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Expanding Frames of Reference in the Work Life Policy Debate

Theodore Hall
Seton Hall Law

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EXPANDING FRAMES OF REFERENCE
IN THE WORK-LIFE POLICY DEBATE

THEODORE HALL

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i. ABSTRACT

The big decisions in domestic life - whether to have child, whether to work or stay home - feel like the most personal, identity-driven choices in our lives. Yet, how we make those choices is largely determined by the impact of a single, global demographic trend: the entry of women into the workforce. In the United States, female employment accelerated throughout the twentieth century without an adequate governmental response. The shortfalls of the policy status quo can be seen in all the intractable and, most importantly, *new* problems that individuals, couples, and nations face in reconciling the needs for paid employment and traditionally unpaid care (i.e., Mom and Mammon). Some nations adjusted to the change earlier, more completely, or cohesively and have had better policy outcomes as a result. But they didn't all succeed on the same model. A socio-economic analysis reveals two kinds of stable systems: some nations make it possible for a critical mass of women to remain at home in more-or-less traditional roles, others provide care, the actual service that is needed, to free up women for the demands of the modern working world.

This paper shows how the personal, domestic choices are connected to labor policy and macroeconomic context by evaluating those choices in different frames of reference. The sources for this contextual analysis range from work-life advocacy whitepapers, to social science studies, to theory at the intersection of sociology and macroeconomics. The first section introduces the category mistake as a way of mapping these frames of reference. The second and third sections place domestic decisions in successively wider contexts, from personal identity, to a couple's earning power, to working conditions. The final section examines how the alternative models provide stability, but also force the choice of one model or the other. I conclude with reasons for both optimism and pessimism about future progress.

I. CATEGORY MISTAKES & COALITION BUILDING

In *Reshaping the Work Family Debate: Why Men and Class Matter*, Joan Williams both frames and addresses work-life problems by seeking common cause among those who are straining under the policy status quo. She aims not just to change the discourse around domestic life, but “refram[e] American politics,” as the means to that change.¹ Her drive for pragmatic alliance is a persuasive candidate for the legislative path forward. But more interestingly, her combination of the two rhetorical roles – identification and solving - in coalition-building shows how opaquely interconnected phenomena, like the myriad problems people have at home, can snap into useful policy proposals where we find a causal hierarchy. She comes to practical proposals, but starts with a more general survey of gender and class conflict. This solvency-first approach (i.e. putting the horse before the cart) will yield good strategy and good rhetoric, but I found it lacking in explanatory power. If such large portions of the American population have neglected interests in common, what forces are preventing the coalition at present? Williams argues for working class overtures as the way to build the coalition, but it is hard to believe that something like class sensitivity could be the *cause* of systemic work-life conflicts.

Colloquially known as “missing the forest for the trees,” the category mistake is a formalization of the concept introduced by the philosopher Gilbert Ryle in 1949.² Ryle tells the story of a young man in the north of England given a scholarship to study at Oxford University. Knowing, and saying, that he is going to Oxford University is enough to put him on the right

¹ JOAN C. WILLIAMS, *RESHAPING THE WORK FAMILY DEBATE: WHY MEN AND CLASS MATTER* 1 (2010).

² GILBERT RYLE, *THE CONCEPT OF MIND* 16 (1949)

path from the northern train station, to oxford's local one, to getting out of a cab. But then the student is stumped. One building is labeled "Library" and another "Administration" but there is no building labeled "Oxford University." However, his idea of what he is looking for should not be written off as completely wrong, since it seems to have gotten him quite far. The actual category mistake is thinking that a university (an administrative relationship between buildings, scholars, students, etc.) was the same type of thing as one of its constituents (a building), but the intended lesson isn't just about describing hierarchies. The category mistake is a way of being partly right. The mistake is thinking that X is about Y in some special sense, when it is actually the case that X is just a type of thing that has things like Y in it. But looking for Y still remains a reliable way toward X, even if it cannot get you there.

This may explain why the category mistake framework is a good fit for explaining the impediment to improving work-life policy. The grievances based on class, race, or gender divisions are partly right but cannot account for the scale of the problem. It is the type of problem that contains social fractures, not the type of problem that can be reduced to them.

