

UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT  
AND WHAT TO DO ABOUT IT

PANEL THREE: NEW DIRECTIONS IN FEMINIST LEGAL  
THEORY

SPEAKERS:

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PANELISTS:

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SUMMARY REMARKS:

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#### PROCEEDINGS

PROFESSOR WILLIAMS: I am going to talk fast, and talk short as an introduction to this panel. First, just a very few words about the norm of parental care. The goal—my goal, anyway, in using the norm of parental care which, of course, started out really as the norm of mother care—is to try to use the momentum of domesticity to bend our current gender to use the norm of parental care as a way of democratizing access to domesticity, which has always been class-based.

I think the poor women example is an extremely important example. All women suffer from the erasure of family work. But certainly in the current welfare evisceration, the women who suffer most concretely are the poor women whose work is being literally erased as they take three buses and sit hours in the clinic, waiting to get their kids care, and then are talked about as being lazy. That is one point I wanted to make.

The other point I wanted to just raise to this panel, who has written very interestingly about commodification, is just a question. Certainly when you talk about linking entitlements to family work in divorce law, judges do get very anxious about commodification. But I just wanted to raise a question. Namely, is that really an issue of commodification? We usually think of commodification as involving the shifting of things into the market that traditionally have not been in the market, as in the market for babies. When you're talking about linking women's family work to entitlements, you're not really talking about commodification, you're talking about allocation. I mean, if the wife does not own it, the husband is going to own it. Why is that less commodification, just because the husband owns it? So I wanted to raise for the panel the issue of whether linking entitlements to family work in fact raises the issue of commodification at all.

Finally, the issue of poor women. I think it's very clear that you need to link a strategy of linking family work to entitlements in the heterosexual family with a strategy of providing some sort of social subsidies. But I also think it's important in the current political climate, where the political will simply does not exist to enact new universal subsidy programs, not to wait; not to wait and not help women in the divorce situation until you can get widespread social subsidies.

PROFESSOR BOYLE: Thank you very much. My name is Jamie Boyle. I teach here at American University, Washington College of

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Law. Joan initially asked me to be the moderator on the panel, which I assumed meant that I had to be moderate. Later I was asked to be the facilitator, which presumably means I have to be facile. Unfortunately, I fear I can be neither.

Adrienne said that she wanted to run her panel in a kind of “Feminist Crossfire” style. I’m not sure I can do that, but what I’m going to try to do is to give a little bit of an introduction, and then to ask each of the panelists to speak for a short period of time—five, six minutes—about some of the issues that they see being raised here. Then I’d like to start off by asking some questions to the members of the panel, and then throw it open for a more general discussion.

The title of our panel is “New Directions in Feminist Legal Thought and Legal Theory,” and specifically reflections on new directions in feminist legal theory that might be inspired by Professor Joan Williams’ book.<sup>1</sup>

I think everyone who’s been here is familiar now with the major outline of the book. Professor Williams argues that our economy, our domestic sphere, our expectations, and our ideological vision are constructed around the notion of an ideal worker, a worker who works full-time and overtime, takes little time off for child bearing, or for childrearing. She argues that we need to eliminate the ideal worker norm in the market, in family entitlements, and that we need to change the way we talk about gender.

Both the specifics and the generalities of this project obviously, then, are an invitation to think more generally about feminism and where it’s going. As I understand it, that’s what this panel is going to do. This is particularly important because, in portions of the book that haven’t received much attention today, Professor Williams makes a series of very important contributions to feminist theory. She offers a series of critiques, or perhaps just friendly mid-course corrections to liberal feminism, to radical “dominance” feminism, and to feminism of any sort that sees the cure for contemporary social problems in an increasing socialization of child care and dependence.

Assessing the liberal feminism strategy, I see Professor Williams as arguing that this is an extremely valuable movement which has achieved much, but that it is running out of steam. She characterizes it as a movement which, having argued for the presumptive illegitimacy of sex segregation of the work place, moved towards a delegated system of child care that allowed mothers to work full-time.

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1. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) [hereinafter *UNBENDING GENDER*].

In its legal manifestation, she argues, it focused on preventing discrimination against women who experienced discrimination despite the fact that they *could* work full-time.

Professor Williams believes that this strategy left too many of the structures of domesticity intact. It ended by pitting women against women along lines of class, race, and status. More importantly, it didn't work, or at least it didn't work *well enough*.

In a second portion of her book Professor Williams discusses dominance feminism and particularly Catherine MacKinnon's work,<sup>2</sup> many parts of which I think she thoroughly agrees with. At the same time, though, she criticizes or argues for modification of one of MacKinnon's most well-known arguments.

Responding to a line of feminist work which had grown up around Carol Gilligan's book *In A Different Voice*,<sup>3</sup> Catharine MacKinnon famously observed, "Take your foot off our necks, then we will hear in what tongue women speak."<sup>4</sup> Professor Williams argues that, even if we woke up tomorrow in a world where the kind of eroticized domination on which Professor MacKinnon focuses did not exist, we would still be trapped within structures of gender that significantly oppressed or marginalized women.

Professor Williams then goes on to argue, perhaps more controversially, that the model of gender as dominance remains important for spheres in which men actively oppress women, but doesn't capture the workings of gender in everyday life. Dominance feminism fails particularly to capture the everyday life, as she puts it, of "people who live the household life,"<sup>5</sup> trying to do the best they can.

In place of the dominance, foot-on-the-neck vision, *Unbending Gender* offers us a vision of gender and the structures of domesticity as a "force field." (Given the context, it may be particularly and

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2. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (providing a critical look at the second wave of feminism in the United States); CATHARINE A. MACKINNON & ANDREA DWORKIN, *HARM'S WAY: PORNOGRAPHY CIVIL RIGHTS HEARINGS* (1997) (illuminating the harms done to women by pornography via first person accounts from transcripts of public hearings); CATHARINE A. MACKINNON, *ONLY WORDS* (1993) (discussing problems faced by both men and women in society); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (exploring the interaction between knowledge and social power in terms of the social inequality between men and women).

3. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) (analyzing the different modes of thinking about relationships and the association of these modes with male and female voices in psychological and literary texts).

4. See MACKINNON, *supra* note 2, at 45.

5. See *UNBENDING GENDER*, *supra* note 1, at 255.

cluelessly “Jake” to quibble about science fiction terms, but I wondered if the metaphor was more that of a gravity field: one that exercises continuous, background pressure, so “normal” that we sometimes forget the force it is exercising on us—a field which constantly pulls back towards an imaginary core. A gravity field, after all, is not an impermeable Star Trek sphere guaranteeing that we are kept out or in, it is a background force that can be fought, temporarily overcome, and even used to advantage.) In any event, whatever the metaphor, Professor Williams tells us that we need to supplement the picture offered by other feminist analyses by a kind of micropolitics that deals with the force-fields of gender and domesticity.

This argument, I think, is also linked to a strategic plan of alliances. She says that feminists need to acknowledge their alliances with men, and identify their enemy as the current construction of gender, not men.

More generally, in the discussion of how we should change gender talk, Professor Williams argues for a discussion of gender that’s both *pragmatic*, in the sense of being politically feasible, and *pragmatist* in the “John Dewey” sense of that word.<sup>6</sup> We must begin in a set of unsubstantiated political institutions and identities and working out from there, rather than seizing on some large, abstract theory which is supposed to provide the key to our situation.

Finally, Professor Williams turns to the line of feminism that seeks the solution to many of the contemporary problems in childrearing, child care poverty, and the subordination of women in the socialization of child care. I am not sure if this is the kind of example she has in mind, but we might look at my colleague Barbara Bergman’s work,<sup>7</sup> which argues powerfully for a massive extension of child care, basically a universalized socialized child care movement. Professor Williams argues that this is ultimately going to be an ineffective strategy. Instead, in her metaphor of domesticity “as drag,” (but presumably not Star Trek drag) she argues that we can work within the structure of domesticity to transform it, while still redeeming a portion of the ideal that domesticity offers—namely the ideal that people would like to be able to have fulfilling work and a rich family life.

Now, as the conference has shown, these arguments are ones with

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6. See *id.* at 260-70 (emphasizing that such a discussion begins by “asking what people’s truths mean” and what the effect these truths have on feminism).

7. See BARBARA R. BERGMANN, *SAVING OUR CHILDREN FROM POVERTY: WHAT THE UNITED STATES CAN LEARN FROM FRANCE* (1996).

which not everyone agrees entirely. I was actually worried initially that we might suffer the ultimate fate of a panel, and have everyone just go down the row saying, "Yep, agree with that. Yep, yep, pretty much agree with that." But I don't think that's going to be a problem.

The last panel dealt very nicely with a specific question. Are Professor Williams' arguments focused on a particular group, whether constituted by class, or by race, or sexual orientation and if so, does this mean that they are not worthwhile? Does Professor Williams' book really limit it to a particular group or a particular status?

But I think that there are broader questions. What does Professor Williams' book, looked at almost as artifact rather than argument, illustrate about the current state of contemporary feminism theory? That's, I think, one of the things that we're going to turn to in this panel.

Having raised such a huge question, I can imagine no better set of people than the ones we have here to answer it. On my immediate left, my colleague Adrienne Davis, who has written a wonderful series of articles on critical race theory and, most recently, on the way in which ante- and post-bellum private law, had both an ideological and a material effect on women's lives, particularly black women's lives.<sup>8</sup>

To her left, Professor Martha Ertman, now at Michigan Law School. I was a fan of Martha Ertman's work even before it was cool to be a fan of Martha Ertman's work, although it didn't take long for that to happen, I have to admit.<sup>9</sup> I particularly like her book review of Judge Posner's *Sex and Reason*,<sup>10</sup> in which he combines his penetrating insights on both gender and sexuality and his economic and methodological nuance, into a single tome.

But more recently, Professor Ertman's work has focused to a great degree, on private law and on the ways in which both contract and property can illuminate current issues in feminist theory, particularly focusing on same-sex partnerships.

To her left, my colleague Nancy Polikoff, who teaches here at the Washington College of Law. Nancy has written extensively on family

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8. See Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695 (1996); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 1367 (1999).

9. See, e.g., *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998) (exploring whether commercializing marriage through PSA's has the potential to "queer" the marriage doctrine).

