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Spring 3-1-2010

## Essay: (Re)Constructing the Framework of Work/Family

Nancy E. Dowd

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### Recommended Citation

Nancy E. Dowd, *Essay: (Re)Constructing the Framework of Work/Family*, 16 Wash. & Lee J. Civ. Rts. & Soc. Just. 331 (2010).

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# Essay: (Re)Constructing the Framework of Work/Family

Nancy E. Dowd\*

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When we talk about the connections between work, family, and marriage, what are our assumptions or our implicit model? In this Essay, I hope to expose the importance of questioning the framework within which we operate. Marriage continues to be a core focus of the typical family law course.<sup>1</sup> As a matter of public policy, supporting and valuing marriage, and concern about the conflict between work and family because of the strains it imposes on marriage, makes balancing work and family within a marital framework a focus of law and policy.<sup>2</sup> I argue that we need to consider

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\* David H. Levin Chair in Family Law and Director, Center for Children and Families, University of Florida Fredric G. Levin College of Law. This Essay is based on a presentation at the 2009 Association of American Law Schools annual conference, in the program developed by the Section on Family Law entitled "The Disconnect Between Work, Family, and Marriage." Professor Robin Fretwell Wilson organized a fascinating panel and I was honored to be a part of the group that addressed this topic.

1. For examples of the coverage of marriage and divorce in several leading casebooks, see generally D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* (3d ed. 2006); DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* (2d ed. 2009); HOMER H. CLARK JR. & ANN LAQUER ESTIN, *CLARK AND ESTIN'S CASES AND PROBLEMS ON DOMESTIC RELATIONS* (7th ed. 2005); IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXTS, & PROBLEMS* (4th ed. 2004).

2. There has been a growing recognition of the importance of work/family policy, although the United States still trails behind most of the nations that it compares itself to in its support of this intersection, and provides the least support for those in need. For a review

whether to change that framework, and suggest a different set of questions that we might ask. In the first Part of this Essay I present an ecological model within which to consider models and assumptions. In the second Part, I critique the traditional family law model of the relationship between work, family, and marriage. In the final Part of the Essay, I suggest a different set of questions both with respect to policy and with respect to teaching family law.

Most importantly, our perspective needs to expressly focus on supporting and promoting equality for children, by supporting a range of families.<sup>3</sup> That requires focusing on race, gender, and class inequalities between and within families as core principles of family law and policy. Envisioning equality goals necessitates particular attention to economic needs. Formal equality norms dominate family law.<sup>4</sup> Colorblindness is the polestar for racial equality;<sup>5</sup> gender neutrality is the norm for gender

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of policies and needs, see THE WORKING POOR FAMILIES PROJECT, *Strengthening State Policies for Working Families*, <http://www.workingpoorfamilies.org>, (last visited Nov. 7, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice) and for a recent review of work/family policy, see American Psychological Association, *APA Briefing Paper on Work and Family Policy*, <http://www.apa.org/about/gr/issues/cyf/work-family.aspx> (last visited on Feb. 13, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Pro-marriage policy has been a cornerstone of recent Republican administrations, fueled by concerns over high divorce and nonmarital childbirth rates as well as the debate over same sex marriage, in addition to data showing the correlations between marriage and positive outcomes for adults and children. See Robin F. Wilson, *infra* note 17.

3. See generally Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433 (2004) [hereinafter Dowd, *Bringing the Margin to the Center*] (explaining that the United States' current work/family policies presume a two-parent marital family which marginalizes divorced and non-marital families and argues that "by bringing those most marginalized by existing work/family structures to the center of our analysis . . . our construction of policy will be geared toward achieving equality for children").

4. In *Orr v. Orr*, 440 U.S. 268, 278–84 (1979), the U.S. Supreme Court established the constitutional requirement that family law rules not reflect common law gendered assumptions; in that case, regarding post-dissolution support. Many property division statutes reflect a starting point of an equal split of property irrespective of title, and custody or parenting statutes often state that gender is not a consideration in allocation of parenting responsibilities and rights. See, e.g., FLA. STAT. §§ 61.13, 61.075 (2009), UNIF. MARRIAGE AND DIVORCE ACT § 307, 9 U.L.A. pts. A–B, at 288–89 (1998), and AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.12 (2002).

5. See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (invalidating Virginia's law banning interracial marriage because "there is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification" and explaining that "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'").

equality. Economic differences are largely ignored and implicitly permitted. Real inequalities, however, characterize the realities of families.<sup>6</sup> By ignoring them, we do much to maintain family policy and law as classed, raced, and gendered. Failing to face these inequalities, in my view, challenges the moral center of policy and law if it operates to perpetuate these inequalities. What is needed is a race-conscious, gender-specific, class sensitive approach, measuring or evaluating the impact of rules, policy, or proposals by their ability to achieve meaningful equality, both within and between families.

