

# Cultural Conflict and the Revival of Class Warfare

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### *I. Work, Family, and the Recreation of Social Class*

Wholesale changes in the organization of the economy inevitably interact with changes in the family. A farm family, for example, which draws no clear distinction between helping with the harvest and helping with the dishes, may operate very differently from two computer geeks who work out of their home offices half the week and travel frequently the rest of the time. Yet, while the two types of changes (family and market) generate enormous discussion, the interaction between them is often obscured. This interaction—and the class, gender, and racial dynamics that accompany it—produces both vicious and virtuous cycles, reinforcing

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newly created advantages for some parts of the population and making others worse off.

Trying to understand the interaction of work and family as parts of an integrated and dynamic system is an enormous undertaking; indeed, Naomi Cahn and I have recently completed a book length project on the subject that only begins to address the changes.<sup>1</sup> Nevertheless, it is important to acknowledge the potential interactions, even while recognizing that any discussion risks simplification and overgeneralization; the alternative may be not to recognize them at all.

Therefore, this Article will attempt to present an overview of the major changes underlying work-family interaction with no pretense that any such discussion can be comprehensive. In addition, it will attempt to describe the dynamics driving these changes while recognizing that the changes are mutually reinforcing and that any starting point for the discussion is necessarily somewhat arbitrary. Finally, it will attempt to highlight the implications in terms of the production of greater inequality, and the differential effects by class and race, acknowledging that differences exist within these groups.

In the end, the Article will maintain that the new dynamic driving the interaction of work and family is greater specialization in the activities performed by women. This greater specialization has dramatically increased the return for investment in women, with college educated women (approximately a quarter of the current adult population) entering the workforce to stay and dramatically increasing their earnings. These women in turn hire other women (and take advantage of the availability of home health care aides, fast food and frozen dinners, and permanent press fabrics) to manage what once were all women's domestic responsibilities. To take advantage of these expanded employment opportunities, college educated women have embraced a new set of moral understandings that replace sexual restraint with greater attention to readiness for childbearing. The average age of marriage has jumped, and with financial independence and emotional maturity as the hallmarks of responsible family formation, these women search longer for compatible and companionate mates. College-educated women, who were once the least likely group in society to marry, have become the only group whose marriage and income rates have increased—and the families they form are more stable than similar unions thirty years ago.

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1. See generally NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES* (2010).

These new terms for middle class life have, in turn, undermined what was once universal support for more traditional marriages. The availability of birth control and abortion has lessened the pressure channeling sex into early marriage, making cohabitation more common. In addition, women's greater independence makes it more feasible for women to leave unhappy unions or to raise children as single parents. As women's circumstances have become less desperate, men feel less compelled to marry the women they impregnate or to stay with their wives if they find themselves attracted to someone else. As marriages become less secure, women invest even more in their own earning potential and choose more carefully before they do marry. At the same time, the male premium that once allowed working class men to earn substantially more than working class women has effectively disappeared, changing the terms on which men and women are likely to get together, and making stable unions less common. Yet, children continue to enjoy significant advantages if their parents stay together, and the parents' likelihood of doing so has become far more correlated with race and class than in earlier eras.

The Article concludes that only with recognition of these dynamics can we hope to recreate shared understandings. One of the dramatic, and largely untold, stories of the last half century is the wholesale shift in resources away from children.<sup>2</sup> As the economic advantages of the middle class have increased vis-à-vis the rest of the population, their relative fertility rates have fallen, and their investment in the children they do have has skyrocketed. The rest of the population has struggled to deal with the lack of support for satisfying traditional roles, new more egalitarian ones, or single parent family needs. The resulting "culture wars" stand in the way of more realistic efforts to reintegrate work and family.

## *II. Family Reorganization and the New Information Economy*

### *A. "Technological Shock" and Family Change*

In an influential article, economists Akerlof, Yellen, and Katz maintained that changes in family dynamics and moral understandings

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2. See JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 119–22 (2000) (demonstrating that family form corresponds to education and income, and that children in single parent families are dramatically more likely to be in households below the poverty line).

could be explained in terms of the same model as "technological shock."<sup>3</sup> Economists use the term to describe disruptions in the stable equilibria of economic sectors.<sup>4</sup> Imagine, for example, a region in which four companies make widgets, each with an established and relatively stable market share. One company, however, adopts expensive new technology that makes it possible to produce more widgets with the same resources, and to sell them therefore at a lower price. Economists maintain that this more efficient company will increase its market share, forcing the other companies to invest in the new technology, otherwise adapt to the new market dynamics, or go out of business.<sup>5</sup> This is true even if the other three companies would prefer to continue as before.

The article's innovative insight was that this same model could be applied to courtship. The economists argued that the traditional bargain underlying sexual exploration was the man's implied promise to marry the woman if she became pregnant.<sup>6</sup> They maintain that the availability of effective contraception and abortion constituted "a technology shock" that allowed women who did not wish to marry at that point in their lives to engage in sexual activity without requiring or necessarily wanting a promise to marry.<sup>7</sup> The willingness of some women to engage in sex on the new terms undermined the implicit bargain for everyone, and Akerlof, Yellen, and Katz maintain that the biggest losers were those women who wanted marriage and children.<sup>8</sup> They had less ability to coax a betrothal

3. See George Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 112 QUARTERLY J. OF ECON. 277, 277–78 (1996) (noting that with the advent of birth control and abortion, overall birth rates fell, but the incidence of shot gun marriages fell even more, increasing non-marital births as a percentage of the reduced total). In 1996, the major alternative theories explaining the increase in the percentage of births outside of marriage were the disappearance of well paying jobs for less skilled men or the availability of welfare benefits. Compare WILLIAM J. WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996), with CHARLES MURRAY, *LOSING GROUND: SOCIAL POLICY 1950–80* (1984).

4. See Akerlof et al., *supra* note 3, at 294 (discussing how the economists describe the older norms: "Before the technology shock it is clear that no woman with positive pregnancy costs will engage in sexual activity without a promise of marriage").

5. See *id.* at 279–80 ("A cost-saving innovation almost invariably penalizes producers who . . . fail to adopt it").

6. See *id.* at 307 ("In the old days, if the woman wanted a child, she was typically able to exact a promise that the man would marry her.").

7. See *id.* at 306 (stating that the technology shock could have been a significant factor in the large increase in the out-of-wedlock births even if abortion and female contraception usage had substantially increased in relation to the number of births and unmarried women).

8. See *id.* at 280 ("In the case of female contraception, and abortion, women who

from a reluctant mate, and became more willing to have children without marriage.<sup>9</sup> The economists emphasize that this could explain a rise in the percentage of non-marital births coinciding with a substantial drop in the overall birth rate and the number of unintended pregnancies.<sup>10</sup>

The article is perhaps most controversial for its use of relatively sterile economic analysis to explain a moral transformation: the erosion of the stigma against non-marital childbearing.<sup>11</sup> Moreover, more recent scholarship suggests that women's willingness to have children outside of marriage may reflect the women's reluctance to marry the fathers, and not just the men's unwillingness to commit.<sup>12</sup> Nonetheless, the model presents a trenchant class analysis. It suggests that if the terms underlying some bargains shift, it destabilizes those available to all, and the more influential players then set the new terms, at least in the short run, consequently increasing inequality. This Article suggests that what Akerlof, Yellen, and Katz described in terms of the limited example of the terms underlying "shot gun" marriages is true of family relationships more generally.

### B. Returns to Specialization and Family Organization

Economists agree that a major change underlying family change in the last half century has been women's increasing labor market participation, and that this change in women's roles has contributed to family change.<sup>13</sup> What they have yet to explain adequately is the class-based nature of family change. This is true, in part, because the widely cited model of family economics—Gary Becker's idea of specialization between home and

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want children, and women who, because of indecision or religious conviction have failed to adopt the new innovations, have lost disproportionately.").

9. *See id.* at 308 ("In the new world . . . unmarried women who wanted children would find it increasingly difficult to make (and also to enforce) a contract in which marriage was promised in the event of pregnancy.").

10. *See id.* at 307–08 (explaining the theory behind a potential drop in the overall birthrate due to current familial and sexual trends).

11. *See generally* JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 156 (2002) (insisting that "technology cannot explain" the lessened stigma attending non-marital births).

12. *See* Amy L. Wax, *Engines of Inequality: Race, Class, and Family Structure*, 41 *FAM. L.Q.* 567, 585 (2007) ("These women's most vociferous complaints are reserved for men's chronic criminal behavior, drug use, violence, and, above all, repeated and flagrant sexual infidelity.").

13. *See* CARBONE, *supra* note 2, at 16–19, 30–35 (examining the economic analysis of the link between women's labor market participation and familial change).

market—largely ignores the more important form of specialization, viz., that among women rather than between men and women.<sup>14</sup> This increase in women's specialization, like the increase in men's specialization a century earlier, builds in greater class differences in much the same way adoption of a new technology does in the Akerlof model.

Gary Becker, a Nobel Prize winning economist, is celebrated for his introduction of economic analysis to the family realm.<sup>15</sup> He maintained that men "specialized" in the market, while women specialized in the domestic sphere, and that with the greater entry of women into the paid labor force, the benefits of this specialization would diminish, undermining the advantages of family unions.<sup>16</sup> Becker is, of course, right that traditional gender roles have changed and that family instability has increased. What he has never attempted to explain is why the groups who have most enthusiastically embraced women's enhanced labor market opportunities (viz., college educated women) are the only group in society whose marriage rates have increased.<sup>17</sup>

Becker's analysis, which insisted on the "sexual division of labor between the market and household sectors,"<sup>18</sup> could not take on the class dynamic, in part, because it missed almost entirely the consequences of greater specialization within each sex.<sup>19</sup> This increase in specialization

14. *See id.* at 417 ("[T]he increased workforce participation [by women] Becker emphasizes produces greater, not less, specialization as women trade in the largely undifferentiated role of wife and mother for a more complex array of activities.").

15. *See* GARY S. BECKER, A TREATISE ON THE FAMILY, ix–xi (1981) (using "the assumptions of maximizing behavior, stable preferences, and equilibrium in implicit or explicit markets to provide a systematic analysis of the family"). For an economic critique of Becker that maintains that his claims depend on contested auxiliary assumptions to which economics has no commitment and which lack empirical support, see Robert A. Pollak, *Gary Becker's Contribution to Family and Household Economics*, REV. OF ECON. OF THE HOUSEHOLD, Jan./April 2003.

16. *See id.* at 245–48 (explaining the theory that the rapid change in the family structure was largely affected by "the growth in the earning power of women as the American economy developed").

17. *See* Eduardo Porter & Michelle O'Donnell, *Facing Middle Age with No Degree, and No Wife*, N.Y. TIMES, Aug. 6, 2006, at A1 (charting census data showing that the only group exhibiting a decline in the numbers of the unmarried by the early forties is college-educated women.). The decline occurred for only a short period around the turn of the century: over the last thirty years all women's marriage rates have declined, but less so for college graduates than for others. *Id.*

18. BECKER, *supra* note 15, at 23.

19. *See* CARBONE, *supra* note 2, at 7 ("[E]lsewhere Becker writes that since married women have been specialized to childbearing and other domestic activities, they have demanded long-term 'contracts' from their husbands.").

among first men and then women underlies the two great "demographic transitions"<sup>20</sup> remaking the worlds of work and family and the interactions between them.

The first transition marked the shift from a largely, rural agricultural society to a more urban industrial one; the second a shift from the industrial era to an information economy.<sup>21</sup> Far from a sharp sexual division of labor between home and market, agricultural societies combined the two. That is, while men and women often performed different tasks, they did so in the same place—on the farm.<sup>22</sup> With men and women living and working together, men oversaw both the farm's domestic *and* productive activities, and husbands were expected to be involved in prescribing children's activities and discipline just as women were expected to work side by side with their husbands when farm life required it.<sup>23</sup> To be sure, women took

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20. See Sara McLanahan, *Diverging Destinies: How Children Are Faring After the Second Demographic Transformation*, 41 *DEMOGRAPHY* 607, 607 (2004) (noting that demographers generally use the term "demographic transition" to mean the changes in a society as it moves from high birth and mortality rates to lower ones); see Ronald Lee, *The Demographic Transition: Three Centuries, of Fundamental Change*, 17 *J. ECON. PERSPECTIVES* 167, 167 (Autumn 2003) ("[G]lobal demographic transition has brought momentous changes, reshaping the economic and demographic life cycles of individuals and restructuring populations.").

21. Arguably, of course, there was an even earlier transformation, viz., that from a hunter-gatherer to an agricultural society. This "demographic transition," however, produced *more* births as the benefits of agriculture made it possible to sustain more children born closer together. Nonetheless, the rise of agriculture certainly produced a demographic transformation as population density rose and the timing and number of births changed, and it also produced a transformation in the relationship between labor and family organization. In work that now seems excessively Eurocentric and reductionist, Frederick Engels wrote in 1891 that "the sole exclusive aims of monogamous marriage were to make the man supreme in the family, and to propagate, as the future heirs to his wealth, children indisputably his own." See FRIEDERICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* 57–58 (4th ed. 1964) (1891) (arguing that with the rise of agriculture, property ownership became important, and as the importance of property ownership increased, so did the importance of insuring women's fidelity so that a man might insure that "his" property went to his descendents and not someone else's). Of course, as that happened, people also became more inclined to settle in one place, and with more stable agricultural life, work, and family occurred in the same place, with the male head of household overseeing both. See *generally* LINDA R. HIRSCHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* (1998) (providing a modern critique of such developments by elaborating on the theoretical link between property ownership and fidelity).

