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THE *FAMILY RESPONSIBILITIES CONVENTION* RECONSIDERED: THE WORK-FAMILY INTERSECTION IN INTERNATIONAL LAW THIRTY YEARS ON

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This year marks the thirtieth anniversary of the International Labour Organization's (ILO) Workers with Family Responsibilities Convention, 1981, No. 156 coming into force. Family responsibilities in the context of paid work and its implications for gender equality have been the subject of international regulation most specifically in ILO 156, although it remains a marginalized convention. Since then, the interaction of work and family and the conflict between them have exploded as a subject of scholarly importance. This article examines ILO 156 in the context of chronological development of other major international legal instruments which address the intersection of work and family. This chronological context reveals explicit and implicit gender norms which have shaped legal treatment of work and family obligations in the 20th Century and suggests new directions to pursue in the 21st Century. The article engages in a detailed critique of ILO 156, and proposes revisions to create a more practical work-family convention to better serve the international community in the 21st Century.

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I. INTRODUCTION

This year marks the thirtieth anniversary of the International Labour Organization (ILO)'s[1] *Workers with Family Responsibilities Convention 156* ("ILO 156") coming into force.[2] Since then, the interaction of work and family and the conflict between them have exploded as a subject of scholarly importance in law and other disciplines, particularly at the turn of the twenty-first century.[3] Conflict between work and family responsibilities significantly impacts the

[1] The International Labour Organization (ILO), the world's oldest currently operative international organization, is the last remnant of the League of Nations and is now a specialized arm of the United Nations (U.N.). *See* Agreement between the United Nations and the International Labour Organisation, May 30, 1946, 1 U.N.T.S. 183. The ILO, with its own Constitution, membership, and processes, is the body designed to regulate labor matters on the international level. *See* World Trade Organization, Singapore Ministerial Declaration, WT/MIN(96)/DEC, 36 I.L.M. 220 (1997). *See generally* KAUSHIK BASU ET AL., INTERNATIONAL LABOR STANDARDS: HISTORY, THEORY AND POLICY OPTIONS (2003); JEAN MICHEL SERVAIS, INTERNATIONAL LABOUR LAW (3d ed. 2011). For brief but cogent explanations of the history, structure, and aims of the ILO, see JILL MURRAY, TRANSNATIONAL LABOUR REGULATION: THE ILO AND EC COMPARED 35-40, 60-67 (Kluwer Law International 2001); Anne Trebilcock, *Putting the Record Straight about International Labor Standard Setting*, 31 COMP. LAB. L. & POL'Y J. 553 *passim* (2010).

[2] Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, ILO Convention No. 156, *adopted* June 23, 1981, 1331 U.N.T.S. 295 (entered into force Aug. 11, 1983) [hereinafter ILO 156]. This convention is commonly referred to as the "Family Responsibilities Convention;" however, because this article addresses the treatment of family responsibilities in several international conventions, this convention is generally referred to herein as "ILO 156" for clarity.

[3] Book-length treatments on work and family since 2000 include JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000); JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE (2010); LABOUR LAW, WORK, AND FAMILY (Joanne Conaghan & Kerry Rittich eds., 2005); WORK, FAMILY AND THE LAW (Jill Murray ed., 2005); JANE LEWIS, WORK-FAMILY BALANCE, GENDER AND POLICY (2009); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BABIES AND BOSSES: RECONCILING WORK AND FAMILY LIFE: A SYNTHESIS OF FINDINGS FOR OECD COUNTRIES (2007) [hereinafter BABIES AND BOSSES SYNTHESIS]; NANCY FOLBRE, THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES (2001); RICHENDA GAMBLES, ET AL., THE MYTH OF WORK-LIFE BALANCE: THE CHALLENGE OF OUR TIME FOR MEN, WOMEN AND SOCIETIES (2006); RHONA RAPOPORT, ET AL., BEYOND WORK-FAMILY BALANCE: ADVANCING GENDER EQUITY AND WORKPLACE PERFORMANCE (2002); SANDRA BERNS, WOMEN GOING BACKWARDS: LAW AND CHANGE IN A FAMILY UNFRIENDLY SOCIETY (2002); JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY AND GENDER INEQUALITY (2004).

ability of women—and all worker-carers[4]—to engage in paid labor outside the home.

Work-family conflict arises where a worker has concurrent obligations to the fundamental social institutions of both family and work. Because of the underlying structure of work and family, a worker with responsibilities to care for family members often may be unable to fulfill both the duties of work and family in the short run, creating conflict. The impact of such conflict can run both from home to work (the worker who must leave work to care for a sick child) or from work to home (the worker who travels for a job must find replacements for the worker's family duties). In this intersection of conflicting obligations to family and work, the law operates to construct, reify, and circumscribe the duties a worker with family responsibilities owes to both institutions. Although work-family conflict can potentially arise for any worker, this issue has strong gender implications because most caring labor is provided by women.

Most legal scholarship on the work-family intersection has focused on national-level regimes developed to address work-family conflict, such as the U.S. Family and Medical Leave Act (FMLA);[5] yet work-family conflict has an impact that crosses national and cultural boundaries. Joanne Conaghan and Kerry Rittich have pointed out that "negotiating the work/family boundary is . . . central to the regulatory challenges of the new economy," since maintaining and increasing global productivity depends on harnessing the labor of all workers—

4 "Worker-carers" refers to those workers engaged in the paid labor force who also have unpaid responsibilities to care for family members. *See, e.g.*, K. Lee Adams, *Indirect Discrimination and the Worker-Carer: It's Just Not Working, in* WORK, FAMILY AND THE LAW 18 (Jill Murray ed., 2005); Belinda Smith, *Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict*, 28 SYDNEY L. REV. 689, 692 n.16 (2006). They are most readily recognized in contrast to "ideal workers" as described by Joan Williams, who are able to devote their primary attention to work because they do not have caring responsibilities. *See* WILLIAMS, UNBENDING GENDER, *supra* note 3, at 1, 5 (defining the "ideal worker" as someone who "works full time and overtime," "who can move if the job 'requires it,'" and who "takes little or no time off for childbearing or child rearing").

5 Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2012). *See, e.g.*, Joan C. Williams, *The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008); Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 115 (2000); Lindsay R. B. Dickerson, *"Your Wife Should Handle It": The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429, 440-41 (2005); Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 456 (2007); Michael Selmi, *Is Something Better Than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 76 (2004).

including the increasing percentage of workers with family responsibilities.[6] The ILO, too, advises that "not only is gender equality in the world of work a matter of human rights . . . it also makes good business sense for employers and is instrumental in achieving economic growth."[7]

Women's reproductive role and family responsibilities in the context of paid work have been the subject of twentieth-century international regulation, culminating in ILO 156.[8] Although the institutions of work and family are central to human society,[9] the treatment of work and family in ILO and other international legal instruments have to date held only a peripheral place in the international conversation. ILO 156 remains a relatively marginalized convention that fails to provide adequate direction for nations reforming the regulation of work and family for the twenty-first century.[10]

This article considers ILO 156 in the context of both theoretical and practical frameworks to assess its adequacy as a guide and an incentive to facilitate concurrent work and family care. ILO 156, although an important step in international recognition of the fundamental link between social, civic, and political equality for women and workers with family responsibilities, is chiefly hortatory and has not been very influential. To render ILO 156 more relevant and to enable it to address worldwide demographic and economic forces, ILO 156 should be revised to be consistent with a social inclusion theory of equality, take account of subsequent international developments, and include specific legal systems and processes which aid governments, employers, and workers in accommodating the legitimate needs of workers with family responsibilities.

To that end, this article considers the concept of social inclusion and its connection to workers with family responsibilities, with an eye

6 Joanne Conaghan & Kerry Rittich, *Introduction* to LABOUR LAW, WORK AND FAMILY, *supra* note 3, at 1, 3-4.

7 INTERNATIONAL LABOUR OFFICE, GENDER EQUALITY AT THE HEART OF DECENT WORK vii (2009); *see also* Int'l Labour Org., *Declaration on Fundamental Principles and Rights at Work* (June 18, 1998), *available at* http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm.