### *I. Models and Assumptions: An Ecological Approach*

Our underlying models and assumptions about family, work, and marriage are critical to the way we construct policy and law. A few preliminary examples may help to illustrate this proposition. First, with respect to "family," we must ask what family or families we envision or assume. My initial assignment when I teach family law requires that my students define "family" and illustrate their definition. The diversity of their responses is notable, along with some commonalities. A common thread for many is function, emotion, and relationship, and the pluralism of structures and people that fit under these definitions of family.<sup>7</sup> This

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6. For example, the range of family income in the U.S. is dramatic. Roughly 10% to 15% of households fall below the federal poverty threshold, while the upper 6.5% control one-third of all income. The disparity in income reached its height in 2006, and has only moderated slightly since then. Press Release, U.S. Census Bureau, Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down (Aug. 26, 2008) [hereinafter Household Income Rises], [http://www.census.gov/newsroom/releases/archives/income\\_wealth/cb08-129.html](http://www.census.gov/newsroom/releases/archives/income_wealth/cb08-129.html) (last visited Nov. 7, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); John Cavanagh & Chuck Collins, *The Rich and the Rest of Us*, THE NATION, June 11, 2008, available at <http://www.thenation.com/article/rich-and-rest-us> (last visited Oct. 16, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Sixteen percent of children, and twenty percent of those under age six, live in poverty as defined by the federal standard (a standard that many argue inadequately defines real poverty). GOVSPOT, *What Percentage of American Children Live in Poverty?*, <http://www.govspot.com/know/childpoverty.htm> (last visited Oct. 16, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. There is a rich literature on defining family. See, e.g., Nancy E. Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 789–90 (2003); see generally JANET DOLGIN, *DEFINING THE FAMILY: LAW TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* (1997), Andrew Weinstein, *The Crossroads of a Legal Fiction and the Reality of Families*, 61 ME. L. REV. 319 (2009); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003); Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining*

suggests the importance of function and relationship over form, as well as the importance of considering whether we should be thinking of "families" instead of "family" in order to move away from an implied norm or preferred model. The importance that we attach to family might also cause us to question the conventional naming of policy in this area: instead of work/family policy, there may be merit in insisting upon family/work policy, in order to challenge how we actually value and support families.

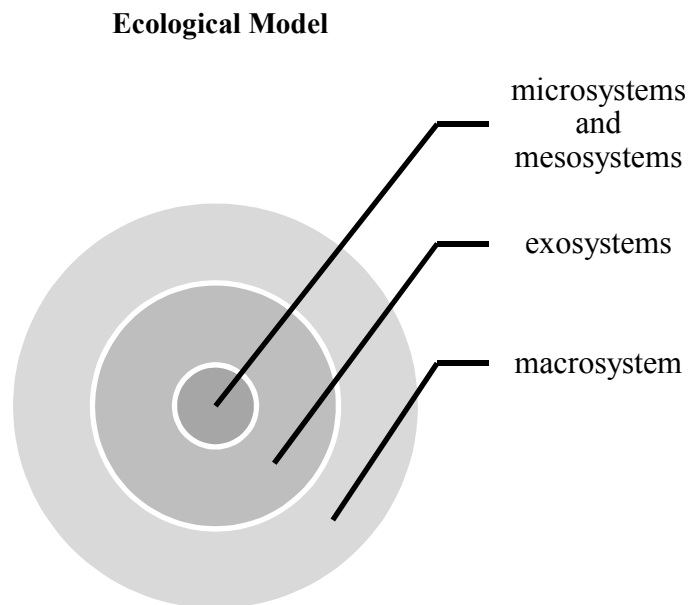


Figure 1

Imagine "families," functionally defined, at the center of an ecological approach to thinking about families. Barbara Woodhouse has brought an ecological framework to family law, borrowing from environmentalists and other social scientists as well as folding in her generist perspective.<sup>8</sup> Under

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*Family Through Tragedy*, 75 TEMP. L. REV. 31 (2002). Threads of this definitional issue arise in family law constitutional cases. See generally *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Troxel v. Granville*, 530 U.S. 57 (2000).

