audrey Milunsky & George Annas eds., 1980) ("[O]nce a pregnant women has abandoned her right to abort and has decided to carry her fetus to term, she incurs a 'conditional prospective liability' for negligent acts toward her fetus." (quoting Zepeda v. Zepeda, 190 N.E.2d 849, 853 (Ill. 1963))). In this way, liberal theory can justify restraining a pregnant woman's freedom while at least ostensibly maintaining the illusion of autonomy, the prime justification of legitimacy in a liberal society. At the same time, alternative sources for grounding obligation—for example, the dependence of the fetus on the woman—are not considered.

[63] While this is true for parents of both sexes, women, particularly, have defined themselves in terms of their familial relationships. For example, Carole Pateman describes how women factory workers in England see themselves as housewives even when they are at work. Similarly, married women workers who ran a cooperative shoe factory still saw one another "fundamentally . . . as wives and mothers." PATEMAN, *supra* note 49, at 141 (citing JUDY WAJCMAN, WOMEN IN CONTROL: DILEMMAS OF A WORKERS' COOPERATIVE 137–49,

makes no sense to conceptualize these parents as individuals who are separate from their ties: the welfare of their children is integrally and inseparably linked with their own self-interest. For such mothers, conceiving of their interest in equality in the workplace as separate from their interests in parenting and in the welfare of their children distorts their view of the world by too narrowly demarcating their interests. Further, treating parenting responsibilities as the product of "choice" also distorts such parents' perception of these responsibilities. For these parents, the activities connected with parenting are *not* an expression of personal preference but rather are the fulfillment of a responsibility that derives from their role as parent and their relationship with their child.[64]

Further, the liberal conception of parenting as individual "choice" not only misconstrues the way that many parents conceive of their parenting responsibilities, it also detaches parenting from its social relevance. This conception denies the ways in which the desire to bear children is affected by social pressures.[65] It also obscures the way in which parenting is a public good insofar as it contributes to the health of the polity of which children will one day be citizens. By conceptualizing parenting as a matter of individual choice, the liberal perspective fosters a sense that parenting is a *private* issue that requires a *private* solution, rather than an issue appropriate for collective assistance.

In addition, the liberal emphasis on the autonomy of human beings obscures the needs of children and the dependence that is inevitably a part of the human condition.[66] It is only through their dependence on adults that

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154 (1983)).

[64] According to Charles Taylor, moral issues involve "strong evaluation," by which he means the exercise of judgment that stands independent of individual preferences. Taylor points out that liberalism cannot separate what is good merely in the sense of satisfying an existing preference from higher goods crucial to one's self-understanding as a healthy, moral human being. *See* CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS II (1985).

[65] *See* Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 931 (1987) (book review) ("What is the meaning of individual choice and self-determination within a social fabric of human interdependence and interaction where 'reality' and expectations are more often than not socially constructed?").

Indeed, Catharine MacKinnon takes issue with the view that the concept of "choice" can be appropriately applied to childbearing in conditions of sexual inequality. She argues that the term "choice" is misplaced in a world in which women's access to birth control and sex education is restricted and in which sexual intercourse is to some degree not "free" because of socialization to customs that define a woman's body as for sexual use by men. *See* MacKinnon, *supra* note 48, at 1312.

[66] Cultural feminists have made this point, although generally in the context of arguing

children ultimately become adults who can at all be conceived of as autonomous. As the conservative critic of Hobbes, William Lucy, wrote: "Methinks that he discourses of Men as if they were terrigene, born out of the earth, come up like Seeds, without any relation one to the other. . . . [By nature, a human is] made a poor helpless Child who confides and trust in his Parents, and submits to them."[67] In focusing on the importance of preserving autonomy, liberal theory ignores the positive need humans have for care from others.[68]

From this liberal account of the individual follows the liberal emphasis on individual rights. By conceiving of individuals as independent and autonomous, rather than as related and requiring care, the primary danger to be avoided in society is encroachment on individuals' autonomy. From this view derives a conception of rights that attaches only to individuals rather than to collective entities such as families or communities. Further, rights are conceived in terms of protecting an individual from incursions by others rather than as, for example, the right to care or to positive assistance in strengthening the relationships between persons. In Mary Ann Glendon's words, the conception

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that the "autonomy" framework represents a male outlook while the "connection" framework represents a female outlook. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). I here contend that the interdependence of humans—both men and women—is a basic fact of human existence. In this, my position more closely conforms with feminists who have written on issues of care and dependence without attempting to rely on biological or developmental differences between the sexes. *See, e.g.*, JOAN C. TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE (1993); *see also infra* notes 117–18 and accompanying text.

[67] STEPHEN G. SALKEVER, FINDING THE MEAN: THEORY AND PRACTICE IN ARISTOTELIAN POLITICAL PHILOSOPHY 211 n.13 (1990) (citing JOYCE OLDHAM APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S 20 (1984)); *see also* Susan Moller Okin, *Humanist Liberalism*, *in* LIBERALISM AND THE MORAL LIFE 39, 41 (Nancy L. Rosenblum ed., 1989) (stating that liberalism pays "remarkably little attention to how we *become* the adults who form the subject matter of political theories").

[68] I use the term "care" here to refer to caretaking practices, or in Nancy Fraser's terms, "carework," rather than to a feeling, disposition, or attitude, especially of the over-sentimentalized sort to which the term "care" is often used to refer. *See* TRONTO, *supra* note 66; *see also* NANCY FRASER, *After the Family Wage*, *in* JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 52 (1997). Included within my usage are those activities that contribute to raising emotionally stable, healthy children in this culture, including feeding them, dressing them, reading to them, dusting them off and comforting them when they hurt themselves, and putting them to bed. Not included is the emotional response one may have to seeing pictures of starving children in a magazine, or by the same token, the feeling of affection one may have for one's children, although this emotion may accompany or serve as an incentive for the performance of caretaking activities.

of rights as merely delineating zones of autonomy results in a "near aphasia" regarding the way that the law might aid individuals in meeting their responsibilities to other individuals and in leading full, dignified lives.[69] Under this tradition, children's dependence is recognized only insofar as parents have the "right" to control them; children therefore are viewed as extensions of the adult liberal individual.[70] We have far less difficulty conceiving of children as falling within a parent's personal sphere of autonomy—and thus allowing parents the right to be free of interference in order to raise and school children as they see fit—than of recognizing how the state can actively support parents in caring for children.

The gendered nature of this depiction of the individual has been the frequent subject of feminist commentary. Feminist theorists have noted, in Susan Okin's words:

> that claims that the subjects of classic liberal theory are autonomous, basically equal, unattached rational individuals—in Hobbes's words "men as if but even now sprung out of the earth . . . like mushrooms"—rest on the often unstated *assumption* of women's unpaid reproductive and domestic work, their dependence and subordination within the family, and their exclusion from most spheres of life. With women's status left ambiguous and the family assumed but not discussed, contemporary liberal theory has yet to take account of the fact that men are not mushrooms.[71]

Feminist theorists have also recognized that liberal theory's conception of obligation as solely voluntary rests on a gendered view of the world. Communities have survived and flourished only because women attended to

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[69] *See* Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109 (1991). In addition, Lucinda Finley stresses the importance of "[i]ncorporating the [i]deal of [r]esponsibilities" into the legal discourse over conflicts between parenting and workplace in the United States. Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1171 (1986).

[70] *Cf.* Michelle Barrett & Mary McIntosh, THE ANTI-SOCIAL FAMILY 48, 50 (1982) (arguing that children are treated as a "private possession" in liberal thought).

This strong strand in liberal thought is embodied in recent attempts in more than half of all states to amend state constitutions in order to incorporate a "Parental Rights Amendment" that gives parents the inalienable right "to direct and control the upbringing, education, values, and discipline of their children." Karen Brandon, *Parents Ask: Who Controls Our Kids? Colorado Proposal Fuels Rights Debate*, CHI. TRIB., Oct. 6, 1996, at 1.

[71] Okin, *supra* note 67, at 41; *see also* WENDY BROWN, STATES OF INJURY 149 (1995) (noting that liberal depiction of the individual reflects the masculinization of the male subject cut loose from the family).

relationships and family responsibilities at a far more fundamental level than is accounted for by liberal conceptions of choice and the free pursuit of ends. Within almost all sexual divisions of labor in history, women have been encumbered by the bonds of necessity and have been bound to relationships they are assigned to tend.[72] In Nancy Hirschmann's words, "[t]he exaggerated emphasis on consent as the only legitimate way to establish relationships of obligation, and the assumption of innate human separateness on which it is based, reveal a masculinist conceptualization of the self, of 'individuals,' that runs contrary to women's historical experience and epistemology."[73]

B. *Parenting as a Private Issue*

The demarcation drawn in the liberal tradition between the public and private realms also impedes legal support for parenting. Two distinct aspects of this dichotomy hinder protection of parenting in the employment context.