8 ILO 156, *supra* note 2.

9 For a brief, powerful example, see Jane E. Larson, *The Sexual Injustice of the Traditional Family*, 77 CORNELL L. REV. 997, 999 (1992).

10 To date, only forty-three countries have ratified the ILO 156. *Ratifications of C156—Workers with Family Responsibilities Convention, 1981 (No. 156)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312301 (last visited Jan. 9, 2014). The United States (along with most other common law countries) has not ratified this Convention. *Id*. Importantly, ILO 156 has received much less scholarly attention than other international instruments discussed in this paper.

towards developing a more practical and supportive work-family instrument. This article first briefly introduces in Part II the issue of work-family conflict in the regulation of work, its impact on women's equality, and the concept of equality as social inclusion. Next, it traces how work-family conflict has been conceptualized and addressed in major twentieth century international conventions. (Although many fine works examine particular international instruments or specific aspects of the work-family system, to date there has been little legal literature specifically addressing work and family obligations in international instruments over time.)[11] Part III of the article proceeds chronologically to reveal explicit and implicit gender norms that shaped legal treatment of work and family obligations in the twentieth century, leading to the adoption of ILO 156 in 1981. Part IV then engages in a detailed critique of the development and provisions of ILO 156, as situated within a social inclusion model of equality, demonstrating that ILO 156 does not adequately reflect or support social inclusion of workers with family responsibilities. The final part of this paper, Part V, proposes revisions to the family responsibilities convention, which promote social inclusion of workers with family responsibilities, harmonize and integrate with newer conventions, and include flexible process rights which facilitate family care by those who work to better serve the international community in the twenty-first century.

II. WOMEN, WORK, AND FAMILY RESPONSIBILITIES

Work and family are two of the most fundamental social institutions in national-level societies. Engaging in paid labor and being part of a family influence how people spend their time, think of themselves, and relate to others. Relevantly, these primary institutions are interdependent.[12] Paid work is vital to the financial wellbeing of workers and the families they support. Family is typically an individual's most basic source of emotional support and economic support for those who do not work for pay. Families underpin work by providing incentives to work and stability and support for workers.[13]

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[11] The exception to this is the work of Nitza Berkovitch, FROM MOTHERHOOD TO CITIZENSHIP: WOMEN'S RIGHTS AND INTERNATIONAL ORGANIZATIONS (1999). Berkovitch discusses several of the instruments addressed herein, but her work goes into greater historical detail and has a broader focus than this paper.

[12] *See* K. Lee Adams & Chris Geller, *Regulating at the Work-Life Boundary: Towards Re-Integrating the Household into Labour Market Policy*, *in* LABOUR LAW AND LABOUR MARKET REGULATION: ESSAYS ON THE CONSTRUCTION, CONSTITUTION, AND REGULATION OF LABOUR MARKETS AND WORK RELATIONSHIPS 432, 439-50 (Chris Arup et al. eds., 2006).

[13] *Id.*

In the majority of societies, the bulk of unpaid caring for others is provided through the institution of the family—traditionally parents caring for children, adult children caring for aging parents, one spouse or partner caring for the other "in sickness and in health," and more broadly within extended, contemporary or non-traditional family forms.[14] Family bonds carry legal, moral or social obligations to assist in physical, emotional, educational, and other forms of support family members may need. Martha Fineman argues that all people need to be cared for or to care for others, in recognition of universal human "vulnerabilities"—that people live in a state of potential need and are interdependent upon each other.[15] Care is obviously required during dependent stages of life (infants, children, and the very elderly), but potential need can become active need at other points along the life span, whether or not an individual lives in a multi-generational household. For example, an able-bodied single adult may need care arising from emotional trauma such as the death of a loved one or from physical trauma such as accident or illness. Fineman argues that all individuals are vulnerable in this way, regardless of sex, race, class, sexual orientation, age, family status, income, or disability.[16] Quite aside from the universal state of the potential need to have or engage in family care, an increasing percentage of the workforce has current responsibilities to care for family members on an unpaid basis.[17] Thus,

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14 What form a "family" takes is socially contextual and disputed. *See, e.g.*, JABER F. GUBRIUM & JAMES A. HOLSTEIN, WHAT IS FAMILY (1990). This paper intends to encompass both traditional and contemporary family forms which may experience conflict between work and care

> regardless of blood or marital ties when cohabitation [or care] is for the support of dependent . . . members (children, ill, disabled, aged) . . . [, including] the intergenerational household, the homosexual couple, [the single-parent household,] and unmarried partners where the household supports dependent(s) [or each other] as described above. We could designate these [links] . . . by another term, but . . . [they] operate and should be regarded as families, rather than given a label with less social significance.

Adams & Geller, *supra* note 12, at 438-39.

15 Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1-13 (2008); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010). *See also* BERNS, *supra* note 3, at 44 ("If participation in care work and household labour is essential rather than contingent, it becomes possible to argue that they should properly be understood to be universal, a human given rather than a particular and individual choice.").

16 Fineman, *The Vulnerable Subject*, *supra* note 15.

17 The increasing percentage of workers with family responsibilities is due to a confluence of demographic trends, including increases in the labor force participation of women, especially mothers, and the aging of the population, which results in a larger aged population (needing care) relative to those still of working age. *See generally* BABIES AND BOSSES SYNTHESIS, *supra* note 3, at 13-14.

the issue of conflict between the duties of work and care has broad implications throughout society.

Yet the universality of the problem of work-family conflict is masked by the gendered nature of caregiving. Throughout the world, family caring labor is provided principally by women, despite the dramatic increase in women's labor force participation.[18] International human rights conventions have formally acknowledged the link between women's caring obligations and their full equality in employment.[19] Scholars in several fields have noted that the "key determinant" of sex equality rests on women's unpaid care duties within the family.[20] Such scholars have linked women's greater family care obligations to such phenomena as the "gender pay gap," women's under-representation in top levels of economic and political life, and the feminization of poverty.[21] In order to achieve sex and gender equality in work—an institution which underpins equality in economic, civic, and political life—nations must find mechanisms to reduce the additional burdens associated with being a worker with family responsibilities.

A. Equality and Social Inclusion

Equality is a contested concept. Scholars have developed a rich

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18 *See, e.g.*, U.N. Dep't of Econ. & Soc. Affairs, *The World's Women 2010: Trends and Statistics*, 78, 100, U.N. Doc. ST/ESA/STAT/SER.K/19 (2010) [hereinafter WORLD'S WOMEN 2010]; BABIES AND BOSSES SYNTHESIS, *supra* note 3, at 14-17. *See also* Suzanne M. Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79 SOC. FORCES 191, 218-19 (2000-2001); Janeen Baxter, Belinda Hewitt & Mark Western, *Post-Familial Families and the Domestic Division of Labour*, 36 J. COMP. FAM. STUD. 583 (2005). For some developed countries (such as the United States) that have longitudinal time use statistics available, the gender imbalance in caring and home labor has shown improvement over the past twenty years but still shows that women spend more of their time engaged in care than do men. WORLD'S WOMEN 2010, *supra*, at 100.

19 Convention on the Elimination of All Forms of Discrimination Against Women, pmbl., art. 3, *adopted and opened for signature* Dec. 18, 1979, 1239 U.N.T.S. 13 [hereinafter CEDAW]; ILO 156, *supra* note 2, pmbl., art. 3.

20 Jane Lewis & Mary Campbell, *UK Work/Family Balance Policies and Gender Equality, 1997-2005*, 14 SOC. POL. 4, 5 (2007); *see also* FOLBRE, *supra* note 3, at 34 (noting "motherhood penalty" of lower lifetime earnings for mothers even where they do not take extensive leave from paid work); WILLIAMS, UNBENDING GENDER, *supra* note 3, at 2-4.