8. See Barbara Bennett Woodhouse, *Cleaning Up Toxic Violence: An EcoGenerist Paradigm*, in *HANDBOOK: CHILDREN, CULTURE, AND VIOLENCE* 415, 419–21 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006) (discussing an ecological model to study of child development); see also Barbara Bennett Woodhouse, *Reframing the*

an ecological model (see figure 1), placing functional families at the center of that model, we would consider three levels of context and interaction with families. First, the microsystems are those that have an immediate impact on families—systems like schools, neighborhoods, parents' work, childcare, and children's peers. Where those systems overlap are the mesosystems. If the microsystems are mutually supportive, then the mesosystems are healthy and reinforce each of the overlapping microsystems. If not, conflicts between systems can cause immense harm. For example, if schools and workplaces work together to adapt time demands and schedules collaboratively, that works far differently than if calendars and schedules are at odds. Or, if childcare is of universally high quality and is affordable, then care can reinforce work; if not, then latchkey kids are unsupported while their parents work. At the next level, exosystems have a more indirect impact on families. These include systems such as employment structures and policies, the justice system, health care, and after school programs and policies. Again, if these systems work in harmony with each other and support the families at the core, then families are socially and systemically supported. After-school programs and health interventions can reinforce problem-solving; affirmative support can minimize the number of children who interface with the justice system and rehabilitate those who do come into that system. A poorly performing system, on the other hand, pushes problems out of their natural sphere with predictable results in the justice system.

Finally, at the macrosystem level, culture, political norms, and social ideals affect the shape of structures and policies. Powerful norms that affect work/family policy, for example, are individualism and family privacy, linked to concepts of family responsibility. Those norms have a huge impact on the well-being of children when they are linked to class, race, and gender inequalities, rendering the support of children and families highly unequal and differentiated. Law functions throughout the system, like air or water in the biological ecosystem, transmitting and translating ideas at the macro level throughout the ecosystem. Thus, systems of

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*Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 147 (2004) ("A generist theory . . . places children at the center of society and sees the highest goal of society as fostering the growth of the next generation."), and Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 441–42 (2006) ("Ecogenerism would examine child welfare policies with reference to communities as well as individuals, and with reference to mesosystems, microsystems, and exosystems, rather than with reference to the familiar triangle of child/parent/state.").

economic support are linked to concepts and ideologies that frame the goals and assumptions of those systems. So, for instance, child support perpetuates economic differences and disproportionately implicates fathers, and therefore has class, gender, and race effects reinforcing inequalities between children and families.<sup>9</sup>

The ecological approach reminds us to keep the big picture in mind even as we focus on component parts or concepts that operate at various levels. In particular, models and beliefs at the macro level affect the structures and ultimately the most immediate microsystems with which families intersect in balancing the presence of both work and family in their lives. The level of stress and conflict felt by many between work and family are linked to strains between systems at the exosystem level that are constructed based on beliefs and ideologies in the macrosystem that ultimately impact the microsystems that most directly affect families. If the focus of policy is limited to marital families as opposed to all functional families, then non-marital families are disproportionately stressed and undermined.

Finally, the importance of models and assumptions is underscored when considering the interaction between law, social norms, and policy. We need to remain clear about the difference between formal law and informal law (or social norms). The functioning of the ecological system makes this clear. Informal law or social norms can significantly undermine or disrupt formal legal or social goals. The dissonance between equality and discrimination is an example of this. Another example is the embrace of marriage as a positive structure but the persistence of high rates of divorce and cohabitation. This "reality check" of our models and assumptions requires that we be realistic about the reach of law but also sensitive to the lived-out social realities that may defy or reject legal models. Law as a mechanism of implementation of ideals may undermine rather than strengthen families when structures no longer reflect the lived realities of families' lives.<sup>10</sup>

A model connecting work-family-marriage puts marriage at the center and in a preferred position in defining family, and as the link between family and work, contrary to more expansive notions that do not privilege a

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9. Nancy E. Dowd, *Boys, Masculinities and Juvenile Justice*, 8 J. Korean L. 115, 116–17 (2008).

10. On the relationship between law and culture, see Dowd, *Law, Culture, and Family*, *supra* note 7; see generally WALTER O. WEYRAUCH, *GYPSY LAW: ROMANI LEGAL TRADITIONS AND CULTURE* (2001), and Walter O. Weyrauch, *Unwritten Constitutions*, *Unwritten Law*, 56 Wash. & Lee L. Rev. 1211 (1999).

particular family form. It places marital family at the center of the ecological model. If the marital family is placed at the center, that model links with a long tradition in family law of ignoring or stigmatizing other configurations of family. That focus, instead of putting "families," plural, at the center, generates a work/family model that may overly focus on a particular set of families. Putting marital families or marriage at the center may thereby reinforce inequalities of gender, race, and class, as well as intersections of those characteristics. With that in mind, I suggest a reconstruction of the central framework of work/family policy that would orient around all children and their families (of whatever form) in order to maximize the wellbeing of children at the center by rearticulating the core value of equality in our law and policy of work-family support.