First, the realm of work is frequently seen as "public" in contrast to the "private" domestic realm. The activities associated with each sphere are then considered properly confined to that sphere. Activities such as child care that are associated with the private realm are in this view bracketed from consideration in the public realm of work. For this reason, while the workplace is considered an appropriate place for some social policies, including those that protect the welfare of workers by requiring employers to pay into the workers' compensation and unemployment compensation systems, laws providing for leave due to pregnancy, childbearing, or child rearing are seen as inappropriate "social engineering."[74] This ideology forces parenting issues out of the

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[72] *See* BROWN, *supra* note 71, at 154.

[73] Nancy J. Hirschmann, *Obligation: Rethinking Obligation for Feminism, in* REVISIONING THE POLITICAL 162 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996). As Virginia Held frames the issue: "To see contractual relations between self-interested or mutually interested individuals as constituting a paradigm of human relations is to take a certain historically specific conception of 'economic man' as representative of humanity. And it is, many feminists are beginning to agree, to overlook or to discount in very fundamental ways the experience of women." Virginia Held, *Mothering Versus Contract, in* BEYOND SELF INTEREST 288 (Jayne Mansbridge ed., 1990). Joan Williams makes a similar point in noting that men could only conceive of themselves as having the capacity for free choice because they assigned caretaking responsibilities to women. *See* Williams, *supra* note 38, at 1596–1608.

[74] Martin Kasindorf, *Campaign '96: With Velvet Gloves: Gore, Kemp Trade Polite Jabs on Taxes, Abortion, Cities*, NEWSDAY, Oct. 10, 1996, at A5 (quoting Jack Kemp on family leave); *see generally* FRASER, *supra* note 68, at 168. As Lucinda Finley notes, "[t]he problem is that the spheres of work and family have been viewed as separate in a way that has

workplace and the economic realm, makes parenting inconsistent with many full-time jobs, and therefore displaces parenting issues that cannot be accommodated within the domestic realm into the social services realm, where such protections are considered to be "charity" rather than a matter of right. Because care is considered a private activity, it is deemed inappropriate in the work world. It is only in the private realm of the family that the concept of care is valorized.[75]

The implications for women's equality of this public/private dichotomy have been explored by a number of feminist writers.[76] They note that not only are certain activities and qualities traditionally associated with women located within the private realm, but that women, themselves, have been and to a considerable extent continue to be associated with this sphere. Indeed, the maintenance of this dichotomy depends on a gendered structure of society—the public world can exclude the domestic and embrace the concept of freedom only because women are left in the private realm to focus on necessities such as rearing children.[77] Because of this formulation, those women who do enter civil society must do so on socially "male" terms as liberal subjects who can separate themselves from the demands of the private realm.[78] The task is often an impossible one for women, insofar as these demands can be confined to the domestic realm only if women stay there in order to meet them.

A second aspect of the liberal demarcation between "public" and "private" also impinges on support for working parents. In this conception, while the workplace is public when defined against the domestic realm, it is private when contrasted with the public realm of government. While the first aspect of the

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excluded the values, needs, and perspectives of one from recognition in the other." Finley, *supra* note 69, at 1171.

[75] In Joan Tronto's words: "Care has little status in our society, except when it is honored in its emotional and private forms." TRONTO, *supra* note 66, at 122.

Katharine Silbaugh makes the related point that housework's association with the domestic realm and that realm's perceived affectionate atmosphere, causes housework to be perceived as not "really work" and therefore not accorded the benefits and protections accorded to wage labor. *See* Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U.L. REV. 1 (1996).

[76] *See, e.g.*, PATEMAN, *supra* note 49; Williams, *supra* note 38; Olsen, *supra* note 48; Finley, *supra* note 69.

[77] Carole Pateman argues that the very founding of the modern liberal state required the construction of a civil society in contradistinction to the private sphere. The creation of this dichotomy allowed construction of the liberal formulation of free and equal men in civil society at the same time as it relocated men's patriarchal right over women to the private domain and deemed it natural rather than political. *See* PATEMAN, *supra* note 49.

[78] *See* BROWN, *supra* note 71, at 184.

public/private dichotomy holds that the workplace should not accommodate parenting responsibilities because these responsibilities are private, the second view then allows workplace policies that fail to accommodate parenting to appear nonpolitical, as merely the private, individual decisions of employers. Nancy Fraser's analysis of this issue is persuasive:

> In male-dominated, capitalist societies, what is "political" is normally defined contrastively over against what is "economic" and what is "domestic" or "personal." Here, then, we can identify two principal sets of institutions that depoliticize social discourses: they are, first, domestic institutions, especially the normative domestic form, namely, the modern restricted male-headed nuclear family; and, second, official economic capitalist system institutions, especially paid workplaces, markets, credit mechanisms and "private" enterprises and corporations.[79]

Thus, in the area in which work-and-parenting issues intersect, parenting issues are, first, bracketed as domestic and therefore inappropriate for intervention in the work sphere and, second, bracketed as altogether nonpolitical because they intersect with the economic system.

C. *The Neutral State*

The liberal conception of the state as neutral regarding individual life plans also poses an obstacle to the development of legal support for parenting. This conception of the state's role derives from the liberal conception of the autonomous individual: in its view, in order to respect the dignity of the person's free and independent self and the choices that liberal theory esteems so highly, government neutrality is required.[80] As Justice O'Connor expressed this doctrine in *Planned Parenthood v. Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the

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[79] FRASER, *supra* note 9, at 168; *see also* Olsen, *supra* note 48, at 1501 (distinguishing market and family dichotomy from state and civil society dichotomy).

[80] *See* SANDEL, *supra* note 61, at 62–63. Interestingly, the view that the government should be neutral on questions of the good life appears to weaken once one moves outside of the framework of legal rights, narrowly construed. Government encouragement of particular activities through U.S. tax policy, for example, is often considered far more acceptable than adoption of laws favoring these activities. Thus, in the 1996 vice-presidential debates, Jack Kemp opposed the Clinton administration's proposal to institute broader family protections on the ground that granting family leave rights to parents violated government neutrality: "That isn't America, that's social engineering." Kasindorf, *supra* note 74, at A5. In its place, however, Kemp proposed a tax break to support families.

mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state."[81] The law, in this view, simply provides a neutral framework of rights, defined as fair procedures, in which individuals can choose their own valued ends.[82] It neither imposes a substantive vision of the good life nor privileges some versions of the good life over others.[83]

Two, sometimes competing, values are given overwhelming preeminence in this rights framework: liberty and equality. While liberty undoubtedly has pride of place in the hierarchy of liberal values, equality is the other highly esteemed value in this tradition.[84] In contemporary liberalism, the tension between these two values is expressed by the divide between two camps of liberals: libertarians who emphasize liberty and egalitarians who stress equality. Both, however, share an individualistic, rights-oriented approach that eschews normative complexity in favor of a focus on these dominant values.[85] Within this culture, state intervention is justified on liberty or equality grounds, or not at all.

This conception of the government simply as a neutral arbiter of rights makes it far easier to place parenting issues in a framework that pits women's rights to equality against the autonomy of employers than to consider the broad range of interests at stake in parenting. Within this liberal framework, the law then converts equality into a narrow guarantee of the right to fair procedures for individual women rather than to a particular end-state: freedom from discrimination is guaranteed, a workplace in which men and women share power equally is not.[86] Under this conception of government neutrality, the

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[81] 505 U.S. 833, 851 (1992).

[82] *See id.* at 850 ("Our obligation is to define the liberty of all, not to mandate our own moral code."); SANDEL, *supra* note 61, at 63–64.

[83] Catharine MacKinnon points out the way in which this doctrine maintains the subordination of women and other disadvantaged groups. The conception of neutrality, she argues, in excluding the state's substantive involvement in civil society,

> has meant that civil society, the domain in which women are distinctively subordinated and deprived of power, has been placed beyond reach of legal guarantees. Women are oppressed socially, prior to law, without express state acts, often in intimate contexts. The negative state cannot address their situation in any but an equal society—the one in which it is needed least.

CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 165 (1989).

[84] *See* Spragens, *supra* note 58, at 42.

[85] *See id.* at 44.

[86] *See* Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 n.5, 1279 (9th Cir. 1982)

issue of how work could be structured to best realize goods besides liberty and equality, such as to promote workers who lead full lives as moral persons and parent healthy, happy children, is not open for consideration. By the same token, the issues of what government policies could best promote community and further the interests of communities are also off-limits.