II. PERSONAL CHOICES ARE MADE AS A COUPLE

The chief category mistake in the discourse around domestic life is the idea that gender conflict consists of wrong actions done across the gender line. The conflict contains those actions, but behind every animus-laden instance of spousal abuse is a more neutral power dynamic with greater explanatory power. The mistake is made by seeing gender conflict through frame of gendered actors and actions. The view is partly right, as individuals and their conceptions of gender roles are some of the causes of friction, but one is better served by

looking at patterns common to the whole set of gender conflicts. This demands that one let go of grievance-based arguments and see the domestic power dynamic as force to be explained rather than result of patriarchal ill-will. This section covers four reasons why the framing of domestic choices as a gender war is bad analysis and rhetoric. First, the gender war is inaccurate as a description of contemporary domestic decision making. Second, it is bad strategy to advocate for a policy that affects all men and women, as if it were a women's issue only. Third, looking only at the domestic imbalance between men and women necessarily focuses the issue on falling short of equality, rather than looking closely at the dynamics behind smaller gains to find what is keeping them small.

A. THE GENDER WAR FRAMING IS INACCURATE

Women who combine motherhood and paid work are the growing majority of women,³ but even the most thorough survey of their problems would not tell you much how they will address them, because the big domestic choices are precisely the type of decisions made jointly by couples. There is a bargain at the base of many things a couple may do, but the essential mission in understanding work-life bargains in particular is that the couples decisions will have strong effects on everyone else in society. This is a highly under-developed aspect of work-life policy analysis, and the social sciences in general. Even a decade ago, it was a rare study that accounted for any joint decision making in couples.⁴ That may be because past negotiations

³ Gøsta Esping-Anderson, *Families and the Revolution in Women's Roles 2* (January 16, 2008) (unpublished paper available at <http://dcpis.upf.edu/~gosta-esping-andersen/materials/families.pdf>).

⁴ Susan G. Singley & Kathryn Hynes, *Transitions to Parenthood: Work-Family Policies, Gender and the Couple Context*, 3 GENDER AND SOCIETY 376, 377 (June, 2005).

were completely dominated by adherence to separate gender spheres, but contemporary social surveys are revealing a different, more egalitarian shape to contemporary domestic decision making.

Contrary to much of the conventional wisdom about the battle of the sexes, our research finds basic alignment between men and women in terms of what they want in life and what they believe about one another.⁵

The survey highlights three main supports for that thesis. First, although reactionary sentiments attract more publicity, the survey shows them to be the minority position. Even with the extra strain on families, most men as well as women view the female presence in the workforce as a change for the better.⁶ Second, this harmony is not a result of men making up for past transgressions, but of both men and women now “largely sharing the same life ambitions, goals, and realities.”⁷ When traditionalists and egalitarians marry within their own group, the potential for the traditional conflict (a woman chafing under the patriarchy, her husband supporting it) may be gone. Third, even the distance between the traditionalists and egalitarians has narrowed, as both sexes now support women’s presence in the workplace.⁸ Although domestic conflicts can cause great strain and emotional damage, the survey’s results support an underlying rule of domestic cooperation. Male vs. Female conflicts are highly charged (and likely misleadingly memorable) exceptions.

⁵ John Halpin & Ruy Teixeira, *Battle of the Sexes Gives Way to Negotiations: Americans welcome women workers, want new deal to support how we now work and live today*, in *THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING* 395, 396 (Heather Boushey & Ann O’Leary eds., 2009).

⁶ *Id.* at 402.

⁷ *Id.*

⁸ *Id.*

B. PUSHING BACK AGAINST WORK-LIFE FEMINIZATION

Even if reactionary attitudes remained the chief barrier to better work-life policy, it would still be a poor strategy to advocate change from a specifically female point of view. First, it keeps the concern of all couples and families ghettoized as a women's issue, which hides common interests from potential allies and needlessly rouses dormant enemies. Second, adopting a gendered frame will lead to gendered policies which often preserve the inequalities of the time. Special pleading for the female's needs and disadvantages may have been the only path available to the pioneers of the women's movement, but now the arguments can come from a position of strength. As Maria Shriver puts it, "[q]uite simply, women as half of all workers changes everything."⁹

The Shriver Report is a collection of work-life advocacy that captures the right tone for modern women's policy advocacy: succinct and sweeping. As half the workforce, there is no cause to label the problems women experience at work as special cases. Problems that affect so many employees should be important for those reasons alone, the same way they are evaluated when men are the beneficiaries. Rhetorically, this analysis tends to favor the entitlement of a citizen over a victim's pleas for redress. Williams builds her coalition up by walking firmly away from identity-driven frames, but it is not just a gesture to placate anti-feminists, it is like in the best interest of feminism itself, as "[f]eminist thinking will always be led by a frisson of self-exploration but feminism will be far more effective if it does not stop there."¹⁰ This reframing is not cosmetic, but essential for visibility.