## *II. Models and Assumptions: A Critique of the Traditional Model*

When thinking about what our contemporary assumptions are about work, family, and marriage, it may be useful to recall the traditional common law assumptions about their relationship. Under the common law, the model assumed a marital norm, and therefore stigmatized those who fell outside of the marital norm (through the naming and treatment of children born outside of marriage as illegitimates, the denigration of unmarried motherhood, and refusing to impose responsibility on fathers); criminalized those who did not meet the heterosexual requirement of marriage (gays and lesbians, cohabitants, and non-marital sexual partners); and dehumanized those who were not meant to partake of the marital norm (slaves). Within the marital family hierarchy was the accepted norm, thus inequality was viewed as essential and natural. Patriarchy was the express structure, placing women and children under the control of men, while imposing responsibilities of care and support on men. Work norms were highly gendered to support breadwinner fathers and domestic mothers, as well as raced in a hierarchy of income and respect. Industrial and post-industrial norms separated work and family, with high value wage work identified with men. This gender defined model of work only prevailed, however, if the family could support that model. The model was only sustainable for those with sufficient resources, and was strongly class and race defined. The traditional common law model linking work, family, and marriage, then, always excluded by class, as well as explicitly or implicitly by race, and incorporated a strongly gendered norm of roles and power.



The traditional common law norm or model has been challenged and changed, but it has not been replaced by an alternative coherent model. The social context of inequality, while changed, has been sustained, so that even the formal embrace of equality has coexisted with sustained gender, race, and class divisions.<sup>11</sup> No model as clear or well defined as the common law model has taken its place, and the norms that have emerged have not been realized while new challenges and changes continue to emerge. Patriarchy has been dismantled in terms of the formal removal of male privilege, but remains in place economically and socially for many, although not all, men. Gender neutrality is the accepted norm in both family law and employment law, but neither sphere is equal or ungendered in reality. In family law, both women and men complain of bias, and the norms of motherhood and fatherhood are asymmetrical and still evolving. In employment law, gender and race inequality persists. State intrusion into families is a significant divider of families by race and class: the model of privacy and family protection is more typical for white middle and upper class families, versus intrusion, supervision, and the presence of the state in the lives of the families of people of color and low income families.<sup>12</sup>

Marriage, or, more broadly, adult intimate relationships, have undergone tremendous change and reflect more of a partnership model, but also reflect significant strains and challenges as evidenced by the high divorce rate as well as the high rate of non-marital cohabitation and parenthood.<sup>13</sup> While divorced and never married parents and their children are commonplace, and no longer branded or explicitly stigmatized,<sup>14</sup> single parents and their children are unsupported, demonstrable by the high rate of child poverty. Other family forms, including same sex couples and their children, more open adoption models, and the creation of family using technologies, remain controversial and legally unsettled. The high likelihood of children growing up in more than one family while minors,

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11. For a recent comprehensive view of inequality and its impact on children, see generally JANE WALDFOGEL, *WHAT CHILDREN NEED* (2006). For a fascinating and innovative model to attack child poverty, led by Geoffrey Canada in Harlem, see generally PAUL TOUGH, *WHATEVER IT TAKES: GEOFFREY CANADA'S QUEST TO CHANGE HARLEM AND AMERICA* (2008).

12. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* vi (Basic Civitas Books 2002) ("African Americans are the most likely of any group to be disrupted in this way by government authorities. Black children make up nearly half of the foster care population, although they constitute less than one-fifth of the nation's children.").

13. JUNE CARBONE, *FROM PARTNERS TO PARENTS* 235–36 (Colum. Univ. Press 2000).

14. NANCY E. DOWD, *IN DEFENSE OF SINGLE PARENT FAMILIES* 17 (New York Univ. Press 1997) [hereinafter DOWD, *SINGLE PARENT FAMILIES*].

and having step, half, and other blended family relationships with other siblings and parental figures is largely unreflected in law or policy.<sup>15</sup> The relationship between work and family is still vexed, and troubling; work has not adjusted to family, and remains oriented to an ideal worker with no family responsibilities or only secondary ones.<sup>16</sup> The worker norm has not shifted to support the engagement of parents with family. The pattern of differential impact, and support, remains highly gendered, classed, and raced (particularly as class lines have disproportionate racial impact).

Within this overall shift from the common law to a contemporary model, how do we connect work, family, and marriage? Overall, we continue to assume a model that connects work and family within marriage as the ideal or best; this is "having it all." When we worry about the disconnection between marriage, work, and family, our concern reflects the primacy of the marital model.<sup>17</sup> Marriage as the preferred structure leads toward "marriage promotion" that assures "responsible fatherhood" followed by reforming the work/family connection in a way that it will function well with marital families.<sup>18</sup> If this is our presumed model, what are the underlying assumptions of its component parts?