The obstacle that the liberal conception of state neutrality poses to support for parenting is compounded by a more recent development in liberal thought. That development conceives of the state stepping outside its role of neutral arbiter as a threat not simply because it constrains the liberty of individuals, but because it creates conditions of dependence. Popular thought increasingly counterposes the liberal adulation of individual autonomy against the threat of dependence, which is conceived broadly in terms of receiving any type of public support.[87] Autonomy, in this view, stands as the ideal against which dependence is negatively compared. Public support can therefore be justified as a necessary evil only when the perceived "normal" state of autonomy has broken down, and then only until the crisis can be overcome.[88] The dichotomy drawn between autonomy and dependence (viewed in terms of public support) limits state support for parenting to conditions of crisis (defined primarily in economic terms). It therefore forecloses examination of the goods that might be

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("Title VII does not ultimately focus on ideal social distributions of persons of various races and both sexes. Instead it is concerned with combating culpable discrimination."); *id.* at 1277 (Title VII "tolerates a disparate impact on racial minorities so long as that impact is only an incidental product of criteria that genuinely predict or significantly correlate with successful job performance, and does not result from criteria that make race a factor in employment decisions.").

[87] The recent welfare debates are a case in point. It should be noted, however, that support for the middle-class and wealthy, including homeowner mortgage interest deductions, social security, and support for particular industries are defined in the popular mind in a manner that does not raise the risk of dependency.

Nancy Fraser and Linda Gordon discuss changes in the concept of "dependence" in the United States in *A Genealogy of 'Dependency': Tracing a Keyword of the U.S. Welfare State*, *in* JUSTICE INTERRUPTUS, *supra* note 68, at 121–49.

[88] In arguing for a family policy in which the "public household" is considered an integral support to the private household, Michele Moody-Adams disputes the prevailing view of the American family as historically self-reliant. She points to the work of Stephanie Coontz, who "compellingly argues that the family types commonly celebrated as ideals of American economic self-reliance—the nineteenth-century frontier family and the suburban family of the 1950s—may have been more heavily subsidized by government programs than any other families in American history." Michele Moody-Adams, *The Social Construction and Reconstruction of Care*, *in* SEX, PREFERENCE, & FAMILY, *supra* note 2, at 5 (*citing* Stephanie Coontz, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992)).

realized through public support of parenting in the ordinary course of the lives of parents and children.

D. *Summary*

In summary, several elements of liberal ideology work together to hinder support for parenting. The conception of individuals as autonomous and existing prior to freely chosen obligations and relationships obscures the way in which individuals can be defined by their relationships with others, misconceives conditions of dependency and the need for care, and prevents recognition that individuals may need more support to realize their goals than simply the right to be left alone. The liberal demarcation between the public and private realms legitimizes the view that parenting responsibilities have no place in the realm of work and that government has no business instituting family policies in the employment realm. The conception of the state as simply a neutral arbiter of rights impedes the state from actively supporting parenting. Finally, the liberal tradition's emphasis on liberty and autonomy obscures the more complex range of goods associated with parenting.

The current legal treatment of the intersection between work and parenting mirrors this liberal philosophy. Title VII replicates liberal theory in framing work-and-parenting issues solely in terms of the right of employers to conduct their business freely and the interests in equality of female employees, conceived apart from relationships with children. In keeping with the liberal view of the state as enforcing the right to fair procedures, the law then construes the employee's interest in equality as the right to be free from sex discrimination, rather than the right to substantive equality. In doing so, it precludes consideration of ways in which the law might affirmatively support parenting responsibilities. The employee's commitment to fulfill parenting responsibilities remains uncomprehended and unprotected in this analysis. Similarly, the needs of children and the benefits to the community realized through parenting go unrecognized. Child rearing, in this view, is conceived solely in voluntarist terms and is valued only as another lifestyle choice.[89] While employees are allowed the right to *choose* to bear and rear children, they are not supported in securing the conditions that will enable them to combine a productive work life with the bearing and rearing of these children.[90]

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[89] *See generally* SANDEL, *supra* note 61, at 108.

[90] Paolo Wright-Carozza notes that Article 3 of Italy's Constitution contains a much broader conception of the ends furthered by law:

> It is the task of the Republic to remove the obstacles of an economic and social nature

Under the FMLA, liberal philosophy limits protection for parenting to crisis situations. In keeping with liberalism's de-emphasis of interdependence, its recognition of the need for care is so grudging that it occurs only at the margins, in situations in which a concrete, tangible need can be verified by a health care professional. The less measurable needs of children—the need to feed them, supervise them, love them, teach them—are invisible under these standards.

IV. FEMINIST LEGAL THEORY

During the course of the last twenty years, feminist legal theory has been one of the critical movements that has most thoroughly and effectively challenged the underpinnings of law and legal theory. It is from this critical perspective that most theoretical treatments of parenting leave have come. Yet, even feminist legal theory has generally not sought to analyze conflicts between work and parenting responsibilities in terms of the broad range of needs and aspirations at issue. Instead, feminist theory, too, has largely accepted the dominant framework's limited focus and has analyzed this issue solely in terms of achieving equality for women in the workplace. It has not often considered these issues in terms of how women (and men) seek to shape their lives outside of the workplace both as parents and as people, except instrumentally, in order to secure women's equality within the workplace. In addition, the needs of children and communities have generally been absent from feminist perspectives.

Feminist legal theory concerning the intersection between parenting and the workplace has focused on the issue of how employment law should respond to pregnancy, childbearing, and child rearing. As this debate emerged in the 1970s and early 1980s, participants could be roughly classified into two camps.[91] In the first camp fell "equal treatment" proponents, who argued that the best legal strategy for women to achieve equality is to apply the same

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> that, by substantively limiting citizens' liberty and equality, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.

Wright-Carozza, *supra* note 9, at 537.

[91] The standard disclaimer here: I use these categories as a heuristic device to aid the reader. I do not mean them to indicate that the distinctions I make reflect sharp divisions between the various groups, that positions within these groups are monolithic, or that no writers have a foot in two camps or, alternatively, no camps.

standard to them that has been applied to men.[92] This position would support, for example, allowing women parenting leaves only when such parenting leaves were allowed to men; it would not require that parenting leaves be provided either to women or men. In the second camp fell advocates of "special treatment," who maintained that women should receive special accommodation in the workplace for specific differences (often confined to biological differences) that disadvantaged them in relation to men.[93] This position would support, for example, providing maternity leaves to women even when no comparable paternity leaves were offered to men.

By the mid-to-late 1980s, the terrain of the debate had evolved into its current form. By that time, equal-treatment feminists had generally conceded that certain basic changes in the workplace were required to achieve equality for women, although they still contended that such changes should be made in a sex-neutral manner.[94] In the meantime, the special-treatment position had been transformed into a position that has been dubbed "cultural feminism," which celebrates values and outlooks associated with women, such as nurturing, building, and preserving relationships.[95] Moreover, the debate was also joined

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[92] *See, e.g.*, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

[93] *See, e.g.*, Linda J. Krieger & 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).

[94] *See, e.g.*, Nadine Taub & Wendy W. Williams, *Will Equality Require More Than Assimilation, Accommodation, or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825 (1985).

[95] Carol Gilligan's pathbreaking book, IN A DIFFERENT VOICE (1982), in which she associates women more than men with a type of moral thinking focused more on relationships, serves as the foundation for much cultural feminism. Nancy Chodorow's study, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978), which links differences between men and women's personalities with the differences in the allocation of child care responsibilities between the sexes, has also served as an important work for cultural feminists. For examples of cultural feminism, see Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990); Kenneth K. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); West, *supra* note 66.

However, advocates of special treatment remain who do not fall into the cultural feminist camp. *See, e.g.*, Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994).

by a third, radical feminist, position. According to this view, focusing the debate on whether women should be treated similarly or differently to men ignores the real cause of women's oppression—power disparities between men and women.[96] The relevant question for litigation in this third view is whether workplace practices regarding family responsibilities maintain women's deprived power status.[97]

The literature surrounding work-and-parenting issues seeks legal protection for working mothers based on the goal of achieving equality for women. In doing so, feminist theory has been the predominant voice in contesting liberal theory's assumption that equality can be conceived or furthered without considering women's parenting responsibilities. Nevertheless, the debate in feminist theory has not contested fundamental ways in which liberal theory has framed parenting issues. Like liberal theory, feminist legal theory has framed work-and-parenting issues in terms of a battle between the employer's autonomy and the employee's equality without recognizing the complex of values at stake. The interests of men, children, and communities generally are taken into account in constructing these protections only insofar as necessary to ensure women's equality. Feminist legal theory therefore accepts the liberal view that liberty and equality mark the limits of the positive vision of society that the state can appropriately support.[98] To boot, like the capitalism that accompanies liberalism, feminist legal theory has tended to limit its conception

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[96] *See, e.g.*, CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 34 (1987).