⁹ Heather Boushey & Ann O'Leary, *Executive Summary* in THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 17, 17 (Heather Boushey & Ann O'Leary eds., 2009).

¹⁰ WILLIAMS, *supra* note 1, at 147.

Because of the way they came onto the agenda of public debate, gender issues have been widely regarded as women's business and of little concern to men and boys. In almost all policy discussions, to adopt a gender perspective substantially means to address women's concerns.¹¹

This is not the benign embarrassment of being invited to the wrong academic conferences; a pre-feminized framing gets in the way of work-life advocacy. The gendered natures of breadwinning and care stand in the way of cultural progress towards equality, and to have every voice that asks for accommodation be female reinforces those preconceptions. They remain even within the work-life field.¹²

Arguing that political tactics require down-playing women's second-class status, one expects criticism from the left, but what to make of the 30% of women who "agree that the best kind of family is premised on a male breadwinner."¹³ The first difficulty with framing work-life policy as a women's issue is that one loses visibility, but it also drives away those that may have everything to gain from the policy, but recoil at the 'feminist' label. A seeming blind spot in feminist discourse comes where one needs to co-opt the traditionalists, as work-life advocates must. Despite the fact that 80% of today's families lack the traditional male and female role regime¹⁴ the holdouts in the remaining fifth both continue on as our fellow citizens and exert influence on the cultural and economic structures affect us all. Understanding (and placating)

¹¹ Emily W. Kane & Laura Sanchez, *Family Status and Criticism of Gender Inequality at Home and at Work*, 4 SOCIAL FORCES 1079, 1085 (June, 1994).

¹² Rhona Rapoport, Susan Lewis & Richenda Gambles, *Work-Personal Life Harmonization and Pragmatic Strategies for Change 2* (March 2004) (unpublished paper available at <http://web.mit.edu/workplacecenter/docs/wplh.pdf>).

¹³ Gøsta Esping-Anderson, Diederik Boertien & Jens Bonke, *Couple Specialization in Multiple Equilibrium*, 9 (September 3, 2008) (unpublished paper available at http://dcpis.upf.edu/~gosta-esping-andersen/materials/couple_specialization.pdf).

¹⁴ Boushey & O'Leary, *supra* note 9, at 18.

the fears of traditionalists will require the type of discourse that can establish common ground even in a red state.

Finally, pleading what is heard as a woman's case can make for victories that preserve the patriarchy of the moment as if in amber. Divorce and Social Security provide an example of how a win for subjugated woman can both preserve and perpetuate pernicious gender norms. When a marriage ends in divorce after less than a decade, the spouse earning less can claim no spousal benefits. Women are substantially more likely than men to be the partner earning less, especially (due to pregnancy and child-rearing) in the early years of a marriage.¹⁵ A marriage that ends after ten years will only give the lesser earning partner the right to an incremental spousal benefit, half that of greater earning partner. Depending on one's position on social welfare, this could seem like a just scheme, dependent on earning and not gender *per se*. But the policy was adopted with a specific type of lesser earner in mind:

The structure of benefits is not entirely an accident; they reflect the realities and the biases of the time in which the program was created. Participants in the debate at the time argued that a woman living alone could survive on less than a man, with one participant declaring that a woman could do her own housekeeping while a man would have to eat in restaurants.¹⁶

C. INCREASING THE MALE CONTRIBUTION

¹⁵ Ann O'Leary & Karen Kornbluh, *Family Friendly For All Families: Workers can caregivers need government policies that reflect today's realities*, in *THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING* 75, 99 (Heather Boushey & Ann O'Leary eds., 2009).