22. See Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 *J. AM. HIST.* 9, 22–23 (1998) (discussing the historical literature describing the rise of the ideology of the separate spheres and arguing that the overgeneralizations denying women any autonomy within a farm economy are inaccurate).

23. See *id.* at 23 (stating that work patterns of men deviated even farther from the traditional role of women).

on more of the cooking and sewing and men managed more of the buying and selling, women oversaw nursery care and men trained their sons to take on adult responsibilities, but the relationship between husband and wife was more often described in vertical rather than horizontal terms.<sup>24</sup>

The sharp differentiation of home and market and their idealization as separate realms came with industrialization. A large literature describes the "cult of domesticity," the rise of the "separate spheres," the ideal of "true womanhood," and the remaking of family life from a "little commonwealth" to a domestic sanctuary.<sup>25</sup> This reorganization marked middle class women's removal from the community's productive life as a historical novelty, and redirected the family's activities to make dramatically greater investment in children possible.<sup>26</sup>

The second transformation, which came during the rise of the information economy during the latter half of the twentieth century, dissolved the strict separation of home and community, and redirected middle class women's activities back toward greater participation in the larger society.<sup>27</sup>

Both transformations redefined the relationship between home and market, and produced greater investment in children by delaying childbearing and reducing overall fertility. Both did so, at least in part, by redefining gender roles and by moving to counter overreliance on the shotgun marriage.<sup>28</sup> Moreover, in both transformations, at least in the short

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24. *See id.* at 23–25 (explaining the impact of women's autonomy on the economic relationship between men and women).

25. *See id.* at 15–16 (documenting overuse of the term "separate spheres"); JOAN WILLIAMS, UNBENDING GENDER 1–3 (2000) (exploring the enduring prevalence of domesticity in American society); *see* JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 140 (1970) (exemplifying changes in family life by using the Plymouth Colony); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 238–50 (1985) (examining the use of contract and the judicial creation of child custody rights as elements in the transition from one family system to another).

26. *See* CARBONE, *supra* note 2, at 62–66 ("The middle classes . . . began to invest more in each child in terms of love, affection, training, and education, and the historical relationship between higher birthrates and class standing was reversed.").

27. *See id.* (explaining that women began to take part in activities outside of the household through this latter transformation).

28. *See* Akerlof et al., *supra* note 3, at 307–08 ("[T]he stigma associated with out-of-wedlock motherhood has declined endogenously."); *see* HIRSHMAN & LARSON, *supra* note 21, at 92 (1998) (explaining the impact of liberalism and personhood on the traditional perception of viewing sexuality as a type of moral problem); *see* Jane E. Larson, "Women Understand so Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 392 (1993) ("Victorian society enforced female modesty



term, changes in family organization exacerbated societal inequality as the wealthier middle class used the benefits of the new system to enhance its class standing.<sup>29</sup>

*1. Industrialization, Male Specialization, and Women's Agency*

The key to both transformations, and their corresponding reorganizations of the worlds of work and family, is the role of greater specialization that took place among males and females and the reorganization of family life necessary to produce the greater investment corresponding to that specialization.<sup>30</sup> The first transformation created a new middle class to staff the professions and managerial ranks of the industrial economy.<sup>31</sup> Critical to its success was greater investment in boys' formal education and training, which required in turn postponing marriage and entry into the labor force.<sup>32</sup> Yet the cities that came with industrialization posed greater temptations for adolescents, and made supervision more challenging than in the smaller communities of colonial America.<sup>33</sup> The solution was greater emphasis on women's "purity" and their agency in overseeing a redefined domestic realm rededicated to childrearing.<sup>34</sup> A new moral code accompanied the transformation.<sup>35</sup> As

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by harshly castigating immodest women, particularly unmarried women who became pregnant.").

29. See MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790–1865*, at 184–85 (1981) ("[T]he parental generation had created the educational institutions and financed the schooling that qualified their children for more skilled and lucrative occupations."); see generally CAHN & CARBONE, *supra* note 1, 37–40 (describing literature that shows greater class-based differences in family structure to the detriment of children).

30. See BECKER, *supra* note 15, at 43–44 (commenting that specialization by either the male or the female will affect the other, and consequently the family as a whole, due to the interdependence within the relationship).

31. See RYAN, *supra* note 29, at 153 (describing the rise and particularly the allure of white-collar employment as industrialism took hold of the economy during the middle of the 19th century).

32. See *id.* at 165–79 (explaining that many parents deliberately delayed their children's entry into the workforce, often sacrificing part of their financial resources to do so, in order to increase their children's education and thus the chances of success in white-collar employment).

33. See *id.* at 162 ("Boy children, however, were increasingly distanced from the roles of their fathers. Their remoteness may account for the fact that boys were often described as restless inhabitants of the private domain.").

34. See WILLIAMS, *supra* note 25, at 1–3 (describing the existence of discrete gender roles for both men and women that justify separate responsibilities); Larson, *supra* note 28,

women become more able and willing to say "no,"<sup>36</sup> the number of brides who gave birth within eight and a half months of their weddings declined from thirty percent in 1800 to ten percent by 1860, the average number of children per family fell from eight in 1800 to four by century's end, and the average age of marriage rose.<sup>37</sup>

These changes affected the moral understandings of the country as a whole in spite of the fact that the urban middle class, the driving force behind the changes, constituted a tiny part of the population.<sup>38</sup> Newly created women's magazines, which were only too happy to offer courtship suggestions, influenced the farm wives who would constitute the majority of women until the much greater urbanization of the twentieth century.<sup>39</sup> And class divisions ironically served to reinforce, rather than undermine, the new order.<sup>40</sup> Social historian Mary Ryan emphasizes that the cultural divide in upstate New York involved the often-pejorative comparison of native-born Protestants with newly-arriving Catholic immigrants.<sup>41</sup> The

at 392 (contrasting the Victorian gender paradigms in which "women were held to be 'naturally modest' and for the most part without sexual desire . . . [and] men were portrayed as 'sexual brutes', obsessed with sex and disposed to . . . exploit the female's trusting and affectionate nature").

35. See WILLIAMS, *supra* note 25, at 1 ("The ideology of domesticity held that men 'naturally' belong in the market because they are competitive and aggressive; women belong in the home because of their 'natural' focus on relationships, children, and an ethic of care.").

36. See Larson, *supra* note 28, at 388–90 ("Victorian culture exalted sexual restraint and designated women as caretakers of society's sexual virtue,"); CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 180–83* (Oxford Univ. Press 1981) (describing the declining birth rates during the 18th and 19th centuries that followed women's greater ability to decline sexual intercourse as changes in gender relations due to the availability of land as well as industrialization).

37. Larson, *supra* note 28, at 392.

38. See *id.* at 389 ("Victorian idealization of sexual restraint did not translate into actual behavior . . . [but] reflected moral aspirations regarding freedom and order, masculinity and femininity.").

39. See Janet Galligani Casey, *Farm Women, Letters to the Editor, and the Limits of Autobiography Theory*, 28 J. MOD. LITERATURE 89, 91 (2004) (drawing on letters to the editor in women's magazines to show the influence of and resistance to middle class models of femininity). See generally Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89 (1998) (explaining that this model of gendered domesticity persists, and interferes with a more thorough reorganization of work and family to meet the needs of a new age).

40. Cf. Casey, *supra* note 39, at 98 ("[The] letters in [*The Farmer's Wife*] . . . cohere around a social group that challenged certain middle-class notions of women.").

41. See, e.g., RYAN, *supra* note 29, at 155–56 (discussing the lower birth rates among native-born women compared to Catholic immigrants in the mid-19th century as a result of firmly entrenched middle-class notions regarding female sexuality).

Protestant middle class identified moral superiority with emphasis on their daughters' chastity, their determination to keep their children away from the temptations of either employment or romance at too young an age, their investment in their sons' educations and training, and their restriction of family size.<sup>42</sup> The opinion leaders in newspapers, legislatures, courts, and many pulpits heralded the new middle class standards as the moral order of the day, and the standard by which other classes might be found wanting.<sup>43</sup> Child labor and mandatory school attendance laws, after all, reflected the judgment of enlightened middle class reformers that the practices of poor and immigrant families were barbaric.<sup>44</sup>

The net result of these changes from the 1840's through the 1920's:

- redefinition of the foundation of middle class male success from farm ownership and the crafts to the professions and the management ranks of the industrial economy, which in turn placed a greater emphasis on formal education;<sup>45</sup>

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42. See, e.g., *id.* at 184–85 ("In retrospect, it seems that the native-born [and middle-class] residents . . . had carried through an elaborate and largely successful strategy for reproducing the middle class."). The Catholic working classes, in contrast, often depended on their children's labor for their families' survival, creating incentives for larger families that transcended religious differences. Moreover, factory employment, which for working class families could start even before the teen years, made parental supervision that much more difficult and further encouraged younger marriages. *Id.* See also Elizabeth H. Pleck, *A Mother's Wages: Income Earning Among Married Italian and Black Women, 1896–1911*, in *THE AMERICAN FAMILY IN SOCIO-HISTORICAL PERSPECTIVE* 490, 492–93 (Michael Gordon ed., 3d ed. 1983) (suggesting that children in Catholic families worked to support their families due to "the importance of the family above individual preference").

43. See ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 192–241 (1988) (describing the gulf between slaveholding and enslaved women in the antebellum American South); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 1–151 (1985) (comparing the experiences of free and enslaved black women in southern United States); Kerber, *supra* note 22, at 10 (explaining that examinations of women's roles in the 19th century have historically been limited to middle class standards).

44. See Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1062–68 (1992) (describing the history of such legislation, observing that Catholic organizations constituted some of the of the most vocal opponents, and concluding that school and work practices often served to reinforce the cultural identity of some immigrant communities); see also LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION 1810* (1999) (illustrating how Protestant child-savers imposed "standards of proper parenting [that] were not only antagonistic to the practices of many of these immigrants but also often inimical to the economic necessities of their lives.").

45. See RYAN, *supra* note 29, at 163 (explaining the concern in one upstate New York town regarding the lack of a school system that could properly educate the town's youth and their actions to make education more available).

- greater separation in both physical and ideological terms of the commercial world of paid employment from the domestic world of home and family;<sup>46</sup>
- the rise of the culture of domesticity, emphasis on women's virtue and the remaking of middle class women's roles to elevate the status of mothers and their importance to children's education and moral instruction;<sup>47</sup>
- an increase in the average age of marriage, decline in the number of brides giving birth within eight months of marriage, and a dramatic decline in fertility, which fell by half over the course of the nineteenth century.<sup>48</sup>

## 2. *The Information Economy, Female Specialization, and Women's Autonomy*

The second transformation began in similar fashion in the twentieth century as technology transformed the economy.<sup>49</sup> The "post-industrial economy" in which we now live has moved away from heavy manufacturing to greater emphasis on the "information economy" and the service sector.<sup>50</sup> The result is even greater returns to education, this time for both men and women, as the new technologies have created greater demand for well-educated "knowledge" workers, and expanded demand for the types of services women historically performed, such as administrative and health services.<sup>51</sup> Together with globalization, the new economy

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46. See WILLIAMS, *supra* note 25, at 1 (describing the "organization of market work around the ideal of a worker who works full time and overtime and takes little or no time off for childbearing or child rearing" in effect forcing the caregiver to specialize only in skills in the home).

47. See *id.* (describing the bifurcated nature of men's public obligations and women's private responsibilities); Kerber, *supra* note 22, at 9–11 (asserting that the concept of men and women occupying separate spheres first appeared in the early 19th century and increased in popularity throughout that century).

48. CARBONE, *supra* note 2, at 63.

49. See Richard G. Harris, *The Knowledge-Based Economy: Intellectual Origins and New Economic Perspectives*, 3 INT'L J. MGMT. REVS. 21, 22 (2001) (commenting that the early 1980s witnessed "the beginnings of a great new era, the *third industrial revolution*, founded on new technologies rooted in computers and the potential of new information technologies").

50. See *id.* at 22–23 ("The economy of bricks and mortar was being replaced with software, CDs, and digitized DNA codes. The metaphor was complete with the emergence of the Internet.").

51. See *id.* at 25 (explaining that human knowledge still plays an important part in a

combines greater opportunities with greater competitive pressures from abroad, producing greater returns for those who can compete in an international economy, but a corresponding decline in the demand for the blue collar male labor associated with the manufacturing era.<sup>52</sup>

Just as the nineteenth century changes brought greater specialization among men (with greater payoffs for male education), the twentieth century changes, in parallel fashion, involve greater specialization among women.<sup>53</sup> With growth in the number of working women, not only could women enter management and the professions alongside men, but new positions opened as women supervised other women in expanding hospital, restaurant, office, and retail settings.<sup>54</sup> Moreover, the new group of high earning mothers hires women from other economic classes to care for their children and (along with fast food, frozen, and restaurant meals) to perform what were once viewed as mothers' domestic responsibilities.<sup>55</sup>

This change in women's roles from generalists, where the vast majority oversaw cooking, cleaning, childcare, and home and family management, to specialists who choose from a variety of work-family combinations has required, like its nineteenth century counterpart, a reorganization of family life and a new moral code.<sup>56</sup> This new moral code starts with the remaking of the middle class transition to adulthood.<sup>57</sup>

The sexual revolution and women's movements that we now identify with the sixties remade middle class morality from an emphasis on

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knowledge-based economy, thus requiring higher levels of education from its employees).