21 *See* NANCY FOLBRE, WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT 2-4, 204-06 (1994); Rosemary Owens, *Reproducing Law's Worker: Regulatory Tensions in the Pursuit of "Population, Participation and Productivity," in* LABOUR LAW AND LABOUR MARKET REGULATION: ESSAYS ON THE CONSTRUCTION, CONSTITUTION, AND REGULATION OF LABOUR MARKETS AND WORK RELATIONSHIPS 410, 411-16 (Chris Arup et al. eds., 2006). *See also* PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS (Judy Fudge & Rosemary Owens eds., 2006).

literature on various models of "equality,"[22] and thorough treatment of this area is far beyond the scope of this paper. However, in general, one may classify basic models of legal equality as "formal" equality or equal treatment of groups, and "substantive" equality, which looks towards the actual attainments of those groups.[23] Although scholars such as Joanne Conaghan argue that a distinction between formal and substantive equality arises from misunderstanding the principles of equality,[24] the different foci of formal and substantive quality are useful lenses through which to interpret the legal instruments examined in this paper.

Formal equality examines whether, within a particular domain such as work, people with certain characteristics are treated "the same" as relevantly similar workers who possess different characteristics. In other words, formal equality at work aims to ensure the fairness of forms or processes applied to a worker, so that the worker is not at risk of decisions based on dislike, ignorance, or prejudice against particular characteristics.[25] Following the civil rights and "second-wave" feminist

22 *See, e.g.*, SANDRA FREDMAN, DISCRIMINATION LAW (2002); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (Harvard Univ. Press 1991); MARGARET THORNTON, THE LIBERAL PROMISE: ANTI-DISCRIMINATION LEGISLATION IN AUSTRALIA (Oxford University Press 1991); WILLIAMS, UNBENDING GENDER, *supra* note 3; Martha Albertson Fineman, *Evolving Images of Gender and Equality: A Feminist Journey*, 43 NEW ENG. L. REV. 435, 443-44 (2009); Christine Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1284 (1987); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1324 (1990-1991). *See also* AMARTYA SEN, INEQUALITY REEXAMINED (1992).

23 FREDMAN, *supra* note 22, at 7-14 (discussing "formal equality," "equality of results" and "equality of opportunity"); Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16, 16-19 (2003) (theorizing different aims and foci for deviations from "equal treatment"); Reg Graycar & Jenny Morgan, *Thinking About Equality*, 27 U. NEW S. WALES L.J. 833, 834-37 (2004) (relating "understandings of equality" to feminist theories of "gender neutrality" and "sameness," "special treatment" and "differences," or recognition of women's "subordination, dominance, or disadvantage"); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108-09 (1976); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 330 (1984-1985).

24 Conaghan argues that reducing formal equality to "sameness" misunderstands the Aristotelian principle of treating like cases alike and different cases differently where there is a relevant difference. Joanne Conaghan, *Pregnancy and the Workplace: A Question of Strategy*, 20 J.L. & SOC'Y 71 (1993). Thus, disparate gender burdens may fit within a formal equality model as a relevant difference to be accorded different treatment. *Id.*

25 Perhaps the quintessential expression of this liberal model of equality is John Rawls' theory of "justice as fairness." JOHN RAWLS, A THEORY OF JUSTICE (1971). For acknowledgements of Rawls' influence, *see, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 4-5 (2000); SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE DUTIES AND POSITIVE RIGHTS 13 (2008); OKIN, *supra* note 22, at 9; SEN, *supra* note 22, at 12-19.

movements of the mid to late twentieth century,[26] this model of equality has become relatively uncontroversial,[27] advocating essentially an Aristotelian principle of treating like cases alike, or "justice as consistency."[28] Sandra Fredman has argued that "[i]n the first energetic drive against racism, it was of fundamental importance to stress the unity of oppressed peoples rather than their diversity" by ignoring differences.[29] Fredman refers to the "chief mischief of discrimination" in a formal model of equality as the risk that a discriminator may wrongfully attribute stereotypical qualities to a person based on disparagement of a protected characteristic that is not relevant to job performance.[30] A conception of equality rooted in a formal model relies on an understanding of discrimination or unfairness as the result of individual aberrant and irrational behavior, rather than as arising from systems and institutions embedded in the social structure.[31]

In the context of sex, gender, and family responsibilities, a formal equality model has been criticized as conceptually and practically limited, likely to reinforce preexisting disadvantage and entrench preexisting power structures.[32] Formal equality or equal treatment is problematic for women and worker-carers because it is inherently comparative—looking to the treatment of another as a yardstick against which to measure equality. Because the social structure and practices of work developed around masculine norms, paid work typically measures performance and value relative to work-primary ideal workers[33] and the

26 At the risk of oversimplification, feminism as a social and political movement has been defined as coming in various "waves"—with the first wave loosely covering the 19th and early 20th centuries focused on women's rights in property, contract and suffrage (*see, e.g.* Declaration of Sentiments, Seneca Falls Conference 1848); the second wave from the 1950s through the early 1980s focused on employment equality and reproductive control (*see, e.g.*, Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951, ILO No. 100, *adopted* June 29, 1951, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312245:NO), and the third wave around the turn of the Millennium reflecting women's multiple identities and rejecting easy characterizations or universalism (*see* Rebecca Walker, *Becoming the Third Wave*, MS. MAGAZINE, Jan./Feb. 1992, at 39).

27 *See, e.g.*, Graycar & Morgan, *supra* note 23, at 834-35.

28 FREDMAN, DISCRIMINATION LAW, *supra* note 22, at 2-7.

29 Sandra Fredman, *Equality: A New Generation?*, 30 INDUS. L.J. 145, 148 (2001).

30 *Id.* at 154.

31 FREDMAN, *supra* note 22, at 11; THORNTON, *supra* note 22, at 15-20, *passim*.

32 *See* Graycar & Morgan, *supra* note 23, at 834.

33 WILLIAMS, *supra* note 3, at 1.

functioning of the male body.[34] Relevantly, a significant part of the role of unpaid care work is connected to women's reproductive functions and biological difference. Thus, formal comparison for a *sui generis* condition is not really possible. More generally, an equal treatment model is insufficient as a rubric to guide answers to the complex—and logically prior—question of when one person or situation is relevantly like another so to as to justify the same treatment.[35] People are multi-dimensional, and employment is typically considered a personal relationship not transferable to another without consent.[36] Since people are not fungible, it is problematic to adequately assess whether workers are equivalent in productivity, creativity, institutional knowledge, ability to form consensus, honesty, diligence, loyalty, etc., so as to ensure that formal comparison considers all relevant characteristics appropriately.

As the Supreme Court of the United States has recognized, when parties are not relevantly alike, equal treatment may be "fair in form but discriminatory in operation."[37] Joan Williams' work has drawn attention to the underlying legal and social expectation that "good" workers perform as "ideal workers," who are work-primary and without family responsibilities.[38] Similarly, although the concept of rewarding "merit" appears to be objective, what we understand to be job-related "merit" was formed historically in masculine contexts and is framed relative to masculine norms.[39] Margaret Thornton and others have noted that the content of "merit," like the content of "good," is constructed rather than objective.[40] These masculine norms embedded

34 FREDMAN, *supra* note 22, at 9; Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1061-62 (1991-1992); Belinda Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 290-92 (2002); Nadine Taub, *The Relevance of Disparate Impact Analysis in Reaching for Gender Equality*, 6 SETON HALL CONST. L.J. 941, 949 (1996); Margaret Thornton, *Comment on Linda Dickens' "Road Blocks on the Road to Equality: The Failure of Sex Discrimination Legislation in Britain,"* 18 MELB. U. L. REV. 298, 301 (1991).

35 *See* FREDMAN, *supra* note 22, at 7-11.

36 For elaboration, *see e.g.*, MARK FREEDLAND, THE PERSONAL EMPLOYMENT CONTRACT 15-18 (2003) (discussing the "unitary" concept of the contract of employent); Paul Davies & Mark Freedland, *Employees, Workers, and the Autonomy of Labour Law*, *in* LEGAL REGULATION OF THE EMPLOYMENT RELATION 267, 271-74, 282-85 (Hugh Collins, Paul Davies & Roger Rideout eds., 2000) (questioning the boundaries of personal obligations in work relationships).

37 Griggs v. Duke Power, 401 U.S. 424, 431 (1971).

38 *See* WILLIAMS, UNBENDING GENDER, *supra* note 3, at 1, 5.

