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### The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue Review Essay

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## REVIEW ESSAY

# THE POLITICS OF WORKPLACE REFORMS: RECENT WORKS ON PARENTAL LEAVE AND A FATHER-DAUGHTER DIALOGUE

*Richard Delgado\**

*Helen Leskovic\*\**

### I. INTRODUCTION

No issues have so united women as those of equality in the workplace. Workplace issues, such as parental leave, child care, and comparable worth, all have a nearly solid front of proponents and few detractors among women. The reasons for praising these innovations, however, stem primarily from concern about sexual equality.<sup>1</sup> Because there has yet to emerge anything like a consen-

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1. Legislation has been the primary vehicle for remedying sex discrimination in the workplace. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). Section 2000e-2(a) makes it unlawful for an employer

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

The 1978 Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k) (1983), amended Title VII to prohibit sex discrimination on the basis of pregnancy, unless pregnancy constitutes "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." § 2000e-2(e). This amendment effectively overruled the United States Supreme Court's ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (discrimination permissible on the basis of pregnancy).

sus about what sexual equality means in the workplace setting, the solutions proposed by feminist groups vary slightly.

Other voices have joined with women on these measures for differing reasons, ranging from the belief that the welfare of families and children requires a national policy<sup>2</sup> to a pragmatic recognition of the need for female workers to sustain the corporate economy.<sup>3</sup>

Parental leave<sup>4</sup>—the focus of this Review Essay—illustrates these differing approaches. Most feminists hail parental leave as a means by which society can accommodate many women's desires to have both a career and a family without losing equal opportunity in the workplace.<sup>5</sup> This approach is taken both by feminists

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2. See, e.g., Kamerman & Kan, *Societal Learning*, in *WORK AND FAMILY: CHANGING ROLES OF MEN AND WOMEN* 330-45 (P. Voydanoff ed. 1984); Moynihan, *Government and Family Policy*, in *FAMILY AND WORK: BRIDGING THE GAP* 7-15 (S. Hewitt, A. Ilchman & J. Sweeney eds. 1986) [hereinafter *FAMILY AND WORK*]. See also remarks of presiding Rep. Patricia Schroeder and testimony of various witnesses in *Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Service & Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. (1987) [hereinafter *Hearings*].

3. See, e.g., Farrell, *Corporate Concern for Working Parents*, in *FAMILY AND WORK*, *supra* note 2, at 169-78; J.P. FERNANDEZ, *CHILD CARE AND CORPORATE PRODUCTIVITY, RESOLVING FAMILY/WORK CONFLICTS* (1986). The majority of labor-force growth now results from participation of women. More than 80% of women between the ages of 25 and 44 will be working by 1995 according to Department of Labor estimates. Fullerton, *The 1995 Labor Force: BLS' Latest Projections*, 108 MONTHLY LAB. REV. 17 (Nov. 1985).

4. Parental leave is an employee benefit that provides time off for parental responsibilities, including paternity, maternity, adoption, and care of sick children. Parental leave legislation is currently before Congress. H.R. 925, 100th Cong., 1st Sess. (1987), called "Family and Medical Leave Act," was introduced on February 3, 1987. It was introduced first by Rep. Patricia Schroeder as H.R. 2020, 99th Cong., 1st Sess. (1985) and reintroduced as H.R. 4300, 99th Cong., 2d Sess. (1986). Sen. Christopher J. Dodd (D-Conn.) introduced a companion bill in the Senate, S. 249, 100th Cong., 1st Sess. (1987). The bills would entitle workers to time off in connection with the birth, adoption, or serious illness of a son or daughter, and temporary leave in case of illness causing inability to work. The bills would protect the leave-taker's job and benefit rights. They would establish a commission to study the problem of salary replacement for persons taking leave. For a history and analysis of this act, see Colvin, *New Perspectives in Parental Leave: The Family and Medical Leave Act of 1987*, 12 EMPLOYEE REL. L.J. 546 (1987). See also Recent Developments, *Beyond Cal Fed: Parenting Leave Possibilities*, 10 HARV. WOMEN'S L.J. 294 (1987). States are also beginning to require employers to grant leave to parents after the birth of a child; these leaves are generally unpaid, Marcotte, *Parental Leave Laws Gaining*, A.B.A. J., Oct. 1, 1987, at 22; BUREAU OF NATIONAL AFFAIRS, *WORK AND FAMILY: A CHANGING DYNAMIC* 102-20 (1986) [hereinafter *WORK AND FAMILY*] (summarizing corporations' and states' treatment of parental leave problem).

5. See, e.g., Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986) (rejecting equality analysis as perpetuating male norms and recommending integration of values of public and home life,

who advocate "special treatment" of pregnant women and by those who believe only "equal treatment" will benefit women in the long run. The special treatment approach is taken by Professor Ann C. Scales, who argues that pregnancy and child-bearing are unique to women and that legislation should accommodate these differences in order to give women full equality in the workplace.<sup>6</sup> Others argue, however, that special treatment, in the form of protective legislation, has served only to reduce women's opportunities in the workplace, depriving them of access to the better jobs.<sup>7</sup> Professor Wendy Williams takes this view, reasoning

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community and interconnection as responsibilities for both men and women); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERK. WOMEN'S L.J. 1 (1985) (arguing for special treatment of pregnancy in order to achieve equal outcomes in the workplace); Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39; Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987) (proposing a flexible model of equality as acceptance of gender differences); Project, *Law Firms and Lawyers with Children: An Empirical Analysis of the Family/Work Conflict*, 34 STAN. L. REV. 1263 (1982); Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) (reasoning that the uniqueness of pregnancy requires special treatment in order to equalize the positions of men and women in the workplace); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85) (advocating equal treatment in the form of family leave because it promotes the well-being of families and children as well as the equality of men and women); Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1984-1985) (advocating an even more comprehensive nurturing leave policy available equally to men and women to care for families, extended families, and non-kin).

6. See Scales, *supra* note 5; Kay, *supra* note 5; see also Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983); E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980). For a critique of the treatment of biological sex differences under due process and equal protection analysis, see Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

Women who support special treatment tend to reason that Title VII permits required maternity leave in order to provide outcomes equal to those of men, who cannot bear children, and have dominated the workplace as a result.

7. Feminists are concerned about what Laurence Tribe calls the Supreme Court's "willingness to transmute woman's 'real' biological difference to woman's disadvantage." Compare L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-29, at 1584 (2d ed. 1988) with C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). For example, in the insurance disability cases, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (equal protection challenge to California's exclusion of normal pregnancy from the state disability insurance plan) and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (Title VII challenge to a private employer's exclusion of disabilities associated with normal pregnancy from its disability plan), the Court held that pregnancy is not a covered disability, reasoning that pregnancy was merely one physical condition of many that could be removed from the list of compensable disabilities because the group of nonpregnant people includes members of both sexes. See also Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59, 62-63 (1987) (criticizing use of equal and special treatment labels and urging instead focus on remedying female subordination).

that pregnancy and childbirth should be analogized to disabilities suffered by both men and women and treated accordingly, namely by providing the worker with leave during the period of disability.<sup>8</sup> She and others point out that special treatment for women has always led to ghettoization and lower wages.<sup>9</sup>

A third group of feminists, while welcoming provisions that enable workers of either sex to take time off while their children are young, are concerned that these measures are unlikely to bring about much improvement in women's status unless coupled with other provisions to accommodate human needs, such as child care, leave to care for sick relatives and companions, adult day care, and flexible work schedules. Women who take this position include Eleanor Holmes Norton,<sup>10</sup> Lucinda Finley,<sup>11</sup> Nadine Taub,<sup>12</sup> Martha Minow,<sup>13</sup> and Catherine Fisk.<sup>14</sup> Many who take this position argue for moving beyond equality analysis to an approach that integrates work and family for all.<sup>15</sup>

Pragmatists, including many in labor and management, are less concerned with equality. They recognize that women with children are needed by the workforce,<sup>16</sup> and that some means must be found of enabling them to work, and bear and raise children.<sup>17</sup>

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8. Williams, *supra* note 5. Professor Williams argues that special treatment reinforces the stereotyping of men's and women's roles into separate spheres of home and work, effectively preventing either men or women from functioning in any large numbers in both spheres. The equal treatment model, she contends, has the advantage of discarding the separate spheres model in favor of an approach that enables both men and women to combine the responsibilities of work and family in a sex neutral framework. *See also Note, Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985).