10. See generally Martha Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485 (1993).

law issues, particularly focusing on issues of custody and adoption in gay and lesbian families.<sup>11</sup>

To her left, Kate Silbaugh, a professor at Boston University, who has written some fascinating essays on commodification and in feminist theory.<sup>12</sup>

Last but by no means least, to her left, Professor Lucie White at Harvard Law School, who has for many years written about poverty law, about lawyers who represent poor people, and about the construction of the stories on which both advocacy and theory so often depend.<sup>13</sup>

So let me ask Adrienne to start off with her remarks.

PROFESSOR DAVIS: I'd like to make one brief, initial comment in response to something Joan said earlier. I'm going to be very provocative. Joan talked earlier about how often women bond. The feminist language of anger against men puts off and alienates non-elite, non-white women. Men and women of those communities bond with each other against the perceived racism or classism of feminists bashing men, including men of color and working-class and poor men. But I'd like to express a bit of disagreement with that conceptualization. Some of the most powerful connections I've made with women of other classes and with white women are through the language of anger against men, you know? "Men are pigs. Men are dogs. They're worthless. They're useless." I've had many a great conversation with women at the check-out register, where we can bond immediately across all kinds of class, race, whatever, types of differences. Men can be silly in every community. [Laughter]

But today I want to abandon that language in which I am oh so conversant and focus on women for a few minutes and be a little provocative; provocative about women and women's choices. I do not mean the choices we make between work and family. Joan has thoroughly persuaded me that these are not real choices. Instead, I want to look at and focus on the choices we make about the men in our lives, which I do take to be more significant and real choices.

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11. See generally NANCY D. POLIKOFF, REPRESENTING PRIMARY CARETAKER PARENTS IN CUSTODY DISPUTES: A MANUAL FOR ATTORNEYS (1984).

12. See generally KATHARINE B. SILBAUGH, *Commodification and Women's Household Labor*, 9 YALE J. L. & FEMINISM 81 (1997); KATHARINE SILBAUGH, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

13. See generally Lucie White, *Theoretics of Practice: The Integration of Progressive Thought and Action: Paradox, Piece-Work, and Patience*, 43 HASTING L.J. 853 (1992) (reflecting an essay by Professor Anthony Alfieri, which examines the methods and routines that poverty advocates use in viewing and dealing with clients); Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

Also, I want to be a little hard on feminists in some ways, and I take it Martha will back me up on this one.

As Joan and I have been mentioning today, through our work in the Gender, Work & Family Project, we're attempting to draw more attention to the economic meanings of gender to supplement the already theoretically savvy analysis of sex, sexuality, and violence. For the purposes of this panel on new directions for feminist theory, however, I want to return to the sex/violence axis of analysis to consider how the erotics of gender inevitability shape the economics of gender. Feminist legal theorists, most notably my former teacher Catharine MacKinnon, have shown quite persuasively how dominance is eroticized, mainly from the perspective of men.<sup>14</sup>

But I want to flip it now and actually look at it from the perspective of women. I was talking earlier about my Feminist Jurisprudence class. My students and I grappled a great deal with why, with the range of options that highly educated, economically powerful women such as ourselves have about the men who we will love and partner with, why we consistently choose to eroticize and be attracted to only men who have similar, or typically more, economic and social capital than we do. Remember, I said I was going to be provocative.

I think it's quite interesting, when you poll men and women, and ask, "Could you be attracted to someone who didn't have your same educational background, didn't make at least as much money as you do?" a lot of men will be quite open-minded, right? Open-minded, and respond, "Well, I certainly see myself falling in love with a woman who didn't make as much money as I did. I kind of have to be open to that, right?"

But a lot of women say, "No, he's pretty much got to match me dollar for dollar, at least, if not earn more money." A lot of other women will even expand the requirements "to be physically big, you know, bigger than me." I think, "What we are doing, hunting dinosaurs?" They require all sorts of conventional things. This is obviously something I think that is mainly descriptive of heterosexual women, but not limited to heterosexual women.

I think this is one way in which even today, for professional women, we find ourselves eroticizing men who have a lot more economic power than we will have, and then finding ourselves shocked and surprised when, "Oh my gosh, gee," someone has to be economically

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14. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 6-7 (explaining how men tend to intertwine notions of sex and dominance resulting in situations in which men commit assaultive and violent acts under the perception that they are merely having sex).

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marginalized given the reality and inevitability of work/family conflict as families grow. Who's going to take care of the kids? "Well, gee, maybe it should be me, because I make so much less money than you do, and after all, my job is far more flexible than yours."

So I want to be a little bit hard on what I think is the choice that women make. Joan's metaphor of gender as a force field is quite a helpful one. I do think it's more empowering than the idea of a boot on a neck.<sup>15</sup> Because I, being a big fan of the old *Star Trek*, know that they always broke out of the force fields in the end. By the end of the fifteen minutes of drama, they had always managed to break out of it.

So I just want to put that on the table as one way of thinking about sources of these conflicts and how a creative feminism could help to theorize and resolve them. As feminists, let's join the already extant critiques from lesbian feminist theorists about the decisions women ourselves make about who we're going to be attracted to, who we're going to build our lives with. And then, you know, the ending is fairly inevitable, right? It's stunning how many of us are surprised that these men who are so high-powered don't want to stay home with kids. "Gee, who would have ever thought?" It's not like you don't see it coming.

So that's one way in which I want to be provocative. A second, related way stems from some very interesting work that Judith Butler<sup>16</sup> and others have done about the ways in which gender is performative (something that Joan uses to ground her critique).<sup>17</sup> I think this does help us to understand why it is that we keep making these decisions that are so bad and so unhealthy for us. All women, all men in some ways, are performing gender every day. We are creating it as a narrative through our daily self-presentations and interactions. Often, I think when we talk about the idea of gender performance, we mistake it as this idea that we kind of go to our closets and say, "What gender will I be today? Will I be a little bit more masculine? Will I be a little bit more frilly today?"

I think that's a mistake. The idea isn't that we get to choose our gender from day to day, or from life to life, but rather, we are constantly inscribing gender roles, or actively resisting gender roles. The choice element isn't really there.

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15. See *id.* at 2 (stating that women must gain a sense of survival in order to endure that male-dominated system that is "killing" her).

16. See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 24-25 (defining performative visions of gender roles as "constituting the identity that it is purported to be").

17. UNBENDING GENDER, *supra* note 1, at 192 ("[A]ppropriate gender performance is a key test of basic social competence.").

I think there are ways in which I'll speak from experience—professional women have been socialized to perform a certain version of femininity that ends up also economically marginalizing us in certain ways. So I'll just sort of put our adherence to gender roles out there as something else to think about.

Two more quick provocative points, one on the question of feminist theory and commodification. In the course of working with Joan on the Gender, Work & Family Project at WCL, and in the course of our doing some work with Martha Ertman, I think we've all become very intrigued by the ways in which in the last, I'd say, five years, feminist legal theory has become quite enamored of what I call the rhetoric of market logic.

I adore Martha's article *Commercializing Marriage: A Proposal for Valuing Women's Work through Premarital Security Agreements*.<sup>18</sup> I teach it in all my classes, and my students adore it. Who would have ever thought we could use the "Repo-man" to help homemakers?<sup>19</sup> I think it's absolutely great.

Yet I think there are some larger issues about what it means that feminists—since the decline of Marxism in the academy some of the last to hoist the banner skeptical of the market *uberalis*<sup>20</sup> that we as feminists have become enamored of market logic. I find it very interesting and very curious that increasingly it seems feminists have been turning to the market, to strategies relying on private solutions rather than on public and state-based solutions. Nancy Fraser and Wendy Brown have each been grappling with these questions in the context of political philosophy. Brown provocatively questions when it was that the left got in bed with the liberal capitalist state, but Fraser wonderfully rehabilitates the notion of a strong public sphere as a feminist site.<sup>21</sup> So I'll just throw that out there also as a sort of interesting question about the language and framework of commodification and its implications for feminist theory.

Then one final provocative thought. As someone who has made it

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18. See Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998) (exploring whether the commercialization of marriage may be a solution to divorced homemakers' financial problems).

19. See *id.* at 37-43 (asserting that, under such an agreement, a primary homemaker becomes a secured creditor for the value of household services provided to the primary wage earner and, thus, is entitled to repossess collateral on this value upon termination of the marriage).

20. *Uberalis* is a German phrase meaning above all.

21. Compare WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY (1995), with NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 69-98 (1997).

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to—I'll be thirty-four next month—and doesn't have children yet—I like them a lot. I think they're great.

PROFESSOR ERTMAN: Unlike Adrienne, I hate them.

PROFESSOR DAVIS: She's more liberated than I am.

But I want to question some of the underlying assumptions in women's culture, and in feminist theory, that one of the goals of feminism has to be to enable women to have more children and to have them costlessly and to have that effort subsidized.

I'd like to see more of a dialogue and discussion about why children are a public good, about why we do continue in so many ways as feminists to associate women with childrearing in ways that I think are quite uncritical. So I want to push us on that a little bit as well.

PROFESSOR ERTMAN: Those were fabulous comments, and they perfectly set the stage for my comments, which are not going to be provocative.

I'd like to start with the nonprovocative idea that I could give a definition of feminism as it's evolved at this moment. Feminism changes over time. I would like to suggest that feminism, at this moment in history, is a commitment to oppose subordination on the basis of sex, race, gender, sexual orientation, class, disability, and any other invidious categories. A very big definition, obviously.

The task that I would see for feminism at this moment in history, as we build on the insights of the excellent work that's been done in feminism, both in the first wave in the 19th century and in the second wave in this century, is to intervene in strategic ways in hierarchies that subordinate on the basis of sex, race, gender, sexual orientation, class, and disability.

One way to do that intervention is to recognize that the hierarchies draw their power from the fact that they are naturalized. We treat them as if they are biological, inevitable, genetic, efficient—in some sense, natural. Thus one primary method for intervening in these status hierarchies is to reveal them as contingent, to show that they are not natural, that they're not essential, that they're not inevitable, biological, or any of these other things.

The reason I'm perky about the market—and indeed, I am very perky about it—is that it is a classic tool to denaturalize. Although the hard-line Chicago school does treat legal economic reasoning as if it is pre-political somehow, and natural, there is still something about the market that is not terribly concerned about morality. It's about, in theory, arm's-length transactions where autonomous individuals make decisions, make choices, and enjoy the benefits and

manage the burdens of relationships. In that context, the market offers us unique mechanisms to reveal what has been obscured.