39 Margaret Thornton, *"Otherness" on the Bench: How Merit Is Gendered*, 29 SYDNEY L. REV. 391 (2007).

40 *Id.* at 391; Margaret Thornton, *Women and Discrimination Law*, *in* WOMEN AND THE LAW IN AUSTRALIA (Patricia Easteal ed., 2011) 131, 132; SANDRA FREDMAN, THE FUTURE OF EQUALITY IN BRITAIN 7-8 (Equal Opportunities Comm'n Working Paper Ser. No. 5, 2002).

in law often operate to devalue and exclude women and worker-carers. Unless a worker with family responsibilities is the fantasy figure of the Supermom or a target of stereotypical assumptions, the conflict produced between duties of work and care may affect the way in which he or she can work, rendering such worker relevantly different.[41] Recognition of the gendered structural assumptions around ideal workers and the negative impact that has on the lives of women and workers with family responsibilities renders a model of formal equality insufficient to address the underlying problems creating work-family conflict.[42]

Equal treatment of workers with family responsibilities, like that of workers with disabilities, tends to simply reinforce the status quo. International conventions have recognized that equality for workers with disabilities requires recognition of the additional challenges they face towards their "full participation" in society.[43] Such considerations reflect a substantive conception of equality that requires more than simple equal treatment of a group. Although there are multiple ways to model substantive equality,[44] this paper advocates the use of a "social inclusion" model of equality for workers with family responsibilities as consistent with framing equality for disabled workers as that of "full participation" in society.

Several theorists have modeled substantive equality as "social inclusion" for members of a minority group within mainstream society.[45] A social inclusion rationale is premised on a positive duty to work towards the full participation of groups and individuals in

41 K. Lee Adams, *The Problem of Voluntariness: Parents and the Anti-Discrimination Principle*, 8 DEAKIN L. REV. 91, 92 (2003).

42 Amartya Sen argues that adjustments to account for real and relevant pre-existing differences in the ability to attain social goods are necessary preconditions to the application of equal treatment. SEN, *supra* note 22, at 4-8.

43 *See* Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons), ILO Convention No. 159, pmbl., *adopted* June 20, 1983, 1401 U.N.T.S. 235; U.N. Convention on the Rights of Persons with Disabilities, art. 5, *adopted* Dec. 13, 2006, 2515 U.N.T.S. 3.

44 *See, e.g.*, Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16, 17 (2003).

45 *See, e.g.*, INT'L LABOUR OFFICE, 91ST SESS., REPORT I(B), TIME FOR EQUALITY AT WORK 25 (2003), *available at* http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_publ_9221128717_en.pdf; FREDMAN, *supra* note 25, at 177-80; BOB HEPPLE ET AL., EQUALITY: A NEW FRAMEWORK: REPORT OF THE INDEPENDENT REVIEW OF THE ENFORCEMENT OF UK ANTI-DISCRIMINATION LEGISLATION 1, 33-35 (2000).

society.[46] Social inclusion is distinct from "diversity" in its focus. A "diversity" rationale focuses on the benefit to society as a whole of the participation of all groups,[47] while "social inclusion" focuses on the position of the disadvantaged group to ensure that the group is able to participate in important social institutions to some meaningful level.[48] The aim of social inclusion, according to Hugh Collins, is to ensure that all groups actually achieve the full benefits of citizenship.[49] Martha Nussbaum employs a similar approach in framing the central question of a woman's equality as "[w]hat is she actually able to do and to be?"[50] Under a social inclusion model, employers have a duty "to consider . . . how the workplace is organized, how jobs are structured, and how the skills and capabilities of the workers could be improved."[51] In particular, a social inclusion model is best suited to measure equality of workers with family responsibilities within the workplace and society at large because it makes visible both gender and sex-based inequalities arising from care duties. Males have historically dominated in work outside the home, so that social institutions within and supporting work developed on a male model,[52] and the work of family care is tied to women's biological reproductive role in significant and complex ways.[53] By examining how workers with family responsibilities fare, a

46 *See, e.g.*, Hugh Collins, *Social Inclusion: A Better Approach to Equality Issues?*, 14 TRANSNAT'L L. AND CONTEMP. PROBS. 897, 913-14 (2005); Sandra Fredman, *The Future of Equality in Great Britain* 16-17 (Equal Opportunities Comm'n, Working Paper No. 5, 2002).

47 *See* Collins, *Social Inclusion*, *supra* note 46, at 910-11.

48 *See* Collins, *supra* note 23, at 23-24.

49 Collins, *Social Inclusion*, *supra* note 46, at 913.

50 Martha Nussbaum, *Women and Equality: The Capabilities Approach*, *in* WOMEN, GENDER AND WORK: WHAT IS EQUALITY AND HOW DO WE GET THERE? 45, 52 (Martha Fetherolf Loutfi ed., 2001). Nussbaum notes particularly that the capability to seek or maintain employment outside the home is instrumental in the achievement of basic needs such as security, health and bodily integrity. *Id.* at 53-55.

51 Collins, *supra* note 47, at 914.

52 *See, e.g.*, WILLIAMS, UNBENDING GENDER, *supra* note 3.

53 Using Amartya Sen's measure of equality as "equal capability," Simon Deakin and Frank Wilkinson reason that

social inclusion model of equality is able to recognize inequalities that may result from social systems, structures, and practices modeled on a dominant group of work-primary "ideal" workers. Equality of outcomes in time working and caring for all workers is not the goal of social inclusion. Instead, the focus is to reduce inordinate burdens on men to engage in market work and women to engage in unpaid caring labor, thus better enabling women to work and men to care.

III. DECONSTRUCTING INTERNATIONAL LAW AND THE WORK-FAMILY INTERSECTION

By examining key international instruments that explicitly and implicitly address women, work, and family over the past century, one can trace a shift in the international community's vision of women's social roles that has implications for legal regulation and policy in the intersection of work and family. This article will consider the most important instruments generated by international bodies that are open to ratification throughout the international community[54] that address work and family—those promulgated by the International Labour Organization (ILO) and the United Nations (U.N.). These instruments have had distinctly different aims and foci over the past century, tied to conventional conceptions of women's appropriate social roles. Deconstructing the historical trajectory of this body of law exposes gendered expectations juridified into international legal instruments. This process demonstrates that, despite recognizing the need to reconcile women's reproductive and productive roles, the international community has yet to identify either a position or a mechanism that will effectively support and accommodate women's and carers' dual roles

> [S]ocial norms, legal rules and legal-political institutions play a vital role in either extending, or diminishing, individual capability . . . . [For example, without anti-discrimination laws,] women of child-bearing age will not expect to continue in employment once . . . they become pregnant. . . . The overall effect is that investment in skills and training are not undertaken, making society worse off as a result. . . . What is the effect of the introduction of a prohibition on the dismissal of pregnant women under these circumstances? In addition to remedying [individual] injustice . . . , a law of this kind has the potential to alter incentive structures [so as to increase investment in human capital and raise women's labor market participation]. . . . [So, employment protections for pregnant workers] provide the conditions under which, for women workers, the freedom to enter the labor market becomes more than merely formal; it becomes a substantive freedom.

SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT & LEGAL EVOLUTION 290-92 (2005).

54 This paper does not attempt to address bilateral treaties, regional treaties, or the law developed by limited supra-national bodies such as the European Union.

without penalty.

This section does not purport to represent a critique of the current status of international law.[55] Rather, the aim is to unpack from the historical instruments themselves their assumptions about appropriate gender roles and the nature of equality and to make explicit how those assumptions shaped the international law of work and family. The paper takes a developmental approach here to consider the instruments as initially crafted, in order to see the powerful influence of the gender norms of the time on the intersection of work and family as constructed and expressed in international law.

A. Early Twentieth Century: The Primacy of Women's Reproductive Labor

In the early twentieth century, the "typical" worker was considered male, and women workers were treated differently.[56] International conventions of the time regarding working women focused on protecting the reproductive capacity of women who worked for pay outside the home. The purpose of protecting childbearing was clear from the language of most instruments, as will be seen below. These reproductive protections often served to legitimate restrictions on women's ability to engage in paid work.