52. *See id.* at 22–23 (contrasting "the de-industrialization of the American economy, and what appeared to many to be the irrevocable decline of the American economic system" with "knowledge-based growth promis[ing] ever increasing wealth based on the emergence of entirely new goods and activities").

53. *See* CARBONE, *supra* note 2, at 16–19 (asserting that not only have women seen increased specialization of women in many areas of the workforce, but that women have benefitted from that change through gains in autonomy).

54. *See id.* (noting that despite the increased role of women throughout the public sector, traditional family roles remained constant for men and women).

55. *See* Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces*, 21 J. ECON. PERSP. 27, 40–44 (2007) (describing how "reduced market discrimination against women and technological advances" changed women's roles by, among other things, increasing the efficiency of household appliances and decreasing the gender wage gap).

56. *See* CARBONE, *supra* note 2, at 16–19 (explaining that women's increased autonomy gives them more ability to influence marriage dynamics as well as seek a divorce).

57. *See* Stevenson & Wolfers, *supra* note 55, at 36–38 (commenting on the growth of cohabitation between men and women as either a precursor or a substitute for marriage).

woman's virtue to concern for equality and responsibility.<sup>58</sup> The transformation began as the baby boomers reached their college years.<sup>59</sup> The new demographic bridled at college parietal rules and sexual double standards.<sup>60</sup> The "pill" galvanized the shift from abstinence to contraception as the hallmark of responsible behavior.<sup>61</sup> The emotionally agonizing choice of abortion also reinforced the conviction that childbearing should be reserved for the right partner at the right time in life.<sup>62</sup> The media celebrated the new sexual freedom,<sup>63</sup> and by the eighties, the majority of Americans no longer condemned pre-marital sexuality.<sup>64</sup> In 1997, a Gallup poll found that fifty-five percent of American adults believed that premarital sex was not wrong, and among the most directly affected, viz., those aged eighteen to twenty-nine, seventy-five percent

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58. See LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 25–29 (2006) (arguing for a balance of power and individual autonomy within the institution of marriage, primarily through limited governmental involvement); see also WILLIAMS, *supra* note 25, at 44–45 (noting that famed feminist author Betty Friedan called for greater involvement by men in family obligations in order to help women enter the public workforce).

59. See STEPHANIE COONTZ, *MARRIAGE, A HISTORY* 249 (2005) [hereinafter COONTZ, *MARRIAGE*] (explaining that the women's revolutions of the sixties were largely the result of social developments that had been occurring without great alarm for decades).

60. See *id.* at 248 (describing the "attack on the whole 1950s package of beliefs about women's roles, courtship, and marriage" as part of a larger pattern of young political movements taking place at the time against traditional norms).

61. See Akerlof et al., *supra* note 3, at 277–303 (arguing that the availability of contraception and abortion ironically contributed to the increase in non-marital births as women assumed responsibility for avoiding pregnancy, and men no longer felt obligated to marry unintentionally pregnant partners); see Stevenson & Wolfers, *supra* note 55, at 41–42 (arguing that not only did the "pill" serve as a reliable method of birth control over which the woman had full control, it also allowed the women to be more deliberate in courtship).

62. See Stevenson & Wolfers, *supra* note 55, at 41–42 (suggesting that the availability of abortion additionally permitted women to avoid marriage to "bad matches" because of unplanned pregnancies).

63. See Barbara Dafoe Whitehead, *The Changing Pathway to Marriage: Trends in Dating, First Unions, and Marriage Among Young Adults*, in *FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE* 168, 170 (Steven M. Tipton & John Witte Jr. eds., 2005) (noting that ninety percent of women born between 1933 and 1942 were either virgins when they married or had engaged in their first intercourse with the man they subsequently married, whereas today, the average age of first intercourse is seventeen and the average age of first marriage is twenty-five).

64. See The Gallup Poll, *For the 1st Time, Most in U.S. Say Sex Before Marriage Is Not Wrong*, 17 *FAM. PLANNING PERSP.* 186, 186 (1985) (reporting that of the adult Americans in 1986 who had an opinion on premarital sex, fifty-eight percent believed that it was not wrong, compared to seventy-six percent who in 1969 declared premarital sex unacceptable).

agreed that "pre-marital sexual relations are not wrong."<sup>65</sup> Moreover, actions reflected changing attitudes: 2002 data indicate that by age twenty, seventy-seven percent of respondents had had sex, and seventy-five percent had had premarital sex.<sup>66</sup> By age forty-four, ninety-five percent of respondents (ninety-four percent of women, ninety-six percent of men, and ninety-seven percent of those who had ever had sex) had had premarital sex,<sup>67</sup> and the average age of marriage had moved from the early to the late twenties.<sup>68</sup>

The remaking of moral understandings produced a cycle of reinforcing shifts in attitudes. As Akerlof, Yellen, and Katz demonstrated, once women gained greater ability to avoid unplanned pregnancies, men felt less obliged to marry the women they impregnated.<sup>69</sup> As non-marital sexuality became more acceptable, so too did the children who resulted, making their mothers more willing to raise them without marrying.<sup>70</sup> In a parallel fashion, the shotgun marriages of the fifties and changing gender relationships produced the divorces of the seventies.<sup>71</sup> More divorce fueled greater wariness about marriage, increasing women's convictions that they need to be able to rely on their own earning power.<sup>72</sup> Greater female education and employment in turn made women more insistent on more equal relationships, and more able and willing to wait for the "right" man

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65. Frank Newport, *Gallup Poll Review from the Poll Editors—Sexual Norms: Where Does America Stand Today?*, THE GALLUP POLL, Dec. 1997, <http://www.hi-ho.ne.jp/taku77/refer/sexnorm.htm> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

66. Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 PUB. HEALTH REP. 73, 76 (2007).

67. *See id.* at 73 (stating that based on these data, Lawrence Finer concludes that "[a]lmost all Americans have sex before marrying").

68. *Id.* at 74.

69. *See* Akerlof et al., *supra* note 3, at 281 ("The sexual revolution, by making the birth of the child the *physical* choice of the mother, makes marriage and child support a *social* choice of the father . . . [The] decisions of the father depend upon the decisions and options of the mother.").

70. *See id.* at 308 (noting also that agency adoptions fell by one-half in the five years following the legalization of abortion).

71. *See* STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 167 (1992) [hereinafter COONTZ, *THE WAY*] (observing that rising divorce rates beginning in the forties actually predated any shifts in favorable attitudes towards divorce, which did not occur until the late sixties).

72. *See id.* at 166 (noting also that "with longer work experience and greater education equalization, they became freer to leave an unhappy marriage" and "as divorce became more of a possibility, women tended to hedge their bets by insisting on their right to work").

before they married.<sup>73</sup> With these changes, the average age of marriage has risen steeply, fertility has dropped, and the variety of family forms has multiplied.<sup>74</sup> For women, the median age of marriage rose from twenty in 1961 to twenty-five in 2005.<sup>75</sup> For men, it increased from twenty-two to twenty-seven in the same time period.<sup>76</sup> The societal structure and support underlying more traditional family formation (e.g., high school romances and unintended pregnancies that lead to early marriage) have atrophied.<sup>77</sup>

These changes have also transformed the relationship between work and family. In the fifties and early sixties, early marriage locked men into the responsibility of providing for their families and women into childrearing roles that left them with little independence.<sup>78</sup> Today, the twenties have become a time of exploration with movement in and out of school, in and out of jobs, and in and out of relationships.<sup>79</sup> Those in the middle class have adjusted, using the period to acquire education, experience, and flexibility that has enhanced their position in the new

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73. See Stéphane Mechoulan, *Divorce Law and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 165–66 (2006) (observing that the average age of marriage increased most in states that eliminated all consideration of fault and arguing that the result reflects women's willingness to search longer for the right spouse in states with less marital security); McLanahan, *supra* note 20, at 609 (describing a rise in the average age of college-educated women with children under the age of five from twenty-six in 1970 to thirty-two in 2000).

74. See ELIZABETH GREGORY, *READY: WHY WOMEN ARE EMBRACING THE NEW LATER MOTHERHOOD* 53–95 (2007) (stating that women who give birth at thirty-four live longer and with fewer health issues than women who give birth at any other age, and that older women generally have more resources, and marriages that are happier, more stable, and more egalitarian).

75. U.S. CENSUS BUREAU, *ESTIMATED MEDIAN AGE AT FIRST MARRIAGE, BY SEX: 1890 TO THE PRESENT* (Sept. 21, 2006), <http://www.census.gov/population/socdemo/hh-fam/ms2.pdf>.

76. *Id.*

77. See COONTZ, *MARRIAGE*, *supra* note 59, at 266–78 (listing as factors that have altered the institution of marriage: the reduced earning potential of men, the availability of acceptable alternatives to marriage including divorce and cohabitation, relaxed sexual norms, increases in longevity, same-sex marriages, and lessened societal expectations of marriage as a gateway to adulthood).

78. See SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 134–69 (1991) (arguing that the more children a woman has under the age of five, the less her power in the marriage relationship).

79. See THE NETWORK ON TRANSITIONS TO ADULTHOOD, <http://www.transad.pop.upenn.edu> (last visited Jan. 23, 2010) (presenting a comprehensive examination of "cultural, economic, and demographic changes [that] have altered the path that many young adults follow as they strive for the traditional milestones of adulthood") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).



marriage and employment markets.<sup>80</sup> The less-educated in the meantime have fallen farther behind.<sup>81</sup>

The college-educated, who postpone childrearing until the parents achieve a measure of financial self-sufficiency and emotional maturity, have become more likely to marry and less likely to divorce than the rest of the population, with two-parent families that remain intact, replicating the statistics that existed before no-fault divorce, the pill, and legalized abortion.<sup>82</sup> At the same time, the rest of the country has seen skyrocketing rates of non-marital births, divorce, and single-parent families, magnifying the effects of income inequality on children.<sup>83</sup> According to sociologist Sara McLanahan, only seven percent of children in the late nineties were born outside of marriage to the top quarter of women, as defined by the mother's education, compared to forty-three percent in the bottom-educated quartile.<sup>84</sup> For couples with four-year degree, divorce rates peaked in the late seventies with roughly a quarter of marriages ending within ten years.<sup>85</sup> The rates then fell to seventeen percent by the late eighties.<sup>86</sup> For couples without college degrees, divorce rates declined only slightly (to about thirty-two percent) by the late eighties, and they rose throughout the nineties.<sup>87</sup>

The hallmark of this new middle-class ethic is later ages of family formation, when adult behavior has stabilized.<sup>88</sup> For the best-educated

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80. See COONTZ, MARRIAGE, *supra* note 59, at 285–86 ("Modern men tend to want mates who are on a similar level in terms of education or earning potential. . . . Being a smart, achieving women used to be perceived as a liability in the marriage market . . . but is now a big asset.").

81. See *id.* at 286–90 (explaining that the "corrosive effects of unemployment and poverty" lead many young, low-income parents to avoid marriage entirely, opting instead to be single parents).

82. See McLanahan, *supra* note 20, at 608 ("Children who were born to mothers from the most-advantaged backgrounds are making substantial gains in resources . . . . [T]heir mothers are more mature and more likely to be working at well-paying jobs. These children were born into stable unions and are spending more time with their fathers.").

83. See *id.* at 608–11 ("[C]hildren born to mothers from the most disadvantaged backgrounds are making smaller gains and, in some instances, even losing parental resources.").

84. *Id.* at 611–12.

85. *Id.* at 612–13.

86. *Id.*

87. *Id.*

88. See COONTZ, MARRIAGE, *supra* note 59, at 276–77 (arguing that men and women should weigh the "potential gains of getting married . . . against the possibilities offered by staying single to pursue higher education or follow a better job").

quartile of American women, mothers' median age rose from twenty-six in 1970 to thirty-two in 2000.<sup>89</sup> For mothers in the bottom quartile, it remained relatively flat in the early twenties.<sup>90</sup> For those who avoid early child-bearing, conventional families with two married parents and a high degree of stability follow to a remarkable degree with a minimum of external coercion.<sup>91</sup>

The net result of these changes has been:

- greater return for investment in women's education, as college degrees correspond to both enhanced marriage and employment opportunities;<sup>92</sup>
- reintegration of women into the paid labor market, as two incomes have become increasingly essential to realize the benefits of middle class life;<sup>93</sup>
- remaking of the moral terms of relationships, with the stigma associated with pre-marital sexuality waning, women assuming responsibility for birth control and abortion, and responsibility toward children replacing sexual control as the most widely shared moral imperative;<sup>94</sup>
- greater class-based disparities, including:
  - age of first birth (increasing substantially for college educated, less so for others);<sup>95</sup>

89. McLanahan, *supra* note 20, at 609–610.

90. *Id.* It should be noted, however, that fertility rates have also dropped, especially for teens. Between 1960 and 2000, for example, births to fifteen to nineteen-year-old women fell by more than half. The composition of the remaining births nonetheless varies by race and class. White women, for example, have higher birth rates in every age group above twenty-five, while African-Americans have higher birth rates in every cohort under twenty-five, even though both races report substantial declines in teen childbearing. CHILD TRENDS DATABANK, PERCENTAGE OF BIRTHS TO UNMARRIED WOMEN 1–2, 8 (2003), [http://www.childtrendsdatabank.org/pdf/75\\_PDF.pdf](http://www.childtrendsdatabank.org/pdf/75_PDF.pdf).