As Kate Silbaugh has so beautifully explored in her work, any time that affection is present within, for example, family work, all of a sudden, all the economic aspects become completely invisible.<sup>22</sup> What the market can do is say, yeah, sure, you still do love your family. But just because you love them doesn't mean there are not significant economic aspects of the various activities that you engage in for your family. Adrienne Davis similarly points out the ways that intimacy can be commodified to intervene in race and gender subordination in her elegant examination of how nineteenth century estate and trust law allowed some white men to leave their property to the "African-American concubines" and interracial children.<sup>23</sup>

Another non-provocative point here is that while Jamie Boyle sees Joan Williams as departing from liberal, cultural and radical feminism, I'm going to take the position that there are strands of all three in *Unbending Gender*. Which is not to marginalize or trivialize her work—obviously Joan has done an outstanding job of revealing the ways that feminists and women generally waste our time and resources by fighting with each other.<sup>24</sup> By no means do I mean to be name-calling, because I absolutely believe each one of these strains of thought is a good-faith representation of the extraordinary variety of concerns that half of the human population has about its life. I do not mean to pigeon-hole Joan's book in any way. My point is, instead, to focus on its global applications. I think there are strains of liberal, cultural, and what I would call radical feminism in Joan's proposal.

First, the liberal feminism. The part that I see as a liberal feminist commitment in Joan's book and in her comments today is the commitment to a particular view of personhood: the notion—which is consistent with Freud's insight that the two big tasks for adults are love and work—that for women to be full people, women should be able to participate in both love and work, and that there's something infantilizing about asking a segment of the population to have only half of that quintessentially human experience. That is a fundamentally liberal commitment, that men and women should

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22. See Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) (arguing that an economic market approach to the commodification of women's home labor can co-exist with non-market conceptions).

23. See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) (tracing the interaction of race, sex, and estate law in the antebellum and post-war South).

24. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (challenging traditional notions of gender).

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share in child care, and men and women should both be able to participate in the wage labor force.

Second, cultural feminism. Cultural feminism has gotten a bad rap. Cultural feminism, in the sense I am using it, is a feminist impulse that wants to value the things that women do, such as caretaking in the home. To that extent, what we have talked about all day has been about cultural feminism, which contends that there's a lot of undervalued work that women do. Big surprise, it's undervalued. Let's value it. That's cultural feminism.

Clearly these twin impulses are evident on every page of Joan's book. But I do not think that you could fully describe her approach as a liberal-cultural combination because I think there's something extraordinarily radical packed in here. I don't mean radical in the sense of Catharine MacKinnon's dominance feminism. The way I think of radical feminism is as whatever happens to be cutting-edge right now, and while MacKinnon revolutionized the field, I don't think she's cutting-edge right now. The strand of feminism that I think is just burning everybody up right now, making them so mad, that they're writing about, is the postmodern premise that identity is socially constructed, and that we can use the tools of postmodernism—particularly, those suggested by Judith Butler and her theory of gender performativity<sup>25</sup>—to show that identity is not natural.<sup>26</sup> It's not essential. Instead, it's socially constructed.

Joan clearly uses those tools in making her point that domesticity can be seen as a drag. In this understanding drag is consistent with a feminist agenda. Because drag shows that when RuPaul puts on an outfit and looks totally fabulous and he perhaps passes as a woman, perhaps not, we know that there is a dissonance between his plumbing and his gender performance. So we know in that particular moment that sex and gender do not have to be paired. And we see in a drag performance a revelation, a drama. Part of the pleasure that is taken from seeing cross-dressers is the recognition that, regardless of what Aretha Franklin says, there is no such thing as a natural woman. In fact, what Aretha Franklin says is, "You make me feel *like* a natural woman," implicitly recognizing that there is no such thing. You make me feel as if there were one, as if I might be one, a natural woman.<sup>27</sup> But of course, there is no such thing.

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25. See generally BUTLER, *supra* note 16 (defining the bias of the theory of gender performativity).

26. For a withering critique of Butler's approach, see Martha Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 22, 1999, at 37 (critiquing Butler's approach).

27. See Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES/GAY THEORIES* 13, 27-28 (Diana Fuss ed., 1991).

In sum, the primary task for feminism at this moment is to use the insights of liberal, cultural, and radical feminism to intervene in hierarchies. If we intervene, we intervene on many levels: gender, sex, sexual orientation, race, and class. Gender is defined by the heterosexual institution, which is one boy and one girl, gendered male, gendered female, hooked up in a legal marriage; that is the only kind of marriage that any jurisdiction in the United States is willing to recognize.<sup>28</sup> One state—Hawaii—was thinking about maybe recognizing same-sex marriage.<sup>29</sup> Congress—and at last count, over thirty states—completely panicked and passed defensive marriage acts,<sup>30</sup> because they couldn't even stand the thought that there could be two women in a marriage, or two men in a marriage, because they insisted marriage is about one man and one woman. The resistance to the intervention posed by same-sex marriage litigation demonstrates the power of that intervention, its radical promise. There cannot be any reason to insist that marriage must be limited to a relation between one man and one woman unless there is some sort of dyad going on. That male/female dyad is also the dyad of the head of the family and his subjects (or objects).

Close association between heterosexual family structures and subordination is the reason why we call the force that feminists oppose patriarchy. The man is on top, the women and children are not, and that's the whole problem. I think that most of us would agree with that description of the traditional family. The question is, how do we get around it?

Joan's proposals are magnificent and move in that direction. What is so fabulous is the way that they look at both the family and the work. They refuse to recognize the split between these categories, and as a true postmodernist will do, cross these barriers in order to disrupt both categories of work and family. By doing so, Joan's proposals have the potential to reallocate the roles, and thereby intervene, not only in gender roles—and this is what's been absent in

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28. The Vermont Supreme Court recently held that the state Constitution required the legislative to either extend marital rights to same-sex partners or to enact domestic partnership provisions that would extend to domestic partners the equivalent of marital rights. *See Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). The legislature opted for the latter.

29. *See* Carlos A. Bell, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 515-16 (2000) (detailing a history of the same-sex marriage issue in the state of Hawaii and recounting how Hawaii voters recently authorized the State Legislature to amend the State Constitution so as to prohibit same-sex marriages).

30. *See* Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 811 (1999) (stating that "approximately thirty states have passed statutes in reaction to the possibility that [Hawaii] will legalize same-sex marriage").

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this conversation so far other than a little bit of talk at the end of the last session—but in the very institution of the family. When we talk about feminists and gay people destroying the family, we mean it. We will. If there is sex equality, the family as we know it will not exist. It can't exist. The family as we know it is based on inequality.

What I would like to suggest is that as we talk about family humanism, and as we talk about reconstructive feminism, we should recognize both the incredible subversive potential here and the dangers. The dangers, I think are what Bob Drago<sup>31</sup> referred to this morning as the forces of evil.<sup>32</sup> He explored reasons why the forces of evil might not like Joan's proposals. I think perhaps there are reasons the forces of evil might like them. And I think the reasons the forces of evil might like elements of Joan's proposals is that they relate to the way that they focus on the conventional. When you focus on the conventional, you pitch towards the middle. The margins are, big surprise, marginal. And therefore, that approach runs the danger of maintaining the existing status quo.

I should say that in Joan's book she very carefully says that she is only talking about heterosexual families. That's where the big problem is. If we look at same-sex families, in fact, you would find much more gender equity, at least among lesbians. Perhaps lesbians could be role models, and we could aim towards that model. I want to clarify that I do not mean to say that Joan or her work is homophobic in any way, shape, or form. I'm just saying that focusing on the heterosexual family is dangerous. You're in dangerous territory. It's a dark and scary place.

*Unbending Gender* focuses on the conventional. The proposals in the book reward women who engage in conventional heterosexual performance. We've talked about marginalized work performance and what that might mean. It perpetuates traditional femininity.<sup>33</sup> In addition, it has the risk of perpetuating hetero-normativity. By focusing on the middle, by uncritically focusing on what heterosexual women and heterosexual men [do] in their particular relationships, this approach runs the risk of implying, this is the way it has to be. In short, this approach runs the risk of inadvertently supporting exactly what the theory purports to oppose.

In 1912 Cicely Hamilton wrote a fabulous book called *Marriage As A*

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31. See Panel One: Redesigning Work and the Benefits Related to It, *supra*.

32. See Panel One: Professor Drago's Presentation, *supra*.

33. See Nancy D. Polikoff, *We Will Get What We Asked For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993) (discussing the dangers of heterosexual models).

*Trade*, in which she argued that when women do not have access to commercial trades, marriage is a trade.<sup>34</sup> She points out that that phenomenon is problematic, using language that foreshadows Adrienne Rich's pathbreaking article in the early '80s, "Compulsory Heterosexuality."<sup>35</sup> Hamilton says that the problem when there's only one trade available is that you get low wages, mere subsistence. You have inefficiencies, because when people are forced to do work, they're not that efficient at doing it. You get women faking heterosexual interest. In 1912, Cicely Hamilton, this British feminist, wrote that women fake it, suggesting that what women present as romance is really very canny business interest. Exactly as Adrienne Davis said so articulately—a woman might be acting as if she's all interested in his body, and his self, and his soul, but she's really interested in his wallet. More precisely perhaps, she's interested in constructing a romance of difference, of complements, of naturalized balance.

What I would suggest is that what we need as feminists is to recognize the close relationship between gender subordination and sexual orientation subordination. Obviously, lesbians, despite pleas to the contrary,<sup>36</sup> are not a majority of the population, which leads us to build coalitions.

Every heterosexual feminist who has been called a dyke can appreciate the close relationship between gay rights and specifically lesbian rights and feminism. Similarly, every heterosexual man who is afraid that if he works part time, someone will think of him as a sissy, or emasculated, or not a real man faces the shadow threat, a homophobic claim, that a real man is a man who plays a particular role in relation to a real woman who defines him as being such. A real man brings home the bacon, even if doing so makes him a pig.

I would like to suggest that the forces of evil might feel a little bit cheerful as they read *Unbending Gender*, just as many feminists would like Joan's proposals. A result of its ability to appeal across a wide ideological divide, *Unbending Gender* has the unique ability to intervene in subordination in ways that can be both effective and transformative.<sup>37</sup>

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34. See CICELY HAMILTON, MARRIAGE AS A TRADE (1912).

35. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in LESBIAN AND GAY STUDIES READER 227 (Henry Abelove et al. eds., 1993).