The first international convention specifically concerning women workers—the Maternity Protection Convention of 1919—governed employment before and after childbirth.[57] This convention applied only to women workers in industrial and commercial enterprises.[58] Progressively for its time, the Maternity Protection Convention of 1919 prohibited the termination of a woman's employment during the six

55 While some of the instruments discussed in this paper have been revised, replaced, or reinterpreted over time, it is nevertheless useful for purposes of this paper to consider the language and interpretation of the instruments as initially crafted, in order to expose underlying gendered assumptions. Where an instrument has been revised, replaced, or is no longer active, it will be noted infra as appropriate.

56 MURRAY, *supra* note 1, at 42.

57 Convention Concerning the Employment of Women Before and After Childbirth, ILO Convention No. 3, *adopted* Nov. 29, 1919, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312148:NO [hereinafter Maternity Protection Convention 1919]. This convention was revised in 1952 by Convention 103 and again in 2000 by Convention 183. *See infra* note 288.

58 In other words, the convention did not apply to workers in schools, agriculture, or medical facilities, and specifically excluded those working in family businesses. Maternity Protection Convention 1919, *supra* note 57, arts. 1, 3.

weeks prior to and following "confinement."[59] In addition, the convention required ratifying governments to provide benefits of medical attendance at birth and support for mother and child during the immediate post-partum period and called for twice daily lactation breaks for nursing mothers.[60] Although the subject of multiple revisions, the 1919 Convention remains in force for some countries.[61]

Viewed in its entirety, the 1919 Maternity Convention clearly prioritizes women's reproductive role over their paid productive labor.[62] The immediate period of childbirth emerges as a socially important protected event, but no attention is provided to the inevitable consequences of birth other than required lactation breaks. For example, under the Convention, women are prohibited from paid work for six weeks following childbirth.[63] If any maternity benefit did not wholly replace the woman's earned wage, such a ban could result in financial hardship for the woman and her family.[64] Similarly, the Convention does not indicate whether required lactation breaks are in addition to or concurrent with other breaks, nor how long lactation is to

59 *Id*. art 3. *See also* MURRAY, *supra* note 1, at 43.

60 Maternity Protection Convention 1919, *supra* note 57, art 3.

61 Convention Concerning Maternity Protection, ILO Convention No. 103, *revised* June 28, 1952, 214 U.N.T.S. 321 [hereinafter Maternity Protection Convention (Revised), 1952]; Convention Concerning the Revision of the Maternity Protection Convention (Revised) 1952, ILO Convention No. 183, *revised* June 15, 2000, 2181 U.N.T.S. 253 [hereinafter Maternity Protection Convention, 2000]. All of the Maternity Protection Conventions are fairly lightly ratified. Thirty-four countries (mostly in Europe) ratified the 1919 Convention; eight have since denounced it. *Ratifications of C003 – Maternity Protection Convention, 1919 (No. 3*), INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312148 (last visited Feb. 15, 2014). Forty-one countries ratified the 1952 Convention, with seventeen denouncements. *Ratifications of C103 – Maternity Protection Convention (Revised), 1952 (No. 103)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312248:NO (last visited Feb. 15, 2014). The most up-to-date of these, the Maternity Protection Convention 2000, has been ratified by twenty-eight countries. *Ratifications of C183 – Maternity Protection Convention, 2000 (No. 183)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328:NO (last visited Feb. 15, 2014).

62 *See* MURRAY, *supra* note 1, at 44, 47, 55.

63 Maternity Protection Convention 1919, *supra* note 57, art. 3(a).

64 The convention requires a woman's maternity benefit to be "sufficient for the full and healthy maintenance of herself and her child." *Id*. art. 3. Thus, the benefit does not address any other financial responsibilities of the mother, such as maintenance of other family members.

be protected.[65] Anti-discrimination protections under the Convention are also quite limited. Employers are not prohibited from terminating women because they had childcare duties, were mothers, or might become pregnant—termination is simply banned during the immediate pre-and post-partum period.[66] Thus, the international community at the time focused on women's roles in childbearing, treating them only as secondary or "discretionary" wage earners rather than as key to financial support for families.

Other early ILO instruments aimed at working women operated in an even more restrictive vein by prohibiting or limiting women's employment. One of the earliest conventions promulgated by the ILO restricted women's ability to engage in paid labor during night hours, ostensibly from an intention to protect their physical and reproductive health.[67] The effect of such restrictions was to reduce female earning capacity, since night work often brought higher wages in the form of shift differential pay. A similar ILO convention prohibited women from engaging in jobs involving manual labor underground in mines.[68] Prior to the mid-twentieth century, other ILO Conventions and Recommendations specifically targeting women workers show a similar

65 Given that bottle-feeding was not typical at the time, lactation could reasonably have been expected to last from six months to two years or more. *See* Samuel J. Foman, *Infant Feeding in the 20th Century: Formula and Beikost*, 131 J. NUTRITION 409S, 409S-410S (2001); Charles Hirschman & Marilyn Butler, *Trends and Differentials in Breast Feeding: An Update*, 18 DEMOGRAPHY 39, 40 (1981).

66 *See* Maternity Protection Convention 1919, *supra* note 57, art. 3.

67 Convention Concerning Employment of Women During the Night, ILO Convention No. 4, *adopted* Nov. 28, 1919, *available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312149 [hereinafter Night Work (Women) Convention]. The Night Work (Women) Convention was subsequently revised in 1934 and 1948 but retained its restrictive character. Night Work (Women) Convention (Revised) 1934, ILO Convention No. 41, *adopted* June 19, 1934; Night Work (Women) Convention (Revised) 1948, ILO Convention No. 89, *adopted* July 9, 1948. The most recent version of this convention is Convention Concerning Night Work, ILO No. 171, *adopted* June 26, 1990, 1855 U.N.T.S. 305 [hereinafter Night Work Convention, 1990]. The purposes of the Night Work (Women) Convention are well noted. *See, e.g.*, Kamala Sankaran, *Night Work by Women: How Should Special Protective Measures for Women Be Defined?*, 9 NEW ENG. J. INT'L & COMP. L. 417, 418-19 (2003). *See also* the ILO Constitution, which seeks the "protection of children, young persons and women." Constitution of the International Labour Organisation, pmbl., June 28, 1919, 2 Bevans 241 [hereinafter ILO Constitution].

68 Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds, ILO Convention No. 45, art. 2, *adopted* June 21, 1935, 40 U.N.T.S. 63 [hereinafter Underground Work (Women) Convention].

restrictive character.[69]

These early twentieth-century conventions prioritized women's unpaid reproductive roles over their paid productive roles by juridifying restrictions on women's engagement in paid work, as distinct from facilitating both paid work and unpaid caring obligations or improving conditions for all workers. As noted above, such instruments ignored or discounted the importance of women's financial contribution to their households. Given the recognized "maleness" of the ILO[70] and its avowed purpose to "protect[] . . . children, young persons and women" in work,[71] it is perhaps not surprising that the ILO initially followed a restrictive-protective strategy for women workers.

This restrictive-protective strategy was evident not only in international law of the time, but also in national laws which prohibited women from working at particular times or in particular occupations, nominally for the benefit of reproductivity. For example, in many developed countries, women were barred from working in certain

69 *See, e.g.*, Recommendation Concerning the Protection of Women and Children Against Lead Poisoning, ILO Recommendation No. 4, *adopted* Nov. 28, 1919, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312342:NO [hereinafter Lead Poisoning (Women and Children) Recommendation 1919] ("In view of the danger involved to the function of maternity . . . , women . . . [should] be excluded from employment in the following processes . . . ."); Recommendation Concerning Night Work of Women in Agriculture, ILO Recommendation No. 13, *adopted* Nov. 15, 1921, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312351:NO [hereinafter Night Work of Women (Agriculture) Recommendation, 1921]; Recommendation Concerning the Protection, Before and After Childbirth, of Women Wage-Earners in Agriculture, ILO Recommendation No. 12, *adopted* Nov. 15, 1921 (withdrawn) [hereinafter Maternity Protection (Agriculture) Recommendation, 1921]; Convention Concerning the Employment of Women During the Night (Revised 1934), ILO Convention No. 41, *adopted* June 19, 1934, 40 U.N.T.S. 3 (shelved) [hereinafter Night Work (Women) Convention (Revised), 1934].

