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## Workplace Restructuring to Accommodate Family Life

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## FOREWORD

# WORKPLACE RESTRUCTURING TO ACCOMMODATE FAMILY LIFE

ELIZABETH R. SCHILTZ\*

The perennial tension between the demands of the workplace and the demands of family life presents perplexing social and legal conundrums. Because each of us came from our lives in some form of a family, and because each one of us labors in some way either in a workplace or in a home (or, more likely in contemporary America, in both<sup>1</sup>), these conundrums engage us all intimately. “Work-life balance” issues arouse equally intense debates in the popular media,<sup>2</sup> the halls of Congress,<sup>3</sup> and the corridors of academia.<sup>4</sup>

Two groups of thinkers who have grappled with these issues most vigorously in the past few decades are feminist legal theorists and Catholic social theorists. These two groups have typically approached these issues from completely opposite directions; however, in recent years some of their conclusions have started to converge.

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1. Katharine K. Baker, *The Problem with Unpaid Work*, 4 U. ST. THOMAS L.J. 343, 609 n.63 (citing Bureau of Labor Statistics data that seventy-five percent of mothers with children under eighteen work outside the home and sixty-five percent of married mothers work outside the home).

2. Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 343, 575 n.6 (summarizing some of the recent popular media debate on this topic).

3. *Id.* at 580 n.21 (discussing recent congressional proposal mandating sick leave); Allan Carlson, *Rise and Fall of the American Family Wage*, 4 U. ST. THOMAS L.J. 343, 571 (discussing recent congressional proposal for family tax relief).

4. Recent symposia on this topic include: *Women's Work is Never Done: Employment, Family, and Activism*, 73 U. CIN. L. REV. 361 (2004); *Thomas Jefferson University Third Annual Women and the Law Conference*, 26 T. JEFFERSON L. REV. 1 (2003); *Law, Labor and Gender Symposium*, 55 ME. L. REV. 1 (2003); *Looking for a Miracle: Women, Work, and Effective Legal Change*, 13 DUKE J. GENDER L. & POL'Y 1 (2006); *Balancing Career & Family: A Work/Life Symposium*, 34 PEPP. L. REV. 313 (2007).

Feminist legal theorists have traditionally started from the perspective of women and how best to ensure the flourishing of women.<sup>5</sup> From that perspective, the family obligations that are predominantly the responsibility of women are often seen as presenting an obstacle to women's flourishing.<sup>6</sup> Catholic social theorists, on the other hand, have traditionally started from the perspective of the family and how best to protect and preserve the family structure, so that it can function as the source of "formidable energies capable of taking man out of his anonymity, keeping him conscious of his personal dignity, enriching him with deep humanity and actively placing him, in his uniqueness and unrepeatability, within the fabric of society."<sup>7</sup> From that perspective, the increasing demands of work outside the home are often seen as presenting an obstacle to the flourishing of healthy families.<sup>8</sup>

In recent years, feminists (particularly a group of feminists known as relational, care, or dependency feminists) have begun to acknowledge that the flourishing of many women might involve being able to care for their families. They have begun to call for workplace restructuring to accommodate family life, rather than insisting that women be released from all family obligations.<sup>9</sup> Catholics (perhaps most forcefully Pope John Paul II) have begun to acknowledge that the flourishing of the larger human family might require greater access to the public sphere by women, including women who have significant family responsibilities. They have begun to call for workplace restructuring to accommodate family life, rather than insisting that women be released from all responsibilities in the workplace.<sup>10</sup>

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5. Patricia Smith, *Feminist Jurisprudence and the Nature of Law*, in FEMINIST JURISPRUDENCE 3, 3 (Patricia Smith ed., 1993) (characterizing as "the one point on which all feminists agree" the rejection of the subjugation of women by patriarchy).

6. See SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans., Vintage Books 1989) (1949); Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1761-62 (2001); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 197 (2001).