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15. See Press Release, U.S. Census Bureau, The 'Nuclear Family' Rebounds, Census Bureau Reports (Apr. 13, 2001), <http://www.census.gov/Press-Release/www/releases/archives/children/000326.html> (last visited Feb. 17, 2010) [hereinafter Census Bureau, Nuclear Family] (noting that the percentage of children who live in nuclear families is fifty-six percent, leaving forty-four percent of children in other family arrangements) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

16. See DOWD, SINGLE PARENT FAMILIES, *supra* note 14, at 72 ("Due to the absence of any meaningful acknowledgement of family responsibilities and their distribution within families, and of the needs of children, equality and choice are illusions in a labor market that remains largely hostile to parenting."); see also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 65, 81 (Oxford Univ. Press 1999) (discussing masculine norms in the workplace such as the "ideal-worker schedule" which tends to hurt women with children and forces these women into "traditional women's work").

17. Robin F. Wilson, *The Growing Disconnect Among Work, Family, and Marriage*, ASS'N. OF AM. L. SCH. (Jan. 8, 2009), <http://www.aalsweb.org/thursday/FamilyandJuvenileLaw> (discussing promarriage policies).

18. On political/legislative movements supporting marriage, see generally THE HERITAGE FOUNDATION, *Family and Marriage*, <http://www.heritage.org/issues/Family-and-Marriage> (last visited Oct. 17, 2010); Julie Nice, *Promoting Marriage Experiment: A Class Act?*, 24 WASH. U.J.L. & POL'Y. 31, 32-38 (2007) (discussing marriage promotion); *Obama Needs to Act on Marriage Promotion*, CHRISTIAN SCI. MONITOR (Aug. 10, 2009), available at <http://www.csmonitor.com/Commentary/the-monitors-view/2009/0810/p08s01-comv.html> (last visited Oct. 16, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Laura A. Sanchez et al., *Unusual Contradictions in Marriage Promotion: How the Marriage Movement May Lead to the Acceptance of Same-Sex Marriages* (Aug.

A. *Work (-Family-Marriage)*

Under this model, we assume that work is available and income is sufficient to support a family. It is not clear whether we assume such work permits only one partner to work, or whether both partners must work, and whether both must work full time, and whether we assume two roughly equal incomes, or unequal incomes. The income assumptions are important, because they may expose whether marriage is idealized as the best work/family combination because it is the one that makes a family (defined as having children) economically possible. Then is family possible or best within marriage because it combines two incomes (which is a necessity), or is it that marriage permits dependency of the family caregiver/nurturer, allowing for the sufficiency of care?<sup>19</sup> Whatever our assumptions are may expose our model or assumptions as deeply classed if our assumptions are only sustained at particular income levels, given our resistance to family income supports.

Income data indicates a wide disparity in family income.<sup>20</sup> There is a persistent rate of poverty, as well as a small percentage of upper income families that control a disproportionate amount of wealth.<sup>21</sup> Low incomes

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14, 2004) (unpublished manuscript), *available at* [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/1/1/1/1/0/p111101\\_index.html#get\\_document](http://www.allacademic.com/meta/p_mla_apa_research_citation/1/1/1/1/0/p111101_index.html#get_document) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Avis Jones-DeWeever, Marriage Promotion and Low-Income Communities (Inst. for Women's Policy Research, Briefing Paper No. D450, 2002), *available at* <http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED469813> (last visited Oct. 16 2010). On the support of responsible fatherhood, see generally NATIONAL RESPONSIBLE FATHERHOOD CLEARINGHOUSE, <http://www.fatherhood.gov/>, and *Responsible Fatherhood and Marriage: Featured Publications*, ANNIE E. CASEY FOUNDATION, *available at* <http://www.aecf.org/KnowledgeCenter/SpecialInterestAreas/ResponsibleFatherhoodMarriage.aspx> (last visited Oct. 16, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

19. On valuing caregiving, see MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 53 (The New Press 2004); see generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (Routledge 1995).

20. Household Income Rises, *supra* note 6. Median income was \$50,233; the poverty rate was 12.5%. But when broken down by race, black households had the lowest median income, \$33,916, followed by Hispanic households \$38,679. For analysis of the upper income aggregation of wealth, see Cavanagh and Collins, *supra* note 6. Income has increased over the past 40 years. FEDERAL RESERVE BANK OF SAN FRANCISCO, FRBSF Economic Letter (Sept. 21, 2007), *available at* <http://www.frbsf.org/publications/economics/letter/2007/el2007-28.pdf>.