9. *See, e.g.,* Finley, *supra* note 5.

10. *See Hearings, supra* note 2 (supplement to testimony), reviewed *infra* text accompanying notes 34-46.

11. *See* Finley, *supra* note 5.

12. Taub, *supra* note 5.

13. *See* Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986).

14. *See* Fisk, *Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 BERK. WOMEN'S L.J. 89 (1986).

15. *See, e.g.,* Hearings, *supra* note 2 (testimony of Eleanor Holmes Norton); Finley, *supra* note 5.

16. Fullerton, *Projections 2000: Labor Force Projections: 1986-2000*, 110 MONTHLY LAB. REV. 19 (Sept. 1987); Recent Developments, *supra* note 4, at 295-96 (women with young children are one of the fastest growing sectors of the work force); Shante, *Women and the Labor Market: The Link Grows Stronger*, 111 MONTHLY LAB. REV. 3, 3 (Mar. 1988) (majority of mothers are now members of the labor force).

17. John P. Fernandez, in CHILD CARE AND CORPORATE PRODUCTIVITY, RESOLVING FAM-

Some believe that this need is urgent enough to warrant a coordinated national family policy.<sup>18</sup> A few have called for legislation providing leave to care not only for children, but the ill and the aged, who have long been dependent on women for these services, generally unpaid.<sup>19</sup>

Two recent books and a monograph supply either sociological analysis or national policy recommendations bearing on many of these approaches. In *Work and Family: Changing Roles of Men and Women*,<sup>20</sup> sociologist Patricia Voydanoff has collected essays representative of the emerging area of work and family issues. The essays in this volume reflect a common theme: that work and family are interdependent and mutually interactive spheres, so that while the family is shaped by the availability, conditions, and pay of work, so too does the family influence work by raising children committed in varying ways and degrees to the world of work.<sup>21</sup> In particular, demographic changes and feminist demands are creating a fluid situation in which men and women increasingly occupy work and family roles interchangeably.<sup>22</sup> For example, the need for both marital partners to work to maintain their standard of living in a slowing economy has increased the demand for employer-provided child care, parental leave, and similar benefits. At the same time growth in the service sector of the economy has increased the demand for new workers, many of whom are women. Voydanoff warns, however, that few studies have focused on the effects of current trends on minority populations or on female-headed families, as most investigators have studied white middle class families.<sup>23</sup> Because so little is known about the

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ILY/WORK CONFLICTS (1986), presents a persuasive argument that enlightened workplace practices accommodating workers' parental responsibilities will enhance corporate productivity. He bases his analysis and conclusions on a survey of 5,000 employees of five large firms.

The concept that family and work roles are determined by gender has developed since the industrial revolution. For a description and analysis of this phenomenon, see R.M. KANTER, *WORK AND FAMILY IN THE UNITED STATES: A CRITICAL REVIEW AND AGENDA FOR RESEARCH AND POLICY* (1977). In case law, the separate spheres doctrine has been used to justify legal barriers to employment for women in male dominated areas of work, including the legal profession. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

18. See, e.g., *FAMILY AND WORK*, *supra* note 2, reviewed in this Essay *infra*.

19. *Id.*

20. See *supra* note 2.

21. *Id.* at 4-5.

22. *Id.* at 7.

23. *Id.* at 6; Shaw & Shapiro, *Women's Work Plans: Contrasting Expectations and Actual Work Experience*, 110 MONTHLY LAB. REV. 7 (Nov. 1987) (great differences among

causes and effects of changes in workforce participation and sex norms, this collection of essays is essential reading for evaluating workplace reforms. It makes few recommendations other than pointing to areas that need further investigation. Hence it implicitly admonishes caution in responding to societal changes in broad fashion, such as federal legislation. Its subtheme is circumspection and the need to move slowly.

In contrast, *Family and Work*,<sup>24</sup> a collection of essays from representatives of management, labor, government, and academia, is advocacy oriented. Its goal is to develop policy recommendations for the support of working parents. The second of two volumes,<sup>25</sup> it concludes by endorsing federal legislation to mandate maternity and parental leave—six to eight weeks of paid leave for women at the time of birth and unpaid leave for either parent for up to six months, with job protection ensured for either leave.<sup>26</sup>

The essayists in *Family and Work* were all members of the Family Policy Panel of the Economic Policy Council (EPC) of the United Nations Association of the United States, brought together "to examine the extent of . . . changes that are affecting the family, the workplace, and the economy"<sup>27</sup> as part of an effort by the EPC "to orchestrate a systematic and constructive involvement in international economic problems by the U.S. private sector."<sup>28</sup> The contributors, described as "hard-headed members of the establishment who had a firm grip on economic and political reality,"<sup>29</sup> were asked "to produce realistic solutions."<sup>30</sup> The participants included well-known figures such as Senator Patrick Moynihan, John Sweeney (president of the Service Employees International Union), Alice Ilchman (president of Sarah Lawrence College), former president Gerald Ford, Robert O. Anderson (chairman of Atlantic Richfield Co.), Marian Wright Edelman (founder and president of the Children's Defense Fund), and Albert Shanker (president of the American Federation of Teachers, AFL-CIO).

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racial groups in income and expectations).

24. See *supra* note 2.

25. The first, entitled *WORK AND FAMILY IN THE UNITED STATES: A POLICY INITIATIVE* (1985), achieved no clear-cut consensus. *Id.* at 2.

26. *FAMILY AND WORK*, *supra* note 2, at 188.

27. *Id.* at xiii.

28. *Id.* at xiv.

29. *Id.* at 187.

30. *Id.*

Like Voydanoff, they argue that changes in demography and social attitudes present critical interdependent problems. To achieve economic growth and family well-being, traditional policies must be replaced in order to support and "respond to what is now the typical American employee: the worker with significant parental responsibilities."<sup>31</sup> Creditably, they do not flinch from recognizing that this worker may very likely be a female single parent.<sup>32</sup> This volume, which concludes by making explicit recommendations to support families through workplace rules,<sup>33</sup> illustrates the "pragmatist" position. It is concerned more with promoting business stability than equality for women. Its subtheme is: Forward, in order to provide an orderly supply of highly motivated workers for business and industry.

The demand for women to fill new jobs, particularly in the rapidly growing clerical and service sectors, has prompted demands for support for the families of these workers, including federally mandated family leave. At hearings on the Family and Medical Leave Act of 1987, Eleanor Holmes Norton, professor of law at Georgetown University and former director of the Equal Employment Opportunity Commission, represented thirty-one women's, labor, and civil rights groups.<sup>34</sup> In her monograph submitted with her oral testimony, Professor Norton analyzed the proposed bill, justifying its leave provisions as a necessary recognition of the needs of the workplace, workers, and the family. She noted that

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31. *Id.* at 190-91.