7. Pope John Paul II, *Familiaris Consortio*, No. 43 (Nov. 22, 1981), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_19811122\\_familiaris-consortio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html).

8. CLAIRE E. WOLFEICH, *NAVIGATING NEW TERRAINS: WORK AND WOMEN'S SPIRITUAL LIVES* 7-9 (2002) (discussing encyclicals reflecting this attitude by Pope Leo XII in 1891 and Pope Pius XI in 1930 and 1931).

9. Two of the speakers at this symposium are among the pioneers of feminist philosophy. See Joan Williams, *UNBENDING GENDER* (2000); Eva Feder Kittay, *LOVE'S LABOR: ESSAYS IN WOMEN, EQUALITY AND DEPENDENCY* (1999).

10. Pope John Paul II, *Laborem Exercens*, No. 19 (Sept. 14, 1981); Pope John Paul II, *Familiaris Consortio*, No. 23 (Nov. 22, 1981); Pope John Paul II, *Evangelium Vitae*, No. 90 (Mar. 25, 1995); NAT'L CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* 101-02, 82-83 (1986), available at <http://www.usccb.org/sdwp/international/EconomicJusticeforAll.pdf>.

This interesting convergence of arguments<sup>11</sup> between these two diverse groups illustrates the growing recognition that issues of workplace restructuring are not purely “women’s issues.” They are “family issues,” involving the entirety of the human family. They are most fruitfully debated in forums that bring together men, women, philosophers, lawyers, economists, and historians. This symposium provides just such a forum.

In her opening keynote address, philosopher Sister Prudence Allen, RSM, sets the stage for the breadth of perspectives represented in the symposium by providing a philosophical foundation for analyzing the wide range of legal issues relevant to balancing work and family obligations.<sup>12</sup> Drawing on the philosophical school of existential personalism,<sup>13</sup> Sr. Allen identifies three areas where the application of positive laws to the intersection of the family and workplace is especially problematic. The first involves the underlying theory of gender identity on which various laws are based. Sr. Allen applies her groundbreaking work on the various theories of gender identity in the history of western philosophy—gender unity, gender polarity, gender complementarity, and gender neutrality—to an analysis of particular laws affecting the workplace and family. She argues that the integral gender complementarity theory most accurately reflects the ontological reality of men, women and families, offering a useful model for assessing workplace laws in support of family life. Second, Sr. Allen examines situations in which our legal system provokes crises of conscience by encouraging lying for the good of one’s family. Arguing that the correct view of conscience describes it as a faculty of the practical intellect, she demonstrates the dangers of alternative philosophical views that consider conscience as conformed to theoretical reason, imagination, emotions, memory or will, particularly with respect to laws affecting tensions between family and work obligations. Finally, Sr. Allen considers the need to apply a correct understanding of the common good (taking into account simultaneously *both* the good of the individual member of a group and the good of the group as a whole) to the work and family laws.

The first panel continues developing the theoretical groundwork for cooperation on issues of conflict between work and family, exploring the challenges of dialogue among feminists from various faith and secular philosophical traditions. Law professor Susan Stabile explores the theoretical underpinnings of a Catholic feminist legal theory, which she argues differs

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11. This convergence is explored in Elizabeth R. Schiltz, *West, MacIntyre, and Wojtyla: Pope John Paul II's Contribution to the Development of a Dependency-Based Theory of Justice*, 45 J. CATH. L. STUD. 369 (2006) and Elizabeth R. Schiltz, *Should Bearing the Child Mean Bearing All the Cost: A Catholic Perspective on the Sacrifice of Motherhood and the Common Good*, 10 LOGOS 3 (2007).

12. Sr. Prudence Allen, *Analogy, Law and the Workplace: Complementarity, Conscience, and the Common Good*, 4 U. ST. THOMAS L.J. 343, 350 (2007).