[97] *See id.*

[98] A few exceptions exist to the limitations of this debate. The most notable occurs in a recent article published by Ruth Colker. *See* Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61 (1997). In it, Colker points out that discourse regarding pregnancy-based discrimination in the United States "virtually ignores the needs and interests of young children." *Id.* at 64. In addition, Lucinda Finley, in the context of a discussion on the shortcomings of the "difference debate," makes the point that current legal policies that apply to parenting fail to consider the essential interconnectedness of human existence. *See* Finley, *supra* note 69, at 1142. In addition, several articles by Nancy Dowd approach work and family issues from a wider perspective. *See* Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995); Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. LEGIS. 335 (1993); Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990). In contrast to this Article's approach to reconceptualizing legal protections by focusing on the parenting relationship and visions of a good society, Dowd seeks to reconceptualize the definition of family in order to support diverse family forms, to include family work in definitions of work, and to guarantee an economic floor to all families.

of equality to economic equality.[99]

Further, feminist legal theory has generally failed to focus on the needs of children any more than necessary to secure women's equality. In doing so, feminist theory, like liberal theory, undervalues the connection that many mothers feel to their children. For these mothers, economic equality is only one of a number of reasons that work-and-parenting protections should be implemented. Chief among the others is the need of their children for parenting and these mothers' commitment to parenting. Failing to give weight to parenting protections because they help fulfill children's needs and mothers' commitments misses a key part of the views of these women.[100]

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[99] Nancy Fraser dubs "the vision implicit in the current political practice of most U.S. feminists" "the Universal Breadwinner." FRASER, *supra* note 68, at 51. As she describes it: "The point is to enable women to support themselves and their families through their own wage-earning. The breadwinner role is to be universalized, in sum, so that women, too, can be citizen-workers." *Id.* She contrasts this vision with the vision she advocates, the "Universal Caregiver" model, which seeks to "*induce men to become more like most women are now*, namely, people who do primary carework." *Id.* at 60. Fraser bases her argument for the "Universal Caregiver" model on the inadequacy of the "Universal Breadwinner" model to achieve equality for women because it holds women to the same standard as men without enabling them fully to meet this standard. In her view, the "Universal Caregiver" model deals better with gender equality concerns. The model Fraser advocates, in seeking to encourage men as well as women to perform primary carework, conforms with the proposal made in this Article. I seek to justify this vision, however, based on a broader range of goods than Fraser, who confines her goal to achieving gender equality.

Cf. BROWN, *supra* note 71, at 10 ("[A]s the Right promulgated an increasingly narrow and predominantly economic formulation of freedom and claimed freedom's ground as its own, liberals and leftists lined up behind an equally narrow and predominantly economic formulation of equality."); Silbaugh, *supra* note 75, at 5–6 (noting that most feminist discussions of women's unpaid labor "implicitly assume that wage labor market participation ought to be the goal for feminist legal reform").

[100] This truncated view of women's interests contrasts dramatically with the description of the political views of mothers conveyed by Susan Carroll, of the Women and Politics Research Center at Rutgers University. According to Carroll, "these women approach issues through the lens of their children and families." Michelle Dally Johnston, *Parties Don't Know Real 'Soccer Moms'*, DENVER POST, Oct. 13, 1996, at A1.

The attempt to separate sex equality from other concerns important to the lived experience of women is what prompted the comment by a professional woman to Anna Quindlen that "the women's movement had been the guiding force in her life until she had children, and then she'd felt abandoned by feminist rhetoric and concerns." Anna Quindlen, *Let's Anita Hill This*, N.Y. TIMES, Feb. 28, 1993, § 4, at 15. In Quindlen's words, feminism's failure to address the importance of children to the lived experience of many women has resulted in "a generation of educated young women who heard a great deal about the glass ceiling but little about the silken chains of mother love." *Id.*

The work of Joan Williams, a feminist theorist who has written extensively on work-and-parenting issues, demonstrates the limits of the current debate in feminist theory. In *Deconstructing Gender*,[101] Williams advocates a combination of the revised equal-treatment and radical feminist positions:[102] she focuses on power relations as the cause of women's subordination while at the same time advocating a gender-blind restructuring of the workplace. In the process, she criticizes cultural feminism as marginalizing women through falsely stereotyping all women as possessing traits associated with femininity and through inappropriately celebrating their exclusion from the workplace in order to accommodate domestic duties. In making this argument, Williams focuses on the issue of the workplace's failure to accommodate parenting solely in terms of the disadvantage it causes to women as an economic matter.

While her analysis of the way in which workplace structures marginalize women with family responsibilities is compelling, it is also incomplete. Williams, like the law, pares down the issues at stake. She fails to consider the way in which these structures limit a woman's ability to parent. Neither does she consider the extent to which parenting is and should be a fundamental part of many mothers' (and fathers') identities, except to consider this a source of women's subordination. In addition, the issue of the adequacy of the care given children in her proposal is never considered. Under this analysis, the workplace should be adjusted to the needs of working parents solely to achieve sex equality. Enabling parents to parent, children to flourish, and communities to prosper plays no role in this scheme.[103]

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[101] Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

[102] In later works, Williams renounces her support for equal treatment feminism in favor of postmodernism's celebration of difference. *See* Joan Williams, *Sameness Feminism and the Work/Family Conflict*, 35 N.Y.L. SCH. L. REV. 347 (1990); Joan Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296 (1991).

[103] In a later article, *Gender Wars: Selfless Women in the Republic of Choice*, *supra* note 38, Williams again considers work-and-parenting conflicts. As in *Deconstructing Gender*, her analysis isolates the gender equality interests from the other issues at stake in the intersection between work and family, except for noting that workplace structures that marginalize women can also cause children to suffer. In the closing pages of her article, however, Williams moves toward a more complete recognition of the complex of interests at stake in the intersection of work and family. There she proposes that feminism should seek to "imagine new worlds in which individual women do not feel trapped, in which children's needs are not pitted against adults' plans for self-development, but rather are viewed as central to our mission as a society." *Id.* at 1633. To do so, she recognizes, will require "more attention to affiliative and communal needs than the traditional liberal model suggests." *Id.* at 1634. Yet, except for these brief mentions in the concluding section of her article, Williams

The clear exception to the position that I have been describing in the feminist legal theory debate over parenting is that of cultural feminists. In contrast to other positions within the debate, cultural feminists have paid careful attention to women's relationships to their children and have argued for government support to foster these relationships. For example, Robin West, in an essay that argues that jurisprudence should be transformed to accommodate virtues associated with women, states that:

> [w]e need to show . . . that a legal and economic system which values, protects and rewards nurturant labor in private life will make for a better community. We need to show that community, nurturance, responsibility, and the ethic of care are values at least as worthy of protection as autonomy, self-reliance, and individualism. We must do that, in part, by showing how those values have affected and enriched our own lives.[104]

Cultural feminism, however, while not succumbing to the limitations of liberal assumptions, presents its own set of difficulties that undermines its alternative framing of work and family issues. First, cultural feminism overlooks differences between individual women and between different social groups of women by placing women as a group in a more privileged position than men with respect to relational qualities such as nurturing and caring.[105] Second, insofar as cultural feminism assigns women a privileged position with respect to qualities that have been associated with them under conditions of subordination, it risks reifying the association between women and these qualities. In other words, by placing women in a fundamentally different position than men with respect to the liberal connection/autonomy dichotomy, cultural feminism risks reaffirming the dichotomies of liberal discourse rather than overthrowing them to move toward a world in which interconnection is the norm for both men and women. As a consequence, it risks entrenching women's subordination by reinforcing the link between them and qualities marginalized in current liberal discourse.[106]

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never develops this provocative vision.

[104] West, *supra* note 66, at 65–66.

[105] In addition, cultural feminists often base such claims on questionable ontological premises. For example, West unconvincingly found women's orientation of connection to others in part on their experience of menstruation and intercourse. *Id.* at 2–3; *see also* Williams, *supra* note 101, at 800–01 n.11 (criticizing West's analysis of the causes of women's differences from men).