¹⁶ *Id.*

Stable, minimal levels of housework and childcare persisted from the 1960s through the 1980s. Then the 1990s produced a 50% spike in North America and Scandinavia.¹⁷ Fathers are not yet doing half the housework, but they are doing more than ever before. But this is a phenomenon limited to the educated elite. Esping-Andersen finds that “not only is gap in childcare between low and high educated fathers very large, but it is actually increasing, and concludes that “[t]he feminization of the male life course is pretty much limited to the top of the social pyramid.”¹⁸ Why is this the case? Highly educated men also are the one who work the longest hours, so there is reason to believe that this is an egalitarian shift that comes from the heart, as workplace pressures have mounted against the type of flexibility that makes routine child care easy. As it turns out, understanding the nature of men’s jobs is the key to promoting gender equality. All strata of men join women in “the ubiquitous belief in an ‘essential’ gender order, the middle and upper classes simply add the subsequent doctrine that rationalizes the primacy of the successful male career in marriage as economically efficient and in the best interests of all family members.”¹⁹

Men perform a masculinity defined almost entirely by class. Educated men may have egalitarian principles, but they are away from the home roughly ten hours a day. With fewer overall working hour (and greater financial constraints) working-class men are more egalitarian in response to housework even if they can be hyper masculine in other arenas.²⁰ But all men are responding to, the economic pressures that threaten to chase them out of the middle class, if

¹⁷ Esping-Andersen, *Couple Specialization*, *supra* note 13, at 9.

¹⁸ *Id.*

¹⁹ Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 5 *GENDER AND SOCIETY* 527, 529 (October 1996).

²⁰ *Id.* at 545.

such has not already happened. “The breadwinner-homemaker family has been emblematic of middle class status” but neither educated nor working-class men are currently able to get the kind of job security (or even standard of living) their peers had only a generation ago.²¹

Paternity leave policies are under-utilized for good reasons everywhere, even where they are thought to be most successful. Norway and Sweden seemed to do away with the usual barriers by making leave pay 80% of earnings and making the minimum paternity leave non-transferable. But the only men taking long leaves were public sector workers because “the career penalty of interruptions is minimal in what we might call ‘soft economy’ jobs, but this is not the case in the ‘hard’ economy where competitive pressures operate.”²² Women also contribute to this dynamic to the extent that they prize masculine career success,²³ but internalized gender norms are not what motivate men to be absent from the home, many “feel powerless to challenge this ideology at work.”²⁴ Williams acknowledges that it takes rare courage to stand up for family responsibilities as a man, and so feminist supporters should rally behind those that buck the office culture by asking for part-time work or quitting altogether, but certainly not expect anyone to do what is actually need for equality; it will likely lose them their job.²⁵

This is the proper context for the difficulty in being a father: one has to walk the line between neglecting children through lack of care and getting fired for being insufficiently dedicated to work. The masculine deficit in care-giving increases with hours worked, and may

²¹ WILLIAMS, *supra* note 1, at 158.

²² Esping-Andersen, *Families, supra*, note 3, at 14.

²³ Pyke, *supra* note 19, at 544.

²⁴ WILLIAMS, *supra* note 1, at 90.

²⁵ *Id.*

be the major factor in the decision for women to leave the workforce. “Today’s all-or-nothing workplaces pressure professionals toward neotraditional families in which the husband has a high-prestige long-hours job and the wife ‘opts out.’”²⁶ This is a pernicious dynamic that may cause even greater inequality in the home, since a wife’s “relative bargaining strength in the family...depends primarily on her earnings power.”²⁷ The key analytic tool is distinguishing between ‘masculinity’ and ‘men’: different types of masculinity are built into the time and devotion norms of all jobs, but that harms men as much as it does women.²⁸ The category mistake is made in treating the instances and effects of patriarchal inequality as something that comes *from* men, when it is better described as a force that is acting on them.

III. COUPLE’S CHOICES ARE MADE IN THE MARKET

Americans typically think of work-family conflict as a private issue. This is not surprising, given that American public policy to resolve such conflict is virtually nonexistent, forcing us all to cobble together individually negotiated solutions in the private marketplace.²⁹

A child was a net benefit in an agricultural economy. They could weed or feed livestock soon after walking and one only need pay them in room and board. When industrialization and urbanization lowered infant mortality and made children relatively more expensive, birthrates

²⁶ *Id.* at 31.