36. See *id.*; see also Martha M. Ertman, *supra* note 10, at 1485 (concluding that Posner's reasoning in fact supports a conclusion that all women are naturally lesbians).

37. See Lisa Duggan, *Queering the State*, in SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 179, 193 (Lisa Duggan & Nan D. Hunter eds., 1995) (stating that

Given that we're dealing with extraordinary mechanisms of power that seem fairly fixed and immovable, Joan's book very nicely traces how the doctrines of domesticity within the family historically have progressed from being justified by status to being justified by affection. Many women end up with less of the pie than they really have a right to under both versions of domesticity.

In many ways, Joan's approach can be seen as a Trojan horse because of its potential appeal to conventional family values. This very appeal is dangerous to everybody who is on the edges. Yet it is because her proposals could be cloaked as something that seems conservative, or maybe liberal, or maybe cultural, that they paradoxically have this really radical potential.

Thus the radical potential of *Unbending Gender*. If the goal of feminism is to intervene in naturalized constructions of the family, *Unbending Gender* serves that goal, specifically in its income-sharing proposals. Joan proposes sharing the income, indeed income equalization post-divorce, in order to intervene in the he-who-earns-it-owns-it rule.<sup>38</sup>

That proposal, if implemented, will increase the economic value of homemaking labor. It will also increase the power that is wielded by homemakers in the domestic realm. It thus has the potential to alter the social construction of homemaker. Right now, I think you could argue that the construction of homemaker is something along the lines of an altruistic doormat. And I think what you can do, and what I've done in my work, where I suggest importing debtor-creditor law to this same kind of problem, is to suggest that we import some powerful social role to empower primary homemakers.<sup>39</sup> I've argued that homemakers should enjoy the rights of Uniform Commercial Code Article 9 secured creditors.<sup>40</sup>

But there are a lot of different ways that you can import some kind of entitlement to change the homemaking role from the all-sacrificing mother, to a participant in family wage acquisition who

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in order to transport the insights of queer theory into the public discourse, it is necessary to be transformative and effective).

38. See *UNBENDING GENDER*, *supra* note 1, at 115-16 (introducing proposal to "treat the ideal worker's wage as joint property" in an effort to combat the traditional treatment of wages by the courts as the personal property of the ideal worker).

39. See Ertman, *supra* note 18, at 88-89 (1998) (concluding that premarital security agreements "may contribute to the evolving social redefinition of gender and . . . may alter the low valuation of women's work").

40. See *id.* at 37-50 (applying the tenets of a commercial security agreement to the institution of marriage and emphasizing the right, under such an agreement, of a primary homemaker to repossess collateral on the value of provided household services upon termination of the marriage).

is entitled to a share of that upon dissolution of the relationship.

If we change the construction of homemaker, by definition we make inroads into the construction of heterosexuality, because the white picket fence view of the ideal heterosexual arrangement, the dreams in many people's heads, have to do with gendered specialization of labor. If we intervene in those gendered roles, there's at least some possibility that those constructions might look different. There might, for example, be more men engaged in more homemaking labor if they know being the ideal wage earner means they're going to income-equalize upon divorce. Perhaps post-divorce income equalization would make men a little less encouraging toward wage marginalization of their primary homemaking partners. If so, post-divorce income equalization might mean there's less marginalization in the first place. Under the second part of Joan's proposal, part-time employment would be remunerated better. If part-time labor were remunerated differently, maybe we'd make some inroads in the construction of the idealized male, heterosexual worker.

We've talked about the primary wage-earner as a male construction. It is all so clearly a heterosexual male construction. When we talk about the executive divorce cases, we're talking about a heterosexual male ideal worker. In a different class context, the ideal worker is explicitly heterosexual and male. Vicki Schultz told a story at the Law and Society Association's annual meeting about miners who go down into the shaft, and go through these remarkable bonding rituals. "They are all men, doing dangerous, scary work." When a new guy comes on the crew, they go through rituals that scholars describe as "penis games."<sup>41</sup> One such game occurs after the men (including the new worker) get into the elevator, and are about to go down into the shaft. They take the new guy, strip him down and rub Vaseline all over his penis.<sup>42</sup>

Vicki Schultz's question was, if a woman comes on the crew, is it sex discrimination if they do it, or is it sex discrimination if they *don't* do it, given that the bonding ritual is clearly a part of this working environment? My question is, what is the miners' investment in establishing a heterosexual environment? Perhaps, they think, we're

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41. John S. Fitzpatrick, *Adapting to Danger: A Participant Observation Study of an Underground Mine*, 7 *SOC. OF WORK AND OCCUPATIONS* 131, 171-75 (1980) (explaining what "penis games" are and describing how submission to such games ultimately results in group acceptance and inclusion).

42. *See id.* at 131, 171-75 (1980) (providing examples of initiation and reaffirmation "penis games" played by miners that strip away an individual's old self image, rendering him helpless against and thus part of the miners as a group).

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going to be close. We're going to be working very closely. In order for us to do our hard, dangerous job well, we must all be so heterosexual that any one of us could have a group of men touching his genitals and not be aroused. Moreover, we must touch one another's genitals without becoming aroused. The ritual thus sends a clear message: gays and women need not apply.

If we change the work force we can change the construction of the heterosexual ideal male worker. Through that change, we might reveal that none of this is natural, none of it is inevitable. The very fact of the change shows the contingency of roles, and the possibility that, even if this change in doctrine doesn't get us what we want, we can change the rules again and get something else, perhaps better, down the road.

PROFESSOR POLIKOFF: My remarks are going to be a little bit more along Adrienne's lines, to the extent that they are individual pieces, rather than the coherent whole that Martha so ably presented. I won't try to connect them, because I can't. But each of them, I think, has some relevance to Joan's book, and to the discussion.

The first thing I'd like to talk about is the notion of marriage that is present. What marriage would look like if the structure of work could be changed runs up against an historical problem, which is that egalitarianism and stability are inconsistent with each other in marriage. Sociologist Judith Stacy concludes as follows:

Historically, all stable systems of marriage and family life have rested upon diverse measures of coercion and inequality. Family *systems* appear to have been most stable when women and men have been economically interdependent, when households served as units of production with sufficient resources to reproduce themselves, and when individuals lacked alternative means of economic, sexual, and social life . . . . Disturbingly, all such family systems have been patriarchal."<sup>43</sup>

Later on, she writes about the rise in divorce and other factors, suggesting that, essentially, it is impossible to have both a stable marital system and true egalitarianism.<sup>44</sup> Stacey's larger point is that the dominant cultural view that emerges from today's discussion of the family would drive us back to an only slightly modified patriarchal family.

The cultural moment that I'll use to suggest as evidence for what

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43. See JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* 49 (1996).

44. See *id.* at 68 ("[H]istorically, stable marriage systems have rested upon coercion, overt or relied, and on inequality.").

I'm saying goes back to television character Murphy Brown. In 1992, when Murphy Brown gave birth to her out-of-wedlock child, and Dan Quayle, then-vice president, trashed her for doing so, he was soundly ridiculed. Furthermore, the public reaction, including from high levels of government, was, if not wholly supportive, at least not hostile to the fact that a single woman who was economically capable of supporting herself and her child without going on public assistance could give birth to a child out of wedlock and raise that child.

That same year, presidential nominee Bill Clinton, in his acceptance speech at the Democratic Convention, extolled all forms of family. He didn't mention gay and lesbian families specifically, but he did say all forms of family, extended families, foster families, and single-parent families.<sup>45</sup> He had quite a long list to make his point, which was that a diversity of family forms exist, and they are all a good thing.

Six months later on the cover of Atlantic Magazine was the headline, "Dan Quayle Was Right."<sup>46</sup> Shortly thereafter the Clintons, including Hillary, retreated into a defense of the marital family unit as the necessary location for childrearing. The "Dan-Quayle-Was-Right" position has been dominant ever since.

The contemporary, so-called "family values" movement, in the name of fixing all problems in society, extols the necessity for bolstering and supporting the institution of marriage. According to their point of view, the deterioration of marriage is the source of all social evils. Somehow they manage to blame divorce for violence against women. They manage to blame it for everything. You name a social evil, and this group, the so called traditional family values movement, will blame it on divorce and the deterioration of the heterosexual nuclear family.

This movement comes close to explicitly calling for a return to patriarchy, even though they can't quite put it exactly that way. Consider David Blankenhorn, author of *Fatherless America*,<sup>47</sup> one of their main spokespeople. He founded the National Fatherhood Initiative, which can sound good, because it sounds like it's really

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45. See *id.* at 3-4, 52-56 (elaborating on the Clinton Administration's early stance on the family entity and providing examples of that Administration's liberal stance and seemingly firm support of all mothers regardless of marital status).

46. See THE ATLANTIC MONTHLY, Apr. 1993 (claiming that Dan Quayle was correct that the decline in two-parent households is having a harmful effect on this country's youth).

47. See DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995) (providing a cultural criticism of the disappearance of the "father" in our society).

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about getting fathers more involved with children, which is generally thought of as being a good thing.

This is how Judith Stacey describes him:

Blankenhorn has been actively crusading against 'excesses of feminism' like the belief that 'men will not become new fathers unless they do half the diaper changes or bottle feedings.' Instead, his campaign promotes a neo-traditional model of fatherhood, in which, 'the old father, with some updating in the nurturing department, will do just fine.'<sup>48</sup>

David Popenoe, another spokesperson of this movement, says he wants to, what he calls "revising the cultural script,' for modern marriages by making such 'temporary,' asymmetrical gender concessions a normative feature in his model of the [so-called] 'modified traditional nuclear family.'"<sup>49</sup>

Reduced to its basics, this position is: women should stay home and take care of the kids, and men should run the show. Everybody should stay married and never get divorced, because that is what is necessary for the social structure.

The power that this movement has is that it claims to be based in social science, the God of the end of the 20th century. This distinguishes it from the movement of the 1980s when the Moral Majority and other organizations called for so-called traditional family values in the name of religion.

It's considerably harder and much more insidious to deal with a group of people who do not cloak themselves in religion, but cloak themselves in the position that the destruction of the heterosexual marriage model is the cause of all social problems. They misstate the significance of social science research which gives an air of credibility to their bogus claims.

In the end, they have a very persuasive line about why heterosexual marriage should be strengthened as the primary building block of society. But if Stacey is right that marriage, if it's going to last as a stable form, cannot be egalitarian, that egalitarianism and stability are on a collision course, you run into some significant problems.