[106] *See* BROWN, *supra* note 71. Joan Williams critiques this difficulty with cultural feminism in detail in *Deconstructing Gender*, *supra* note 101, at 806–22. While I agree with many of the insights of her critique, in my view, Williams fails to preserve the positive

Third, cultural feminism, by unqualifiedly celebrating traits associated with women, risks celebrating traits that are wholly a product of women's oppression and would be dysfunctional in a society composed of men and women who share power equally. Nancy Fraser refers to such traits as those differences that are solely the "artifact[s] of oppression," in other words, that are simply the "stunting of skills and capacities."[107] In contrast with some of the traits described in the second point, which could serve a valuable function in a restructured world and should therefore be developed in men as well as women, the group of traits discussed in this third point should be fostered in no one. However, cultural feminism does not make a normative determination regarding which traits associated with women should be fostered within all members of society and which traits should, ideally, disappear.[108]

What is missing from the work-and-parenting debate in feminist legal theory is both a more nuanced and a broader account of the interests at stake in the intersection between work and parenting. Such an account should recognize the ways in which the needs and aspirations of parents, children, and communities are implicated in parenting. It should, moreover, recognize that valuing parenting solely for the way in which it furthers sex equality too narrowly defines the self-interest of many women who are mothers, for whom sex equality is only one of a complex of lenses through which they approach work-and-parenting issues, and only one of the goods derived from protection for parenting. At the same time, this account must recognize the complex ways in which women's historical assignment of primary parenting responsibilities relates to these other issues. To do so, at the same time that it recognizes the social value of parenting and the necessity of parenting in any community that will sustain itself, it must also recognize that women more than men conceive of their identities as closely tied to their children because of the gender roles they have been assigned in their subordinate status.

A feminist political vision derived from this more nuanced account would

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insights of cultural feminism—its attention to relationships, community, and the need for care—in attempting her reconstruction of feminism. *See supra* notes 101–03 and accompanying text.

[107] NANCY FRASER, *Culture, Political Economy, and Difference*, *in* JUSTICE INTERRUPTUS, *supra* note 68, at 203.

[108] *See id*; *cf.* Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U.L. REV. 858, 862 (1993) (arguing that cultural feminism errs in uncritically celebrating traits associated with women due to women's oppression, and contending that an adequate feminist theory must critically respond to women's experience and history of oppression rather than to desires and needs embedded in their subordinate roles).

support parenting, not because of its association with women in their subordinate status, and not solely because support for parenting is necessary to help women achieve equality,[109] but also because of the important role that fostering connections generally and parenting specifically should play in a healthy community. The goal, then, is not to dissociate parenting from women nor to devalue the importance of the parenting relationship, but to insure that men as well as women recognize the importance of parenting and assume parenting responsibilities equally. Parenting is valued here because of the important role it plays and should play in the lives of parents, children, and in the health of communities in the world we seek to make through feminism.

V. TOWARD A MORE COMPLETE VISION OF LEGAL PROTECTION FOR PARENTING

The vision sketched out in Part III constitutes the dominant political philosophy in the United States today. Yet although this vision is widely held, it conflicts with the also widely-held support—often by the same people—for government policies that enable the adequate rearing of children. In other words, while many Americans recognize the value of supporting parenting on a policy level, they lack the ideological structure on which to hang these beliefs.[110] The slippage between support for parenting on a policy level and the dominant political philosophy contributes to the current situation in which, on the one hand, we hear endless rhetoric about the need to support parenting and the family and, on the other hand, we develop frameworks unable to cognize the multiple issues at stake and unable to accomplish these ends.[111]

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[109] Clearly, the importance of achieving workplace equality cannot be overstated. My point here is that women's interest in achieving this goal cannot and should not be divorced from their other needs and aspirations. In remaking the world to eliminate disparities in power, we must also attempt to reconstruct it to become a place in which we and our children would like to live.

[110] The gap between Americans' support for policies that actively aid members of the community and the dominant ideology has been documented by empirical research. For example, researchers Stanley Feldman and John Zaller discovered that those who opposed welfare programs had little difficulty expressing philosophical grounds for their opposition—they relied on the liberty and autonomy venerated in the liberal tradition. In contrast, those who supported welfare programs generally could not provide philosophical justifications for their beliefs. *See* Stanley Feldman & John Zaller, *The Political Culture of Ambivalence: Ideological Responses to the Welfare State*, 36 AM. J. POL. SCI. 268, 292–99 (1992). The dominant political philosophy provides us no language with which to justify policies that depart from simple enforcement of the right to be left alone.

[111] Another example of America's conflicting beliefs about raising children is

Our public philosophy's preoccupation with liberty, autonomy, and rights obscures the range of issues at stake in the intersection between parenting and the workplace—the interests of communities in raising sound citizens; the needs of children in becoming healthy, competent people; and the commitment of parents to fulfilling parenting responsibilities. Moreover, this philosophy's exaltation of individual ends prevents the state from furthering any vision that seeks to nurture and sustain relationships between individuals.[112] In Mary Ann Glendon's words, the ideology of liberalism deals well with "rights-bearing issues but does not allow us to consider how to conceive of interrelationships and transmit values that sustain the polity."[113] Neither does this ideology permit discussion of how we, as members of a polity, can best live together.[114]

It is time to stop bracketing the moral issues associated with parenting and to value it not as an expression of individual choice or even solely as a way to insure that women are fully integrated into the workplace, but also for the human goods it makes possible. To do so, it is time to revise the prevailing political vision to account for the ways in which individuals are interrelated and interdependent. Such a revision, in turn, could ground discussion of the ways that we, as a collective matter, can best live together—a discussion that the dominant public vision does not permit. This revision, moreover, would open a range of possible legal options for handling work-and-parenting issues that would better take into account and support the goods at stake in parenting.

A. *A Revised Account of the Relations Between People*

In order to more adequately reflect the ways in which people actually live their lives, a revised account must, instead of simply conceiving of society as

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demonstrated by conflicting polls showing, on the one hand, that Americans overwhelmingly support government playing a large role in solving problems facing children, *see supra* note 5, and, on the other hand, that they believe that parents have sole responsibility for raising children. *See* Charles M. Madigan, *Poll: Cancer Cure More Likely Than Tax Cut*, CHI. TRIB., Aug. 29, 1996, at A1.

[112] It should be noted that my argument in this Article about the flaws of liberalism therefore has two prongs: First, liberalism fails to recognize the ways in which humans are actually interrelated. Second, through the law, liberalism impedes individuals from acting on the responsibilities that derive from these relationships.

[113] Glendon, *supra* note 69, at 33.

[114] *See* Michael Walzer, *The Communitarian Critique of Liberalism*, *in* NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES, *supra* note 58, at 52, 66 ("A good liberal (or social democratic) state enhances the possibilities for cooperative coping.").

composed of autonomous individuals, contain a more complex understanding of individuals, of the relationships among individuals, and of communities. At the most basic level, this understanding begins with a conception of the self that admits the possibility of an intersubjective self-understanding, in contrast to the liberal conception of the discrete, autonomous individual.[115] Under this view, the "self" should be recognized to include those relationships central to how individuals conceive of themselves. While all of a person's relationships will not approach this fundamental level, some relationships likely will. Insofar as one's self-conception can extend beyond a single individual, the concept of self-interest, too, must extend beyond the individual to include the perceived interests of others central to the individual's conception of self. This revised view far better reflects the self-understanding of those parents who fundamentally conceive of themselves in terms of their role as parents and for whom the well-being of their children constitutes a fundamental part of their own well-being.

Insofar as our relationships with others and the well-being of others are considered part of who we are, the revised account requires changing the way we view actions that derive from our relationships with others. Under the liberal formulation of the autonomous self, acts performed for others are freely chosen because individuals, seen as complete in themselves, would not perform these acts unless they wanted to do so. In contrast, the revised formulation admits the possibility that some acts performed for others will arise from responsibilities that derive from fundamental relationships. In contrast to "freely chosen acts," these responsibilities involve moral claims on the self created by one's ties with another that are better conceived as duties than as freely chosen.