91. *See* McLanahan, *supra* note 20, at 618 (describing the greater influence women exercised over their careers and marriage if they chose to delay pregnancy, due not only to increased financial resources but also increased maturity).

92. *See* Stevenson & Wolfers, *supra* note 55, at 44–55 (noting that wage instability in the overall job market has simultaneously affected how women view the prospect of marriage and possibly increased the value of delaying marriage to pursue education or a career).

93. *See* Harris, *supra* note 49, at 30 (noting the heightening demand and wages for skilled and educated workers as the country has shifted to a knowledge-based economy, as well as the simultaneous drop in both demand and wages for unskilled workers).

94. *See* McLanahan, *supra* note 20, at 618 (presenting evidence of changes in sexual norms, which have in turn affected attitudes concerning pregnancy and child-rearing).

95. *Id.* at 609–10.

- likelihood of marriage (increasing for college educated women, declining for others);<sup>96</sup>
- births outside of marriage (decreasing for the best off, leveling off at high levels for the worst off, still increasing for the center);<sup>97</sup>
- income (rising for college educated; stagnant for others),<sup>98</sup>
- work/leisure balance (high income men and women work more and have less leisure than forty years ago; working class men have similar or more leisure time than forty years ago, working class women are in between the other groups).<sup>99</sup>

### III. Rebuilding the Foundation

#### A. Recognizing the Effect of Work on Family

If economic reorganization destabilizes family life, then creation of new family understandings requires rebuilding the pathways for the least advantaged to realize the benefits of the new system. Family life has become an engine of economic inequality in part because the poorest Americans can neither take advantage of the new system, which requires access to the resources that make greater education and achievement possible, nor maintain their position in the traditional system, which permitted young men to earn enough money to make early marriage feasible and locked women into dependent roles that made exit difficult.<sup>100</sup>

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96. See COONTZ, MARRIAGE, *supra* note 59, at 285–90 (“[M]any [lower-class] women today see no point in marrying unless their prospective husband has both the economic prospects and the emotional dependability to make pooling their resources worthwhile.”).

97. McLanahan, *supra* note 20, at 611–12.

98. See CLAUDIA GOLDIN & LAWRENCE KATZ, LONG-RUN CHANGES IN THE U.S. WAGE STRUCTURE 2, 34 fig. 6 (2007), [http://www.brookings.edu/es/commentary/journals/bpea\\_macro/forum/200709goldin\\_katz.pdf](http://www.brookings.edu/es/commentary/journals/bpea_macro/forum/200709goldin_katz.pdf) (observing that the wage premium for a college graduate compared to a high school graduate has widened dramatically since 1980, producing a “polarization” in wage structure between high paying jobs requiring high levels of education and low paying jobs requiring less education).

99. See CAHN & CARBONE, *supra* note 1, at 198 (summarizing literature that shows that leisure time did not differ by social class in 1965, but now varies substantially, with well-educated men and women working substantially more hours than the less educated); see also McLanahan, *supra* note 20, at 612–14 (explaining that college-educated men on average spend more time with their children than men without college educations).

100. See SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 157 (1989)

Standing in the way of systematically rebuilding family life—and the interaction between the reorganized family and the workplace—is profound disagreement on how to respond. The wealthiest areas of the country, those most dominated by the secular, college-educated middle class, have embraced the move to new practical and normative understandings about family life.<sup>101</sup> The poorer, more religious, and more traditional areas of the country view the new morality, which deregulates sexuality and dismantles gender-based roles, as a threat to an increasingly fragile family system.<sup>102</sup> Yet, the political opposition to the new system promotes measures that are ineffective, if not counterproductive, because of the refusal to acknowledge the links between family and the economy.<sup>103</sup>

The failure to do so is understandable. The successful middle class reaps the benefits of the new system by training their children to take advantage of new opportunities; they manage the conflicts between public temptation and private discipline by preparing their children for adult autonomy.<sup>104</sup> More traditional families, in contrast, expect public reinforcement of private morality, and are distressed by their children's failure to live up to their parents' principles.<sup>105</sup> In other work, we refer to the core of this more traditional system as "communities on the cusp."<sup>106</sup> While the college-educated enjoy the family stability of a more traditional era, and the poorest Americans have non-marital birth and divorce rates that have plateaued at very high levels, the family instability—in terms of both divorce and non-marital birth rates—of the middle has continued to rise.<sup>107</sup>

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(explaining that women with young children have the least power in relationships because the combination of their devotion to their children and economic dependence gives them little ability to leave, and without a credible threat of "exit," they also lack "voice" within the union).

101. See CAHN & CARBONE, *supra* note 1, at ch. 4 (examining how differences regarding family values play into the fault lines created by religion, personality differences, and political realignment).

102. *Id.* at 2.

103. *Id.*

104. See generally JOAN C. WILLIAMS, CLASS ACTS AND GENDER WORKS: RETHINKING THE ELECTORAL AND EVERYDAY POLITICS OF WORK AND FAMILY (2010) (emphasizing that the middle class uses the language of autonomy and trains its children to exercise personal choice in defining the character of their adulthood while the working class looks for greater structure and more permanent values to guide its children).

105. See, e.g., Barbara DaFoe Whitehead, *Trends Shaping Youthful Sexuality*, NAT'L PASTORAL LIFE CENT., <http://www.nplc.org/commonground/papers/whiteheadpaper.htm>.

106. CAHN & CARBONE, *supra* note 1, at 73.

107. See McLanahan, *supra* note 20, at 612–13 (showing rising trends in divorce during the first ten years of marriage and non-marital birthrates among the middle class).

Andrew Cherlin observes that the United States differs from the rest of the developed world in its greater marriage and divorce rates.<sup>108</sup> Many American small towns, suburbs, and rural communities continue to revolve around married couples; over the last forty years, they have responded to more divorce with remarriage. In the last fifteen years, however, the group whose non-marital birth rates have increased most dramatically are white, high school graduates in their early twenties; women whose family formation patterns are critical to the future of marriage in communities on the cusp.<sup>109</sup>

The political and ideological response to these developments has been a moral call to arms; critics such as James Q. Wilson accordingly dismiss Akerlof and Yellen for their purported failure to address the change in moral values.<sup>110</sup> They miss entirely that while the economists use the sterile language of bargaining analysis, they are describing a normative shift—one that proceeds from the inability of the most vulnerable women to command either the right marital terms or the ability to postpone pregnancy effectively, and produces in turn a shift in the understandings that channel such behavior.

The insistence on viewing sexual morality apart from economic change and of viewing the perspectives of high school graduate whites as though they were universal has been the promotion of policies that cannot address the nation's needs as a whole. The result has, ironically, exacerbated class and regionally based inequalities as the wealthier states build in greater support for the transformation to the new middle class model while poorer states block assistance that might further undermine traditional practices.

These policies exacerbate class and regional differences. Consider teen pregnancies, which overwhelmingly result in single parent families,

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108. See Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, 15 *THE FUTURE OF CHILD*, 33, 46 (2005) ("[W]hat makes the United States most distinctive is the combination of high marriage and high divorce rates—which implies that Americans typically experience more transitions into and out of marriages than do people in other countries.").

109. See STEPHANIE J. VENTURA, *CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES* 1 (2009), <http://www.cdc.gov/nchs/data/databriefs/db18.pdf> ("Birth rates have risen considerably for unmarried women in their twenties and over, while declining or changing little for unmarried teenagers.").

110. See WILSON, *supra* note 11, at 156–57 (suggesting that technology alone cannot explain why women are more likely to keep unwanted children rather than get an abortion or give the child up for adoption). Wilson argues the fact that "keeping a child without a husband entails no major social costs" plays a part in women's decisions to get an abortion or give a child up for adoption. *Id.*

limit the mother's educational opportunities, and have life-long effects on the child's prospects.<sup>111</sup> Between 1988 and 2000, teen pregnancies fell substantially across the United States, but they fell most dramatically in New England, dropping by at least a third in Massachusetts, Connecticut and Maine, and closer to forty percent in New Hampshire and Vermont.<sup>112</sup> In contrast, teen pregnancies barely dropped at all in Mississippi and Wyoming, and only slightly in West Virginia, Texas, Idaho and New Mexico.<sup>113</sup> The diverging teen birth rates reinforce regional patterns, with New England leading the country in declining teen pregnancies, births, and overall fertility while the Southern (particularly Mississippi), border (especially Arkansas and Oklahoma), and Southwestern states (Texas, New Mexico and Arizona) retain much higher rates of reproduction at earlier ages.<sup>114</sup> Looking just at whites, the regional and wealth differences are even more concentrated. The states with the lowest white teen birth rates are the wealthy mid-Atlantic states: New Jersey, Connecticut, Massachusetts, New York, and Rhode Island.<sup>115</sup> In contrast, the highest white teen birth rates were concentrated in the poorest border and Southern states: Arkansas, Kentucky, Mississippi, Oklahoma, and Tennessee.<sup>116</sup> The Northeast as a whole has most unequivocally embraced the new family patterns (followed by the West Coast and the upper Midwest) while whites in the belt that runs from Oklahoma through West Virginia (followed by the South, the plains, and the mountain West) remain most opposed.

These patterns reinforce others. Family form has become one of the best predictors of electoral politics. Michigan political scientists Ron Lesthaeghe and Lisa Neidert demonstrate that family characteristics showed a significant correlation with voting preferences in the last three presidential elections.<sup>117</sup> They measure family factors in terms of a host of variables

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111. See generally KRISTIN LUKER, DUBIOUS CONCEPTIONS: THE CONTROVERSY OVER TEEN PREGNANCY (1992).

112. GUTTMACHER INST., U.S. TEEN PREGNANCY STATISTICS: NATIONAL AND STATE TRENDS BY RACE AND ETHNICITY 13 (2006) [hereinafter GUTTMACHER INST., TEEN PREGNANCY], <http://www.guttmacher.org/pubs/2006/09/12/USTPstats.pdf>.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. See RON LESTHAEGHE & LISA NEIDERT, POPULATION STUDIES CENTER, THE "SECOND DEMOGRAPHIC TRANSITION" IN THE U.S.: SPATIAL PATTERNS AND CORRELATES 18 (2006) [hereinafter LESTHAEGHE & NEIDERT, DEMOGRAPHIC TRANSITION], <http://www.psc.isr.umich.edu/pubs/pdf/rr06-592.pdf> (showing CNN exit poll data

that include postponing marriage and childbearing, overall fertility, marriage, abortion, and cohabitation rates.<sup>118</sup> Lesthaeghe and Neidert conclude that "the very strong negative correlation found here between the SDT dimension<sup>119</sup> . . . and the percentage votes for G.W. Bush is to our knowledge one of the highest spatial correlations between demographic and voting behavior on record."<sup>120</sup>

The fact that the areas of the country that have yet to make the transition to the new family system are both the poorest *and* most politically conservative means that these regions are also most likely to oppose support for practices that would speed the transition. Consider the trends in unintended pregnancy rates. Unplanned pregnancies reflect access to contraception and disciplined use. The most reliable contraceptives—injectables, IUD's, and the pill—require access to a doctor.<sup>121</sup> The Guttmacher Institute reports that "between 1994–2001, the unintended pregnancy rate rose twenty-nine percent among women living below the poverty level even while it declined twenty percent among women with higher economic status."<sup>122</sup> It rose for high school drop outs while declining for college graduates.<sup>123</sup> With restrictions on public funding for

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demonstrating statistical correlation between family factors such as marital status and presence of children and choice of presidential candidate in 2000 and 2004 elections); Ron Lesthaeghe & Lisa Neidert, *Voting and Families: America's Second Demographic Transition*, NEW GEOGRAPHY, Dec. 11, 2008 [hereinafter Lesthaeghe & Neidert, *Voting and Families*], available at <http://www.newgeography.com/content/00461-voting-and-families-america%E2%80%99s-second-demographic-transition> (showing that family characteristics influenced voting preferences in 2008 much in the same way they influenced preferences in 2000 and 2004).

118. See LESTHAEGHE & NEIDERT, DEMOGRAPHIC TRANSITION, *supra* note 117, at 5 (using factors such as the postponement of marriage, greater prevalence of cohabitation and same sex households, postponement of parenthood, sub-replacement fertility, and a higher incidence of abortion to show spatial correlation to voting behavior).

119. See Lesthaeghe & Neidert, *Voting and Families*, *supra* note 117 (explaining that the "second demographic transition" corresponds to the changes produced by the new information economy. The first demographic transition is the transition associated with the transition to industrialization).

120. *Id.*

121. See generally James Trussel et al., *The Economic Value of Contraception: A Comparison of 15 Methods*, 85 AM. J. PUB. HEALTH 494 (1995) (showing that more reliable forms of birth control are both more expensive and out of reach for many without health insurance or public program access).

122. HEATHER D. BOONSTRA ET AL., ABORTION IN WOMEN'S LIVES 26 (2006), <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf>.