32. *Id.* at 190.

33. The other recommendations: provisions for maternity and child health, flexible work schedules and career ladders, preschool and early childhood education, and child care. *Id.* at 188-89.

34. *Hearings, supra* note 2, at 31. The groups Professor Norton represented included Amalgamated Clothing and Textile Workers, American Association of Retired Persons, American Association of University Women, American Civil Liberties Union, American Federation of Government Employees, American Federation of Teachers, American Nurses' Association, Association of Flight Attendants, Children's Defense Fund, Coal Employment Project, Coalition of Labor Union Women, Communications Workers of America, Disability Rights Education and Defense Fund, Epilepsy Foundation of America, International Ladies' Garment Workers' Union, Leadership Conference on Civil Rights, National Council of Jewish Women, National Education Association, The National Federation of Business and Professional Women's Clubs, Inc., National Federation of Federal Employees, National Organization for Women, National Women's Political Caucus, National Women's Law Center, NOW Legal Defense and Education Fund, Planned Parenthood Federation of America, Service Employees International Union, Union of American Hebrew Congregations, Washington Council of Lawyers, Women's Equity Action League, Women's Legal Defense Fund, Young Women's Christian Association of the USA, National Board.



the bill avoids the problems of providing benefits only for women, special treatment which makes women vulnerable to denial of jobs on the grounds of business necessity.<sup>35</sup> Furthermore, she stated that the bill will encourage paternal parenting so that fathers will "share in the emotional rewards" of caring for their children.<sup>36</sup>

Thus while Professor Norton advocates equal treatment for women in the workplace, she calls for a much broader approach to the relation of work and family in society, one which fosters the well-being of both. Like Professor Taub and others, Professor Norton criticizes the bill for not going far enough, particularly in the face of rising numbers of single parent families, which are especially common among minorities.<sup>37</sup> Mandatory family leave, then, is only a minimal step in meeting those needs, falling far behind the support most other societies give working parents and their families, including third world countries.<sup>38</sup>

Nevertheless, she praises the bill for providing minimal job guarantees for both working members of families<sup>39</sup> and employees with serious health conditions. Moreover the bill provides effective means of enforcement and deterrence through administrative investigation and hearings containing strict deadlines, alternative judicial enforcement, and authorization of significant penalties for noncompliance.<sup>40</sup> If a violation is found, money damages are mandatory.<sup>41</sup>

Professor Norton notes that while the bill provides needed benefits for workers, it will not unduly burden employers.<sup>42</sup> Many

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35. See her analysis of the potential long-range effects of the case of California Federal Savings & Loan Ass'n v. Guerra, \_\_\_ U.S. \_\_\_, 107 S. Ct. 683 (1987), *Hearings, supra* note 2, at 31.

36. *Id.* at 46. Professor Norton points to the experience under Sweden's parenting leave statutes: in twelve years, 1974-86, the percentage of men taking leave increased from 3% to 22% (citing *WORK AND FAMILY, supra* note 4, at 174). But see *WORK AND FAMILY, supra* note 4, at 106-07—when U.S. companies provide parental leave, few men opt to take it.

37. *Hearings, supra* note 2, at 34.

38. *Id.*

39. The bill allows workers to take time off from work to care for close family members, children or parents. See *supra* note 4.

40. Because Department of Labor offices are located in many cities across the country, aggrieved employees will have relatively easy access to redress for their grievances through the agency, or alternatively through the federal and state courts. *Id.* at 54. The bill provides that a complaint may be filed through the Department of Labor or in any federal or state court. H.R. 925, *supra* note 4, at secs. 108, 110.

41. H.R. 925, *supra* note 4, at sec. 112.

42. *Hearings, supra* note 2, at 55.

employers already provide some form of leave covered by health insurance.<sup>43</sup> In addition, since the employee on leave is not paid,<sup>44</sup> employers do not face an inordinate financial burden or even much disruption; most leaves are requested far enough in advance for employers to shift work to other employees or hire temporary workers, thus avoiding resort to the more expensive temporary worker agencies.<sup>45</sup>

Professor Norton concludes that the costs to employers, workers, and society at large will be far greater if employees are not granted job-guaranteed leaves. These costs include the emotional and developmental costs to children whose parents cannot take the minimal time necessary to nurture them, the costs to workers who lose their jobs to tend to children or the sick, the burden on the welfare system to which unemployed workers must eventually turn for survival, and the direct costs to business of employees' low morale and high job turnover.<sup>46</sup>

To date, no commentator or organization seems to have questioned the idea that parental leave is a good, or, whether, if it is, it continues to be beneficial when offered in a capitalistic society, like ours, with a long history of patriarchy. Although the authors of this Essay take no hard-and-fast position on this question, we believe that it deserves more treatment than it has received. If parental leave, and associated workplace reforms like child care, have the potential to injure those whom they are ostensibly designed to benefit, then society—or, at least, the female sector of it—should be slow to press for their adoption. As a way of raising the issue of parental leave's ability to benefit or harm women, we offer the following dialogue between two imaginary characters. We believe that dialogues, stories and narratives can provide useful means by which we are able to examine our own unconscious predilections and mindsets—matters which are generally invisible because we take them for granted. We use them to scan the world but rarely focus on them.<sup>47</sup>

The two characters in our dialogue are Rebecca Forest, a 25-year old divorcee and office worker, and her father, Robert Collis,

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43. *Id.* at 55-56.

44. *Id.* at 59.

45. *Id.* at 60.

46. *Id.* at 61.

47. *E.g.*, D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 7 (1987) (use of parables and stories to analyze mindset and ideology).

a 63-year old professor of American Studies specializing in social reform movements. The two are seated in the comfortably furnished study of Professor Collis, in his home near the university campus.

REBECCA: Dad, I am so happy. I just learned that I am pregnant. I thought it would never happen.

ROBERT: (frowning slightly) I'm delighted to hear that, Becky. When are you due?

REBECCA: In the middle of March. I'll take off work in late February and, if all goes well, be back by the beginning of the summer.

ROBERT: And are you going to be able to manage? I'm concerned about you, now that you and Mark have split up.

REBECCA: I'll be fine. I have some money saved up. Besides, I'll only miss three months of work, and the bank has said that if I need another few months, I can take that off, too, without pay—not that I think I'll need that long.

ROBERT: Your company certainly has a more generous leave policy than my university, even though we're private, elitist, and supposedly well endowed. Yet, I wonder whether things are as rosy as they seem at the bank. In particular, you seem to be contemplating taking off as much as six or nine months. I wonder if that is wise.

REBECCA: What do you mean?

ROBERT: I mean, are you sure that you won't end up worse off than before? It seems to me that the bank may say your job will be guaranteed when you come back, and that your taking a leave won't be held against you in fewer promotions, longer hours, lower pay, and shorter vacations, but may not do it in practice.<sup>48</sup>

REBECCA: Dad, you're such a worrier. Of course they will. Their new policy provides for it, and a new bill before Congress right now would make those job protections mandatory.<sup>49</sup>

ROBERT: Becky, I don't mean to overdo it, particularly since there's not much you can do about it at this point. And, frankly,

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48. Compare Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, \_\_\_\_\_ YALE L.J. \_\_\_\_\_ (1988) (forthcoming) (reforms hailed with praises and celebration, then often gutted by foot-dragging, narrow construction, or delay), with Rodensky, *California Federal Savings & Loan Ass'n v. Guerra: Preferential Treatment and the Pregnancy Discrimination Act*, 10 HARV. WOMEN'S L.J. 225, 230 n.22 (1987) (asking whether landmark decision signals a restructuring of the workplace or merely reinforces stereotypes of women as atypical workers with men as the real bread-winners).