I connect this, then, to the structure in which childrearing takes place. In the same way that the ideal worker is constructed around a male norm, something that Joan's book proves beyond a doubt, the ideal parent is constructed around a heterosexual norm, and a heterosexual norm specifically within marriage.

I think that it is dangerous to attack the ideal worker norm as being

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48. See STACEY, *supra* note 43, at 64.

49. *Id.* at 65.

built around men without also attacking the ideal parent norm; in other words, to attack the ideal worker norm as being built around men without also attacking the ideal parent norm as being built around heterosexuality.

This point is important even though it does not inherently speak to the majority, since the majority is overwhelmingly heterosexual, and since the parenting issues for most women revolve in some way around the fact that their children have some connection to a heterosexual relationship.

If one is trying to speak to what affects most people, there's a logic in keeping it within the heterosexual family context. But there is a danger in thinking about restructuring parenting in any way without also attacking the married heterosexual norm that goes with the ideal parent. This norm restricts and even vilifies not only lesbian and gay couples who want to raise children, but all women who want to parent outside the control of men, including those who choose divorce.

Okay. Now I'm going to move onto something else without necessarily trying to link it up—domestic partnership and the movement for extending benefits beyond marriage in the work place.

Probably you all have some awareness of the concept of domestic partnership and domestic partnership benefits. It's no longer front-page news when a major corporation extends benefits to unmarried couples, although it once was. Lotus was the first in 1991, followed by such household names as Microsoft, Time Warner, Walt Disney, and IBM.<sup>50</sup>

In the interests of time, I'm going to speak about only one piece of the domestic partnership issue that I think is important here, and that is the dispute, very live everywhere domestic partnership benefits are being talked about, as to who should get those benefits.

At this University, the issue was solved by extending benefits to lesbian and gay couples only. The belief was that since heterosexuals can marry, they ought to marry and get the benefits. Our policy is a very deliberate statement about an ideal family construction. It recognizes there's inequality in not giving these benefits to lesbians and gay men who can't marry, so it extends the benefits for that reason.

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50. See Andrea D. Heinbach & Pierce J. Reed, *Wilcox v. Trautz: The Recognition of Relationship Contracts in Massachusetts*, 43 DEC. B. B.J. 6, 6 n.7 (1999) ("A number of prominent American corporations, including IBM, Levis Strauss & Co., Chevron, Time-Warner, Lotus, Xerox, and Scudder Kemper Investments, Inc., offer some form of 'domestic benefits' to employees and their domestic partners.").

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The fight has been between this type of policy and the extension of domestic partnership benefits as well to heterosexual couples who don't marry. A more inclusive policy makes a statement that marriage is not the necessary family structure, but an optional one for heterosexuals, as well as for gay men and lesbians.

This plays out in both private work places and states and municipalities. California passed a law just last month, the second state to provide some kind of statewide domestic partnership benefits.<sup>51</sup> They are limited to gay and lesbian couples, except if you're over sixty-five, or sixty-two, in which case it is available to heterosexual couples. This is because old people don't want to lose their Social Security benefits, which they would if they got married. Thus, California is willing to let them register as domestic partnerships. But if you're heterosexual and of a working age, as opposed to a retirement age, you cannot be a domestic partner in California.

Another approach, and this is what I'll close with, is what Hawaii has done, the only other state that has some statewide recognition for partnerships that are not marital.<sup>52</sup> Hawaii has created what they call reciprocal beneficiaries, which is a status under state law that can be applied to any two people who cannot legally marry each other. So again, you cannot be heterosexual and be a reciprocal beneficiary. But it does move the discussion of family out of the adult sexual realm, saying that the person who is the primary person in your life does not have to be, by definition, an adult sexual partner. It gives each person the option to name another family member or a same-sex friend as a reciprocal beneficiary, as the person who under state law is entitled to a whole series of benefits: not as many as one would like, but at least some significant set of state benefits.

So I'll just close by saying that the best argument for moving family in that direction, for moving family away from the adult sexual partnership as the key unit, are found in Martha Fineman's many articles, and especially her book, *The Neutered Mother*,<sup>53</sup> which I recommend to everybody to read, along with Joan's book, as the

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51. See CAL. FAMILY CODE D.2.5, §§ 297-299.6 (West Supp. 2000); CAL. GOV'T CODE §§ 22867-22877 (West Supp. 2000); CAL. HEALTH & SAFETY CODE § 1261 (West Supp. 2000).

52. See HAW. REV. STAT. ANN. § 5726-1 to -7 (Michie Supp. 1997). Note: after the date of this Conference, Vermont enacted the status of "Civil Union" to extend the rights and responsibilities of marriage to same-sex partners. The status is not available to heterosexual partners.

53. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

thinking of two feminists with completely different perspectives about how to achieve justice for women in families.

PROFESSOR SILBAUGH: My name is Kate Silbaugh. I was originally scheduled to be on the "Who's Minding the Baby" panel. In some ways, I think my comments may be more appropriate to that panel. There's a lot to say here, and I am tempted to respond to some of the things other people have said. But I'm going to try to stick with my point.

I think I have a slightly different question to inject into the debate, although I don't think I actually have an answer here. I just have a separate set of concerns I want us to look at.

First, I just want to say, I think that Joan's proposal about proportional pay and benefits for part-time work is excellent. I think it's really wonderful, and I think that there are reasons why people can get behind it from a lot of different angles.

I, though, am interested in what happens during the time that a person is not in the work place; or not, at least, in an institutional work place. I'm interested in family work. The point I want to make is about sentimentality, maternalism and family work, domesticity.

I have a little bit of concern about Joan's embrace of domesticity. I completely understand the extent to which her's is a strategic decision, and that's embodied in her idea of domesticity as drag. I think I could entertain getting on board with that strategic decision. So it's not that I have an insurmountable conflict with it. But I do want to set out some of my concerns.

One time Joan and I were talking on the phone briefly about commodification. It became clear that we had a different understanding of what that meant. For her, the word "commodification" meant taking family work and putting it into the market and having somebody else do it, whereas for me, commodification meant using the language of materialism to describe anything, and that includes family work. To the extent that I have delved into the question of commodification, it has been a question of whether to talk about family work in material and economic terms. I think the answer is yes.

I didn't think at the end of the day today I was going to have anything left to contribute, because there have been so many great speakers. But I think this is something we haven't pulled out quite enough. I think that family work plays the role in today's sessions of negative space. There is employment in the paid labor force, and then there is family and family care. We haven't actually delved too much into what the nature of family care is. We've said that some

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people don't do it, some people might not want kids, that single parents do it, that lesbian parents do it, that paid caregivers do it in their own families. We've said those things, but we haven't really said too much about the content of what the "it" is, or how we should understand it, other than as an interference with paid work.

Some senior feminists have been quoted, so I'm going to quote one. Charlotte Perkins Gilman, who is one of my absolute favorites, said, "We consider the work of the woman in the house as essentially feminine, and fail to see that, as work, it is exactly like any other kind of human activity, having the same limitations and the same possibilities."<sup>54</sup>

This is my primary concern: we should view this family care as work. For that reason, I think a coalition built around the idea that we can all be interested in part-time work because some of us want to go rock climbing, and some of us want to engage in family care, has a risk in it.

That is, that there is a difference between rock climbing and care. Bob Drago<sup>55</sup> said this earlier—let's draw in people's interest in children. But I don't want to be too sentimental about children. I don't simply want to say, "Love the children, they're so beautiful." My point is that the work of caring for children and the work of caring for the elderly is work that needs to be done, whether it's done in a completely unsentimental way or in a sentimental way. It has to be done.

Regardless of whether any one individual doesn't have children, I'd be willing to make the case for why children need to happen. They need to happen for the economy. They need to happen for the polity. They need to happen for the species. There's lots of different angles from which you can produce the answer to the question, why children? Not why children for any individual, but why children need to happen.

The same is true of elder care. It's going to be a rare person who doesn't face care issues at some point in her life of one sort or another.

In order to fill the negative space of the family work, I'm interested in an accounting of that work. I literally mean an accounting, and this is very hard to do. I want the economy to express this work formally. I want it to be expressed formally in the sense that it falls into somebody's subtraction column. Whoever the beneficiaries of

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54. CHARLOTTE PERKINS GILMAN, *THE HOME: ITS WORK AND INFLUENCE* 97, 98 (Univ. of Ill. Press, 1972) (1903).

55. See Panel One: Redesigning Work and the Benefits Related to It, *supra*.

the work are, including the economy as a whole; the polity in certain ways; the state.

I think all of these institutions have to have a red line in their column for this work, and we need to ask them to internalize their share of its cost. We need an accounting of the kinds of social benefits that flow from the work. Not because we care about children, but because it's work. It's economically productive work, and we attach all kinds of benefits to economically productive work, and for that reason, we need to look at the social benefits produced by the work.

I think that Joan's domesticity, and then this norm of child love, actually contribute to the devaluation of the work in material terms. It's tricky. Some of the race and class conflicts we've talked about with respect to who's minding the baby are places where the general devaluation of the work is played out. Some family workers are able to take advantage of other family workers in that devalued context, but the background context is sentimentalized and simultaneously devalued family work.

I think an independent case can be made for leisure. But there's a way that family work is productive and we could count it. The tax system would be one way to bring it onto the books. There might be other ways. I'm not suggesting that that is the only way. I am suggesting though, that we need to do a lot more work on the best method of accounting for family work.

I think that is important for a number of reasons. One is the basic comparable worth idea, which is what Martha said about valuing what it is women do. It's not really about gender redistribution of the work. I don't have as a primary goal gender redistribution of the work. That's not to say I'm against it remotely, but I'm for creating entitlements and benefits and getting the work on the books as work, getting the work understood as work. If men are thereby drawn to it, great; attracting men to it could serve as another *reason* to value the work. If they're not drawn to it, though, the work would still have its own benefits and entitlements.

So I think of that as a pretty important mission for feminism, and, I'm not sure if it's one that Professor Williams disagrees with it. I just think that her strategy of trying to hook people's sentimentality about children runs the risk of moving family work forward as something other than work, and I think as long as it is, all those marginalization concerns will stay.