²⁷ Esping-Andersen, *Families*, *supra* note 3, at 15.

²⁸ WILLIAMS, *supra* note 1, at 144.

²⁹ *Id.* at 8.

declined all across the civilized world, but shot back up again when women started to work.³⁰ The economist, Jerry Muller, makes sense of the economic contexts of the modern family by viewing the issues through four spheres of human interaction (the family, market, state, and nonprofit sector) and the paid and unpaid labor that take place in them.³¹ The rarity of accounting for unpaid labor in economic models is instructive for how one might have to retain some seemingly regressive elements (spousal Social Security benefits) to design an equitable social safety net, but the real value of this analysis is in seeing where the burdens of modern life get passed from sphere to sphere.

The state and nonprofit sector touch Americans primarily early and late in life, or at margins of society below the poverty line. The adult trade-off is primarily between the market and the family, with time spent in either necessitating neglect of the other.³² Esping-Andersen finds the same economic and temporal divides in all developed nations. "From a life cycle perspective, the welfare state only really gains prominence when we are very young or old."³³ Expansion of the formal welfare state looms large in the progressive mind, but the empirical economic reality of domestic life takes place in the balance between home and market. And it is that respect that the current American patchwork of worker's protections have been most inadequate. Children and families have needs that are only met by the provision of services, i.e. care. When everyone needs care but only the rich can have servants, we may have an instance of market failure.

³⁰ Jerry Muller, *Lecture Thirty-One: The Family Under Capitalism*, in THINKING ABOUT CAPITALISM: PARTS I-III, 64-65 (The Teaching Co., pub. 2008).

³¹ *Id.* at 65.

³² *Id.*

³³ Esping-Andersen, *Families*, *supra* note 3, at 16.

Unless subsidized (say by tax concessions or by vouchers), commercial social services are typically priced out of the market for most households below the median income. The same goes for private health insurance and retirement plans.³⁴

We have long since passed the era when one source of employment could sustain a family, what we see in the extra domestic stress in the working class is evidence that now several sources of income, or even a benefit-less well-paying job cannot suffice. The preferred policy tool of the past few decades has been tax-expenditures along the lines of Flexible Spending Accounts. They've proven to be a poor fit for worker's needs, employed by 6% of the 30% of workers eligible.³⁵ Discounts cannot price very many workers back into the power to meet their care needs on the market. This may be a system in which regressive taxation persists out of inertia and lack of lobbying strength (and not by design) but the effect of the market failure for care services reaches all women, not just the poor. When someone has to quit employment for the sake of the family, it can only be the lesser earner and - as with Social Security and divorce - that is almost certain to be the woman. But women under that kind of strain are precisely the ones whose earnings are a vital contribution to their home.³⁶

At every level, the policy of tinkering around the details of the current system lacks solvency because it channels funds or protection to an influential (or, to be more charitable, highly visible) constituency when the source of the problem is a global change in the biography of a critical mass of women. It's the significance of the 50% shift that goes surprisingly

³⁴ *Id.*

³⁵ O'Leary & Kornbluh, *supra* note 15, at 81.

³⁶ Esping-Andersen, *Families*, *supra* note 3, at 8.

underplayed in the Schriver Report, despite being placed front and center in the rhetorical lede of each article. The shift from disfavored class to majority participants is reminiscent of the post-war de-colonization of the second and third worlds. And yet the concept of childcare remains treated in Lifestyle sections of the press rather than in Business or national political discourse.

A. **SHORTFALLS IN CURRENT WORK-LIFE POLICY**

Work-family conflict is so insoluble for so many people because of a public policy environment that makes Americans' daily efforts at balance unworkable.³⁷

The policy status quo comes in for harsh treatment in the literature of work-family advocacy, but before one looks at the critique, it is helpful to learn what the advocates want to get out of labor policy. The items bulleted below are a particular example of such advocacy but are also broadly representative of the common calls for reform:

- Updating our basic labor standards to include family-friendly employee benefits.
- Reforming our anti-discrimination laws so that employers cannot discriminate against or disproportionately exclude women when offering workplace benefits
- Updating our social insurance system to the reality of varied families and new family responsibilities, including the need for paid family leave and social security retirement benefits that take into account time spent out of the workforce caring for children and other relatives

³⁷ WILLIAMS, *supra* note 1, at 8.