49. See *supra* note 4 and accompanying text (proposed federal legislation).

I'm delighted at the prospect of becoming a grandfather—I thought you would never get around to it. But for your own sake, and to avoid disappointment, I don't think you should imagine that your taking time off work will go without notice or penalty.

REBECCA: Dad, I know your anti-corporate streak. You feel you can never trust the bosses. But, believe me, it's all going to work out just fine. Emily Reed was going to have to quit if they didn't offer something like this. And, I was afraid I could barely manage, but now I won't have to worry about those last few weeks of pregnancy, or those first few months of day care and baby sitters.<sup>50</sup> I can relax and enjoy my baby—and being a mother. I can't wait.

ROBERT: I can certainly understand your pleasure and excitement. I remember how it was for Madeline and me when you arrived. And, I'm glad the situation at work sounds so convenient. Management seems anxious to please.

REBECCA: (frowning). Oh, Dad, come on.

ROBERT: What?

REBECCA: "Anxious to please," you said. I've known you long enough to recognize your famous sarcasm, which even your students complain about.

ROBERT: Not sarcasm, Becky—just call it healthy suspicion. I think you should take steps to protect yourself, and you can't do that if you don't know what kind of situation you will come back to when your leave is over.

REBECCA: I'll just step back into my old job. They have to hold it open for me.<sup>51</sup>

ROBERT: And where will everyone else be when you come back? Six months or a year ahead. And where will your skills be? Six months or a year behind. Or do you think management is going to bless, love, promote, and honor you for having a baby? They're not in the baby business—they're a bank.

REBECCA: But they know their workers are human. They fall in love. They get pregnant. They have babies.<sup>52</sup> This accommodates them, enables workers to feel more comfortable on the job. It makes them more loyal to the firm. The bank is an enlightened

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50. Most proposed legislation and existing policies provide leave in such situations, although they vary in length of the paid period. *Supra* notes 4-5 and accompanying text.

51. *Id.*

52. See A. RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE* (1976) (pointing out difficulties of motherhood; yet women constantly decide to accept these difficulties and become mothers).

employer; they realize that worker morale is important to an effective work force.<sup>53</sup> So, it's in their best interest.<sup>54</sup> And another thing, Dad. The policy is not just for women. It's for men, too. It's *parental* leave.

ROBERT: And how many men have opted for this great new opportunity?

REBECCA: That's not the point.

ROBERT: But it is. I would bet the climate at work is such that few, if any, of the men jump for this carrot.<sup>55</sup> Doesn't that make you suspicious of your chances when you go back?

REBECCA: To the contrary, Dad. Everyone at work is delighted with our new parental leave policy. Even the men.

ROBERT: And are the men excited about it for themselves, or for their wives or girlfriends?

REBECCA: I'm sure that many of them, if appropriate, will take advantage of parental leave. Caroline, my supervisor, encouraged all of us to participate.

ROBERT: Didn't you tell me that Karen Jaworski is going to have a baby?

REBECCA: Yes, and she is very enthusiastic about the new program, just like me. She is going to take off the full year, in fact, although her last nine months will be without pay. She wants to have some time with her baby after it is born.

ROBERT: Didn't you tell me that her husband works in the Mortgage Department?

REBECCA: Yes, Brent. And, no, Dad, I don't know if he is going to take off leave too. I'm sure Brent will if he wants to and if the two of them can afford it. Things may be different in his department.

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53. See arguments for parental leave made by "pragmatist" proponents of workplace reforms, *supra* notes 24-33 and accompanying text.

54. Cf. D. BELL, RACE, RACISM AND AMERICAN LAW § 1.12 at 1-51 (2d ed. 1980) ("interest convergence" formula: Whites will act for Black justice only when doing so promotes whites' self-interests); Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980).

55. European countries as well as United States corporations offering parental leave find that few men opt to take it. *E.g.*, WORK AND FAMILY, *supra* note 4, at 106-07; *Hearings*, *supra* note 2 (testimony of David Blankenborn, Director of Institute for American Values) (American mothers ten times more likely to take leave than fathers). For a summary of parental leave policies in other countries and their experience with them, see S. KAMERMAN, A. KAHN & P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 14-25 (1983); WORK AND FAMILY, *supra* note 4. But see Norton, *supra* note 36 (increasing members of men taking leave in Sweden).

ROBERT: Oh? So it may turn out not to be such a great alternative for the men? The administrators in his department may frown on Brent's leaving his post to take care of a baby when his wife can do it. Is that what you mean?

REBECCA: You're twisting my words. There are several reasons why fewer men than women take parental leave, not just the one you describe.<sup>56</sup> Women are told all their lives that being a mother is important; men aren't. Also, men are taught to identify "success" with a career, not with being a good care-giver. Still, as more and more workers take parental leave, it will become more accepted. It really is innovative, and you know how it sometimes takes things a while to be accepted.<sup>57</sup> Especially by you men.

ROBERT: Now I detect a little bit of sarcasm on your part, Becky. But I think the contrary is true. The new leave policy is already being accepted, but as the trap it is. No one is saying so publicly, however. This new, innovative program removes you from your job. It's like indirect, covert demotion. You lose any leverage you had for promotions and worse yet, you could lose your job. It's just one more thing they can hold against you. There are a lot of people out there in need of jobs. It's very easy to replace one, even a wonderful worker and person like you.<sup>58</sup>

REBECCA: Dad, I can't believe what I am hearing. This is the sort of thing you are always preaching—that the rights of women and minorities must be taken seriously. Now someone is finally doing it, and you oppose it. Whose side are you on, anyway?

ROBERT: It's certainly not that I oppose measures that actually give power to women and other outgroups. I've worked for that all my life, as you know. But do parental leave policies accomplish that? It seems to me they make you more, not less, vulnerable and powerless. And by the way, what about single women and gay couples—are they included in the provisions?

REBECCA: Single women are; gays I'm not sure about.<sup>59</sup> But,

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56. See *supra* note 36 (few men opt to take parental leave).

57. See, e.g., testimony of Eleanor Holmes Norton, *Hearings, supra* note 2, at 46, making this argument.

58. Cf. Taub, *supra* note 5, at 398; Hoffman, *Employment and Quality of Working Life: The Situation of Women in Hungary* (presented at Internat'l Symposium on Women & Indus. Rel'n's, Vienna, Sept. 12-14, 1978) (both pointing out that when women take long-term leaves, men reduce participation in household tasks and women return to the labor force in part-time or marginalized positions).

59. See Colvin, *supra* note 4, raising concern that family-oriented language in most parental leave bills will exclude lesbian couples and single mothers from coverage.

I've heard this argument before, not least of all from you. The whole system has to change. Small reforms just amount to window-dressing. That's what you're saying, Dad. Right?

ROBERT: As a matter of fact, I do think the whole system should change, and the sooner the better.<sup>60</sup> But that is not the point I am trying to make. It's that these workplace reforms, like child care and parental leave, will just make matters worse for women.<sup>61</sup>

REBECCA: I think you're just buying into patriarchal capitalist values yourself. Is it all that important to move up the corporate ladder as fast as possible? If all the women's movement does is give us the opportunity to become clones of men, not much will have been achieved. The real goal is to enhance choices. Ten years ago, I would have had to choose between a career and having a baby. Now I don't. Sure, I may lose a Brownie point or two at work, and I may be fifty instead of forty when I'm appointed bank president, but so what? Just as favorable legislation and court decisions opened things up for Blacks and other minorities,<sup>62</sup> workplace reforms are opening up paths for women.<sup>63</sup> The new policies may not be perfect, but they're a start.