70 *See* Sean Cooney, *Testing Times for the ILO: International Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL'Y J. 365, 369 (1999). Hilary Charlesworth and Christine Chinkin have also commented on "male assumptions" underlying international legal institutions and structures. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 17 (2000). *See generally* Joan Acker, *Hierarchy, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139 (1990).

71 ILO Constitution, *supra* note 67, pmbl.

occupations after marriage—the so-called "marriage bar."[72] Similarly, in developing countries women were often still banned from entering into work contracts without their husband's consent.[73] The result of such restrictions was often to remove women (at least those engaged in or presumed to be engaged in reproductive and caring labor) from competition with men for more lucrative jobs.[74] These restrictions entrenched women's lower earnings in multiple ways, shaping their expectations, plans, and opportunities for combining productive and reproductive work.[75]

B. The Mid-20th Century: Formal Equality for Women Who Work

Towards the middle of the twentieth century, a "second-wave" of feminism followed the massive call-up of female labor during World War II and the struggle for racial equality in the developed world.[76] The demand for greater access to employment for women was reflected in international instruments employing a model of formal equality.[77] The mid-twentieth century emphasized the removal of explicit, intentional barriers for women in work, which had characterized earlier eras.[78] As will be seen, the ILO's Anti-Discrimination Conventions and the major U.N. human rights declarations and conventions of this period reflect an underlying conception of female equality requiring identical treatment as compared to the typical male worker. It is important to note that the development of the instruments discussed below chronologically overlapped and were mutually influencing. However, for purposes of deconstructing the language of the instruments, they are

72 *See* Audrey Hunt, *An Overview*, *in* WOMEN AND PAID WORK: ISSUES OF EQUALITY 1, 5-15 (Audrey Hunt ed., 1988); Claudia Goldin, *Marriage Bars: Discrimination Against Married Women Workers, 1920's to 1950's* [sic] *passim* (Nat'l Bureau of Econ. Research, Working Paper No. 2747, 1988), *available at* http://www.nber.org/papers/w2747.pdf?new_window=; Tom Sheridan, *Mandarins, Ministers and the Bar on Married Women passim* (Univ. of Adelaide Sch. of Econ., Working Paper No. 2003-08, 2003), *available at* http://economics.adelaide.edu.au/research/papers/doc/wp2003-08.pdf.

73 *See, e.g.* BERKOVITCH, *supra* note 11, at 44-50 ; CHARLESWORTH & CHINKIN, *supra* note 70, at 10; FRANCESCA MILLER, LATIN AMERICAN WOMEN AND THE SEARCH FOR SOCIAL JUSTICE 77-82 (1991).

74 *See, e.g.*, RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS 241-42 (9th ed. 2006) (noting compensating wage differentials for night work and jobs that have less preferred working conditions).

75 *See* Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33 (1985) (discussing human capital theory and decision-making in paid labor).

76 *See generally* discussion on feminist movements, *supra* note 26.

77 *See* CHARLESWORTH & CHINKIN, *supra* note 70, at 213.

78 *See, e.g.*, BERKOVITCH, *supra* note 11, at 100-16 (discussing the development of an equal treatment model of gender in international law and discourse between WWII and the 1960s).

examined separately. Although the ILO's Anti-Discrimination Convention 111 preceded the U.N. human rights conventions by several years, the U.N. conventions will be discussed first, since they were derived from the U.N.'s Universal Declaration of Human Rights, which was developed before ILO Convention 111.

1. Equal but Nearly Invisible: The International Bill of Rights

Catharine MacKinnon has suggested that, according to the U.N.'s Universal Declaration of Human Rights (UDHR),[79] women are not yet "human."[80] She not only questions the male universal in the language used in the Declaration, but also highlights that women's experience of work and family are different from that of the male norm assumed in the Universal Declaration:

> Article 23 encouragingly provides for just pay to "[e]veryone who works." It goes on to say that this ensures a life of human dignity for "himself and his family." Are women nowhere paid for the work we do in our own families because we are not "everyone," or because what we do there is not "work," or just because we are not "him"?[81]

MacKinnon acknowledges that most of the world's men do not have the rights guaranteed in the Universal Declaration, but she argues, "it is hard to see, in its vision of humanity, a woman's face."[82] This is also true of the "universal" human rights instruments implementing the UDHR. While a structure of formal equality and the increasing importance of the productive labor of women is evident in the treatment of women, work and family in the International Bill of Rights, the distinctive flavor of these instruments is, however, a sublimation of women and "women's concerns" to the political project of universality. And that universality is male.

The so-called International Bill of Rights[83] consists of the key

79 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

80 *See* CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 41-43 (2006).

81 *Id.* at 42.

82 *Id.* at 43.

83 *See* U.N. Econ. & Soc. Council Rep. of the Comm'n on Human Rights, Drafting Committee of an International Bill of Rights, 1st Sess., June 9, 1947-June 25, 1947, U.N. Doc. E/CN.4/ 21.

comprehensive[84] United Nations instruments on human rights: the Universal Declaration of Human Rights (UDHR),[85] the International Covenant on Civil and Political Rights (ICCPR),[86] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[87] These instruments are considered to form the foundational statement of human rights in the international community and were an important focus of international legal efforts in the mid-twentieth century.[88] The UDHR, as a Declaration, is technically non-binding, although some claim it has attained the status of customary international law.[89] After the U.N.'s unanimous passage of the UDHR in 1948, subsequent wrangling over the form of binding instruments operationalizing its terms resulted in the adoption of the ICCPR and ICESCR nearly twenty years later.[90] Although following the rights proclaimed in the UDHR, these conventions are frequently more specific, so the focus of the discussion below is the ICCPR and ICESCR, with reference to the UDHR where appropriate.

The ICCPR (1966), which follows closely part of the UDHR, is a widely ratified instrument.[91] Neither the ICCPR nor the UDHR directly address the issue of workers with family responsibilities. While the

84 While it will be apparent from the subsequent discussion that the instruments are not in fact comprehensive, as has been implicitly recognized by later instruments such as CEDAW, these conventions are commonly described as comprehensive for their wide focus on many areas, in an attempt to describe within a single document broad human rights that address many different areas of concern—and as opposed to more targeted international instruments, such as the U.N. Convention on the Rights of the Child. Thus, the label "comprehensive" can still serve a practical use.

85 UDHR, *supra* note 79.

86 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

87 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

88 The universality of these instruments and the norms they contain remains contested. *See, e.g.*, Diane Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997). However, a detailed critique of the universality of human rights norms or instruments is beyond the scope of this paper.

89 *But see* Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry under International Law?*, 17 INT'L J. REFUGEE L. 542, 547 (2005) (noting scholarly dispute on the binding character of the UDHR and ultimately concluding the UDHR is non-binding).

90 Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the 'International Bill of Rights'*, 16 INT'L J. OF GLOBAL LEGAL STUD. 437, 439-42 (2009).

91 One hundred sixty-seven countries have ratified the ICCPR, including the United States of America in 1992. *International Covenant on Civil and Political Rights, Status of Ratification, Reservations and Declarations*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf (last visited Jan. 16, 2014). The reservations made by the U.S. as a state-party upon signing do not directly affect the matters discussed in this paragraph. As a declaration, the UDHR is not open for signature or ratification.