123. See Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90, 94 (2006) ("[W]omen aged 20 and older without a high school diploma had an

contraception and the availability of health insurance, the disparities also reflect race.<sup>124</sup> Latinas, for example, are three to four times more likely than white women to use no method of contraception.<sup>125</sup>

These factors produce interlocking virtuous and vicious cycles. The wealthiest states are the most liberal and the most likely to support comprehensive sex education, public support for contraception, and abortion.<sup>126</sup> These policies reduce overall fertility rates and do so most dramatically (in comparison with other states) for the poorest women, who would have the greatest difficulty in restricting reproduction in the absence of public support. Declining rates of unintended pregnancy increase the average age at which mothers have children, which in turn increases the overall well being of children in these states.<sup>127</sup> In addition, wealthier states are also more likely to attract well-educated college graduates from other

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unintended pregnancy rate about three times that of college graduates, and they were less likely than women in other education subgroups to end an unintended pregnancy by abortion." As a consequence, such women's rate of unintended childbearing was "four times that of college graduates." *Id.*

124. See Andrea Miller & Rebecca Wind, *Contraception Needs and Services, 2006*, GUTTMACHER INSTITUTE, March 1, 2009, <http://www.guttmacher.org/media/nr/2005/02/22/index.html> ("Among women in need of publicly supported contraceptive services and supplies in 2006, seventy-one percent (12.4 million) were poor or low-income adult women, and twenty-nine percent (5.1 million) were women younger than age 20 and of any income level."). Of those women, "9.6 million were non-Hispanic white, 3.1 million were non-Hispanic black and 3.6 million were Hispanic." *Id.*

125. See Chandra A. Martinez et al., *Fertility, Family Planning and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, 23 VITAL & HEALTH STAT. 25, 101 (2005) (showing that Latina women are statistically more likely than white women to fail to use any method of contraception); see also Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000–2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 294, 297 (2002) [hereinafter Jones et al., *Contraceptive Use*] (showing that 4.3% of white study participants reported as never using contraception, versus 13.1% of Hispanic participants).

126. See generally CAHN & CARBONE, *supra* note 1, at ch. 1.

127. See, e.g., Janet B. Hardy et al., *Adolescent Childbearing Revisited: The Age of Inner-City Mothers at Delivery Is a Determinant of Their Children's Self-Sufficiency at Age 27 to 33*, 100 PEDIATRICS 802–09 (1997) (showing that a thirty-year follow-up study found that the mother's age at the time of the child's birth was an important independent factor in predicting the child's well-being); John Mirowsky & Catherine E. Ross, *Depression, Parenthood, and Age at First Birth*, 54 SOC. SCI. & MED. 1281, 1295–96 (2002) (finding maternal depression greater with younger age of first birth, and the least depression in first-time mothers around age thirty); Antonio Merlo & Kenneth Wolpin, *The Transition from School to Jail: Youth Crime and High School Completion Among Black Males*, PENN. INST. FOR ECON. RES. (Sept. 2008), [economics.sas.upenn.edu/system/files/08-033.pdf](http://economics.sas.upenn.edu/system/files/08-033.pdf) (mother's age at time of birth is an independent risk factor for boys' incarceration).



states, further increasing the human capital in the population.<sup>128</sup> While other factors also affect these developments—wealthier states, for example, are also more urban and expensive and therefore less attractive to families with young children,<sup>129</sup> the results undermine support for a more comprehensive national approach. Indeed, the factors that produce these results have become some of the more politically divisive issues in American politics over the last decade.

**Contraceptive sex education.** As Kristin Luker's innovative work demonstrates, attitudes toward sex education involve a "chasm, wide and getting wider, between the sexual right and left . . ." <sup>130</sup> The Bush administration insisted on funding abstinence-only programs in spite of substantial evidence that they were less effective, and possibly counterproductive, in comparison with comprehensive programs that included both arguments for abstinence and accurate information about contraception.<sup>131</sup> Less well reported, however, has been the effect of such programs in increasing class and racial disparities. A Clinton-era study indicated that the percentage of African-American and Latina women receiving abstinence-only instruction in lieu of other forms of sex education exceeded the portion of white women receiving such instruction, and that women living below 200% of the poverty level were more likely to receive abstinence-only instruction—or no sex education at all—than were higher-income women.<sup>132</sup> Moreover, at the time of their first sexual encounter,

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128. See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 131–33 (2008) (showing the increasing percentage of young people with college degrees migrating to central cities and wealthy suburbs).

129. See Steve Sailer, *Value Voters*, *THE AM. CONSERVATIVE*, Feb. 11, 2008, available at <http://www.amconmag.com/article/2008/feb/11/00016/> (showing, for example, that wealthy, urban areas, such as the San Francisco Bay area, are more expensive to raise children and tend to be less family oriented and boast significant liberal populations). By contrast, areas such as Dallas-Fort Worth are half as expensive to raise children, tend to attract families from across the country, and produce more socially conservative voters. *Id.*

130. KRISTIN LUKER, *WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES* 91 (2006).

131. See, e.g., Hazel Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 *COLUM. J. GENDER & L.* 12, 38–42 (2006) (summarizing reviews of various abstinence programs' effectiveness); Hannah Bruckner & Peter Bearman, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 *J. ADOLESCENT HEALTH* 271, 273–77 (2005) ("Pledgers are consistently less likely to be exposed to risk factors across a wide range of indicators, but their STD infection rate does not differ from nonpledgers."); Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 *W. VA. L. REV.* 459, 494–98 (2008) (summarizing evidence pointing to the ineffectiveness of abstinence-only education).

132. Laura D. Lindberg et al., *Changes in Formal Sex Education: 1995–2002*, 38

two-thirds of white women had received instruction about contraception compared with fewer than half of African-Americans.<sup>133</sup> The assumption that teens receive "sex education" outside of school programs or that discussion of contraception is likely to undermine support for abstinence is least likely to be true for the groups most at risk.<sup>134</sup>

**Contraception.** Today, it seems remarkable that the first comprehensive federal efforts to increase access to birth control were bipartisan. In 1970, President Richard Nixon signed Title X of the Public Health Service Act,<sup>135</sup> which created "a comprehensive federal program devoted entirely to the provision of family planning services on a national basis."<sup>136</sup> The vote for passage was unanimous in the Senate and overwhelming in the House (298 to 32).<sup>137</sup> Kristin Luker explains: "When poor women were having unwanted, out-of-wedlock births in such large numbers (out-of-wedlock births were assumed to be unwanted births), and when unwanted babies seemed to be swelling the AFDC rolls, an archaic birth control policy that kept contraceptives out of the hands of the poor seemed ludicrous, if not tragic."<sup>138</sup>

The results may be no less tragic today, but without AFDC as a political issue, support for contraception has waned.<sup>139</sup> In 2006, half of all pregnancies in the United States were unplanned,<sup>140</sup> but the rates varied

PERSP. ON SEXUAL & REPROD. HEALTH 182, 185–86 (2006), available at <http://www.guttmacher.org/pubs/psrh/full/3818206.pdf>.

133. *Id.* (citing statistics).

134. See MARK D. REGNERUS, FORBIDDEN FRUIT: SEX & RELIGION IN THE LIVES OF AMERICAN TEENAGERS 65 (2007) (finding that evangelical parents are most likely to believe that discussing contraception sends mixed messages, but observing considerable variation between African-American and white teen attitudes about the possibility of restricting sexual activity).

135. Family Planning Services and Population Research Act of 1970, 42 U.S.C. §§ 1001–08 (LexisNexis 2010).

136. GUTTMACHER INST. FACTS IN BRIEF: TITLE X AND THE U.S. FAMILY PLANNING EFFORT (1997), <http://www.guttmacher.org/pubs/ib16.html>.

137. KRISTIN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY 59 (1996).

138. *Id.* at 57.

139. Cf. Tonya Brito, *From Madonna Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 416 (1999) (arguing that "because the prevailing images of welfare mothers are pejorative, it has been difficult to win broad-based political support for progressive welfare reform proposals"). Congress abolished the Aid to Families with Dependent Children Program when it passed "the Personal Responsibility and Work Opportunity Reconciliation Act of 1996." Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601 et seq. (West 1997).

140. GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES (2008)

from twenty-nine unplanned pregnancies per 1,000 women aged fifteen to forty-four for those with income 200% or more of the poverty line, rising to eighty-one per 1,000 women whose income was 100%–199% of the poverty line, and to 112 per 1,000 for those below the poverty line.<sup>141</sup> The disparities in unplanned pregnancies produce even greater disparities in unplanned births: Eleven per 1,000 women for the most affluent group, thirty-five per 1,000 for women at 100%–199% of the poverty line, and fifty-eight per 1,000 for those in poverty, more than five times the rate of the wealthiest group.<sup>142</sup> Unintended pregnancies also vary significantly by race.<sup>143</sup> In the nineties, sixty-nine percent of African-American pregnancies were unintended in comparison with forty percent of those for whites, and fifty-four percent of Latina conceptions.<sup>144</sup> Restrictions on public funding for contraceptives disproportionately affect the most vulnerable.<sup>145</sup>

**Abortion.** Given limits on access to contraception, the availability of abortion has become far more important to poorer women's reproductive autonomy than it is for wealthier women.<sup>146</sup> In the United States in 2000, for example, the poorest thirty percent of women of reproductive age had fifty-seven percent of the abortions.<sup>147</sup> A remarkable forty-three percent of all African-American pregnancies ended in abortion compared to eighteen percent for whites and twenty-five percent for Latinas.<sup>148</sup> Abortion rates also vary geographically.<sup>149</sup>

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[hereinafter INDUCED ABORTION], [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf).

141. Rachel Benson Gold, *Rekindling Efforts to Prevent Unplanned Pregnancy: A Matter of "Equity and Common Sense,"* 9 GUTTMACHER POL'Y REV., Summer 2006, at 2, 3, available at <http://www.guttmacher.org/pubs/gpr/09/3/gpr090302.pdf>.

142. *Id.*

143. See INDUCED ABORTION, *supra* note 140 (citing statistics revealing the disproportionate percentages of unintended pregnancies between white, black, and Hispanic women).

144. *Id.*

145. See Gold, *supra* note 141, at 4–5 (discussing the lack of safe, affordable, and effective contraceptives for low-income women and the need to expand Medicaid coverage of contraceptive services in order to decrease the number of unintended pregnancies for low-income women).

146. See INDUCED ABORTION, *supra* note 140 (explaining that the abortion rate among women below the federal poverty level is over four times that of women above the poverty level, largely due to the higher rate of unintended pregnancies).

147. Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 226, 228–31 (2002) [hereinafter Jones et al., *Patterns*], <http://www.guttmacher.org/pubs/journals/3422602.pdf>.

148. *Id.*

149. See GUTTMACHER INST., U.S. TEEN PREGNANCY, *supra* note 112, at 13–14 (ranking abortion rates by state); see also Jones et al., *Patterns*, *supra* note 147, at 231 (noting that

The states<sup>150</sup> with the highest teen abortion ratios (i.e., the number of abortions per 100 live births) are New Jersey, New York, Massachusetts, Connecticut, and Maryland, all in the Northeast;<sup>151</sup> the highest ratio for adults (i.e., the number of abortions per 1,000 live births) are New York, Delaware, Washington, Massachusetts, and Rhode Island.<sup>152</sup> The states<sup>153</sup> with the lowest teen abortion ratios are Utah, Kentucky, South Dakota, Louisiana, and Arkansas;<sup>154</sup> the states with the lowest adult abortion ratios are Colorado, Utah, Idaho, South Dakota, and Kentucky.<sup>155</sup> Based on these statistics, abortion has been a much more important component in the reduction of overall fertility in the relatively diverse Mid-Atlantic States than in other parts of the country.

The more conservative states have enacted legislation that restricts access to abortion, and abortion clinics have largely disappeared from the overwhelming majority of rural, and conservative suburban counties.<sup>156</sup> Abortion restrictions have kept abortion rates low in states such as South Dakota,<sup>157</sup> while more effective

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because abortion services are concentrated in cities, it is often easier for women residing in metropolitan counties to obtain these services).

150. Excluding the District of Columbia.

151. GUTTMACHER INST., TEEN PREGNANCY, *supra* note 112, at 11.

152. Laurie D. Elam-Evans et al., *Abortion Surveillance—United States, 2000*, MORBIDITY & MORALITY WKLY. REP.: CDC SURVEILLANCE SUMMARIES (Ctrs. for Disease Control & Prevention, Atlanta, Ga.), Nov. 28, 2003, at 1, 18–19 tbl.3, 29, <http://www.cdc.gov/mmwr/PDF/ss/ss5212.pdf>.

153. Excluding the District of Columbia.

154. GUTTMACHER INST., TEEN PREGNANCY, *supra* note 112, at 11. If we were to measure teen abortion rates as opposed to ratios, New Jersey, New York, and Maryland would remain in the top five, but Massachusetts and Connecticut would be replaced by Nevada and California. *Id.* The lowest abortion rates also would change, with Utah, South Dakota, and Kentucky remaining in the top five, but North Dakota and West Virginia replacing Louisiana and Arkansas. *Id.*

155. Elam-Evans et al., *supra* note 152, at 18, 29. Florida and Louisiana had low rates as well, but did not report the number of abortions with respect to in-state residents. *Id.*

156. See Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL'Y REV. 12, 16 (2007) (estimating that between eighteen percent and thirty-five percent of women who wanted an abortion continued their pregnancy because of the inability to obtain funding); Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6, 13 (2008) [hereinafter Jones et al., *Incidence*], available at <http://www.guttmacher.org/pubs/psrh/full/4000608.pdf> (reporting that in 2005, ninety-two percent of non-metropolitan women and twenty-four percent of those in metropolitan areas lacked an abortion facility in their county).