13. *Id.*

from mainstream secular feminist legal theory in four fundamental ways.<sup>14</sup> Catholic feminist legal theory is based on an understanding of: (1) the human person as fundamentally relational in nature; (2) the institution of the traditional family as indispensable in the promotion of the common good; (3) differences in sex and gender not as simply biological facts or social constructs, but rather as expressive of fundamentally different but equal reflections of the image of God; and (4) human work as vocation. Stabile explores the ways in which these differences support and conflict with aspects of secular feminist legal theory dealing with work and family.

Marie Failinger, also a law professor, claims that a Lutheran feminist perspective incorporates many subversive elements of the Gospel's proclamations.<sup>15</sup> While supporting secular feminists' arguments for contextual reasoning about justice, Failinger argues that the Lutheran "hermeneutic of suspicion," based on the infection of both the reason and the will by sin, should be applied to the alternative ideological foundations constructed by feminists themselves.<sup>16</sup> Similarly, while Lutheran feminists must accept their status as co-creators with God and acknowledge their own responsibility for some forms of workplace oppression, this recognition of the inherent sinfulness and finitude of all human lives offers potential resources for identifying and implementing appropriate legal responses to human limitations. Failinger also offers the Lutheran concept of work (as something that derives its value not from its own nature but from the fact that it is done in service to the neighbor) as a tool for navigating some of the knotty problems arising out of the social value of private and public work.

Eva Feder Kittay responds to Stabile and Failinger from the perspective of a secular feminist philosopher.<sup>17</sup> She finds significant areas of overlapping consensus in the religious feminism presented by Stabile and Failinger and the secular care ethics she has been instrumental in formulating.<sup>18</sup> Indeed, she argues that the philosophical basis for an understanding of the self as relational in nature and the rationale for a contextual approach to knowledge articulated by secular care ethicists is richer and has more in common with their religious analogues than either Stabile or Failinger recognize. Kittay suggests that future cooperation on these areas of overlapping consensus will require "secular feminists . . . to curb their suspicion of the faith-based motivations of religious feminists and religious feminists . . .

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14. Susan J. Stabile, *Can Secular Feminists and Catholic Feminists Work Together to Ease the Conflict Between Work and Family?*, 4 U. ST. THOMAS L.J. 343, 432 (2007).

15. Marie A. Failinger, *Women's Work: A Lutheran Feminist Perspective*, 4 U. ST. THOMAS L.J. 343, 405 (2007).

16. *Id.* at 413.

17. Eva Feder Kittay, *Searching for an Overlapping Consensus: A Secular Care Ethics Feminist Responds to Religious Feminists*, 4 U. ST. THOMAS L.J. 343, 468 (2007).

18. Eva Feder Kittay, *A Feminist Public Ethic of Care Meets the New Communitarian Family Policy*, 3 ETHICS 111 (2001); see also KITTAY, *supra* note 9.

to check their insistence on having hold of the deeper truths.”<sup>19</sup> At the same time, however, Kittay sees significant disagreement between secular feminists’ conception of the family as the “social technology by which we take care of our dependency needs,” and the Catholic conception of the family presented by Stabile and Allen as a monogamous, heterosexual unit.

In the second keynote address, Joan Williams, law professor and director of the Center for WorkLife Law and the Project for Attorney Retention, shifts the focus of the symposium from the theoretical to the practical.<sup>20</sup> She addresses the growing distress felt by both male and female workers of all economic classes from the conflict between the norm of the ideal worker (totally devoted to and always available for work) and the norm of family care (requiring the presence of adults to care for their children and elderly or ill parents or relatives). Williams meticulously documents the ways in which this clash of ideals is “bad for men, worse for women, and worst of all for children,”<sup>21</sup> with particular focus on how time norms are enforced in law firms. Drawing heavily on her experiences with the Project for Attorney Retention and the Center for WorkLife Law, Williams argues that the growing tension over this issue is increasingly manifesting itself as a generational gap rather than a gender gap. She sketches a compelling business case for more flexible work arrangements to alleviate this tension.