ROBERT: A start toward what? Further subordination of women?<sup>64</sup>

REBECCA: There you go again, always harping on what could go wrong. I don't know why you can't admit that things might be changing for the better.

ROBERT: Rebecca, let me put it this way. You know about patriarchy, right?

REBECCA: Of course I do. I've been living with it all my life.

60. See Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1, 2 (1987) (goal to subvert, transform patriarchal system of laws and customs, not adjust better to it).

61. See D: BELL, *supra* note 47, at ch. 1 (legal system assures that "reforms" for Blacks never come at price whites will not pay); Delgado, *supra* note 48 (such reforms often deepen predicament of those they ostensibly benefit).

62. *E.g.*, *Brown v. Board of Educ.*, 349 U.S. 294 (1955); Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* (1982).

63. *E.g.*, Family and Medical Leave Act of 1987, *supra* note 4; Child Care Opportunities for Families Act of 1985, H.R. 2867, 99th Cong., 100 Sess. (1985); an amendment introduced in 1985 to increase block grants for child care under Title XX of the Social Security Act.

64. Women with children "have the highest incidence of absenteeism of all employees" and report higher levels of stress than men with children. WORK AND FAMILY, *supra* note 4, at 29. "Absenteeism for men was low because women's was high." *Id.* at 30.

What's more, we studied it in the Women's Studies course I'm taking in the evening division. I told *you* about it, in fact. It means that the men in this country control things. They are in charge, and so they coin a system of rules and values that solidifies their control and keeps women out.<sup>65</sup> It's like the father-daughter relationship writ large.

ROBERT: Not bad. And do you think the patriarchs are really willing to share power with women by giving them concessions at work that help make up for the disadvantages women suffer, by virtue of their biological role, in workplaces and workplace culture, as currently understood?<sup>66</sup>

REBECCA: They might if they decided it was in their best interest. And it is, today at any rate. Women are aroused. We are demanding our rights—and getting them, in such areas as anti-sexual harassment laws, court holdings making abortion every woman's right, and increased law enforcement against rape, spousal abuse and incest. Workplace reforms are an important ingredient in the movement. We want to be taken seriously at work and have babies, too. Or, at least, we want to have the choice.

ROBERT: Who could be against choice, against having options? So long as they are free ones and not pressured, or ones that come with penalties attached, which I'm afraid will happen.

REBECCA: I'm not sure I follow you.

ROBERT: Focus on the social backdrop against which the choices—to have a baby or not, to take leave or not, to put Junior in child care or not—will take place. And that backdrop is one of thoroughgoing patriarchy, in which men call the shots and women survive as best they can.<sup>67</sup> It's the same, basically, as it is with race. Surely you read about those recent reports that show that conditions are worse for Blacks than they were ten years ago.<sup>68</sup>

65. On patriarchy, see, e.g., Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1984); Rich, *The Antifeminist Woman*, in *ON LIES, SECRETS AND SILENCE* 69, 78 (1979). For a collection of documents chronicling patriarchy from colonial times to the present, see *WOMEN IN AMERICAN LAW* (M.S. Wortman ed. 1985).

66. See Moss, *Progress for Women? Yes, But . . .*, *ABA Hearings Show Bias Remains But in More Subtle Form*, *A.B.A. J.* 18 (Apr. 1, 1988) (women lawyers testified before American Bar Association Commission on "subtle barriers" to professional advancement). A.M. MORRISON, R.P. WHITE, E. VAN VELSOR, & THE CENTER FOR CREATIVE LEADERSHIP, *BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA'S LARGEST CORPORATION?* (1987).

67. *Supra* note 60.

68. Delgado, *supra* note 48, and sources cited therein (1988, forthcoming).



And this, despite our much-vaunted constitutional and statutory protections of their civil rights. The same may happen with you, with women.

Consider our own lives for the past few years. Remember when you tried to get a loan at the credit union and were turned down until I came to cosign for you. Do you think that would have happened had you been a young, upwardly mobile white male? And how about the recent job promotions in your very own office? What advanced those two fellows from accounting past Celia Proust, Maggie Woolfe and Kayla Chopin—all of whom had “seniority”? And do you remember the time you went to the City Club with some of the men from work and you had to sit in the lobby because five of the seven floors were open to men only and not women? As I recall, you had to eat by yourself, and the guys laughed at you when you followed them halfway to the men’s dining area where waitresses were parading around in skimpy clothing. I believe that all happened last year. Little has changed.

REBECCA: Outrageous as it was, that was an isolated incident. Many men in the business world may be sexist, but they’re also rational people when it comes to economic self-interest. They know that satisfied workers are productive workers. That’s why the bank is trying to remedy past wrongs. Someone has to take the initiative.

ROBERT: Remedy past wrongs—that’s fine. But parental leave is the next great band-aid, like affirmative action, “fair” housing, and the equal protection clause, remedies that didn’t remedy because they were never intended to.<sup>69</sup>

REBECCA: So you wouldn’t opt for parental leave? You wouldn’t recognize the benefits it could have for your family, for the stability it could create for you, your wife and your child?<sup>70</sup> How elitist can you get? You and your nihilist male professor friends prefer to sit around spinning theories and ignoring the obvious—that parental leave is a tangible benefit for women. It’s unlike those other reforms and concepts that do lend themselves to manipulation to suit the patriarchs’ purposes. Working class women don’t have the luxury you have; if we can’t return to work or afford day care, we are in serious trouble. But no, you would rather sit on

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69. D. BELL, *supra* note 54, ch. 1; D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

70. These are some of the policy reasons urged by pragmatists and others in support of parental leave. See, *e.g.*, text and notes 24-33 *supra*.

top of the mountain you have built and defy someone to kick you off. Oh, Dad. Can't you let anyone improve? When will we be so wise as you?

ROBERT: I just recognize potential problems. I have seen first-hand some of the horrors that discrimination imposes on women and minorities. Power is power. Don't you understand that this new "benefit" could only be yet another pressure valve, assuring that the system has just the right amount of sexism<sup>71</sup>—too much would be destabilizing, too little would endanger the material and psychic rewards men receive from a system of female subordination. All this new and so-called enlightened approach does is quell any questioning of more sinister policies, like advancing white men . . . .

REBECCA: And that's how you advanced to the position you have?

ROBERT: I can't deny it. I know I was given breaks by virtue of my status, my appearance. I fit in, I win.

REBECCA: I don't see you marching down any cubicle rows, defending the integrity, job security and wages of us poor plebeians. Thank you for being so sympathetic to our plight. Now, while you question the establishment's motive behind your full-sized desk with your man-sized paycheck, I shall enjoy these small strides that I and other women and minorities have fought for. The physical and psychological health of my child means much to me, and I am proud of my employer for recognizing it. Many studies have proven that an infant needs close parental contact for the first months.

ROBERT: I don't deny that at all. Of course I understand the noble intentions behind this type of policy. But I question the sincerity behind the bank's use of it. In the first place, I doubt that many men will take parental leave, mainly because of the pervasive idea still so much a part of this society that women, only, take care of the kids.<sup>72</sup> Until it is commonplace instead of happenstance that being a father means nurturing the baby, few men will feel compelled to take—or even feel secure about taking—several weeks or months off to be a parent. Women, on the other hand, will be encouraged to assume the parental duties. So,

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71. Cf. Delgado, *The Ethereal Scholar: Does Critical Legal Studies Offer What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303-04 (1987) (civil rights "breakthroughs" serving same function).