21. See Household Income Rises, *supra* note 6 ("[T]he nation's official poverty rate in 2007 was 12.5 percent, not statistically different from 2006. There were 37.3 million people in poverty in 2007, up from 36.5 million in 2006.")

are more prevalent among families of color, with the lowest median income for black households.<sup>22</sup> Gender also divides income, with women on average only earning seventy-eight percent of the income of men.<sup>23</sup> Poverty is more common among single-parent than two-parent families.<sup>24</sup> Among two-parent families, dual incomes are the norm; a single income is a small proportion of families.<sup>25</sup> These income patterns reflect continuing inequalities with respect to the distribution of work, and the low pay characteristic of the lowest paid work.

The characteristics of work are critical in developing a meaningful work/family policy that supports all families.<sup>26</sup> Much of existing work/family policy fails to provide income replacement, making any form of entitlement hollow for families that cannot afford even temporary and limited loss of income. Beyond income, differences in the structure, hours, and flexibility of work, as well as other factors, should be taken into account in devising a policy that supports all workers with family responsibilities. Most broadly, how we conceptualize the ideal worker in terms of his or her connections and priorities with respect to family must be reexamined if work will ever truly value family. The work assumptions of policy are critical to egalitarian ends.

### B. Family (-Work-Marriage)

When we talk about family, and particularly when we talk about the ideal combination of work, family, and marriage, often we are implicitly talking about women.<sup>27</sup> Frequently, policy discussions explicitly move to discussing women's combination or balancing of work and family. This coded (or explicit) discussion reveals the embedded patterns of care and a series of gender assumptions about family. That is, in order to combine work and family in a balanced and well supported way, from the

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. There is a high correlation between poor outcomes for children and low income. *Child Poverty and Family Income*, CHILDSTATS.GOV, available at <http://www.childstats.gov/americaschildren/eco1.asp> (last visited Nov. 7, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

27. See Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GEN. & SOC. 201, 241 (2008) ("Typically, feminist evaluation of work/family issues and fatherhood has come from the perspective of women or predominantly of women.").

perspective of those actually doing family care, who disproportionately remain women, those who link marriage to work/family assume it is the best structure for women. This assumes marriage incurs responsibility on the part of men and promotes stability, particularly important if women may be fully or partially dependent or if they cannot manage work and family without a partner. Care-giving patterns are critical to our analysis, in particular the gender asymmetry still typical of care.<sup>28</sup>

If that reality is at the center of our analysis, and if equality is the goal, then that leads to the question of where men are in our model or assumptions. If men have a different relationship and balance of work, family, and marriage, then any model may tend to reinforce inequality or promote equality, however we define what equality is, or the goal of work/family balance.<sup>29</sup> Inequalities within family can easily be ignored. Do we mean through policy to support gender equality by supporting equal division of family responsibilities, or equal numbers of men and women in the primary caregiver role most typical of family care? That might mean a reorientation of policy away from "choice" to "responsibility" or other means to insure the redistribution of care.

Inequalities between families, rather than within families, are also ignored if family only means the marital family. The identification of marriage as the ideal leaves out single parents, and even more so the never-married rather than the divorced. Same sex families are largely excluded, cohabitation is left out, and blended families are not distinguished within marital families.<sup>30</sup> Uniformity and singularity in the model leaves out many American families. Children then are differentially treated depending upon the family form in which they find themselves. In addition, family members other than children that need care also are missed in this focus if family responsibilities are limited to those of minor children and not the care of other family members.

Data on family forms tell us that this is not an insignificant issue. Cohabitation and divorce rates have been rising, and of children living with a single parent, almost 20% live with an unmarried parent who is

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28. *Id.*

29. *Id.* at 239–44.

30. See Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 85, 86 (2009) ("Excluded families include unmarried couples of any sexual orientation, single-parent households, extended-family units, and any other constellation of individuals who form relationships of emotional and economic interdependence that do not conform to the one-size-fits-all marriage model.").

cohabitating with another adult.<sup>31</sup> Although same sex unions have achieved increased formal status in some jurisdictions, the denial of such recognition is still the norm. The reality of families is enormous pluralism and the likelihood of significant change over time. Children are likely to spend some time in a single parent family, and likely to have step and half siblings.<sup>32</sup>

Recognizing the range of family forms that function as families is critical to meaningful work/family policy. Just as important are the continuing asymmetric patterns of care, with women still the primary providers of care, functioning essentially as single parents whether within single or two parent families. These realities need to be taken into account, and if change is envisioned (say, to egalitarian parenting, or multiple parenting norms) then that should be explicit in the construction of policy.

### C. Marriage (-Work-Family)

Finally, what do we envision marriage to be (leaving aside the question of who can be married, in most states, for the moment) under this model? Does this mean a partnership of equals? Particularly important are economic implications or dependencies. Should each partner remain self-sufficient or can they be dependent within our ideal? Are we expecting marriage to be life-long or do we really mean serial marriage, which might create multiple work/family obligations and responsibilities?