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Under Williams' proposal of domesticity as drag,<sup>56</sup> of promoting the norm of parental care, family work will always be something less than real work, something less than employment, and I think only by desentimentalizing it and really coming to understand its economics and its economic value and the values it produces can we bring it in from the margins.

I will just say one more thing. As to family form, I think once you make family care work, family form is not the most troubling question anymore, because the recognition of the work is not dependent on the affectionate or sexual ties.

LUCIE WHITE: Good afternoon. I am Lucie White. I want to begin with a quick thought that arose as I listened to today's discussions. For the last several years, as I have worked on child care for low income women, I have been trying to understand why care work is always so devalued, no matter who is doing it or whether it is compensated. Sure, we can attribute that devaluation of caring labor to misogyny in some vague sense. But what are the precise dynamics through which that devaluation is sociologically accomplished? That question caused me to listen closely as panelists referred to Catherine MacKinnon's domination model of feminism over the course of today's proceedings.<sup>57</sup> What was the basic dynamic of gender subordination that MacKinnon sought to understand and undo through her relentless focus on sex and violence, at the expense of all other dimensions of women's lives? What was she really saying about the interplay between erotic desire and sexist oppression? Is there anything that we can learn from her work, as we seek strategies for enhancing the social value of caring labor?

One of MacKinnon's key insights was that what women *experience* as sexual desire—what we feel to be our own bodies' instinctual pleasures—have actually been shaped by social forces—she might say patriarchy—in ways that recruit us into the ugly business of suppressing our own autonomy, capacity, and equality. We know that women are reputed to gain great satisfaction from caring for their loved ones. Indeed, we are said to *love* that work so much that the pleasure we get from *doing* it more than compensates us for the paltry—or nonexistent—pay that we receive. We have talked a lot today about how care work is sentimentalized: about how an image of the work as warm and fuzzy, rather than dirty and hard, helps to rationalize the wage exploitation of care workers. Would it add

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56. See UNBENDING GENDER, *supra* note 1, at 198-99.

57. See, e.g., MACKINNON, FEMINISM UNMODIFIED, *supra* note 2 (identifying the sexual power differential between men and women as domination).

anything to the analysis if—following MacKinnon—we thought about care work as *eroticized* as well as *sentimentalized*? Indeed, women, particularly mothers, are said to feel erotic pleasure around face to face caretaking tasks. I am thinking especially of the tasks of primary parenting, like feeding, “mirroring” a child’s facial expressions, and the adult-infant language games that attachment theorists have taught us that mothers and their infants *love* to engage in. Have social scientific theory and popular culture conspired to eroticize these features of primary caretaking work? Has this eroticization spilled over into other caretaking tasks, like cooking and washing dishes and supervising homework and driving children to after-school activities? Has it affected the ways that women actually experience caretaking labor, or think that they *should* experience it? Has it led women to accept less compensation for their care work, or to underrate the joy that they get from less selfless forms of employment? Has the association of care work with a form of sexual pleasure that women can secure apart from the heterosexual relationship played into the dynamic of its devaluation? I offer these thoughts for us all to think about as we continue to work together toward the fair valuation of care work in all of its forms.

Now I will turn—briefly, since time is short—to my prepared remarks. I want to start from Nancy Fraser’s insightful essay, “Beyond the Family Wage”. In that essay, Fraser notes that one cannot evaluate the merits of different policies for addressing the work-family dilemma without specifying the normative goals that you want your policy to achieve. The question that I want to ask of Joan’s book is the question of what Fraser calls “global equity.” What if global equity, as well as gender equality, was a primary normative goal that we wanted this country’s regime of work-family policies to advance? How would that normative force field change the way that we see the issues that Joan addresses?

I tend to work at the grassroots, rather than inside the beltway of policy debate and enactment. About a year ago, several students and I did a project with the Cambridge Child Care Resource and Referral agency in which we interviewed fifty low income women about their child care practices and needs. Most of these women were first generation immigrants from low income Latin American nations like Haiti, the Dominican Republic, El Salvador, and Colombia. These women all worked long hours for low wages, many in care-taking jobs. They were coping with their own childcare needs through the kinds of informal care networks that were discussed in the last panel. They were receiving little help in addressing their work family conflicts

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from state policy.

Over the course of today's panels, we have set forth two big ideas for the ways that state policy might do a better job of addressing these—and all—women's care needs. The first idea calls for the state to provide subsidies to enable families to purchase care on the paid labor market. This is the voucher solution: give working women and families the extra income that they need to buy good child care, at a living wage rate for their care workers. The second idea calls for greater flexibility in waged work, combined with paid leave time or other subsidies that will enable women and men to spend more time caring for their own children, in their own homes. This is the restructuring-the-workplace solution: help women (and men) off of the fast track, so that they can spend more time doing housework in gender equitable ways. From the perspective of the low income women that we interviewed in Cambridge, both of these proposals have major problems. These problems point toward deep flaws, from the perspective of "global equity," in both approaches to engaging the state's power in the project of "unbending" one of the major material dimensions of gender inequality.

First, let us consider the proposal to give women income subsidies so that they can purchase the care that they need to secure equality with men—or simply earn a living wage—in the paid workforce. Try to work out the economics of such a subsidy proposal. How could we marshal the political will to give the lowest income women of Cambridge—or any American city—the income subsidies that they would need to buy decent care, *at a living wage for the care workers*, for *all* of the hours that they need to work to secure a living wage for themselves? These subsidies need to be large enough to pay a living wage to all of the people who help to care for their dependents, including their teen-aged daughters, their elderly mothers, their neighbors, and their informal care workers, as well as their licensed family care providers and unionized day care workers. It would take a huge amount of money to subsidize a living wage voucher system that will be accessible by the most marginal immigrant workers, undocumented as well as documented, as well as more politically vocal citizens. The problem becomes even more imponderable if such an entitlement is coupled with a humane immigration policy, that opens our borders to women and men from poor countries who often have an urgent need to migrate to affluent economies like Boston's to keep their families alive.

Even if it could be secured, such a voucher system, funded by tax dollars, would be subject to intense public pressure to hold down

labor costs. This would lead to one of two forms of oppression of the front-line care workers whose wages are paid through the subsidy payments. First, it might lead to a highly bureaucratized system, in which care workers are subjected to punitive levels of supervision in order to ensure that they work "efficiently," so as to keep down costs. Alternatively, it might lead to a privatized system, in which deregulated providers are free to speed up and underpay the care workers that they employ in order to make the maximum profit off of their contracts with the state. In either scenario, the fact of the public subsidy creates pressure to squeeze as much work as possible out of individual care employees that the subsidies fund.

Next consider the alternative proposal, of subsidizing parents, including low income women, to spend more time at home caring for their own children. This proposal also runs into grave problems from the perspective of global equity. For one thing, without much deeper across-the-board subsidies for income security, low income women, particularly single mothers, will remain desperate for *more hours* of paid work in order to feed and clothe their families. They will not be able to afford cutting back on hours of paid work, even with stay-at-home subsidies, unless those subsidies pay a living wage. Thirty years of vigorous advocacy to enforce cost-of-living protections in the Aid to Families with Dependent Children program were stunningly unsuccessful in securing anything close to a survival level stay-at-home subsidy for welfare recipients. The failure of AFDC to pay a survival level subsidy to poor women to care for their own children forced virtually all welfare recipients into working for wages under the table in order to make ends meet, a practice that constituted the criminal offense of "welfare fraud" under federal law. There is no reason to assume that new programs to subsidize parenting leave will be any more generous than the old welfare system to poor women. It is even less likely to be accessible to those women whose welfare is of paramount importance from the perspective of global equity, such as unauthorized refugees, undocumented immigrants, ex-offenders, and other politically disfranchised women who are likely to work in the secondary labor market for minimum or sub-minimum wages.

Even if adequate stay-at-home subsidies could be secured for low income women, the homes in which they would then be required to care for their children often present serious environmental hazards to both children and their parents. These families need massive housing subsidies to correct health and safety violations, address overcrowding, and remove toxins like lead paint and asthma-inducing pollutants. Low income families' housing is often isolated

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from the kinds of support networks that might sustain stay-at-home parents both emotionally and materially. Thus, stay-at-home care subsidies without other forms of social support run the risk of compounding women's isolation. And without social support systems as well as individual family subsidies, any nuclear household in this society may be a site of violence.

In closing, I want to ally myself with Kate Silbaugh's intuition that we need to think more critically about the notion of domesticity in drag or otherwise. We need to understand domesticity as an historically specific social formation, one in which different racial and class groups participated differently, and some not at all. A strategy of embracing or deconstructing it with respect to one group of women—middle class white wives, for example—will have implications for other, more socially and politically marginalized women as well. We must ensure that we are in wide political dialogue, across class and race differences, as we envision and pursue such ideas. Joan's book can make a good opening for such dialogue, but it has hardly started to take place.

I would like to see all of the ideas in Joan's book the subject of such dialogue. I would like to see all of its ideas reworked from the perspective of global equity. How would those ideas be debated and developed by the women who are increasingly doing the most invisible care work that our high-flying, "wide-open," and gender equitable e-economy is generating? How would her ideas be debated and developed by the many women who are still closed outside of the border of that economy entirely?

PROFESSOR BOYLE: Thank you. Thank you very much to the panelists for a set of extremely interesting remarks. What I would like is for people to pose questions and then I know the panelists will respond with the brevity that is the universal mark of the law professor.

SPEAKER: I'm taking Adrienne's cue in terms of raising provocative questions. My question is in thinking of new theoretical feminist justifications for the support of care giving work and restructuring the workplace; whether organizing a theory around gender has outlived its utility, it's successfully contested, as Martha mentioned, as we all know in terms of liberal feminism the concept of the naturalness of women's role as care givers, but what I see is not the threat of liberal theory but much more voracious, the threat of rational choice theory. And I'm not sure that the concept of bounded agency, which gender socialization rests upon, will get us all the way.

It successfully contests the concept of the autonomous individual, unencumbered, ideal worker, but the rational decision maker in terms of law and economic theory is rational unless a gun is held to their head, and so agency that's bounded by [inaudible] you can just act out of your gender role, if that's the problem. So I know Martha Fineman has responded to this critique in terms of her concept of gender lives by saying in some ways, gender socialization can bind somebody's agency even more than biological—we've overcome our biology through technology.<sup>58</sup> But I guess the bottom line is thinking about even beyond, which I think Joan's book is great in terms of getting us to the next stage, but I'm thinking even beyond that about law and economic theory, so that's my comment and I guess question.