72. See *supra* note 55 and accompanying text.

unlike the men, women will be pressured to leave their jobs. This is just another way, indirect if you like, to put women back in the home and out of the job market—or, better, shuffle them in and out of the market on demand. I have no problem with any woman's *choosing* to do that to herself—or a man, for that matter. But I question this pressure; it is manipulative. They are playing you, making you feel secure in taking leave or guilty if you don't.

REBECCA: So you think I am being gulled out of my job.

ROBERT: Yes.

REBECCA: But you do not deny that it is essential to give the baby stability.

ROBERT: No.

REBECCA: Sounds like a pretty tough dilemma you've got yourself in, Dad. So what is your solution? Get a nice little wife and have her take care of Junior while you earn the bread and bring home the bacon, and have an interesting career?

ROBERT: Someone must have taught you impudence. It was not I, I swear.

REBECCA: Perhaps during those two minutes you changed my diaper in the thirtieth week of my life you muttered something sardonic. Or maybe it was during those thirty minutes in the second week of my life.

ROBERT: I'll overlook that. I only want you to be aware that those in power do not relinquish but soothe. What percentage of women have the clerical jobs at work compared to the administrative jobs? How many women get promoted? Who is your boss?

REBECCA: Once again, you're assuming that status in a corporate hierarchy is all important. But even if I preferred an administrative job at this point in my life, you're not suggesting anything I didn't know already. Women have always been relegated to the low status, low paid clerical jobs. But things are changing now that we are showing men how good we are. Last year Mary White was promoted to director of customer services.

ROBERT: One slipped through.

REBECCA: No, Dad. Mary White, a brilliant, highly motivated and courageous worker, was promoted because she deserved it. The bank, in recognizing her skills, rewarded her for her performance.

ROBERT: Yes, but how long did she work for it before anyone noticed? Or, rather, how many men passed her by before she finally reaped the fruits of her labor? Or, realistically, how many

men did she compete with in customer services? It's my understanding that there is about a 9-to-1 ratio of women to men, and the reason it's not 3-to-1 is because the two men who worked there briefly took higher salaried jobs in other departments. And, finally, Rebecca, Mary White certainly deserved her promotion, but will she really get to run the department? You watch. Mary will be placated for awhile, she may get a little of what she deems necessary to the growth and improvement of her department, but sooner or later, after management has chiseled away at her budget, balked at her new ideas, refused to hire any workers she has suggested—sooner or later, she will feel defeated. She may stay at the bank, sullen and disillusioned, or she may go elsewhere, where the game is essentially the same, only a little more complex.

REBECCA: Your cynicism gives you a remarkable imagination, Dad. I prefer to have hope, and to regard Mary White as a role model—someone who has all the respect and admiration of both her peers and her superiors.

ROBERT: But that's exactly what they want you to do—feel full of hope and encouragement, as though you, too, can make it someday. But it is only a trick to keep you down, to keep you satisfied with the way things are. If the administration strategically promotes a couple of women or minorities, it enshrouds the real policy in which outgroups are subordinated.<sup>73</sup> Moreover, the powers can say, a chorus of workers joining in with them, "If you didn't make it, it was your own fault." "You've got child care now and parental leave, so what's your excuse?"<sup>74</sup> And you, unpromoted, unnoticed, uninspired, will conclude the very same.

REBECCA: This is so paradoxical. Dad, I think you enjoy twisting things around this way. Parental leave is a tangible benefit for women. But you persist in trying to show it will hurt us—not just that it will, or may hurt us, but that it must, that it is inevitable that it will turn out to be a step backward. I just cannot believe that, no matter what arguments you give. Right is not wrong. Black is not white. And increasing women's range of options is

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73. For a discussion of token concessions to ward off more fundamental change, see Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

74. Cf. Delgado, *supra* note 71, at 310 ("neutral" Civil Rights laws enable rest of society to blame Blacks' laziness or lack of intelligence for their failure to progress in a society now purged of racism).

not a step backward.

ROBERT: Rebecca, let me tell you a story. You remember when you were little and I used to tell you stories? (Rebecca nods) Well, let me tell you a big-person, adult story. It's a sort of fairy tale, but it has a point.

REBECCA: I have a feeling I already know what the point is going to be. But, you have always been a good storyteller, Dad—I have to hand that to you. Bad at diapers, good at stories. So, go ahead.

ROBERT: Suppose that once upon a time, around fifteen years ago, there was a very cunning, very powerful wizard. The wizard wore a fine, three-piece business suit, had silver hair, and looked something like a walrus. And the wizard was the Chief Capitalist, the captain of all industry in the United States. The wizard's existence is kept a closely guarded secret. Even though he calls all the shots, makes all the important economic decisions, his existence is known only to a few powerful capitalists, all of whom take orders from him.

REBECCA: Go on. I think I see what is coming.

ROBERT: Now, the wizard is also all-knowing. He foresees the future, sees trends. And one day, staring into his crystal ball, the wizard foresees a day when the information industry explodes. Transistors are invented, and electronic data processing becomes the norm in a thousand industries and businesses.<sup>75</sup> In a short time, there is a need for four million new workers operating data processing machines of various kinds.<sup>76</sup>

REBECCA: This is starting to sound like my job.

ROBERT: I'm not surprised. And what will the four million new workers do? They will sit eight hours a day and stare at green computer display terminals until their eyes go half blind. They will enter data, numbers or words. They will take out data, numbers or words. And they will do this every workday of their lives.

REBECCA: It's not as bad as you make it sound, Dad.

ROBERT: Isn't it? It's interesting that you say that, Becky. For who is the perfect worker for the task? Who will the economy

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75. For discussion of the data processing revolution and the impact on the workplace, see S. ZUBOFF, *IN THE AGE OF THE SMART MACHINE* (1988) (transformation of the American workplace by computer-based information technology).

76. For evidence that this trend is likely to continue, see Personick, *Projections 2,000: Industry Output and Employment Through the End of the Century*, 110 MONTHLY LAB. REV. 30 (Sept. 1987) (most new jobs will be in service sector).

look to to fill these four million new jobs? Consider the traits of an ideal worker. The worker must be neat. The worker must be careful. The worker must have great powers of concentration. The worker must not aspire to a higher position, because these new jobs lead nowhere. The worker must be willing to sit in a cramped work space, with little privacy, and be happy with a salary of 20,000 dollars a year or less. Who is the perfect worker for such a job, Rebecca?

REBECCA: I know—a woman.<sup>77</sup> But that doesn't mean that these are dead-end jobs, or that men don't sometimes fill them. It's just that many of the workers who are now starting out are women, either at the reentry or entry level. So, I don't buy your conspiracy theory, Dad, any more than I buy your stereotypes of us as neat, careful, and unambitious.

ROBERT: If you don't buy my theory, you should at least hear it out. To continue, Rebecca, if you were the walrus, the Captain of Industry, and if you foresaw the need fifteen years hence for four million neat, careful female workers to sit and stare at data display terminals forty hours a week, what changes would you make in society to assure those workers' availability when the technology is in place?

REBECCA: I am not sure what you are going to say, Dad, but I doubt very much that I will buy it, whatever it is.

ROBERT: Bear with me a minute. Might not you first loosen family law rules so that marriage and divorce become easy-in, easy-out, no-fault kind of things?<sup>78</sup> That would keep the women insecure, since they would no longer be able to rely on their husbands for the support of themselves and their children.<sup>79</sup>

REBECCA: I suppose I might. Studies have shown that no-fault divorce puts divorced women in a far worse economic position

77. Rebecca has recently read M. ATWOOD, *A HANDMAID'S TALE* (1987) (describing futuristic society of biologically enslaved women), but rejects the parallel to current trends.