- Increasing support to families for child care, early education, and elder care to help working parents cope with their dual responsibilities.³⁸

All four policy suggestions *could* fit in with moving the United States toward the northern European model, but they could also fit half-measures that would fail in that task. The northern European system is financed through taxes that are kept high enough to get the essential care support and services to all who need them. Our current system is designed on using the market to fill those gaps and letting the market fail those that cannot afford proper care. The two are much further apart than the general call to “increase support,” can account for. They depend on different *politics* as much or more than as different policy. That is why tact, rather than intellectual honesty may be the best way forward. Williams’ coalition-centered approach is her response to this problem of connecting the problems we have with the country we have.

Writ large, this book is about reframing American politics...The United States has the most family-hostile public policy in the developed world, and changing that situation will require reshaping American politics in some basic ways.³⁹

One of the reasons the above policies proposals acquire a feminine voice is that, given the current workplace culture, “programs that seem neutral between men and women actually cater to traditional male working patterns.”⁴⁰ The neutral (and status quo-preserving) laws are currently the only ones that can any traction in political debate. The items that directly ask for family accommodations will face a legislative uphill battle. It would be better of work-life advocates to

³⁸O’Leary & Kornbluh, *supra* note 15, at 105.

³⁹ WILLIAMS, *supra* note 1, at 1.

⁴⁰ *Id.*

bargain for policies that seem (or actually are) neutral, business-like, and the farthest thing from contentious redistribution. It is the way to build a coalition for action, and possibly swift, new law if the general wish list can be set aside for what polls best. Flexible work hours are the top choice for what both men and women would change about their jobs.⁴¹ There could be a large advantage to arguing for that, and only that, until it is realized in full.

One invites strong opposition, if not failure, by casting the needed reforms as targeted toward family, women, and children. That seems to be what has gone wrong with the Family Medical Leave Act and the Fair Labor Standards Act. Both pieces of legislation fail to apply to (and therefore help) half of all workers, and under-serve the families they do affect. A legislative strategy that is based on universal appeal and coalition building may lead to more effective, generally applied laws. One can imagine a scenario where employers are required to allow alternatives to 9-to-5 working hours. Not only would every childless young adult be brought into the coalition, but the broad base of support would also insure that the law does what it claims to do. Neither parents nor hourly workers have been able to amass enough support on their own to amend laws that were targeted at them, but have failed to work as advertised.

i. FAMILY MEDICAL LEAVE ACT

⁴¹ Halpin & Teixeira, *supra* note 5, at 11.

The Family Medical Leave Act of 1993⁴² (guaranteeing certain workers up to 12 weeks of unpaid family leave) has done more good than harm. Even so, concerns about patchwork tactics and loaded language continue to color its current implementation and future improvement. The final assessment can come across as too glib to reflect reality, but it does - for essentially all men, the act is worse than useless. Taking the leave will do them more harm from employers than it yields good to the family.

FMLA was passed in response to the failure of both Title VII and the even more closely targeted Pregnancy Discrimination Act to stop pregnant workers from being fired.⁴³ The law's language was made gender-neutral to alleviate "the inability of both men and women to access needed leave for family responsibilities."⁴⁴ But the remaining conception of it as legislation for a woman's problem, mostly based on pregnancy, comes from the new bill's own language defining maternity leave as a disability which "reinforces the idea that time off from work around the birth of a child is a time for recuperation a, physical need not experienced by fathers. In distinct contrast, men must take a 'vacation' from work."⁴⁵

The failure of FMLA to help support to men can be rendered more instructive than frustrating once one knows about the failings of stronger leave systems for men, I address in greater detail below how even Norwegian paternity leave (nearly forced on the populace through high incentives) is stymied by masculine career cultures that penalize any time men take off. So, as perhaps with FMLA as a whole, taking half-a-loaf is better than the *status quo-ante*. But half-measure may indeed be too generous a term for *unpaid* leave.

⁴² The Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2006).

⁴³ O'Leary & Kornbluh, *supra* note 15, at 87.

⁴⁴ *Id.*

⁴⁵ Singley & Hynes, *supra* note 4, at 393.