For example, in our society, I would probably not conceive of my providing dinner for an acquaintance to fall into the category of a moral duty because I would not consider providing dinner a responsibility that arose from an acquaintanceship relationship. However, there is a significant chance that I would consider eating dinner with my children to fall into this category. To the extent that particular actions are the product of responsibilities that derive from relationships, understanding them as "free choice" is an inappropriate framing. Engaging in parenting responsibilities is, in this sense, different from one's

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[115] I owe the development of this conception of the self to conversations with Pamela Conover, who explores the psychological framework for intersubjective conceptions of the self in *Citizen Identities and Conceptions of the Self*, 3 J. POL. PHIL. 133 (1995); *see also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 62 (1982) (defining intersubjective conceptions of the self as those which "allow that in certain moral circumstances, the relevant description of self may embrace more than a single individuated human being").

choice of chocolate ice cream over vanilla; the latter is a choice based on taste, the former is a moral imperative based on one's understanding of one's self (conceived of in terms of one's relationships), which stands independent of individual preferences.[116]

Moving one step away from the narrow focus on the individual, a revision of the dominant world view should recognize interdependency among persons as a basic condition of human life—as the normal, rather than exceptional, state.[117] Humans are never completely autonomous, this view would recognize—they are autonomous only in some limited sense and in different degrees at different stages of their lives.[118] During most of their lives, humans require care from others and, at some points in life—certainly in childhood but often also in old age and at other points—they largely rely on others for care. This need for care is a basic fact of human existence.

Thus, while the proposed reconception of the self accommodates the spectrum between those who conceive of themselves more in terms of their relationships with others and those who conceive of themselves far more autonomously, the recognition of interdependence suggests that on some level, regardless of whether relationships are incorporated into one's conception of self, they are the basic rule of human existence rather than an aberration and that care is a basic requirement rather than an exception to the rule. The disjunction between these two levels of analysis is explained at least in part by sex inequality. Men, in this view, often perceive of themselves as more autonomous and less defined by relationships than women because much of the carework necessitated by the human condition of interdependence has been assigned to women.[119]

Finally, while the liberal framing of parenting makes it difficult to take into account the obvious fact that the public has a great interest in the conditions under which children are raised, a revised ontology would bring into focus the

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[116] *See* DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS 37 (1993). The distinction between the pursuit of preferences and the exercise of duties is one that liberal theory fails to cognize. *See* SANDEL, *supra* note 61, at 70.

[117] A number of feminist theorists have pointed out the basic interdependence of the human condition. *See, e.g.*, TRONTO, *supra* note 66, at 33; 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 (1995).

[118] *See* TRONTO, *supra* note 66.

[119] *See supra* notes 71–73 and accompanying text. Race and class fill two other parts of this void. White middle- and upper-class men can feel autonomous at least in part because many of the unpleasant but necessary tasks in this society are performed by minorities, the working class, and the poor.

close links between the well-being of those within communities and the health of these communities. In the context of parenting, this ontology would shed light on the important role that fundamental relationships play in the well-being of citizens and on the vital links between today's good parenting and tomorrow's good polity. Democracy requires certain traits of its citizenry to function effectively. It demands citizens who can subordinate personal preferences to laws and to elected representatives, appreciate the values of freedom and democracy, recognize the legitimacy of the state, and, at least to some extent, rationally weigh options.[120] Adequate child rearing is central to the development of these characteristics.[121]

Recognition of the strong link between child rearing and the health of the polity accords with the longstanding counsel of democratic theorists that democracies depend on well-reared citizens. Thus, Aristotle recognized that the upbringing of citizens crucially affects the character of the state, "at least if it is true that it makes a difference to the soundness of a state that its children should be sound. . . . And it must make a difference; for . . . from children come those who will participate in the constitution."[122] In the words of John Stuart Mill, "if we ask ourselves on what causes and conditions good government in all its senses, . . . depends, we find that the principal of them, the one which transcends all others, is the quality of the human beings composing the society over which government is exercised."[123] For this reason, society has a large

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[120] In the eloquent words of John Dewey:

> The foundation of democracy is faith in the capacities of human nature; faith in human intelligence and in the power of pooled and cooperative experience. It is not belief that these things are complete but that if given a chance they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action.

JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 117 (1927).

[121] Empirical evidence demonstrates the strong relationship between child rearing practices and children's potential to become sound, productive future citizens. For example, a study by social scientist Jean Richardson and her colleagues demonstrates that eighth-grade students who took care of themselves for eleven or more hours a week were twice as likely to be abusers of controlled substances (marijuana, tobacco, or alcohol) as those who were actively cared for by adults, no matter the race or socioeconomic status of the children. *See* ETZIONI, *supra* note 2, at 69. In addition, "students who took care of themselves for eleven or more hours per week were one and a half to two times more likely 'to score high on risk taking, anger, family conflict, and stress' than those who did not care for themselves." *Id.* at 69.

[122] ARISTOTLE, THE POLITICS 97 (T.A. Sinclair trans., rev. ed. 1981).

[123] JOHN STUART MILL, *Considerations on Representative Government*, *in* ON LIBERTY

stake in the way its future citizens are raised. Again, in Mills' words:

> The existing generation is master both of the training and the entire circumstances of the generation to come; it cannot indeed make them perfectly wise and good, because it is itself so lamentably deficient in goodness and wisdom; and its best efforts are not always, in individual cases, its most successful ones; but it is perfectly well able to make the rising generation, as a whole, as good as, and a little better than, itself. If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences.[124]

B. *A Revised View of the Role of the State*

Revision of the ontological understandings of the relations among people in turn requires rethinking the prevailing view that adequate respect for the dignity of individuals requires that the state simply enforce the right to be left alone. That approach is based on respect for the autonomous individual for whom the free choice in one's own life is the highest good.[125] Once the self is no longer conceived as exclusive of its relationships and responsibilities, enforcing an individual's right to fair procedures or to "choose" whether to stay in a job that does not accommodate parenting is no longer sufficient to treat individuals with dignity. Instead, treating individuals with dignity requires respecting the importance that constitutive relationships and the responsibilities that derive from them play in their lives.[126] In the context of the work-and-parenting issue, it requires changing the perspective from enforcing the right to choose to parent to providing institutional support for parenting responsibilities. Furthermore, recognition of the close connection between the parenting of children and the health of the polity reveals that parenting is a public good. State support for parenting, this connection demonstrates, is both as necessary and as important to the polity as state support for national defense, and should be pursued with at least as much diligence.[127] Failure to provide such support abdicates the possibility of using the state's power to help create a polity composed of a more

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AND OTHER ESSAYS 225 (John Gray ed., 1991).

[124] JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS, *id.* at 91.

[125] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); *cf.* SANDEL, *supra* note 61, at 114–16.

[126] *Cf.* Caroline Whitbeck, *A Different Reality: Feminist Ontology*, *in* BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY 64, 78–81 (Carol Gould ed., 1983) (contrasting an ethic of rights with an ethic of responsibilities).

[127] *See* Moody-Adams, *supra* note 88, at 5.

stable, healthy citizenry.[128]

My proposal moves away from the image of state neutrality on questions of the good life. It does so based on the recognition that the ideal of state neutrality is itself unattainable: the determination of what constitutes a neutral action in any given case will depend on contestable assumptions about the self, the relations between persons, and the state.[129] The current, dominant conception of neutrality, rather than remaining neutral, celebrates self-sufficiency and the power of the self to choose at the same time as it assumes an autonomous self constantly engaging in free choice. This dominant conception favors a vision of parenting in which parents detach themselves from parenting responsibilities during the large portion of their lives that they spend at work, and in which parenting, like other lifestyle choices, is conducted in private spaces and at private times, during fewer and fewer hours. In addition, it favors the continued subjugation of women and other groups within society who are assigned to perform the caretaking responsibilities that must inevitably be performed in any human society. In doing so, this vision of neutrality moves us away from conditions that foster human dignity and healthy communities.

Rather than rely on a vision of the state's role that promotes separation, isolation, and threatens the physical and emotional well-being of future citizens, we should adopt a vision of the state that fosters connection, cooperation, and helps children, their parents, and their communities to flourish. A non-neutral approach to child rearing requires specific attention to questions that do not get asked within the current framework. It requires discussion of what conditions children within this society need to flourish and the ways that the state can support the instantiation of these conditions.

While the basic parameters of these conditions can be set through public discussions, parents must also be given substantial room to implement their particular vision of child rearing. Indeed, the high value placed on liberty within our society, requires that any viable political vision must give great weight to the value of liberty, and therefore strive to further "good lives" rather than a single, unitary conception of the good life. This requires ensuring that

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[128] *Cf.* Robin West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1455-56 (1986) (arguing that the "insistence that consent is *the* absolute moral trump simply traps us in our present lives" and ignores that the "state has the potential for good").

[129] A number of feminists have also challenged the liberal conception of state neutrality on the ground that, in the United States, the supposedly neutral state has stepped out of its supposed role of neutrality in order to strengthen men's patriarchal power over women, including by enforcing the rights of husbands to their wives' property and persons and by limiting women's ability to obtain divorces. *See* Okin, *supra* note 67, at 42.

parents have significant freedom to raise their children according to their own personal visions. It also requires recognizing that what it means to be a parent, what it means to be a child, and what constitutes good care for children vary enormously both within and between cultures and over time.[130] Therefore, parents should, within broad parameters, generally have the ability to rear children as they see fit.[131] The state, in this model, would provide institutional support for parenting, but generally without determining the substantive content of parenting. In contrast to the existing framework in employment law, which allows parents to define their children's needs but forces them to respond to these needs privately, my proposal would circumvent the autonomy/dependence dichotomy in liberal thought by allowing parents generally to define these needs while granting public support to help these needs.