There are many who argue that marriage deserves a positive focus because of its correlation with positive outcomes for adults and children.<sup>33</sup> Our tendency when valuing marriage, however, is to stigmatize individuals and families outside this preferred norm.<sup>34</sup> In addition, we may fail to face the strains within marriage that make this a challenging family form. If marriage does not work, will we perpetuate the same problems by retaining the same unworkable core? By failing to focus on the actual intersections between work and family, we create a never ending "Catch-22" problem of

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31. Census Bureau, Nuclear Family, *supra* note 15.

32. *Id.*

33. MAGGIE GALLAGHER & LINDA J. WAITE, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 125-35 (2001).

34. See DOWD, SINGLE PARENT FAMILIES, *supra* note 14, at 3-16 (discussing the stigma attached to single parents given the legal and social preference for marital two-parent families).

the equality/subordination problems on the work side affecting the equality/subordination problems on the family side.

We may want to consider what the implications would be of thinking about work/family issues without connecting them to marriage. We might consider improving the ability to balance work and family by assuming a single parent norm but supporting greater involvement or social parenting by all parents. We might focus on dependencies and needs, rather than a particular family form or structure. This might also lead us toward considering the necessity of a family support policy.

### *III. An Alternative Model*

If work, family, and marriage are increasingly disconnected, we might consider alternative interpretations of this pattern, and what law and policy should do about it. Rather than being a cause for concern, the disconnection may simply represent rejection of an imperfect or irrelevant model, either because the model is flawed or it simply does not work for too many people. In other words, what may be happening might be a good thing. It might be liberating, instead of a cause for concern. We may simply need a new vision.

With respect to work and family, it may be reasonable to assume that long term relationships are better than serial shorter relationships (or multiple relationships), and that consistency of family and parenting is best for children. But marriage is not essential to these goals. So many families are not marital families, and so many marital families end in divorce, that a system that penalizes those who do not choose the preferred norm or do not remain within the preferred norm makes little sense if we care about the welfare of children and families. In the alternative, we might want to consider as part of work/family policy the specific strains that exist in marital families, but not be limited to that focus. Ironically, we seem to penalize even those who do embrace the marital model by exacting a significant price for marriage when there are children. That is, those who marry either have to sacrifice family time in order to satisfy the demands of work, or have to sacrifice economic independence or career satisfaction for economic necessities in order to have sufficient family time, and for either choice, typically one person takes on that choice. What we have missed by focusing exclusively on marital families, however, is the deeper stress placed on other, less supported families, particularly all working poor and poor families.

The other reason we may be dwelling on marriage may be linked to concerns about responsibility. Marriage makes responsibility (especially male responsibility) for family private, not public. We strongly believe that children should not be born into the world without their parents taking responsibility for them. Marriage is equated with responsibility as if it also bestows automatic economic capability with the marriage license. Marriage is seen as a bailout program for poor mothers and children.

The avoidance of marriage, however, may be because marriage does not pragmatically work well at different class levels. Marriage may mean the loss of benefits rather than economic gain. Marriage may also impose obligations that individuals do not want to take on, if the structure of rights and obligations still distinguishes between marital and non-marital families/children. Or avoiding marriage may simply be an exercise of liberty—a choice.

The emergence of a range of family forms demonstrates that family should be thought of functionally and relationally rather than structurally. If we support families as they are, it would benefit children, families, and ultimately, society. Instead of penalizing or stigmatizing non-conforming families, we would be thinking of pluralism and broad means of support as a means to insure children's equality.

Finally, we should question whether our concern about declining marital families might itself be gendered, raced, and classed. The concern may reflect deeply ingrained and limited perspectives. First, historically we have worried about problems once they become issues for white, middle class women. The conflict between work and family has been present for poor women for a long time; it has been present for women of color for a long time. Those conflicts were ignored until they became a reality for middle class women. Second, we worry and search for solutions for the poor within a framework of blame, stigma, and easing the burden on the public purse. We have an atrocious, embarrassing, dehumanizing level of child poverty that we persistently refuse to confront.<sup>35</sup> Our work/family solutions tend to imagine only the needs of middle and upper class families and do not address the needs of poor children. If we are responsive to the inequalities among families, then those needs should be part of any work/family solution that we might devise, or any consideration of it as we

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35. See NATIONAL CENTER FOR CHILDREN IN POVERTY, <http://www.nccp.org/topics/childpoverty.html> (last visited Mar. 5, 2010) (stating that 19% of all children live in families with incomes below the federal poverty level) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).



teach family law. Indeed, because the needs are greater and the consequences so dire for children of poverty, arguably these marginalized families should be at the center of policy.