ICCPR and the UDHR do recognize "equal rights" for men and women,[92] the instruments themselves offer no content to such rights to suggest approaches other than formal equality between the sexes in civil and political matters. The Preamble of the ICCPR explicitly relies only on the UDHR and the U.N. Charter, which do not define equality.[93] Importantly, the ICCPR's terms confine the issue of sexual equality of rights to those enumerated within the instrument,[94] although the U.N. Office of the High Commission for Human Rights, Human Rights Committee (HRC) has commented that this limitation is not present with respect to the guarantee of equal protection in Article 26, which should be viewed as an autonomous right.[95] This would be consistent with a prevailing concept of the time that "equality" is a relative rather than a stand-alone right; i.e., that one must find unequal access to or attainment of some other enumerated right in order to have a violation of "equality." The ICCPR and the UDHR do call for equality of rights "as to marriage, during marriage and at its dissolution," but these rights are not further specified in the instruments.[96]

The ICCPR and the UDHR obliquely address discrimination in terms and conditions of employment based on sex by holding that "everyone" has a right "to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."[97] Also, "everyone, without any discrimination, has the right to equal pay for equal work."[98] This is the language of "equality of opportunity" and appears addressed to *de jure* restrictions on work rather than social and cultural barriers to the free exercise of the right to "work" or to "free choice" of employment. Cases before the U.N. Human Rights Committee have used the ICCPR to support claims of sex discrimination based on overtly disparate treatment and thus are

92 ICCPR, *supra* note 86, arts. 2(1), 3, 26; UDHR, *supra* note 79, pmbl., arts. 2, 7 (by implication).

93 *See* ICCPR, *supra* note 86, pmbl.

94 *Id.* art. 2(1).

95 Human Rights Comm., Gen. Comment 18, Non-Discrimination, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 10, 1989) [hereinafter HRC Gen. Comm. 18].

96 UDHR, *supra* note 79, art. 16; ICCPR, *supra* note 86, art. 23(4).

97 UDHR, *supra* note 79, art. 23(1).

98 *Id.* art. 23(2). The U.N. Human Rights Committee has issued a General Comment adopting the definitions of discrimination that appear in the International Convention on the Elimination of All Forms of Racial Discrimination and CEDAW. HRC Gen. Comm. 18, *supra* note 95, ¶¶ 6-7.

consistent with a formal equality mandate.[99]

While the HRC has indicated that equality of rights and freedoms "does not mean identical treatment in every instance" and sometimes requires "preferential treatment,"[100] the institutions and structures within which people are to assert equality rights remain unchallenged in the ICCPR and the UDHR. The very observation that states may be required to take "affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination"[101] under the ICCPR explicitly employs a comparative model of the disadvantaged group against an unspecified norm. Further, labeling different treatment as "preferential" is consistent with an underlying paradigm of formal equality. Finally, the HRC has commented that "if the criteria for such differentiation [of treatment] are reasonable and objective, and if the aim is to achieve a [legitimate] purpose," different treatment is non-discriminatory.[102] Legal standards of reasonableness and objectivity contain the status quo as an implicit norm without unpacking gendered structures. From that point of view it becomes difficult to justify a departure from the norm for the sake of improving equality.

Given the formal framework and overarching theme of political participation which characterizes the ICCPR as a whole, it would be quite a leap to impute the radical project of destabilizing gender roles in caring work to the call for "equal rights" in marriage under this Convention. Yet the HRC has subsequently attempted to broaden the conception of rights within marriage based on the ICCPR, stating in 1990 that "spouses should have equal rights and responsibilities in the family . . . extend[ing] to all matters arising from their relationship" including the "running of the household."[103] In 2000, the Committee issued a strong comment that the ICCPR obliges states-parties to adopt "positive measures . . . to achieve the effective and equal empowerment of women."[104] Much of the focus of this comment was on violence

99 Aumeeruddy-Cziffra v. Mauritius, Human Rights Comm. Communication No. 35/1978, at 67, U.N. Doc. CCPR/C/OP/1 (1984); Broeks v. The Netherlands, Human Rights Comm. Communication No. 172/1984, at 196, U.N. Doc. CCPR/C/OP/2 (1990); Avellanal v. Peru, Human Rights Comm. Communication No. 202/1986, at 196, U.N. Doc. Supp. No. 40 (A/44/40) (1988).

100 HRC Gen. Comm. 18, *supra* note 95, ¶¶ 8, 10.

101 *Id.* ¶ 10.

102 *Id.* ¶ 13.

103 Human Rights Comm., Gen. Comment 19, Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 8, U.N. Doc. HRI/GEN/1/Rev.1 at 28 (July 27, 1990).

104 Human Rights Comm., Gen. Comment 28, Equality of Rights Between Men and Women, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

directed at females and expressly different government treatment based on sex (regulation of clothing, household confinement); but the comment also explicitly stated, "equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family."[105] Further, parties were asked to describe the support measures provided to enable women in single-parent households to "discharge [their] parental functions on the basis of equality with a man in a similar position."[106]

Despite these attempts to amplify the meaning of marital equality, the HRC comments fit most readily into the context of formal equality during marriage and in any case are difficult to reconcile with the language of the ICCPR itself in Article 23. The ICCPR maintains recognition of a public-private divide in state regulation.[107] As many commentators have noted, characterizing state regulation as legitimate only for matters deemed "public" has significant gendered implications.[108] The ICCPR replicates this gendered divide in holding that the family is the principal unit of society and is entitled to lack of intrusion by the state.[109] The public-private divide has long been used to avoid state regulation on matters deemed "internal" to the family or "private" decision-making, such as a division of caring responsibilities within the household.[110] While the recognition of privacy and individual autonomy may be appropriate with respect to the exercise of political rights, the family-is-private line drawn in the ICCPR and the UDHR does not lend itself to arguments that state regulation in the intersection of work and family responsibilities is appropriate or welcome—much less necessary—in order to achieve the equal rights between the sexes which they elsewhere guarantee.

The other comprehensive U.N. Human Rights treaty, the International Convention on Economic, Social and Cultural Rights (ICESCR) deals more explicitly with both labor and family matters than does the ICCPR. The ICESCR is considered by some to be the more controversial of the two, although they have a roughly equal number of

105 *Id.*

106 *Id.* ¶¶ 25, 27.

107 ICCPR, *supra* note 86, arts. 17, 18, 23.

108 *See, e.g.*, CHARLESWORTH & CHINKIN, *supra* note 70, at 30-32; CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 105, 136, 237 (2005); Susan B. Boyd, *Challenging the Public/Private Divide: An Overview*, *in* CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY 3 (Susan B. Boyd ed., 1997).

109 ICCPR, *supra* note 86, art. 23(1). This is true of the UDHR as well. UDHR, *supra* note 79, arts. 12, 16(3).

110 BERKOVITCH, *supra* note 11, at 170-72.

ratifications.[111] In addition, the ICESCR is structurally weaker than the ICCPR as it has no optional protocol permitting individual complaints.

The ICESCR guarantees both sexes "equal rights" to economic, social and cultural rights stated in the Convention,[112] although, like the ICCPR, equality is determined relative to other enumerated rights.[113] However, the U.N. Committee on Economic Social and Cultural Rights (CESCR), which oversees the implementation of the ICESCR, suggests that "equality" in the convention "carries substantive meaning" and requires more than merely gender-neutral laws.[114]

Although not addressing work-family conflict directly, some provisions of the ICESCR do relate to the work-family issue. Labor rights are a focus of the ICESCR, including the right of "everyone" to "just and favourable conditions of work" including "fair wages" and conditions and "equal pay for equal work," "in particular women being guaranteed conditions of work not inferior to those enjoyed by men."[115] The labor rights in the ICCPR include the right to work, including free choice of occupation; the right to just and favorable working conditions and the right to freedom of association and collective bargaining, including the right to strike.[116] Further, workers are to be afforded equality of opportunity in promotions and "rest, leisure and reasonable limitation of working hours."[117]

On the "family" side of the scale, the ICESCR, like the UDHR and the ICCPR, defines the "family" as the "natural and fundamental group unit of society."[118] The ICESCR is most explicit about a work-family connection in its acknowledgment of the family's role in reproductive labor, which states that the

111 The ICCPR has 167 ratifications; the ICESCR 161. *International Covenant on Economic, Social and Cultural Rights, Status of Ratification, Reservations and Declarations,* UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf (last visited Jan. 19, 2014). However, the U.S. has not ratified the ICESCR. *Id.* This may have contributed to its perceived controversiality.

112 ICESCR, *supra* note 87, art. 3.

113 Comm. on Econ., Soc. & Cultural Rights, Gen. Comment 16, Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, ¶ 2, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005) [hereinafter CESCR Gen. Comm. 16].

114 *Id.* ¶¶ 6-8.