In advocating replacement of the dominant political vision, I have argued that its inadequacy is revealed in part by the way in which it conflicts with the perspective from which many view the world and by its inability to support the aspirations of most of us for our children and our communities. I want to emphasize that although the ways in which we live and our aspirations point to inadequacies in the existing liberal ontology and political program, I rely on neither popular support nor "shared understandings" to justify my alternative vision of the state's proper role. Instead, I justify it based on an explicit normative judgment that support for parenting will lead us to a better society than the existing vision. The "common good" that I advocate is not something either irrefutable or discoverable, but is, instead, constructed, and open to political discussion, negotiation, and disagreement.[132]

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[130] *See* Martha C. Nussbaum, *Constructing Love, Desire, and Care*, *in* SEX, PREFERENCE, AND FAMILY, *supra* note 2, at 31.

[131] I use the term "generally" with purpose here. The value of parental autonomy must be considered in concert with other values that may sometimes outweigh parental autonomy. For example, a parent's determination that a child needs to be placed in a tub of scalding water for disciplinary reasons should not be considered an acceptable exercise of parental autonomy. Children, in this view, should not be viewed as the property of parents that liberal theory sometimes makes them out to be, but neither should they be viewed simply as wards of the polity. The tendency of liberal theory to dichotomize the world in general and rights in particular into either/or categories suggests the need for a more nuanced account of the status of children.

[132] Thus, although I have relied to a considerable extent on the work of theorists who have been labeled "communitarian" in formulating my critique of liberalism and in constructing an alternative vision, I part company with the view often attributed to such theorists that the common good is unitary, uncontestable, and discoverable through unearthing previously settled "shared understandings." I note, however, that much of this position has already been explicitly rejected by many theorists dubbed "communitarian." *See, e.g.*,

C. *Toward a Revised Parenting and Work Policy*

Applying this revised vision to the intersection of work and family would make clear that support for parenting should not only further the value of sex equality, it should also help give children the care they need, help parents realize responsibilities essential to their leading lives they consider moral, and foster the character traits and capacities of citizens that a democratic society requires. This recognition, in turn, requires replacing the prevailing models for considering work-and-parenting issues. In their place belongs a framework that better recognizes the complexity of needs and aspirations at stake and the multiplicity of goods that can be realized within the parenting relationship—a model that sees a more integral role for state protection of parenting than simple crisis management.

Transforming the vision of the appropriate role of the state and the issues at stake in the intersection between work and parenting opens up an array of possible legal reforms for democratic deliberation. Is it not as important to provide for a system of compensation when parents need time off from work to parent as it is to provide workers' and unemployment compensation?[133] In order to ensure that parents who wish to do so have sufficient time to parent, should it be unlawful for employers to *require* parents of young children to work more than a set amount of hours each day? Should on-site day care that allows parents to have ready contact with children be required of certain employers? Should providing flex-time be required? Should employers be required to guarantee breaks for mothers who breast-feed? Should optional six-month parenting leaves be made available to parents? Once the questions concerning protection for parenting are broadened from the dominant assumptions embodied within the current legal framework, the issues for discussion are unlimited.

D. *Objections to Moving Away from the Dominant Vision*

The proposal for change presented here raises a number of possible objections. In this Part, I address two major groups of concerns: first, liberal objections to the state moving away from existing conceptions of neutrality;

SANDEL, *supra* note 61, at 320–21. I also note that any constructed common vision of the good life (or, in my view, good lives) cannot be developed in the abstract but must take into account the understandings of members of the society.

[133] Because such leave would be justified in part by the state's interest in ensuring the development of its future citizens, principles of fairness would suggest that the state bear at least some part of the economic burden for this leave.

second, feminist theory objections that the proposed framework for parenting proposed would redound to women's detriment.

1. *The Non-Neutral State*

The proposal that the state move away from its role of neutral enforcer of the right to be left alone towards a positive role in aiding parenting raises two principal objections. First, the proposition that the state should support *any* activity, including parenting, rather than allow citizens to choose which activities they themselves support might be contested. Second, some might propose a "slippery slope" objection based on the lengths that the government may go in infringing liberty once it steps outside its position of neutrality to support parenting. In other words, this second objection might be phrased the following way:

> If we decide that the state can seek to further its interest in creating solid citizens by *allowing* employees such rights as the right to take time off, why can't we *require* parents (or simply mothers) of young children to take time off to advance that same interest? For that matter, why can't the state then take other measures that it believes would benefit good citizens, such as, for example, forbidding them to watch any television except educational television?[134]

The heart of both these objections concerns the extent and manner in which the government may move outside of its role of simple protector of the right to be left alone and, instead, interfere with individual choice by privileging a particular activity based on a societal determination to do so.

The objection to the state privileging certain activities over others is entitled to considerable weight, although not enough to trump the other interests at issue. It is inevitable that disparate conceptions of the good will exist in any society. For some, that conception of the good will more importantly weigh sound future citizens and parents who are allowed to fully satisfy their parenting responsibilities; for others that good will more heavily weigh a society in which art and music play an important role. Where these visions of the good conflict, furthering one vision of the good may require tradeoffs with other goods. Such tradeoffs are an inescapable part of living in society; indeed, in Isaiah Berlin's

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[134] The hypothetical objection posed here represents a response to this proposal that reflects liberalism's distrust of non-neutral state action. *See, e.g.*, *supra* notes 80–82 and accompanying text. I am indebted to a conversation with Thomas Spragens for helping me to formulate my response to this objection.

words, they are "an inescapable characteristic of the human condition."[135]

Isaiah Berlin eloquently describes the tradeoffs between competing visions of the good when he writes that "[t]he world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others."[136] The trade-offs involved between ultimate ends are in part the reason that liberal society places such emphasis on the individual's right to his or her own free choice.[137] Yet some societal goods cannot adequately be pursued on an individual level. In such cases, again in Berlin's words: "[t]he extent of a man's, or a people's, liberty to choose to live as they desire must be weighed against the claims of many other values, of which equality, or justice, or happiness, or security, or public order are perhaps the most obvious examples."[138]

Thus, in answer to the question "Why allow the state to support any particular activity, including parenting, when this support will, to some extent, infringe on individual liberty to choose?" I suggest that two factors together justify state support. First, parenting cannot be adequately pursued within a framework of individual choice. Second, communities' interests in good citizens, children's needs for parenting, and parents' commitment to parenting are so compelling as to justify the state's active support of parenting despite some infringements on individual choice. Promoting some base level of adequacy of childbearing and child rearing is an interest that lies at the heart of a democracy's ability to perpetuate itself,[139] at the heart of a child's important interest in becoming a stable person, and at the core of many parents' views of themselves as moral persons. Few other activities will weigh so heavily in the balance against liberty interests.

The discussion of liberty brings me to the second objection: the possibility

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[135] ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 169 (1969); *see also* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 216 (1996).

[136] BERLIN, *supra* note 135, at 168.

[137] *See id.*

[138] *Id.* at 170.

[139] As Amy Gutmann notes, a democracy's interest in perpetuating itself does not legitimate its taking measures to replicate current practices. *See* Amy Gutmann, *Undemocratic Education*, *in* LIBERALISM AND THE MORAL LIFE, 71, 78–79 (Nancy L. Rosenblum ed., 1989). Rather, it requires that the state cultivate the capacities necessary for democratic deliberation and decisionmaking without restricting deliberation about the good life itself. To the extent that current practices restrict deliberation by being repressive and discriminatory, democracy requires their eradication, not their perpetuation.

that once the state steps outside of its role of neutral arbiter, it could greatly infringe on liberty in its support of parenting. The fact of state support for parenting should not, however, end the discussion regarding liberty. In a society such as ours, which values liberty so highly, support for parenting must be reconciled as much as possible with autonomy. Adoption of less coercive methods by the state is therefore clearly the more preferable route to supporting parenting. Thus, ensuring that employees will have the opportunity to take leave from work is less problematic than decreeing that they must.[140]

My proposal advocates support for parenting without offering any fail-safe formula for determining how far the state may infringe on individual liberty to pursue that goal. Formulation of any such blanket rule, I believe, is impossible. Instead, the decision can be made only through reasoned deliberation in the democratic process. For those who feel uncomfortable with this determination, I offer two observations. First, choosing the alternative of never allowing the state to privilege some life paths over others leaves in place a status quo that may be equally or even more constraining of individual freedom but result in far more damage to interests deemed important by many in the community. For example, the failure to support parenting may result in a situation in which parents are constrained to work long hours to the detriment of themselves, children, and society. Second, the clear bias in the United States is toward allowing liberty automatically to trump other values. Insisting that the value of liberty should be weighed against other values places liberty in better perspective: because of the paramount regard in which liberty is held, far less danger exists that it will be given too little weight than the danger that currently exists that it will be given such tremendous weight that it will prevent the achievement of valued ends.