157. See Boonstra, *supra* note 156, at 13 (noting that South Dakota is the only state to

contraception in other states has contributed to the overall reduction in abortion rates for the country as a whole.<sup>158</sup> The *New York Times* reports, however, that the largest recent declines in abortion rates were not due to the legal restrictions.<sup>159</sup> Instead:

Almost two-thirds of the decline in the total number of abortions can be traced to eight jurisdictions with few or no abortion restrictions—New York, New Jersey, Massachusetts, Illinois, California, Oregon, Washington State and the District of Columbia, . . . places . . . that have shown a commitment to real sex education, largely departing from the Bush administration's abstinence-only approach. These jurisdictions also help women avoid unintended pregnancies by making contraception widely available.<sup>160</sup>

The national picture of family change, of course, includes multiple dimensions. Indeed, the big story during the nineties involved substantial declines in both teen births<sup>161</sup> and abortions.<sup>162</sup> Careful review of the statistics indicates that greater abstinence was a factor, but that increases in abstinence overwhelmingly delayed sexual activity from the mid-teens to the later teens—not into marriage.<sup>163</sup>

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exclude public funding for abortion in cases of rape and incest unless necessary to protect the woman's life).

158. See Jones et al., *Incidence*, *supra* note 156, at 15 ("The long-term decline in abortion incidence continued through 2005. . . . Data are not yet available to determine the reasons for the continuing decline, but they likely include a range of circumstances, such as better contraceptive use . . . ."); Boonstra, *supra* note 156, at 13 (noting that South Dakota is the only state to limit state funding to cases necessary to save the life of the mother, and is the only state to exclude public funding for abortion in cases of rape and incest unless necessary to protect the woman's life).

159. See Editorial, *Behind the Abortion Decline*, N.Y. TIMES, January 26, 2008, at A16 (reporting that the decline in abortion rates is likely explained by increased pregnancy prevention rather than by states making it harder for women to obtain abortions).

160. *Id.* See generally Cicely Marston & John Cleland, *Relationships Between Contraception and Abortion: A Review of the Evidence*, 29 INT'L FAM. PLAN. PERSP. 6 (2003), available at <http://www.guttmacher.org/pubs/journals/2900603.pdf> (reviewing the empirical literature on the relationship between the availability of contraception and abortion).

161. See John S. Santelli, et al., *Explaining Recent Declines in Adolescent Pregnancy in the United States: The Contribution of Abstinence and Increased Contraceptive Use*, 97 AM. J. PUB. HEALTH 150, 150 (2007), available at [http://opr.princeton.edu/seminars/papers%5CRecent\\_declines\\_in\\_adol\\_pregnancy\\_NSFG.pdf](http://opr.princeton.edu/seminars/papers%5CRecent_declines_in_adol_pregnancy_NSFG.pdf) (noting that after 1991, the rate of adolescent pregnancy in the United States declined dramatically).

162. See Jones et al., *Incidence*, *supra* note 156, at 6 (reporting that the number of abortions in the United States declined after reaching an all-time high in 1990).

163. See Santelli et al., *supra* note 161, at 154 (noting that although more adolescents in the United States are delaying initiation of sexual intercourse, the impact of this change on

Overall, the studies attributed eighty-six percent of the reduction to more effective contraception, with contraception as a particularly critical factor for eighteen- to -nineteen-year-olds.<sup>164</sup> Since 2005, teen birth rates have inched back up and the largest increases have occurred in the African-American community.<sup>165</sup>

Studies of family stability, of the well-being of children born to single mothers, and of the likelihood of divorce, all find that later age of family formation is an important protective factor.<sup>166</sup> Yet today, these factors are the product of different family systems. The five states with the lowest median age of marriage are the states with high teen birth and low abortion rates: Utah (22.8 for women, 25.2 for men), Idaho (23.5, 25.5), Arkansas (24.0, 25.7), Oklahoma (24.5, 25.9), and Kansas (24.7, 26.3).<sup>167</sup> Correspondingly, the states with the

pregnancy risk is small and confined to younger teenagers aged 15 to 17).

164. *Id.* at 153–54 ("We estimated that fourteen percent of the change observed among 15- to 19-year-olds was attributable to a decrease in the percentage of sexually active young women . . . and that eighty-six percent was attributable to changes in contraceptive method use . . ."). All of the change in pregnancy risk among 18- and 19-year-olds can be attributed to increased contraceptive use. *Id.*

165. See Brady E. Hamilton et al., *Births: Preliminary Data for 2006*, 56 NAT'L VITAL STAT. REP., no. 7, Dec. 5, 2007, at 2, [http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56\\_07.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_07.pdf) (reporting that the pregnancy rate among adolescents fell thirty-four percent between 1991 and 2005 before it reversed in 2006, rising by three percent among females aged 15–19). The largest single-year increase was reported for non-Hispanic black teenagers, whose overall rate increased by five percent. *Id.* The pregnancy rate increased by two percent for Hispanic teenagers, three percent for non-Hispanic white teenagers, and four percent for AIAN teenagers. *Id.*

166. See SAUL D. HOFFMAN, NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, BY THE NUMBERS: THE PUBLIC COSTS OF TEEN CHILDBEARING 114–16 (Oct. 2006), available at [http://www.thenationalcampaign.org/resources/pdf/pubs/BTN\\_Full.pdf](http://www.thenationalcampaign.org/resources/pdf/pubs/BTN_Full.pdf) (reporting that a mother's educational attainment and earnings, a father's earnings, and a child's health, educational attainment, and earnings all decrease with teen births); see also *Jamie Lynn Spears and Teen Pregnancy*, THE NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY (2009), <http://www.thenationalcampaign.org/media/jls.aspx> (noting that children of teen mothers do not do as well in school as children of older mothers) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also PAUL R. AMATO ET AL., ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING 79 (2007) [hereinafter AMATO ET AL., ALONE TOGETHER] (reporting that divorce proneness declines with age at time of marriage).

167. See U.S. CENSUS BUREAU, AM. FACT FINDER, AMERICAN COMMUNITY SURVEY 2007, MEDIAN AGE AT FIRST MARRIAGE FOR WOMEN, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=01000US&ds\\_name=ACS\\_2007\\_1YR\\_G00\\_-lang=en&-redoLog=false&-format=US-9&-mt\\_name](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&ds_name=ACS_2007_1YR_G00_-lang=en&-redoLog=false&-format=US-9&-mt_name=ACS_2007_1YR_G00_GCT1205_US9&-CONTEXT=gct) (last visited Feb. 23, 2010) (citing statistics) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); U.S. CENSUS BUREAU, MEDIAN AGE AT FIRST MARRIAGE FOR MEN, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=01000US&-ds\\_name=ACS\\_2007\\_1YR\\_G00\\_-lang=en&-redoLog=false&-format=US-9&-mt\\_name](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2007_1YR_G00_-lang=en&-redoLog=false&-format=US-9&-mt_name)

highest median age of marriage have low teen birth and high abortion rates: Massachusetts (28.5, 29.9), New York (28.0, 29.9), Rhode Island (28.1, 29.3), Connecticut (27.5, 29.4), and New Jersey (27.5, 29.4).<sup>168</sup> The high average age of marriage and first birth figures correspond closely; in 2000, the mean age of the mother at her first live birth for the country as a whole was 24.9; Massachusetts had the highest mean age, at 27.8, followed by Connecticut (27.2), New Jersey (27.1), New Hampshire (26.7), and New York (26.4).<sup>169</sup> The marriage and first birth figures correspond less closely at the other end in large part because of racial differences.<sup>170</sup> The states with the lowest median age of first birth tend to have higher concentrations of minority women, who are less likely to marry: Mississippi had the lowest (22.5), followed by Arkansas (22.7), Louisiana and New Mexico (23.0), Oklahoma (23.1), and Wyoming (23.2).<sup>171</sup> Over the past thirty years, all states have experienced an increase in the mean age at which the first child is born for mothers,<sup>172</sup> but the changes range from a 5.3 year increase in Massachusetts to a 1.9 year increase in Utah.<sup>173</sup> With the highest rates of change concentrated in the Northeast and Mid-Atlantic States, and the smallest rates of change in the states with the lowest average ages of birth, the gap between the states is growing.<sup>174</sup>

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=ACS\_2007\_1YR\_G00\_GCT1204\_US9&-CONTEXT=gct (last visited Feb. 23, 2010) (same) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). These reports show that Kansas is fifth in terms of overall totals, but Wyoming is fifth for women (24.1), while Alabama is for men (26.2).

168. *Id.*

169. T.J. Mathews & Brady E. Hamilton, *Mean Age of Mother, 1970–2000*, 51 NAT'L VITAL STAT. REP., Dec. 11, 2002, at 1, 10, [http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_01.pdf).

170. *See id.* at 3 (explaining that states with higher proportions of black, Hispanic, and American Indian women can be expected to have lower mean ages at first birth).

171. *Id.* at 10.

172. *See id.* at 1 ("The mean age of mother has increased steadily in the United States over the last three decades."). The mean age of women having their first live birth has increased by 3.5 years in the past three decades. *Id.* at 2.

173. *Id.* at 3.

174. *See id.* at 10 (reporting the absolute change in the mean age of mother at first live birth by State from 1970 to 2000). The jurisdictions with the greatest increase in age were Massachusetts (5.3 years), New Hampshire (5.1), Connecticut (4.7), District of Columbia (4.7), and New Jersey (4.7). *Id.* The states with the smallest increase were Utah (1.9), New Mexico (2.0), Wyoming (2.2), Oklahoma (2.4), and Louisiana and Alaska (2.5). *Id.* Looking at just the 1990s, however, the areas with the biggest jump in age as of first birth were the District of Columbia, Massachusetts, Michigan, New Hampshire and New Jersey, North Carolina, and Virginia. *Id.* The states with the least change were Wyoming and

*B. Recognizing the Effect of Family Systems on Work*

If changing opportunities for women have helped transform family understandings, so too has the changing family affected expectations about employment.<sup>175</sup> Unsurprisingly, the changing work-family interaction breaks down very differently across class lines.<sup>176</sup>

Two incomes have become increasingly important for all but the wealthiest Americans,<sup>177</sup> yet college-educated women more successfully combine work and family than other parts of the population. First, they make more.<sup>178</sup> In 2004, for example, women with only a high school degree earned less than half that of college graduates and those with graduate degrees earned even more.<sup>179</sup>

Second, college-educated women have an easier time combining childrearing and employment, at least in part because they are better prepared for children when they do have them, and enjoy more resources to manage the tensions between the two.<sup>180</sup> Early childbirth in contrast derails education: almost 60% of teens with a school-age pregnancy drop out of

Alaska, which showed declines in age, New Mexico, which stayed the same, and South Dakota and North Dakota. *Id.*

175. See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 9 (2003) ("When millions of mothers entered the workforce, they ratcheted up the price of a middle-class life for everyone, including families that wanted to keep Mom at home. . . . To keep Mom at home, the average single-income family must forfeit decent public schools and preschools, health insurance, and college . . .").

176. See *infra* discussion at notes 177–234 and accompanying text.

177. See WARREN & TYAGI, *supra* note 175, at 8–9 (arguing that two incomes are increasingly needed to support a family so that the loss of one income puts families at greater financial risk than in the past, when middle-class fathers could earn a "family wage" and at-home mothers could get jobs to tide the family over economic rough patches).

178. See U.S. CENSUS BUREAU, *AVERAGE MONTHLY INCOME BY EDUCATION, SEX, AGE, AND RACE AND HISPANIC ORIGIN, 2004*, tbl.2B, <http://www.census.gov/population/www/socdemo/education/sipp2004w2.html> (last visited Jan. 15, 2010) (providing the average monthly income in the United States by education, sex, age, and race and Hispanic origin for 2004) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

179. See *id.* (listing the average monthly income for women with a high school diploma as \$1,357, with a bachelor's degree as \$2,851, with a master's degree as \$3,733, with a professional degree as \$4,837, and with a doctorate as \$5,180).