What if we always asked, taught, and evaluated policy and law from a different set of questions and a different implicit model or set of models? I suggest we might consider the following questions for a refocused model of policy within an ecological framework (illustrated in figure 2) designed to balance families and work:

- (1) Does this work for *all families and children* (expressly considering the range of family forms we could easily identify), therefore no longer preferring a marital, nuclear or traditional family norm?
- (2) Does this foster *equality* for children (taking account of how children are differently situated and intervening to insure equality of life opportunities), using empirical data to define areas of need?
- (3) Does this address *inequalities* for all actors in the system, at the micro and macro levels, or does this reinscribe those inequalities?
- (4) Are we *balancing private and public* inputs? In particular, first and foremost, are we addressing the *economic needs* of children and their families?
- (5) Are work/family policies being addressed in a way that accomplishes *the support of all families in their nurture of children and eliminates child poverty*?

### Ecological Model of Work/Family

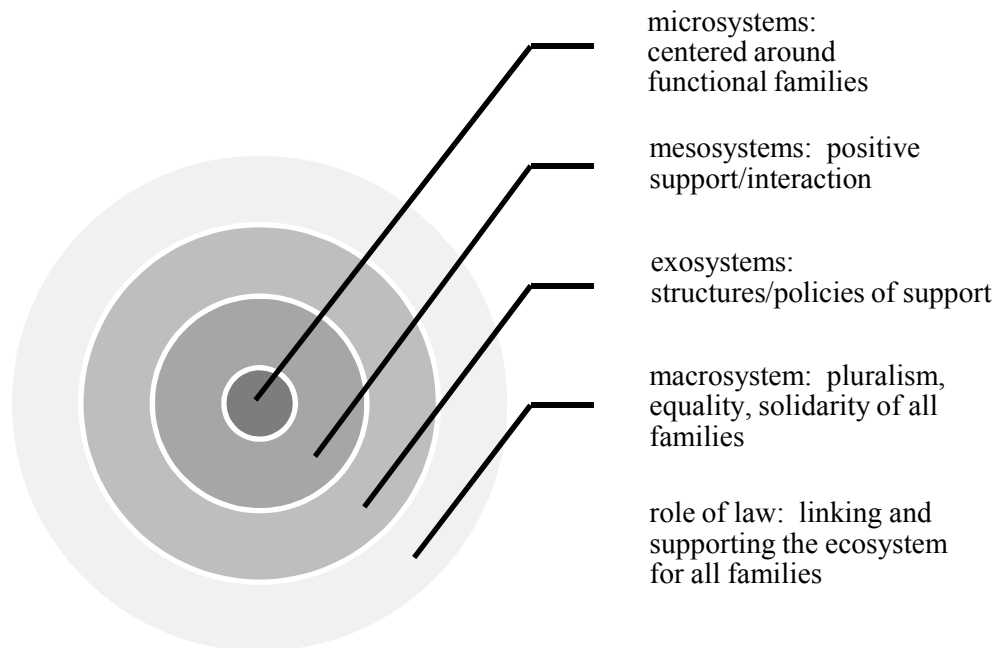


Figure 2

Restructuring the framework of policy also suggests reframing our focus in teaching family law. I would suggest that the reconstruction I envision would give emphasis to the following in family law:

- (1) Identifying core principles and models in contrast to the hierarchical, patriarchal, raced, classed, and marital values of traditional common law.
- (2) Working toward greater interaction and dialogue between family and employment law.
- (3) Focusing on families instead of family, including less attention to marriage, and more attention to the plurality of family forms.
- (4) Giving greater visibility to children's rights and in particular the right to be free from poverty.

- (5) Bringing an explicit equality perspective to family law, including race, gender, and class as essential lenses to consider, analyze, and critique family law rules and policies.

The goal of a reconstructed framework of work/family policy would be the support of all children and families, and adopting a perspective that achieves equality in this important sphere. Paying attention to demographic realities and trends is a means to measure how family law affects families, defined pluralistically, and all children, not just some children. Paying attention to inequalities moves us away from a commitment to neutrality that hides or ignores inequalities. Inequalities plague welfare, intrusion into families for abuse or neglect, the juvenile justice system, child support, and custody. Those inequalities need our attention. In addition, the lack of concepts of affirmative support of children and families plays out in predictable ways as evidenced by our rate of child poverty and the race and gender identity of children and families in poverty.

Family law should embrace a robust, deep, contextualized notion of equality that would require examining and uncovering current policy that functions in unequal ways, and it should articulate the means to achieve equality. It would be race conscious and gender specific, and likely not include a single norm but rather multiple forms of equalities. In this reconstruction, marriage might still be included as a valued means within which equality might be achieved, but it would not be the center. The connection between work and family, so critical to the well-being of families and children, is an ideal place to start to look at policy in a way that grapples with the goal of equality for all children.