For most couples, the availability of unpaid leave for men through the FMLA was seen either as irrelevant or as a constraint. Almost uniformly, men were the higher wage earners, so going without their earnings was not considered an option. Couples who identified the mother as the primary caregiver did not consider it; couples whose approach to parenting was more pragmatic than ideological may have considered it but rejected it because of the financial implications.⁴⁶

Not only does the narrow application hurt the act's public support, but it also undermines the purpose of the act. To be covered under the law, one must first work for a business with more than fifty employees for over a year, which leaves half of American workers beyond the law's reach.⁴⁷ All those exemptions directly counteract the cultural and political shift that is the precondition for men to take time off for care. The concession won by the actors with public choice advantages (the business lobby) to make the leave unpaid enabled the establishment of a weak program that has hardened, rather than broken the culture of masculinized paid labor and feminized unpaid care.

ii. FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act⁴⁸ mandates time-and-a-half pay for wages earned in excess of a forty-hour workweek, "but the law does not put an actual limit on the number of hours an employer can require an employee to work. Nor does it prohibit mandatory overtime or

⁴⁶ *Id.*

⁴⁷ O'Leary & Kornbluh, *supra* note 15, at 90.

⁴⁸ The Fair Labor Standards Act of 1938, 29 U.S.C. §§201-219 (2006).

unpredictable, constantly changing workplace schedules.⁴⁹ The FLSA also manages to split the difference between workers' society-wide need and individual firms' economic imperatives by giving workers the benefits it takes to keep them working. As stated above, one either needs time to care for a family or wages high enough to employ someone to do so. The additional wages will not go far enough to solve the problem, and the requirement of mandatory overtime actually makes it worse. A factory worker that has a sick spouse or child could benefit from a 40 hour workweek with optional overtime, but by starting from the premise that the job comes first, the FLSA placed him or her in an even more difficult position.

What the FLSA does is entrench the care-taking-free demands of male-employment and gendered earning disparity by pulling middle-class breadwinners out of nurture either through mandatory overtime or the obvious economic pressure to capture a fleeting incentive. Again, the laws that are supposedly designed to enhance workers' quality of life both miss the root cause of the modern problems, and make it worse when the new policy further reinforces gendered separation of work and care giving. A cap on working hours is an entirely a unrealistic policy, but it may be the only thing that gets people home enough to be good parents without losing them their jobs. Williams argues that “[w]omen will continue to be disadvantaged if employers persist in designing the most desirable jobs around someone available 24/7 – in other words, a man with a stay-at-home wife.”⁵⁰

⁴⁹ O’Leary & Kornbluh, *supra* note 15, at 91.

⁵⁰ WILLIAMS, *supra* note 1, at 39.

IV. VIEWING U.S. POLICY IN INTERNATIONAL CONTEXT

Equality within any given couple depends...on societal level shifts.⁵¹

Unbending employers are not the source of society's ills. They cause certain problems in the United States and both the same and different problems elsewhere, but it is a final category mistake to look at the problems of the workplace and see them as the result of American capitalist attitudes. Again, it is more accurate to say that larger forces are acting *on* the business world than to say business interests are at war with the family. The problems that have resulted from mass female employment are greatly clarified by the absence of America-specific effects. This is a global trend, and the global differences are quite revealing for the American strain of the problem.

Efficiency is far more pronounced in Spain and Denmark but, of course, for opposite reasons: in Spain, because the conventional male breadwinner family still remains pervasive; in Denmark, because the gender-symmetric model is well-entrenched. In other worlds, the kinds of inefficiencies that we associate with the unstable equilibrium are most manifest on societies, just like the British, where the old normative order is in decay and where an alternative has yet to become established.⁵²

One can have the southern European model that has preserved the old ways, or the northern European model that provides adequate care services (or access to them) to keep both spouses working. America is dealing with a more severe version of the British model, where the

⁵¹ Esping-Anderson, *Couple Specialization*, *supra* note 13, at 4.

⁵² *Id.* at 33.

state supports neither home care nor replacement-level services, but people continue to both have families and need jobs. The dual equilibriums of the two models come out of their mutually exclusive Pareto optimal (economic jargon for the game-winning sense of efficiency) outcomes. Once at a critical mass, "equilibriums become stable and self-reinforcing" because although the actual mechanism at work is something akin to manners, humans respond very strongly to cultural norms.⁵³ In a country where few or many wives work, doing the opposite makes one an oddity or perhaps a rebel, but one can have a fully validated social presence by doing what is expected.