180. See HEATHER BOUSHEY, *ARE WOMEN OPTING OUT? DEBUNKING THE MYTH* 10 (2005), [http://www.cepr.net/documents/publications/opt\\_out\\_2005\\_11\\_2.pdf](http://www.cepr.net/documents/publications/opt_out_2005_11_2.pdf) (arguing that highly educated, thirty-something mothers are advantaged over other mothers in terms of educational attainment, earnings potential, marriage to spouses with very high earning potentials, and in the benefits and workplace flexibility that makes work/family balance easier).



high school compared to the twenty-five percent who drop out without a child.<sup>181</sup> Educational attainment also affects the likelihood that a mother will stay in the workforce.<sup>182</sup> Economist Heather Boushey found that the "child penalty"—the effect of having a child on labor force participation rates—is negligible for highly educated women, while it is considerable for women with less education; employment rates for women with less education who had children at home were 21.7% less in 2004 than for those women with the same education who did not have children at home, while for women with a graduate degree, the "penalty" rate was 1.3%.<sup>183</sup>

Third, educational levels affect perceptions of work-family tensions.<sup>184</sup> Nearly three-quarters of working fathers and two-thirds of working mothers with children under eighteen went to the polls in 2008 with daily worries about work-family issues.<sup>185</sup> Between 1980 and 2000, the percentage of spouses who reported that the *husband's* work interfered with family life almost doubled, increasing from just fewer than twenty-five percent to about forty-five percent of the public.<sup>186</sup> The percentage reporting that the wife's employment interfered with family life also increased substantially, from approximately seventeen percent to over thirty percent.<sup>187</sup> In looking at the last several decades, sociologists Jerry A. Jacobs and Kathleen Gerson conclude that the biggest shift has been in the number of weekly

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181. See *Why It Matters: Teen Pregnancy and Education*, THE NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY (Mar. 2010), <http://www.thenationalcampaign.org/why-it-matters/pdf/education.pdf> ("Less than half of mothers (40 percent) who have a child before they turn 18 ever graduate from high school compared with about three-quarters of similarly situated young women who delay child bearing until age 20 or 21.").

182. See BOUSHEY, *supra* note 180, at 10 (noting that the adjusted labor force participation rate for women with children is higher for highly-educated women).

183. *Id.* at 11–12 tbls.5 & 6.

184. See Press Release, Rockefeller Family Fund, Election Poll Finds Work and Family Issues—Amid Economic Worries—Are a Frequent Daily Concern for Majority of America's Voting Parents (Nov. 13, 2008), [http://kelleycampaigns.homestead.com/RFF\\_release.pdf](http://kelleycampaigns.homestead.com/RFF_release.pdf) (reporting that sixty-three percent of voters were more likely to support a candidate they thought would help parents balance work and family).

185. See *id.* ("Daily worries about work and family responsibilities proved to be frequent for 72 percent of working fathers and 74 percent of working mothers with children under 18.").

186. See AMATO ET AL., *ALONE TOGETHER*, *supra* note 166, at 107 (citing statistics).

187. See *id.* (citing statistics). The percentage of husbands observing that their wife's job created tensions rose from just over 10% in 1980 to over 20% in 2000, while the wives' reporting interference from their own job rose from about 22% to about 34% in the same period. *Id.*

hours worked by families rather than individuals, exacerbating time binds.<sup>188</sup>

Nonetheless, the implications of these changes play out differently by social class. It is often said that American workers work longer hours than the rest of the industrialized world,<sup>189</sup> and, in fact, a larger *number* of Americans work longer hours per week than in most of the industrialized world.<sup>190</sup> Indeed, a larger number of women do so in the United States than anywhere else on the globe.<sup>191</sup> The average American, however, does not necessarily work more than the average worker in a number of other countries; instead, the hours of the most highly educated Americans have increased.<sup>192</sup> In 1965, the correlation between hours worked and leisure time did not vary by class.<sup>193</sup> Today, it varies inversely with socioeconomic

188. See JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 46 (2004) (noting the dramatic growth in the number of families depending on the wife's earnings and arguing that the demographic transformation of family life without countervailing shifts in the time men spend away from the job explains the rise of widespread work-family conflict).

189. See *Americans Work Longest Hours Among Industrialized Countries*, INT'L LABOR ORG., Sept. 6, 1999, <http://www.hartford-hwp.com/archives/26/077.html> ("US workers put in the longest hours on the job in industrialized nations, clocking up nearly 2,000 hours per capita in 1997, the equivalent of almost two working weeks more than their counterparts in Japan . . .") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

190. See Jerry A. Jacobs & Kathleen Gerson, *Who Are the Overworked Americans?*, 56 REV. SOC. ECON. 442, 442 (1998) [hereinafter Jacobs & Gerson, *Overworked Americans*] (noting that the United States stands out as having among the highest percentage of workers putting in 50 hours per week or more).

191. See *id.* at 449 (reporting that women in the United States have the longest work week out of nine countries, including Australia, Germany, the United Kingdom, Canada, Belgium, Sweden, the Netherlands, and Luxembourg). Since 1970, the percentage of men and women in the United States working either long or short work weeks has increased. *Id.* at 445. Approximately one in four men (25.2%) and one in ten women (10.8%) work at least fifty hours per week. *Id.*; cf. JODY HEYMANN, *THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT* 164 (2000) (noting that the majority of working Americans are caring for children, elderly parents, or disabled family members and endorse social change that would provide more flexible adult work hours, extended children's school hours, and a longer academic year).

192. See Jacobs & Gerson, *Overworked Americans*, *supra* note 190, at 445 ("Nearly two in five American men with four or more years of college education work 50 hours per week or more, compared to less than one in eight men with less than a high school degree."). Nearly one in five college-educated American women work 50 or more hours per week, compared to less than one in twenty with less than a high school degree. *Id.*

193. See Stephen E. Landsburg, *The Sin of Wages: The Real Reason to Oppose the Minimum Wage*, SLATE, July 9, 2004, <http://www.slate.com/id/2103486/> (arguing that the real argument against the minimum wage is that it is an off-the-books tax paid by a small group of people, with all the proceeds paid out as the equivalent of welfare to a different

status, with certain high paying and high status positions commanding the greatest number of hours of employment while less skilled men work fewer hours today than in the recent past, in large part because of underemployment.<sup>194</sup>

For the most elite women—women with graduate and professional degrees who hold jobs that demand more than forty-five hours a week—career pressures produce lower rates of marriage and child-bearing, and higher risk of divorce.<sup>195</sup> Sociologist Paul Amato finds more generally, however, that women college graduates who work full time enjoy *greater* marital satisfaction and lower divorce risk than the rest of the population.<sup>196</sup> He observes that, while two-earner couples spend less time together than happily married couples of earlier generations, they also report less conflict and fewer problems.<sup>197</sup> They have successfully redesigned their relationships to deal with the combination of greater resources and less leisure.<sup>198</sup>

Instead, the families most adversely affected by work-family issues are those traditional families in which the wife works full-time and would prefer to work less but cannot because of her husband's failure to earn enough money to support the family.<sup>199</sup> These couples show the greatest

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small group of people) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

194. See JACOBS & GERSON, *supra* note 188, at 39–40 ("Although there are also less affluent workers who put in substantial overtime or who work at two (or more) jobs, this group represents a smaller proportion of blue-collar workers than do overworked Americans who are professionals and managers.").

195. See AMATO ET AL., ALONE TOGETHER *supra* note 166, at 141 (noting specifically that women's working more than forty-five hours per week is associated with a small, but statistically significant increase in divorce proneness and marital unhappiness); see also Robin Fretwell Wilson, *Keeping Women in Business (and Family)*, in SAMUEL GREGG & JAMES R. STONER, JR., *RETHINKING BUSINESS MANAGEMENT*, manuscript at 96–97 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1115468](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115468) (finding that women with professional degrees have lower rates of marriage and higher rates of "failed or failing relationships" relative to men with professional degrees or women college graduates) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

196. See AMATO ET AL., ALONE TOGETHER *supra* note 166, at 172 (noting that various changes in marriage, including the increase in wives' percentage of family income, are collectively associated with aggregate increases in marital quality).

197. See *id.* at 138 (concluding that the movement of highly educated wives working full-time had generally beneficial consequences for marriages).

198. See *id.* at 173 (discussing the shift from patriarchal, institutional marriage to a more egalitarian, companionate form of marriage between 1980 and 2000, as more families have become dual-earner arrangements).

199. See *id.* at 124 ("[W]ives who worked primarily for financial reasons and who preferred to be working fewer hours tended to have relatively troubled marriages."). Indeed,

dissatisfaction with the wife's employment and experience the greatest likelihood of marital dissolution.<sup>200</sup> In contrast, traditional couples who are able to enjoy traditional family lives, with wives who work part-time or not at all, enjoy high rates of marital stability, though not quite at the level of better off dual-earner couples.<sup>201</sup>

While the country as a whole, therefore, experiences high rates of dissatisfaction with work-family balance,<sup>202</sup> little basis exists for a consensus approach to the issues. Despite the fact that a higher percentage of Americans see male rather than female employment as interfering with family life,<sup>203</sup> poorer and more traditional couples, particularly in hard times, would prefer more, not less, male employment.<sup>204</sup> Better off women seek more flexible employment; more traditional women seek fewer overall hours.<sup>205</sup> More successful women have children only after completing school and beginning careers; less successful women, who have children at younger ages, often seek to better their labor market skills only after their children are older.<sup>206</sup>

These differences play out not only in terms of different individual preferences, but also in terms of the different political constituencies for workplace reform. Better-educated workers, who have greater human capital, already enjoy greater access to paid leave to deal with family and health issues.<sup>207</sup> Of those working parents who have incomes less than

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the most troubled couples in Amato's study were young, working class, dual earner couples. *Id.* at 124.

200. *See id.* at 124, 168, 173 (describing the weaknesses of marriages in which wives work more than they want to, especially when those wives hold traditional views on marriage or are working-class employees).

201. *See id.* at 134 (noting that wives' income has a direct positive effect on marital problems, but that wives employed full-time may improve marital quality by increasing a sense of economic well-being).

202. *See id.* at 25 ("The potential for work-family conflict has grown in recent decades.").

203. *See id.* at 137 (citing a study in which interference from the husband's job was a stronger predictor of poor marital quality than was interference from the wife's job).

204. *See id.* at 138 (explaining why the marriages of employed working-class wives are particularly vulnerable to work-family strains).

205. *See id.* at 137 (noting that working-class wives would prefer to work fewer hours or not at all).

206. *See* CAHN & CARBONE, *supra* note 1, at ch. 12 (summarizing recent developments).

207. *See* Ann O'Leary, *How Family Leave Law Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 8 (2007) ("From the 1960s to the 1990s, . . . access to maternity leave for working-class women remained nearly constant, whereas access increased more than fourfold for professional women.").

200% of the federal poverty level, forty percent have no access to paid leave at all (no paid sick days, vacation, or personal days).<sup>208</sup> "Seventy-six percent of low-wage workers do not have a single day of paid sick leave—the most basic employment benefit."<sup>209</sup> Indeed, as a general matter, low-wage workers are less likely than higher income workers to be covered by family leave policies, to be eligible to take even unpaid family leave, or, much less, to receive paid family leave.<sup>210</sup> They are also less likely to have access to flexible scheduling.<sup>211</sup> From 1996 to 2000, women with a college degree were three times more likely to take paid leave following the birth of their first child (58.7%) than women with less than a high school education (17.8%); while 56.4% of women with less than a high school education took unpaid leave, only 38.6% of women with a college degree used unpaid leave.<sup>212</sup>

These results are hardly surprising. More educated women are more valuable to their employers, and the employers offer more flexibility and

208. JODI GRANT, TAYLOR HATCHER & NIRALI PATEL, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS 58 (2005), *available at* <http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

209. *Id.* at 10.

210. *See* O'Leary, *supra* note 207, at 8 (citing statistical discrepancies with respect to access to disability policies, paid sick leave, and paid holidays between workers making more than fifteen dollars per hour and those making less than fifteen dollars per hour). Ann O'Leary reported this discrepancy as follows:

In March 2005, fifty-four percent of workers who made more than fifteen dollars per hour had access to a short-term disability policy, while only twenty-eight percent of workers earning less than fifteen dollars per hour had access to a short-term disability policy. Similarly, forty-six percent of workers who made over fifteen dollars per hour had access to long-term disability leave, while only sixteen percent of workers making less than fifteen dollars per hour had access to long-term disability leave. There are similar disparities in access to paid sick leave and paid holidays. Eighty-eight percent of workers making more than fifteen dollars per hour had access to paid holidays, and seventy-five percent of these workers had access to paid sick leave. Meanwhile, sixty-eight percent of workers earning less than fifteen dollars per hour had access to paid holidays, and only forty-seven percent had access to paid sick leave.

*Id.* (internal citations omitted).

211. *See* JOAN C. WILLIAMS, WORK LIFE LAW, UC HASTINGS COLL. OF THE LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION 8 (2006), *available at* [http://www.uchastings.edu/site\\_files/WLL/onesickchild.pdf](http://www.uchastings.edu/site_files/WLL/onesickchild.pdf) ("[F]lexible scheduling is available for nearly two-thirds of workers with incomes of more than \$71,000 a year but to less than one-third of working parents with incomes less than \$28,000.").

212. JULIA OVERTURF JOHNSON & BARBARA DOWNS, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2000 11 (Oct. 2005), <http://www.census.gov/prod/2005pubs/p70-103.pdf>.

benefits to retain them.<sup>213</sup> Less educated women, in addition to being less able to secure benefits, invest less in employment; they are therefore more likely to quit in the face of a child's increased medical needs or a taxing pregnancy and resume employment later.<sup>214</sup> Nonetheless, state laws that vary with the state's wealth, political ideology, and family formation patterns exacerbate the class divide.<sup>215</sup> The National Partnership on Women and Families developed a state-by-state scorecard of parental leave programs.<sup>216</sup> The highest-ranking states in adopting mandated leave provisions were California, New Jersey, and Rhode Island, followed by Hawaii, Maine, Oregon, Vermont, and Washington, with some protections in Connecticut, Minnesota, New York, and Wisconsin.<sup>217</sup> Unsurprisingly, all of the states to act were in the Northeast, West Coast or upper Midwest (plus Hawaii), all are relatively liberal, and all are well on their way toward embracing the new pathways to middle class status.<sup>218</sup>

For poorer states, the more immediate challenge is not family leave—which may simply make employment more expensive and harder to come by.<sup>219</sup> Instead, the bigger challenge requires revisiting the relationships between family formation, work, and education. For most, the twenties has become a period of exploration.<sup>220</sup> More affluent and ambitious Americans

213. *See id.* at 10 ("Increasing levels of education go hand-in-hand with increases in the use of paid leave benefits.").