78. See, e.g., R. EISLER, *DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN*, ch. 1 (1977) (movement toward no-fault divorce). See also 24 AM. JUR. 2D *Divorce and Separation* § 29 n.78 (1983). The participation of married men in the workforce has been declining as women enter in increasing numbers, "reflect[ing] the dramatic rise in wives' participation and the increase in the numbers of divorced, separated, and never-married persons that has resulted from changes in marital patterns." Hayghe & Haugen, *A Profile of Husbands in Today's Labor Market*, 110 MONTHLY LAB. REV. 12, 17 (Oct. 1987)

79. Cf. K. GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* 69-91 (1985) (insecurity and family conflict make women career-oriented). See also Arendell, *Women and the Economics of Divorce in the Contemporary United States*, SIGNS 121 (Autumn 1987) (divorce makes women poorer, men richer).

than it does men. But of course all this is fantasy—there is, and was, no such person. And, if there were, would he or she provide for battered women's shelters and rape counseling centers? So much for your conspiracy against women.

ROBERT: Valid points. But my wizard is not anti-woman per se—just pro-profits. So, he arranges for women to have a powerful incentive to work and to learn things like word processing. To continue, if you were the wizard, Rebecca, might you not also make available parental leave and inexpensive, low-quality child care so that the four million new women workers would be able to shuttle into and out of the work force as their biological needs dictated?

REBECCA: Maybe I would. But I would give it an entirely different interpretation from the one you give it.

ROBERT: I'm not sure you would if you thought hard about the quality of some of those child care programs that are becoming available. Whether privately operated or subsidized by the state their quality is almost uniformly dismal.<sup>80</sup> In many, there are too many children to give the youngsters even a modicum of adult attention. So the kids end up being propped in front of TV sets most of the day and being fed sugar snacks when, understandably, they become restless.<sup>81</sup> At the end of the day, the working mother, single or divorced, picks up Junior at the day care center. Both are tired and irritable. They spend the evening screaming at each other, and tomorrow do the same thing. What a life.

REBECCA: I'm sure some of them are that way, even though the worst of them are undoubtedly better than being a latch-key child. That's why subsidizing low-cost child care is a high priority for women. But people like you will say that is just another band-aid. If you were really consistent, you would welcome this terrible situation you describe. It will just make the workers more ready for the revolution. But what else will your wizard do, Dad?

ROBERT: Third: The wizard would then disseminate a myth that the four million women living lives like these are on the cut-

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80. Serious dissatisfaction with the quantity and quality of available child care, see Arendell, *supra* note 79, prompted the proposed comprehensive child care bill, The Act for Better Child Care, H.R. 3660, 100th Cong., 1st Sess., CONG. REC. H 10659, 100th Cong., 1st Sess., 133 CONG. REC. S 16554-62, introduced in November, 1987 by more than 130 congressional co-sponsors. See also McNamara, *At Last! A Major Push for Child Care*, Ms., Feb. 1988, at 17.

81. See sources cited *supra* note 80.

ting edge of a great revolution. The wizard, and other corporate leaders, all male of course, will use propaganda and publicity to make everyone believe they are revolutionaries, pathfinders in a great historical epoch, when in fact women's well-being is plummeting, particularly at the lower socioeconomic echelons.<sup>82</sup> How many women working at fast food restaurants or as secretaries will be able to take advantage of unpaid parental leave policies? REBECCA: Truly diabolic, Dad, your myth, I mean. I still don't buy it. What else would your wizard do?

ROBERT: Fourth: The wizard would make absolutely sure that a few women of great energy and talent progressed farther than they would have under the old, suffocating regime that prevailed before the women's movement began, say during the fifties and early sixties.<sup>83</sup> He would make sure a few women became professors, members of Congress, justices of the Supreme Court. And he would point to these as examples of where one can go if one has the talent and willingness to work hard.

REBECCA: Is that it?

ROBERT: And, last, he would laugh all the way to the bank because everyone actually bought it.

REBECCA: Dad, I appreciate the story, and the warning. But, really, it does not correspond with my, or anyone else's understanding of what is going on today. The women's movement is gaining, not losing, momentum. And we have not been co-opted as you seem to suggest. And frankly, Dad, I find the story more than a little patronizing. Who are you to tell us how to run our own revolution or what counts as a step forward or backward?<sup>84</sup>

ROBERT: I'm not criticizing anyone in the women's movement. Rather, I'm blowing the whistle on what men are doing. I'm breaking ranks and revealing a nasty secret my sex would rather we kept quiet about. I thought you and your sisters would appre-

82. See Arendell, *supra* note 79 (problem especially acute for older divorced mothers).

83. Justice Sandra Day O'Connor, for example, could not find a position as lawyer when she graduated third in her class in 1952 from Stanford Law School. *Book Note*, 97 HARV. L. REV. 2001, 2001 (1984) (reviewing C.F. EPSTEIN, *WOMEN IN LAW* (1983)).

84. On paternalism, see Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). See also Littleton, *supra* note 60, at 6 ("[S]cholarship has failed to account for women's concrete experience of empowerment through making rights-based claims."). But see Colker, *supra* note 7, at 80 (when Blacks and women acquiesce in rules that affect them, coercion may have affected their choice, hence we should still question these rules); Colker, *Consciousness and Love: Toward a Feminist-Theological-Spiritual Dialogue* (forthcoming) (difficulty of achieving one's authentic self or knowing what counts as finding it).



ciate that.

REBECCA: Let's drop the *ad hominem* stuff, Dad, and leave aside the question of whether you should have a voice in our revolution. Let's talk substance. I've been thinking about what you said, and it worries me more than a little. If you are right that workplace reforms like parental leave and child care are injuring us and engraving patriarchy a little deeper, then we, you, or anyone for that matter, ought to decry them. But I'm not so sure things would be that much better for women in your hypothetical Utopia. We all know sexism isn't just a capitalist phenomenon—things aren't too great for women in Cuba and China, either. Shouldn't we all work with the system we have and try to improve it?

ROBERT: (sighs)

REBECCA: I know, Dad, we've had this discussion before. But that's just my point. Your argument is just the old, tired one about moderate reform versus total, systemic change. We'll never settle that one.

ROBERT: I agree only that I don't need to settle it. As a white male, my status is secure. But I think women need to settle it, don't you?

REBECCA: Your story, Dad, although repulsive, is arresting. If even one tenth of it is true—not at the literal level, of course, but metaphorically—then we need to think carefully about what these workplace reforms can and cannot do for us. Family law innovations have both an apologetic and a Utopian aspect, and what is needed is a balancing of the two in each case.<sup>85</sup> So each reform, for example, no-fault divorce, both sets us back and propels us forward, both legitimizes the current unfair system and offers the promise of something better.<sup>86</sup> And these two functions are everywhere present.<sup>87</sup> I have the feeling that workplace reforms are the same way. They offer the promise of helping us, for example by allowing us to combine work and career. At the same time, they accommodate us to the system, enabling it to progress with minimal disruption, without altering its course—namely the search for profits—much at all.

ROBERT: And how do you see the balance? Do you think that

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85. See Olsen, *The Politics of Family Law*, 2 *INEQUAL. & L.J.* 1 (1984).

86. *Id.* at 1-2.

87. *Id.* at 2-4.

parental leave and child care promote Utopian goals more than they do the bad, apologetic functions?