The experience of mid-twentieth century American conformity may have left behind a maladaptive aversion to social pressure. It can be used for good. With something as legally unconstrained as gender relations, manners are what do the work of setting new expectations. The way progress is occurring is more familiar in a game-theoretic analysis. Through the twentieth century's progress in access to education and employment, the number of autonomous women is increasing in size, and is inviting men to adjust their gendered expectations or compete for the shrinking number of traditionalist women. If the trend is not halted or reversed, it sets the scene for an eventual critical mass. The subsequent, socially enforced manners to cement the new paradigm can then arise the way they always have, just by looking around at the neighbors.

A point in this reading's favor is that it accounts for both optimal peaks. The traditional equilibrium was and is sustained by women investing "primarily in homemaker skills in anticipation of the future role and this, of course, reproduced the self-fulfilling prophesy of

⁵³ Esping-Anderson, *Couple Specialization*, *supra* note 13, at 5.

comparative advantage."⁵⁴ Where there are expansive gender gaps regarding wages and education, specialization within the couple will win out as both a strategy for welfare maximization and a social norm. The rise of the dual career couple created a rival equilibrium (another way the game could be won) and it gained and sustained its own momentum as a generation of women planned to take *that* path through life. But there is a cost to not adopting either system if the unworkable territory between them is what a plurality of your population want. Those cultures have two equilibriums of their own to evaluate:

Failure to reconcile motherhood and careers will, for citizens, provoke a trade-off between having children, on one hand, and pursuing employment, autonomy and increasing household income, on the other hand. At the societal level this translates into one of two sub-optimal scenarios: a childless 'low fertility equilibrium' or a 'low income, low employment equilibrium'.⁵⁵

The United States is possibly suffering from both directions. Having children needs to be somewhat logical for most of the population, but the highly educated need to curb their outside commitments in order to sustain a career and the poor find themselves forced out of work to care for their children. Having children is no longer a strong strategy to succeed in any corner of American society. Both the educated and working classes are now made worse off by the tension between employment and care giving.

⁵⁴ *Id.*

⁵⁵ Esping-Andersen, *Families*, *supra* note 3, at 4.

V. CONCLUSION

Because gender and class are defining aspects of our identities, they make category mistakes very likely. We jump to the familiar script of gender or class oppression because those things are felt so deeply, and because they are partially accurate descriptions of what is harming up. But if one chooses to move past recrimination to solving the problem, then a wider view of oppression is necessary. Williams' coalition is a way to get to solutions by declaring war on blame, and making the case to the aggrieved parties that a narrow framing of their problems is not just an academic fault but truly wrong in a way that has real-world consequences. Because problems of work-life balance are felt by men and women alike, it was wrong for feminists to cast men as oppressors. Because both the lawyer and the factory worker are limited by their jobs, it is wrong to denigrate one or the other over culture war issues. Her strongest utilitarian point is that the failure to bind together dooms your own cause, but she expands the sense of wrongness to an ethical context. It is *wrong* not merely *wrongheaded*.

At first, I recoiled from the ethical color of her writing and the righteous anger that suffuses the writing of work-life advocacy, then I adopted it, but now I can see it in a wider context. The temperature runs so high on this subject because people are fighting for the welfare of those closest to them. The tone quickly turns accusatory because the institutions people are battling on this front are always more powerful than they are. It can turn despondent because some of the real causes behind this problem are amorphous social constructs like masculine norms of dedication to work and unequal expectations of mothers and fathers. If one cannot see a way to fight City Hall, it is nearly impossible to contemplate how one could fight society. But that is the task in this arena. The norms that establish patriarchal or egalitarian structures are things that cannot be legislated, only changed, one mind at time.

The comparison of the U.S. work-life problem with other models shows that what may have looked like softhearted continental-European welfare statism can be, by turns, more supportive of employment or home care than our own policy. But we should think very seriously before trying to emulate either model, as it is *politics* in the form of all those social conventions that determines *policy*, not the other way around. Williams was quite right to put the horse before the cart in this debate.