214. *Cf. id.* at 16 (explaining that women who have invested in their careers by way of education, training, and wages prefer to maintain ties to the labor force).

215. *See* June Carbone, *Age Matters: Class, Family Formation, and Inequality*, 48 SANTA CLARA L. REV. 901, 950 (2008) [hereinafter Carbone, *Age Matters*] ("Background state laws exacerbate the class differences.").

216. *See 2009–2010 Assets and Opportunities Scorecard: Family Leave Benefits and Protection*, CORP. FOR ENTERPRISE DEV., [http://scorecard.cfed.org/business.php?page=family\\_leave\\_benefits\\_protection](http://scorecard.cfed.org/business.php?page=family_leave_benefits_protection) (last visited Jan. 17, 2010) (comparing state policies) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

217. *See id.* (demonstrating that few states have such policies); *Working Families Need Paid Family and Medical Leave*, NAT'L PARTNERSHIP FOR WOMEN & CHILD., [http://www.nationalpartnership.org/site/DocServer/WF\\_PL\\_FactSheet\\_PaidFamilyLeave\\_2009.pdf?docID=4682&autologin=true](http://www.nationalpartnership.org/site/DocServer/WF_PL_FactSheet_PaidFamilyLeave_2009.pdf?docID=4682&autologin=true) (citing those states with paid leave programs as indicative of building momentum for the increasing support of such programs nationwide) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

218. *See* Carbone, *Age Matters*, *supra* note 215, at 950 ("Particularly with respect to the protections mandated for private employers, the states that require such protections are wealthier, more liberal and more likely to vote Democratic.").

219. *See id.* at 950 n.215 (acknowledging the argument that increased employer mandates make job creation more expensive and thus result in greater unemployment).

220. *See id.* at 932 (noting that the twenties "may involve an unmooring from the institutions that once provided guidance").

spend their late teens and much of their twenties in school or in temporary positions that add to their human capital.<sup>221</sup> In contrast, lower income men in this age group are dramatically less likely to be either in school or employed on a regular basis.<sup>222</sup> For the least advantaged men, prison has become the single institution most likely to shape the transition to adulthood.<sup>223</sup>

Those who secure employment, moreover, have become less likely to retain it. Employment turnover in the economy as a whole has risen, placing a greater premium on the ability to acquire new skills and seek out new opportunities.<sup>224</sup> For example, Henry Farber reports that "by virtually any measure, more recent cohorts of workers have been with their current employers for less time at specific ages."<sup>225</sup> The drop in long-term employment for men has been dramatic,<sup>226</sup> increasing the insecurity of early marriage and the corresponding importance of women's employment across the board.<sup>227</sup>

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221. See *Fast Facts: Work and Education*, THE NETWORK ON TRANSITIONS TO ADULTHOOD, [http://www.transad.pop.upenn.edu/trends/facts\\_wa.htm](http://www.transad.pop.upenn.edu/trends/facts_wa.htm) (last visited Feb. 21, 2010) (indicating that young adults in the top income quartile receive seventy percent more in the way of material assistance from their parents during this period than young adults in the bottom quartile, even though they are only ten to fifteen percent more likely to attend college) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

222. See Mary Corcoran & Jordan Matsudaira, *Is It Getting Harder to Get Ahead?*, 11 MACARTHUR FOUND. RES. NETWORK ON TRANSITIONS TO ADULTHOOD & PUB. POL'Y 2, 2 (Oct. 2004), <http://www.transad.pop.upenn.edu/downloads/chap%2011-formatted.pdf> ("More than fourteen percent of white men and forty percent of African American men had accumulated at least 26 weeks of nonwork over three years. Almost one in four African American men reported 52 or more weeks of nonwork between ages 24 and 26.").

223. See Stephen Raphael, *Early Incarceration Spells and the Transition to Adulthood*, 31 MACARTHUR FOUND. RES. NETWORK ON TRANSITIONS TO ADULTHOOD & PUB. POL'Y 31 (Sept. 2006), available at <http://www.transad.pop.upenn.edu/downloads/raphael-formatted.pdf> ("Young men in their early twenties are especially likely to have served time. Their risk of imprisonment has tripled between 1979 and 2001. For all racial and ethnic groups, less-educated men are considerably more likely to be incarcerated than more educated men.").

224. See Carbone, *Age Matters*, *supra* note 215, at 953 ("[T]he rate of employment turnover has increased in the economy as a whole, making the ability to acquire new skills, seek new employment, and manage the period in between jobs more critical for every social class.").

225. Henry S. Farber, *Is the Company Man an Anachronism? Trends in Long-Term Employment in the U.S., 1973–2005*, THE NETWORK ON TRANSITIONS TO ADULTHOOD, at 2 (May 2006), available at <http://www.transad.pop.upenn.edu/downloads/farber%20with%20cover%20sheet.pdf>.

226. See *id.* at 23 (writing that long-term employment has become much less common for males).

227. See AMATO ET AL., *ALONE TOGETHER* *supra* note 166, and accompanying text

Uncertain economic prospects increase both the pay-off for dual earner couples (one can see the other through lay-offs, returns to school, and extended job hunts) and the financial tensions that increase divorce rates.<sup>228</sup> At the same time, the increased importance of dual incomes makes better integration of work and family pressures more important to both employment and family satisfaction.<sup>229</sup> This combination should increase support for a new social contract—one that shapes understandings about employer accommodations for sick children, mandatory overtime, and part-time employment. So long as part of the country has unequivocally embraced the new family system while another influential part resists the reshaping of the workplace it requires, however, national action will be hard to come by.

#### IV. Conclusion

Family change has aggravated regional and class divisions, both politically and practically.<sup>230</sup> The college-educated middle class has reaped the benefits of a new family system, which encourages investment in women's as well as men's employment, deregulates sexual expression, creates incentives to postpone the assumption of family responsibilities, and trains young people for decision-making during an extended period of career preparation and personal exploration.<sup>231</sup> More traditional working class and lower level white-collar employees, especially those who live in more rural or religious areas of the country, have resisted the terms of the new order.<sup>232</sup>

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(citing dissatisfaction of wives who work out of necessity to supplement their husbands' incomes).

228. *See id.* at 124, 141 (explaining that dual earner arrangements are less satisfying and more problematic for lower earners in part because they derive less satisfaction from employment and have fewer resources to purchase assistance with domestic responsibilities).

229. *See generally* LOTTE BAILYN ET AL., INTEGRATING WORK AND FAMILY LIFE: A HOLISTIC APPROACH, SLOAN WORK-FAMILY POL'Y NETWORK (2001), <http://web.mit.edu/workplacecenter/docs/WorkFamily-sum.pdf> (addressing the challenges of integrating work and family life).

230. *See supra* Part II.B.2 (describing how family life has become "an engine of economic inequality").

231. *See id.* (noting that the middle class has "embraced the move to new, practical, and normative understandings about family life").

232. *See id.* (explaining that more traditional areas of the country view new morality as a threat to their family system).



In and of itself, it is unsurprising that different parts of the country experience family change at different rates or share different understandings about family norms. Indeed, the U.S. Constitution assigns family law to the states precisely because of the greater ability of smaller political units to take regional variation into account.<sup>233</sup> What is of concern is not the regional variation in laws and practices; instead, it is the use of the different needs of one group to block consideration of the needs of others.<sup>234</sup>

Part of what has fueled the ire of more religious and conservative families is the fact that the national media culture—Hollywood entertainment in particular—does not reflect their values.<sup>235</sup> Yet, the response of a more politically muscular Christian right has been to promote policies that reflect their own values at the expense of groups that may either not share them, or even if they subscribe to a more religious approach to public issues, may not be able to realize the benefits.<sup>236</sup>

Some of the differences are simply irreconcilable. Representative Henry Hyde, the author of the successful efforts to block abortion funding, admitted in 1977, for example, that "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the . . . Medicaid bill."<sup>237</sup> In other words, Hyde was quite willing, in the name of antiabortion activism, to promote measures that would leave middle class women's ability to secure an abortion intact, while disproportionately restricting poor women's access.

Today, restrictive efforts are farther reaching because they target the whole range of public assistance in limiting unwanted births: sex education, which is of greatest importance to teens who lack supportive parents or other reliable sources of information; public subsidization of effective contraception, which may be particularly critical to those who do not have health care insurance; and abortion, which disproportionately

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233. See generally Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL OF RTS. J. 381 (2007) (noting the Supreme Court's shift away from an analysis of divorce law based on the competing interests of different states).

234. See Part III.A (citing that poorer states block assistance that might further undermine their traditional practices).

235. See Part II.B.2 (describing the media's celebration of newfound sexual freedom).

236. See Part III.A (characterizing the conservative response to family changes as a "call to arms").

237. 123 CONG. REC. H19, 698–19, 715 (daily ed. June 17, 1977).

affects minority women and others who lack either the ability to control their own sexuality or access to effective birth control.<sup>238</sup>

The result of these policies in turn aggravates class inequalities as the reinforcing cycles produce different fertility rates between rich and poor, increase the differences in educational achievement as poor women have children at younger ages with fewer emotional and monetary resources to invest in their offspring, and reduce the productivity of less educated workers, who cycle in and out of the workforce, in and out of relationships, and too often in and out of their children's lives.

Rebuilding the foundation for a more productive workforce requires reexamining the connection between work and family and the material sources of class differences. Reproductive patterns will determine the nature of tomorrow's workforce as much as, if not more than, employment policies taken on their own. I accordingly recommend that any more honest assessment of these issues must examine the complex relationship between work and family, and quite literally change the subject in three important ways:

1. More realistically address preparation for family life. Marriage proponents, who have discovered that neither the restrictive provisions of covenant marriage nor lesser access to abortion have much impact on nonmarital birth and divorce rates, have turned their attention to marriage education classes.<sup>239</sup> These classes have been designed around surveys that ask the divorced what contributed to their marital break-ups.<sup>240</sup> Respondents list the factors contributing to their divorces in the following order: "lack of commitment" (seventy-three percent), "too much arguing" (fifty-six percent), "infidelity" (fifty-five percent), "marrying too young" (forty-six percent), "unrealistic expectations" (forty-five percent), "lack of equality in the relationship" (forty-four percent), and "domestic violence" (twenty-nine percent).<sup>241</sup> Forty-one percent added that a lack of premarital preparation contributed

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238. See *supra* Part III.A (describing factors that contribute to class differences in embracing family changes).

239. See Scott Stanley, *Making a Case for Premarital Education*, 50 FAM. REL. 272, 272 (2001) (promoting the benefits of premarital education).

240. NAT'L FATHERHOOD INITIATIVE, WITH THIS RING . . . A NATIONAL SURVEY ON MARRIAGE IN AMERICA 32 (2005), available at <http://www.fatherhood.org/doclibrary/nms.pdf>.

241. *Id.* at 32.

to their divorce.<sup>242</sup> While the classes themselves have gotten mixed reviews, the undertaking marks a healthy acknowledgment that maturity, gender roles, and preparation have something to do with the quality of family life.<sup>243</sup>

2. Focus on procreation rather than sex, and contraception rather than abortion. The antiabortion movement is more about mobilizing partisans than solving problems. Refocusing on the high rate of unplanned pregnancies in the United States and the disproportionate impact on the poor and the vulnerable (in short, those least prepared to care for the resulting children) should garner greater support for avoiding the unwanted births.
3. Consider the multiple interactions between work and family. High income couples worry about the disproportionate impact of family obligations on career success (the "mommy track"),<sup>244</sup> but lower income couples are caught in a cycle in which financial pressure pushes them into unsatisfying jobs that exacerbate family tensions that in turn undermine both the parents' and children's prospects for the future.<sup>245</sup> Rebuilding the relationship between work and family requires greater attention to getting parents into the workforce, through family sensitive efforts at education and training, and making it possible for them to remain productive workers without undermining the prospects for the next generation.

Today, we have created an economy in which those on the other side of the reorganization of work, family, and gender have profited handsomely, and those most threatened are blocking the pathways for everyone else. It is time to see cultural conflict for what it is: class warfare at its most counterproductive.

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242. *Id.* at 29.

243. See Scott M. Stanley et al., *Premarital Education, Marital Quality, and Marital Stability: Findings from a Large, Random Household Survey*, 20 J. FAM. PSYCHOL. 117 (2006); see also Jason S. Carroll & William J. Doherty, *Evaluating the Effectiveness of Premarital Prevention Programs: A Meta-Analytic Review of Outcome Research*, 52 FAM. REL. 105, 105–18 (2003) (evaluating the effectiveness of premarital prevention programs).

244. See AMATO ET AL., *ALONE TOGETHER*, *supra* note 166, at 102 (noting that well-educated wives give up high earning potential by avoiding employment in order to raise children).

245. See *id.* (describing the connection between financial pressure, employment, and marital problems).