The second panel explores policy prescriptions for addressing the tension between the demands of the workplace and the demands of the family in different contexts. Economist Gregory Acs from the Urban Institute analyzes the particular challenges to the well-being of children faced by low-income working families—such as the economic necessity of working during the first year of a child’s life, non-standard work schedules, lack of flexibility in taking time off work to care for sick children, and poor quality day care.<sup>22</sup> Law professor Michael Scaperlanda subjects the immigration reform proposals to the scrutiny of Catholic social thought, concluding that the Catholic Church’s commitment to a view of the human person being made for community—in families, the Church, civil society, and the state—favors a comprehensive, compassionate resolution of the problems faced by the large population of illegal immigrants in the United States. He proposes strict measures to stem future influxes of undocumented immigrants, creation of a guest worker program, legalization for most undocumented immigrants currently in the country, and the use of foreign development aid to reduce the economic disparity that prompts most immigration.<sup>23</sup> Social

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19. Kittay, *supra* note 17, at 473.

20. Joan C. Williams, *The Politics of Time in the Legal Profession*, 4 U. ST. THOMAS L.J. 343, 379 (2007).

21. *Id.* at 380.

22. Gregory Acs, *A Good Employee or a Good Parent? Challenges Facing Low-Income Working Families*, 4 U. ST. THOMAS L.J. 343, 489 (2007).

23. Michael A. Scaperlanda, *Reflections on Immigration Reform, the Workplace and the Family*, 4 U. ST. THOMAS L.J. 343, 508 (2007).

critic and historian Allan Carlson, President of the Howard Center for Family, Religion and Society, documents the gradual implementation of what came to be a robust family-wage regime (a family-sustaining wage for male workers) in the United States, grounded in Catholic social teachings and advocated and promoted primarily by labor unions through the 1970s.<sup>24</sup> Carlson argues that the weakening of the family-wage regime in the 1970s has adversely affected families and recommends aggressive payroll and income tax policies to support households rearing children.

In the final panel, three law professors present highly original perspectives on the legal theory of work-family conflict. Kirsten Davis focuses on the legal rhetoric used by legislators, courts, and regulators to navigate conflicts between work and family. She argues that the language of “accommodation” unduly restricts thinking about how employees can successfully enact their work and family roles, and proposes substituting “facilitation” or “negotiation” in discussions about policies on work-family issues. She supports her argument with a careful examination of the meaning of “accommodation” in four different legal schemes: “reasonable accommodations” under the Americans with Disabilities Act; “religious accommodations” under the Civil Rights Act of 1964; “accommodations” under the Family and Medical Leave Act; and “public accommodations” under both the Americans with Disabilities Act and the Civil Rights Act of 1964. Michael Selmi poses the provocative question of why employers should be expected to bear the brunt of changing practices to accommodate the demands of family life. He argues that the persistent focus on workplace restructuring in debates about work-family balance obscures some deeper issues that are at play, such as the failure of the school day to correspond with the typical work day and, most significantly, the failure of men to assume a greater share of the burdens of family life. Finally, Kathleen Baker grapples with the perplexing question of the persistence of the disparity between the amount of unpaid work men and women do, despite our professed political and legal commitment to gender equality.<sup>25</sup> She concludes that neither the biological nor the patriarchal explanations for this disparity address the normative question of what exactly is problematic about it. The disparity is troublesome, she argues, because it perpetuates a norm that is *not* the choice of all women, or even a realistic economic option for many women, and it threatens to undermine the gains made toward gender equality over the past decades.

In the introduction to his article, Selmi suggests that the debate over the work-family conflict has become “relatively stagnant.”<sup>26</sup> The contributions to this symposium illustrate, however, that the confluence of diverse

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24. Carlson, *supra* note 3, at 556.

25. Baker, *supra* note 1, at 599.

26. Selmi, *supra* note 2, at 573.

currents of thought represented by different perspectives of faith, philosophy, gender, and academic disciplines can stir the waters and dispel the stagnancy, opening the possibility of cooperation on crucial issues affecting the entire human family.