2. *Sex Equality*

In addition to the first set of objections, which come squarely from within mainstream liberalism, three objections might be leveled at this proposal from a feminist perspective. First, it might be objected that using the liberal state—which has historically been linked to patriarchal privilege—to support parenting by providing legal protection will either not improve the position of women or,

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[140] And probably more effective, as well. It is not difficult to imagine that requiring an unwilling parent to leave work in order to be at home with their children might result in poor parenting during the enforced time together. In a society that values individual decisionmaking as highly as our own, the far better route would be to make the choice to parent a true option for parents rather than either a requirement or the hollow promise that it is now. *Cf.* KOPPELMAN, *supra* note 135, at 217–18.

worse, will further entrench their subordinate position. A number of feminist theorists have argued that the state itself is deeply linked to patriarchal structures that impedes the emergence of feminist principles.[141] While the power of this critique of the state is undeniable, unfortunately, the alternatives are few.[142] The ways in which law affects both the lived reality of women's lives and reinforces the nation's reigning ideology make attempts to change the law a crucial feminist project. Thus, the link between the state and patriarchal privilege calls generally for caution and for considerable attention to the type of intervention sought of the state, but not for complete retreat from attempts to use law as a vehicle for social change.

In this regard, this proposal provides a vehicle through which the stated rhetoric of the regime (usually phrased in terms of concern for children, a "kinder, gentler nation") can be used to disrupt some of the links between patriarchy and the state. As Wendy Brown argues, the legacy of gender subordination in the modern liberal state is located "in the *terms* of liberal discourse that configure and organize liberal jurisprudence, public policy, and popular consciousness."[143] As a tactical matter, few better issues exist with which to demonstrate the shortcomings of liberal theory and to muster support for its revision than parenting issues, since such issues implicate the needs of children who have caught the popular imagination in a way that, in a society accustomed to the subordination of women, the needs and aspirations of women have not.[144]

Second, it might be argued that my analysis largely assumes that the relevant interests that support parenting protections will coincide and therefore overlooks the way in which these interests may conflict. In this view, gender equality interests can often conflict with the needs of children, the needs of mothers can conflict with the needs of children, the interests of parents can

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[141] *See, e.g.*, DAVINA COOPER, POWER IN STRUGGLE: FEMINISM, SEXUALITY, AND THE STATE 71 (1995) ("While the state may not *function* to maintain the interests of a particular class or grouping, gender, race or economic principles inform the state's reaction to changing sexual discourse and practices."); MacKinnon, *supra* note 48; BROWN, *supra* note 71.

[142] In Catharine MacKinnon's words: "[t]reacherous and uncertain and alien and slow, law has not been women's instrument of choice. Their view seems to be that law should not be let off the hook, is too powerful to be ignored, and is better than violence—if not by much." MacKinnon, *supra* note 48, at 1285.

[143] BROWN, *supra* note 71, at 138.

[144] *See id.* at 164 ("[T]he trap consists in working with formulations of personhood, citizenship, and politics that themselves contain women's subordination, that can indeed be extended to women, or to activities inside 'the family,' but are not thereby emancipated from their masculinism by virtue of such extension.").

diverge from one another, and the needs of communities can diverge from the needs of parents. By assuming the convergence of the interests of parents, children, and family, according to this objection, I am romanticizing relationships between persons in a manner that ignores the reality of relationships and the power disparities that operate within society.

While the legitimate interests of children, mothers, and fathers potentially (and sometimes actually) conflict, at the level of lived experience, these interests are often sufficiently interrelated that they can and should be pursued simultaneously. Thus, while in an abstract situation, the needs of children can be considered separately from the needs of parents, in the real world, the interests of both parents and children are generally far more interrelated. For example, as an abstract matter, it might be argued that it is better for children to have a parent stay at home with them and devote the better part of his or her life to them. However, in the real world, children are parented by real people whose own needs and aspirations in employment are important to them, and are part of a family with economic needs that must be fulfilled. Even considering the issue only from the perspective of the child's welfare, a happy, fulfilled parent for some part of the day is far more in the interest of the child than a disgruntled, unfulfilled parent for all of it; moreover, food on the table is better than a parent home all day with no food to eat. By the same token, while it is possible to consider gender equality interests as independent from and, possibly, in conflict with the interests of children, in fact, these interests are also interrelated.[145] Because mothers often take their children's interest into account in making decisions,[146] furthering interests in sex equality requires factoring in the well-being of children.

In other words, the interests of children, mothers, fathers, and the community—while clearly not identical, and perhaps often in potential conflict—are interrelated enough generally to make it possible to craft measures in which they coincide. The goal should be to construct arrangements that improve the position of all these parties rather than set up zero-sum situations in which satisfying some operates to the detriment of others. To do so, however, will require careful attention to the ways in which the aspirations and needs of

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[145] *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY (1989).

[146] A national survey by the *Washington Post* and *ABC* found that 9 out of 10 women had made significant sacrifices at work because of their children: 59% of women stated that they had given up or delayed career ambitions on account of their children, 64% of women stated that they had delayed or decided against taking a full-time job outside of the home, and 47% reported on cutting back on the number of hours worked for this reason. *See* Richard Morin, *National Poll Finds Support for Day Care as Employee Benefit*, WASH. POST, Sept. 3, 1989, at A17.

affected parties may conflict. In this way, the situation is similar to the debate regarding fetal hazards. Although the prevailing view is to cast the issue in terms of conflict between the mother and fetus, as one commentator notes, this model "has undermined the development of effective policy by focusing on the competing rather than the common needs of the mother and the fetus."[147] A more productive approach is to craft policy in order to promote the needs of both mother and fetus.

Because of the strong link between the disproportionate parenting responsibilities assigned to women and their disempowerment, positive support for parenting should be pursued in concert with measures that encourage breaking down the sex division in parenting. Support for parenting must therefore not only be phrased in sex-neutral terms but must genuinely be available to parents of both sexes. Within that framework, and with careful attention to the ways in which interests might diverge, proposals can be crafted in which sex equality interests and the other interests at stake in parenting support rather than conflict with one another.

The third objection from feminist theory derives from women's historical exclusion from political power and their current marginalized status in public debate. From this position, a legitimate worry might arise that my advocating deliberation over the common good(s) of the community will result in deliberations that marginalize women's voices and a vision that neglects the needs and aspirations of women. The short answer to this objection, in my view, is that this feared nightmare is the state in which we live today. Liberalism rests on a particular vision of the good—a good that values autonomy and choice over other values. This vision was developed on the back of women's exclusion and subordination, and it continues to ignore the needs and aspirations of real, historical women and their views of the world. I am therefore advocating replacement of one inevitably non-neutral vision by another that better reflects both the lived reality of women's lives, the needs of parents, children, and communities, and that better provides a vision for ordering our lives together than the current model. Focusing attention on the way in which any vision of the good is an artificial construct, including the vision promulgated by liberalism, calls into question the inevitability of those visions that have historically disadvantaged women and suggests the importance of including different perspectives in the discussion over what a better vision would look like.

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[147] *Rethinking Motherhood*, *supra* note 31, at 1336; *see also, e.g.*, Johnsen, *supra* note 31.

VI. CONCLUSION

In any society, the law is an institution that performs a number of functions simultaneously. It expresses a vision of the current state of affairs—who and where its members now *are*, both as a society and as individuals. It also reflects a vision for the future—who its members *should be* and what the polity *should become*. Finally, by limiting some possibilities and encouraging others, the law ultimately helps to order the future by shaping who members of the polity *actually become* and how they live together. By the law's failure to recognize and support important needs and aspirations at stake in the intersection between work and parenting, American law currently reflects a society composed of isolated individuals, aspires to nothing more, and creates conditions inhospitable to human connection, human dignity, and human development. It is time to reconsider whether this vision accurately represents the society in which we actually live, whether it reflects our aspirations for who we want to become, and whether it leads us toward a world in which we would want to live and raise our children.