KATE SILBAUGH: I want to let Martha talk about this a little bit so I'm just going to say one thing about rational theory and economic theory. One of the reasons it doesn't make me nervous is that I don't think it's as powerful as, and I don't think it can take over social relations to the extent that, economists would have you believe.

I am a mother of two small children and Martha would be disgusted if she saw me with my children; I'm a sappy mother. It doesn't scare me in the least that economics could crush or describe all social relations. But I will also say that I have some of these feelings about my coworkers, too. Some of my coworkers I love, and my conflicts with others are not without emotion. And so I don't think the workplace can be described in purely economic terms either. For that reason, I don't fear the power of economic rhetoric that much. I don't know if that's a complete answer, but I think Martha could say more.

MARTHA ERTMAN: I'm willing to be the scapegoat here. I really don't hate children, but I'm happy to be the one to speak for everybody who might, so just channel it right here.

Rational choice. I think that there is, of course, the line of law and economics approaches that makes one wonder whether there is a pulse in the room, the discourse is so devoid of human considerations. There's that feeling that it totally divorces any notion of humanity from the very regulations that regulate humanity.

Certainly there are elements of it that that would be problematic and voracious. But by the same token we are so deeply immersed in this ideal (at least of rhetorical) of the social contract that personhood itself is defined as the ability to enter binding

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58. See Martha Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 4 (1992) (noting that social and cultural norms are harder to change than biological differences).

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agreements.

Historically, certainly African-Americans in this country did not have the capacity to enter binding agreements, nor did married women. There is something to be said for rational choice and what it has to give us, and yet it certainly can't give us anything. My comments are grounded in the whole notion of compulsory heterosexuality, which presupposes a set of social forces that preclude rational choice, particularly for women and particularly in the realm of heterosexuality. That's one way to come in and combat the rational choice line of reasoning with compulsory heterosexuality in order to recognize constrictions on agency.

PROFESSOR ADRIENNE DAVIS: Two very quick thoughts. First, my work is trying to show a lot of the economic relationships that are inherent in sexual relationships.<sup>59</sup> But I think part of my nervousness about feminism adopting market logic is that given the particular strain of economic theory that pervades law and economics, once we begin to use the discourse of the market, the measure inevitably becomes efficiency as opposed to justice, rights, other things that we might want the measure to be.

Another point: I took part of what you were saying to be about the usefulness of gender and I just wonder again the extent to which I'm a diehard feminist. I was trained at the feet of bell hooks and Catharine MacKinnon—not to mention my mother who got to me way before they did. But I'm just not persuaded that women have the same sorts of unified interests as black people or other communities that seem to be more aligned, vote along common lines, identify common interests, et cetera. I'm just not as persuaded by the possibility of gender as a unifying force. Race is declining as such, more and more. So that's just a quick response to your comments.

SPEAKER: Just on the economics piece, it's intriguing to think about economics as a mode of critique as opposed to economics as a religion. It's just two completely different ways to pragmatically use it.

PROFESSOR SILBAUGH: I want to say one quick thing about that. A lot of the commodification concern about using rational choice to analyze the family has been the idea that it could change the way we think about relations. An answer that I have for that is well, so what? It's fundamentally conservative not to want to change the way you view relations. It may be that in some contexts, it's

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59. See, e.g., Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) (discussing the intersection of race, sex, and estate law in the South).

conservative to be applying economic theory, but I think in some contexts it's conservative not to be.

SPEAKER: Just on the issue of gender as a salient category, when you look again at the sort of global context and step way back that big patterns of like who is really getting screwed by a lot of these transactional processes, the category of femaleness is a tremendously salient one, and I don't know how we map that back onto where we've gotten them and the issues that we're struggling with in U.S. feminism.

SPEAKER: I think we have time for one last question. With no question being offered, let us thank the panelists very much.

SPEAKER: This is just another piece on Blankenhorn. I find it so absolutely astonishing when I read him that he is equally as negative and oppressive towards men as he is towards women.<sup>60</sup> He talks about marriage as being essential to civilize men, who he describes in just the most incredibly negative terms that you have ever heard. In other words, that marriage is necessary in order to contain the violent, antisocial, and other horrific essential qualities that all men have.

I think that's a piece of the conservative package that needs to be made more visible, because far from wanting to empower men—I mean, I certainly think he means to do that as well; he certainly wants to keep the patriarchy in place—but his view of who men essentially are is really dark. Really, really dark. I think that needs to be made more visible.

The other comment I wanted to make was on Adrienne's very first provocative thought about relationships and on the choices that women make about sort of "I don't want someone who's my equal," "I want someone who's a little bit more whatever." This is totally from a personal perspective of not having ever followed that pattern in my life and finding it extremely problematic, particularly when the economic differential makes my income much higher than the man that I am with, and that has been a continuing problematic piece, and when I voice that to other women I hear the same thing.

In other words, that women always want to look up, in some sense, or maybe marry up in the sense that we were talking about this morning, but that it's very difficult to reverse that presumption on both sides.

PROFESSOR DAVIS: Time for me to be provocative again. In response to the first thing that you were saying, I think that they're

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60. See David Blankenhorn, *The State of the Family and the Family Policy Debate*, 36 SANTA CLARA L. REV. 431 (1996).

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trying to pull a fast one on us. I don't think he really believes that men have this nature. I think what's going on is an effort—here I'm really building on some of your comments, Nancy—is an effort to save heterosexual marriage. They're trying to say look how grim it is for unmarried men and unmarried women. It's just so awful. Gee, aren't we all better off once we get married? Men are better, women are better.

The fact of the matter is, all of it's just—many of my friends tell me marriage is a deeply rewarding and loving and beautiful institution and that they're incredibly happy, and I believe that they think that and that they believe that. Yeah, I do, I really do. And I find it so compelling that—and Nancy Polikoff and I have talked about this—some of the domestic partnership benefit plans in institutions or in states exclude heterosexual couples who won't marry from them. What is the fear here, right? What is the fear here?

Why can't people partner for life, maybe even really for life, without marriage? You know, all the statistics that I keep seeing about how marriage is really good are about men, you know? Married men live longer than unmarried men; married men earn more than unmarried men.<sup>61</sup>

Marriage, when you compare the same statistics, is bad for women. Single women out-earn married women.<sup>62</sup> I'm thinking, you know, gee, are they trying to pull a fast one on us here? They're trying to convince us that being single is equally bad for men and for women, and then when we get married it's equally good. Just ignore all the statistics about what actually happens to men and women when they get married? Marriage is great for men.

Again, I believe that people who are married really do believe that they're happy, and they are. But I also really do believe that a lot of people who partner and aren't married also seem to me to be quite happy in lots of ways as well. They'd probably be even happier if they could get economic benefits and not be married.

SPEAKER: Anything else?

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61. See JESSIE BERNARD, *THE FUTURE OF MARRIAGE* (1982). Married men are notably better off than single men on measures of physical and mental health, life expectancy, occupational success, and earning power. See Linda J. Waite & Glenna D. Spitze, *Young Women's Transition to Marriage*, 18 *DEMOGRAPHY* 681 (1981); see also *UNBENDING GENDER*, *supra* note 1, at 59, 125, 127 (comparing mothers' and fathers' earning capacity); *UNBENDING GENDER*, *supra* note 1, at 125, 127 (showing mothers' diminished earning capacity).

62. See BERNARD, *supra* note 61. See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 59 (1988) (noting that married women in their forties earned only 85% as much as non-married women who are the same age and that unmarried women earn more than married women at every age except their early twenties).

SPEAKER: I'd really like to thank the panelists for an extremely interesting set of comments. Thank you.

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#### SUMMARY REMARKS

##### REPORTERS:

JOAN WILLIAMS: The format that we have now is that we have two people who are going to make some fairly brief summarizing remarks reflecting on the conference as a whole: Susan Carle and Leti Volpp. While they're coming up here, let me do two things.

First of all, let us please thank the people who have provided the support and basically the invisible work that's made this conference possible. Sharon Wolfe took the primary responsibility in organizing all of the logistics and as usual has done an unbelievably fabulous job, assisted by Frankie Winchester, and my two dean's fellows, Ellen Kyriacou and Leticia Vasquez, who have also provided extremely important help in this effort.

Also, Bob Drago, who we're very pleased to have here, runs a very informative and excellent listserv on family matters, work family matters, and I'm going to write the address up here.<sup>63</sup>

SUSAN CARLE: I'm going to try very briefly to summarize what I heard as some of the main themes, both commonalities and contrasts in the presentations of the speakers, though I will admit at the outset that it was so rich and so complex a discussion that I feel completely overwhelmed by the idea of trying to do justice to any more than just a little bit of it. Then Leti will pick up and ask some of the big questions. Where do we take all of this? What's missing? What's left to do?

What I heard today was fundamental agreement with respect to Joan's brilliant location of the problem we're discussing. It involves both the material and ideological separation of work and family, and the goal we are all engaged in here is to rethink the linkage of those two arenas of work and family. To do that we have to both change the structure of work and change the structure of families. Neither of those projects can occur on its own. There is a very real danger that problems in the work world and problems in the family world will cross-react to undermine the kinds of progress that people are trying to achieve in changing the inter-relationship of these two spheres that

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63. See <<http://www.la.psu.edu/lair/workfam>>.

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we think of as so separate.

Finally, there was strong agreement in understanding that any change we try to carry out is going to be change within constraints. We are searching for the give points. Where can we make changes productively?

I think that the discussion basically focused on three types of changes, three areas of possible destabilization. One is norms in the private sphere. Most of the discussion, at least in the morning, focused on changing norms in the traditional heterosexual dual-parent family, though Martha Ertman and Nancy Polikoff added an additional dimension in the afternoon by deconstructing that focus. Another question involved recognizing that, if gender stereotypes are not going to be completely dismantled, how can we, as Bob Drago put it, find images that are consistent with some aspects of gender identification, but also allow us to remodel gender relationships in a way that's going to be productive? He used the example of trying to use masculine symbols like climbing Mount Rainier as ways of describing a new attitude men could take towards performing child care.

A second area of destabilization that people were talking about involved understandings about the private nature of the family. We must realize that what are viewed as natural and inevitable aspects of family life or child care are actually embedded in structures that we've created socially. Here there were a lot of very interesting comments from the second panel. Marion Crain talked about how little understanding we actually have of how class functions with gender; how little theorists who focus on class issues really understand about how women's class identification gets formed or transformed; and the fluidity of those identities for women as they marry or otherwise use the strategies available to them to try to improve their economic situation.