REBECCA: I have trouble deciding that, Dad. I'm not even sure how to start. It's like comparing apples and oranges. Wizards and walruses may benefit somewhat from the reforms, I'll grant you. And you are certainly right that these new jobs are in many cases unpleasant, boring, and go nowhere. Even mine, at times. So, in a sense, the men who run things benefit from our thinking we have gained ground, or gained more than we have. Yet it seems to me that there is an aspirational side, too. These reforms whet our enthusiasm for more of the same. They give us a glimpse of where we might get if we continue the struggle.<sup>88</sup> And they mitigate to some extent the unfairness, harshness, and sexual stereotyping that prevailed, and still do today.<sup>89</sup> I believe, on balance, the gains outweigh the costs. But I have no way of proving that, certainly not to your satisfaction.

ROBERT: I don't want to be unreasonable. These things may not admit of proof.

REBECCA: So, where do we go from here?

ROBERT: The answer may ultimately be political, unsusceptible of anything like empirical or mathematical demonstration; one simply has to make a value judgment.

REBECCA: And I know what kind of judgment you would make, Dad. It's all or nothing. Total reform or nothing. There has to be a third way—some middle ground.

ROBERT: I hope there is, and I'd love to have your ideas on it. Just now, when you mentioned the twin functions of apologetics and Utopian reform, the thought flashed through my mind that there might be some way to reconcile the two, at least in connection with workplace reforms like parental leave.

REBECCA: I thought you would like that. You have always been a great one for dialectical oppositions and tensions.

ROBERT: Filial piety has never been your strong point, Rebecca. But tell me about your third way. What middle ground do you see?

REBECCA: You seem to want total reform and see workplace improvements as mere tinkering, mere adjustments of an unfair system—patriarchy — to eliminate some of the roughest edges and

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88. Cf. Delgado, *supra* note 71, at 308.

89. *Id.* at 305-07.

so adjust us to our fates under that system.

I, by contrast, am ready to grasp at any sign of improvement and accept it, believing that change will come only in small steps. Maybe there is a way to reconcile our two views. Can we say, Dad, that reform is beneficial, and should be supported, if it will promote movement toward the Good, the goal, the Utopian solution we should all be working for?

ROBERT: I don't see why not, but isn't that the same old cost-benefit equation that has divided reformers and revolutionaries since time immemorial, the reformers certain that incremental changes are genuine steps forward, the revolutionaries equally certain that they are snares and delusions?

REBECCA: No, I don't think it's just that. I think there are benefits to reforms that don't immediately meet the eye. For one thing, workplace reforms help break down the dichotomy between the family, or the private sphere, and the market, or the public sphere, making the family respond to human need, as the market does.

ROBERT: Reforms just assure second-class status for women.

REBECCA: But they make that status more overt. You may be right that women who take time off won't be promoted as fast, but that may prompt reconsideration of arbitrary promotion policies, as well as of matters such as the forty-hour work week and nine-to-five day. Why, for that matter, must workplaces be competitive rather than cooperative? Why must nurturing ability take second place to macho ambition on the job? So, Dad, might not it be that certain reforms can help us see the Good, the Utopian vision, more clearly and plainly than before? Only after moving to the new vantage point, so to speak, can we perceive better where we are going, what sorts of persons, what kinds of society, we want to become.<sup>90</sup>

ROBERT: Breaking down barriers, smashing dichotomies—these are pretty strong suggestions from someone who believes in working within the system. Maybe we're more in agreement than I thought. I agree with you that some changes—and workplace reforms may be a subclass of them—help us see things better—refresh the spirit, so to speak, and help us see where to go

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90. Cf. Littleton, *supra* note 60, at 5 (“[R]eform that opens paths to additional struggles must be part of feminist jurisprudence.”). See also *id.* at 5-6 (reforms’ inevitable failure can also serve useful purpose of demonstrating system’s hypocrisy, thus spurring search for deeper change).

from there. For example, having women in the workplace helps break down ideological blinders and stereotypes about women's role. Policies like the ones we are talking about can perhaps do that, even if the walruses of the world have figured out ways to assure that most of the women who take parental leave and drop their kids off at child care will be unlikely to get anywhere, are unlikely to gain positions of real authority, are unlikely ever to do anything that will displease or unsettle the walruses in their lofty seats of power. Or, to put it a little more moderately, the changes may benefit a few women, hurt some and leave others untouched—while benefiting virtually all men a great deal. Yet the changes may give us a glimpse of what a better, fairer, world would look like, and so may cause us to look for more searching reforms. So that these reforms, although moderate, incremental, and likely to do little to improve the lot of the women who stare at green screens all day long, may ultimately prove the system's undoing, the beginning of the end for patriarchy and sexual subordination.<sup>91</sup>

REBECCA: I'm amazed, Dad. Are you actually admitting error?

ROBERT: Rebecca, you know me. I'm never wrong. It's just that you and I have maybe hit on a higher synthesis.

REBECCA: Higher or lower, I'm not sure which it is. We have decided little. I still don't know whether to take leave or not. All I know is that I'm going to have a baby, and that I need some kind of job after that. Utopia may have to wait for a while.

ROBERT: We may all have to wait for a while. But let me know how you and your sisters come out on this one. I'm willing to stand with you, even if I don't agree on every detail and every bit of interest-balancing you come down to.

REBECCA: Thanks, Dad. I knew I could count on you, if only for a good argument. I hope you are up for some baby-sitting. The

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91. Utopian proposals are always derided as unrealistic; yet, critics are always attacked if they do not propose alternatives to the current system. We could (i) establish comparable worth, with pay scales determined by a national referendum or demographically balanced commission; (ii) pay all women more than men at work because many of them will have to take time off to give birth, something which benefits us all; or, (iii) give every woman \$20,000 for each baby she bears. Of crucial importance is that women define their own Utopia. See Cornell & Benhabib, *Introduction*, in *FEMINISM AND CRITIQUE* 2-4 (S. Benhabib & D. Cornell eds. 1987) (problem of defining authentic self, authentic Utopian goals in a society whose dominant messages and values are originated by males); Colker, *Consciousness and Love: Towards a Feminist-Theological-Spiritual Dialogue*, *supra* note 84.

rather terrible tale of woe you described just now made me reconsider the wisdom of putting your grandchild in one of those homes.

ROBERT: I see you are beginning to test my solidarity already; yes, I will be glad to help out with Junior, even if I have to take a refresher course in how to mix formula or change a diaper. I'm sure I speak for Madeline, too.

(Rebecca and Robert exchange a quick hug, turn and leave.)\* \* \*

## II. CONCLUSION

Recent writing on workplace reforms has been largely instrumental, concerned either with increasing women's access to jobs on an equal basis with men or with increasing the number and well-being of workers and their families in the interest of the corporate economy.

Yet as the dialogue between Rebecca and her father illustrated, these issues may also have normative and political dimensions. Workplace reforms, such as parental leave and child care, may disadvantage women, either in the short or long run. These measures may accommodate women to a basically unfair system, concealing its unfairness and postponing the time when more fundamental reforms are demanded. They may be token concessions, or, worse yet, may subtly damage women's job chances while ingraining patriarchy a little deeper.

Workplace reforms, as the dialogue shows, have an aspirational dimension, too, giving us a glimpse of what a humane world in which sex played little role in determining life's chances would look like. The aspirational and apologetic sides of these reforms may be in unresolvable tension; yet an understanding of their relationship is essential to intelligent reform. Exploring the twin poles that generate this tension has been the central task of this Essay.