Bonnie Thornton Dill spent some time very gently critiquing the situated perspective from which many of us, including myself, of course, come to this debate, noting that the questions we are able to ask are ones that speak to us most personally and from our own social locations and experiences. That's why we're all sitting in the room today talking about "mommy issues," as she put it. She emphasized how important it is to think about including the voices and experiences of the women who end up doing the domestic work that we delegate in a delegation or commodification paradigm. Those voices need to be included in a way that we still need to work on.

Similarly, Nancy Dowd's comments focused on the way that looking

from the perspective of the most marginalized families can show us alternatives in how we could restructure family life. Looking at those marginalized families helps us to understand that family life is actually very fluid, that extended families, networks of friends, constructed families that are not the dual-parent heterosexual model, are all important alternative models that need to figure into any analysis about how to take apart these two spheres of work and family and put them back together.

Then we talked about trying to deconstruct the norm that understands work—and here I'm talking about dependency care and other kinds of work—as something that's structured through private relationships. There the question that Ann Shalleck asked at the end put it all in perspective, noting that really the first delegation happens from the state to the private sphere—that the responsibility for taking care of dependents is really a state responsibility that gets delegated to private individuals, usually women.

We also discussed how we can understand the public dimensions of the way our work relationships outside the domestic realm are organized. Many speakers urged us to start thinking about ways to change those relationships, including the very interesting presentation that Mary Louise Fellows gave as to how the tax system could be used to encourage certain types of restructuring by employers. Another issue involved the question of how many responsibilities we place on employers. Clearly, putting the health care system on the shoulders of employers completely undermines many of the policy changes we are talking about here. Those changes include allowing for more flexible work arrangements such as part-time, flex-time, and other creative ways of deconstructing the norm of the "ideal worker," as Joan calls it, who works very hard, for at least forty hours a week, in return for a living wage and health insurance coverage. One of the many advantages of de-coupling health insurance coverage from relationships with particular employers is the way this policy change would take some pressure off of the ideal worker model.

What I found perhaps most interesting about the conference were some of the contrasts in terms of discussions of where to go from here. These seemed to me to be very closely related to debates about what language we should use, what values we should appeal to, in pragmatically taking our theoretical understanding and putting it to use. Here I enjoyed the friendly debate between Bob Drago and Heidi Hartmann about whether we should appeal to children as a way of instituting a new public policy, or whether it is better to

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understand, as Heidi Hartmann put it, the “encumbered nature” of most workers and to say that we need to create a system where the flexibility that we’re looking for in terms of work life is something that workers can appeal to for all sorts of reasons and not simply for child care, or even not simply for dependency care.

Then there were questions as to the extent to which we should try to rely on arguments stemming from economic efficiency, or whether that actually is a dangerous and counterproductive move; do we instead need to put this call for change in terms of the reconception of what the government’s duties are to promote values that are not economic efficiency values.

Next were questions of what kinds of norms we want to focus on in describing parental care. We heard interesting comments by Kate Silbaugh about de-sentimentalizing the care function, as contrasted to, say, some of what Joan Williams was talking about in arguing that we should appeal to values of the love and care that exist in a family and use those as a way of getting a broad base of support for change.

What I find the most interesting part of this debate is the question about the extent to which we should use the language of conventionality, and Joan and I have debated about this before in other conversations. Do we want to talk within the paradigm of marriage, understanding that that is very much a patriarchal institution? Do we want to appeal to norms of heterosexuality? Do we need to deconstruct those? Do we need to show alternative paradigms for living together and raising children? Then I would raise also to Nancy and Martha the question of do we need to deconstruct norms about lesbian identity? Isn’t the idea here to increase the fluidity of these rigid categories from *both* sides of the picture?

Those are some of the language and rhetorical strategy issues I found common throughout many of the talks. What we all agree on as we sit here having this discussion is that the goal is to play within existing institutions, to use the language and rhetoric that we have available to us today, and to make interventions on a wide variety of levels and from a wide variety of perspectives. There’s no one solution to all of this, and Joan’s work in making a whole series of very perceptive and brilliant interventions that combine a very radical view with a pragmatic focus stands as a great model of how those interventions could be made.

LETI VOLPP: I first want to thank Joan for inviting me to participate in this symposium. It has been wonderful to be here. The depth, the breadth, and the complexity of what has been discussed

today is a testament to Joan's book. Her book is really quite remarkable.

It is significant that in organizing this conference, Joan chose to subject her work not just to acclaim, but also to criticism. She deliberately invited people here to comment who she knew would disagree with some of the things she wrote in *Unbending Gender*.

What I see Joan doing in her book are several very important things. One is the development of what she calls reconstructive feminism. She provides a history of domesticity, a discussion of how to move beyond the sameness-difference debate, and a strong argument as to the limits of universalist thinking and the benefits of a pragmatist theory. Joan gives us useful metaphors—gender as a force field, domesticity in drag, flipping about gender as if one is a judo master—that provide new and fresh images about what is gender, and how one negotiates with it.

Joan is also using her book as part of a deliberate rhetorical strategy to change the allocation and remuneration for market and family work. Here her work reflects her calculations as to what is most likely to lead to change. For example, as she stated in her introduction today, she is deliberately using the language of family values. Her focus is on heterosexual and nuclear families. This reflects Joan's sense of the cultural resources of the United States and the political possibilities for change. So she seeks to shape the market, rather than fight for state subsidies, which may make sense in a context where there is such hostility to state support for child care that the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) became law.<sup>64</sup> Joan is also couching gender equality as "good for children," and describes the norm of the ideal worker as "bad for men."<sup>65</sup>

There was a lot of discussion because of these choices. For example, do we call people with child rearing responsibilities "encumbered workers," or do we describe their concern as an issue of "child care?" Do we talk about this as discrimination against women or do we talk about this as taking care of the nation's children?

The discussion spurred by this deliberate political strategy contained a question beneath its surface. Will programs that may work strategically be ultimately liberating? And, in thinking strategically, are there too many compromises being made?

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64. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 403, 110 Stat. 2105 (1997) (codified as 8 U.S.C. § 1613 (Supp. III 1997)).

65. See *UNBENDING GENDER*, *supra* note 1, at 3-4.

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I want to turn now to make some specific points. One thing I found interesting is that the discussion today really focused primarily on two sites: (1) reshaping work and (2) reshaping child care. There was very little discussion on how economic resources get allocated to the family after divorce, which is a major subject covered by Joan's book.<sup>66</sup> I think it is worth thinking about the silence on this point, and whether this is perhaps a more uncomfortable point to discuss. Is it easier to criticize the market or the state, than to criticize the family? (And Nancy Polikoff suggested this point nicely, earlier today).

Another question is whether there would have been any way to put the first two panels in dialogue with each other. The first panel really focused on how to make part-time work more friendly, more accessible, and more of a reality. The second panel really focused on the race and class aspects of who has access to child care, and who performs that care. My sense is that these two discussions, both urgent, need to be fused together. It's possible that the second panel focused on race and class, when the first did not, in reaction to that absence on the first. But I also wonder if the absence of such reflects general research on market work as not integrating concerns of race and class in the same way as does research on family work.

A third issue to probe is whether children are necessary to promote the public good. Nancy Dowd mentioned that in Sweden there is a conscious impetus to encourage children so as to have more workers; France also has a pro-natalist policy. When the state determines that children are a good for the purposes of reproducing its citizenry, we must recognize the racial and nativist aspects of that desire. It would be productive to theorize the relationship of gender and nation more deeply.

A fourth point is to echo the call for thinking about these questions from the perspective of those who are the most marginalized—those who are discouraged from reproducing and having children, for example, women who are now being cycled through workfare programs. How would this shift the analysis? But I recognize that Joan's book deliberately writes from the perspective of what she thinks will bring about meaningful change, which means finding the broadest possible base of support.

Lastly, I want to focus on an axis that Marion Crain and Lucie White mentioned in the context of global equity, which is immigration, which I think could have been discussed more today.

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66. *See id.* at 114-44.

When Heidi Hartmann raised the issue of the little known temporary disability insurance program this morning, I was reminded of fighting to try to keep that program available to immigrants. Following on the heels of Proposition 187,<sup>67</sup> the federal government passed PRWORA,<sup>68</sup> which mandated a denial of all federal and state benefits to “non-qualified” immigrants with the exception of emergency medical care and disaster relief. Temporary disability insurance, and a myriad of other programs, were denied. So this suggests to me that adding the axis of immigration helps us take note of exactly who is allowed to benefit from state supported programs.

The question of immigration also surfaces when we think about who provides child care. As we know, a large number of people who provide domestic work as “live-ins,” nannies, domestic workers, are African Americans and immigrants. It was suggested today that quitting is used as a strategy of negotiation with exploitative work situations. The workers who are immigrants can find it very difficult to quit for immigration-related, as well as poverty-related reasons, because the family they work for may be holding their papers, the family may threaten to call the INS, or the worker’s legal status may be tied to her continued employment.

Lastly, discussion today reminded me of another way in which immigration is tied to these issues. The program started by Ms., Take Our Daughters to Work Day, and its shifts (women are in market work, let’s expose daughters to that; let’s bring sons in to work and show children about possible careers) would be interesting to theorize. WBAI, the Pacifica radio station in New York, did a program on “Take Our Daughters to Work Day” where the subject was immigrant women who *always* have to take their daughters to work: women who work in garment sweatshops, cleaning buildings, who cannot afford child care, and have their children with them as they work. That is another way that immigration and poverty intersect in shaping market work and family work, that we should think about.

In conclusion, I want to echo the caution raised earlier today not to glorify the market, the state, or the family. We recognize that all of these are structures that have and that continue systematically to subordinate those who are most marginalized. To talk about these as single, calcified entities is also something that we should move

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67. See California’s Proposition 187, 1994 Cal. Legis. Serv. Prop. 187 (West) (codified in scattered sections of Cal. Educ., Gov’t, Health & Safety, Penal, Welf. & Inst. Codes).

68. See *supra* note 64.

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beyond, when they are deeply intermingled.

Again, congratulations to Joan for a book that has inspired this incredible symposium, and thank you all so much for a wonderful discussion.

(Whereupon, the PROCEEDINGS were adjourned.)

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