115 ICESCR, *supra* note 87, art. 7(a); *see also* UDHR, *supra* note 79, art. 23.

116 ICESCR, *supra* note 87, arts. 6-8; *see also* UDHR, *supra* note 79, art. 23 (right to strike is absent).

117 ICESCR, *supra* note 87, art. 7(c), (d); *see also* UDHR, *supra* note 79, art. 24.

118 ICESCR, *supra* note 87, art. 10(1).

> widest possible protection and assistance should be accorded to the family, . . . particularly for its establishment and while it is responsible for the care and education of dependent children.[119]

The same article provides that "[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth" and that during such a maternity period "working mothers" should be allowed leave with pay or social benefits.[120] In addition, the ICESCR recognizes rights to an adequate standard of living for oneself and one's family[121] as well as positive rights to social security and social insurance.[122]

The "social" rights noted above are both explicitly and logically tied to work. The ICESCR's right to supported maternity leave is premised on the mother being engaged in paid labor. Tying maternity leave to financial support recognizes in a practical way key concepts which labor law scholars have only recently articulated.[123] First, the right to "leave" from paid labor for purposes of childbearing acknowledges some tension between productive and reproductive labor. Second, the income-generating purpose of the market labor from which leave is required in order to engage in reproductive labor calls for some measure of socially appropriate institutional support. Third, and perhaps most importantly, the institutions of the family, the market, and the state are inextricably (though implicitly) linked in a dance of interdependence.[124] Tying the right to supported maternity leave in Article 10 of the ICESCR with the right to a family's "adequate standard of living" in Article 11 extends these work-family themes further,[125] since an "adequate" standard of living in developed countries is typically attained through market work performed outside the home by household members. The visibility within the ICESCR of these "social" rights with their implicit links to market work and their explicit connection to reproductive work offers an early foundation for locating work and family issues within a human rights framework.

The CESCR has suggested that Article 3 requires parties to promote "sharing of responsibilities in the family, community and

119 *Id.*

120 *Id.* art. 10(2); *see also* UDHR, *supra* note 79, art. 25. This is consistent with the ILO's Maternity Protection Convention 1919, discussed *supra* Part II.A.

121 ICESCR, *supra* note 87, art. 11(1).

122 *Id.* art. 9.

123 *See, e.g.*, Kerry Rittich, *Equity or Efficiency: International Institutions and the Work/Family Nexus*, *in* LABOUR LAW, WORK, AND FAMILY, *supra* note 3, at 43.

124 *See* Adams & Geller, *supra* note 12.

125 ICESCR, *supra* note 87, arts. 10, 11.

public life,"[126] but the CESCR itself has not commented further on the interaction of work-family rights and obligations within Articles 10 and 11 of the ICESCR. The "right to work" in the ICESCR has been described as "essential" to the achievement of other rights and an "inherent part of human dignity."[127] However, the CESCR has not addressed work-family conflict directly except in declaring that "pregnancy" should not be a justifiable reason for termination or refusal to hire.[128] Citing the ILO's Employment Policy Convention,[129] the CESCR has said that the "right to work" requires states to engage in "stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment."[130] The Committee expressed the view that state parties should "adopt a national strategy, based on human rights principles aimed at progressively ensuring full employment for all."[131] Despite these comments, work-family conflict, and its implication for women's equal participation in the civil, political, and economic spheres, remains packed within the universalist masculine[132] in which the documents forming the International Bill of Rights are constructed.

2. Equal Treatment in Employment

The ILO's Discrimination (Employment and Occupation) Convention 111[133] is declared to be a fundamental part of the core labor

126 CESCR Gen. Comm. 16, *supra* note 113, ¶¶ 22-28.

127 Comm. on Econ., Soc. & Cultural Rights, Gen. Comment 18, Right to Work, ¶ 1, U.N. Doc. E/C.12/GC/18 (Nov. 24, 2005) [hereinafter CESCR Gen. Comm. 18].

128 *Id.* ¶ 13.

129 Convention Concerning Employment Policy, ILO Convention No. 122, *adopted* July 9, 1964, 569 U.N.T.S. 65.

130 CESCR Gen. Comm. 18, *supra* note 127, ¶ 26.

131 *Id.* ¶ 41.

132 The project of "universality" is evident from the title of the UDHR and the treaties that grew out of it. More pointedly, however, the instruments use masculine pronouns (typical of the time) to represent all of "mankind," language that has the effect of obscuring the needs and concerns of women. Further, as Catharine MacKinnon has noted, not only the rhetoric of the International Bill of Rights, but also the social forms and situations the instruments address, envision a masculine context. MACKINNON, *supra* note 80, at 42-43.

133 Convention Concerning Discrimination in Respect of Employment and Occupation, ILO Convention No. 111, *adopted* June 25, 1958, 362 U.N.T.S. 31 [hereinafter Convention 111]. This convention has 172 ratifications, but that number does not include the United States. *See Ratifications of C111—Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256 (last visited Jan. 19, 2014).

standards of the ILO.[134] Adopted in 1958, Convention 111 is a general instrument that does not directly raise issues relating to family responsibilities of workers, although this issue is now recognized to have a significant impact on the attainment of gender equality in employment conditions. However, Convention 111 does reflect an underlying shift in the international community's view of women and work relative to the ILO instruments of the early twentieth century.

Convention 111 and its accompanying Recommendation 111[135] broadly prohibit employment and occupational discrimination based on "race, colour, sex, religion, political opinion, national extraction or social origin."[136] Relying in its Preamble on previous human rights instruments (the Declaration of Philadelphia and the Universal Declaration of Human Rights),[137] Convention 111 grounds its measures in a universal right, "irrespective of . . . sex," to pursue material wellbeing in equality.[138] The key concept of "discrimination" is defined in Convention 111 as any "distinction, exclusion or preference" that is based on a protected characteristic and "which has the effect of nullifying or impairing equality of opportunity or treatment in employment."[139] "Equality" is not defined within Convention 111.

As has been recognized, the language of Convention 111 and its accompanying Recommendation 111 appear directed at differences in the treatment of workers having protected characteristics.[140] The phrase "distinction, exclusion or preference" that appears in Convention 111 suggests a focus on deliberate dissimilar treatment of workers, and at least in the case of the words "distinction" and "preference," it carries an implicit comparison with "other" workers. Further, repetition of the phrase "equality of *opportunity* or *treatment*" (emphasis added)[141] within the instruments suggests that the "equality" sought is formal or procedural as opposed to substantive in nature.

134 Int'l Labour Org., *Declaration on Fundamental Principles and Rights at Work*, *supra* note 7.

135 Recommendation Concerning Discrimination in Respect of Employment and Occupation, ILO Recommendation No. 111, *adopted* June 25, 1958, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312449.

136 Convention 111, *supra* note 133, art. 1; *see also id.* at pmbl.

137 ILO Constitution, *supra* note 67, Annex ("Declaration of Philadelphia"); UDHR, *supra* note 79. For a discussion of the UDHR, *see supra* Part II.B.1.

138 Convention 111, *supra* note 133, pmbl.

139 *Id.* art. 1.

140 Henrik Karl Nielsen, *The Concept of Discrimination in ILO Convention No. 111,* 43 INT'L & COMP. L.Q. 827, 831 (1994).

141 Convention 111, *supra* note 133, arts. 1, 2.

Yet, Convention 111's concern with the "effect"[142] of distinctions, exclusions or preferences introduces the potential for its definition of discrimination to expand beyond an "equal treatment" mandate and encompass the outcomes of substantive equality.[143] The radical potential of defining discrimination as effect is blunted by its phrasing, since, grammatically, the relevant "effect" is defined as one which eliminates or reduces equal opportunity or treatment.[144] However, some commentators suggest such a reading would render the words "have the effect of" as mere surplusage.[145] This linguistic tension is not clarified within the terms of either Convention 111 or Recommendation 111, as both texts repeatedly use the same formulation without further definition.[146] While in hindsight one might quibble with the way in which discrimination is defined in these instruments, it is worthwhile to acknowledge that in context they were quite forward-thinking and precede the formalization of the ICCPR and ICESCR by nearly a decade.[147] National legislation mandating gender-equal pay and prohibiting employment discrimination based on sex was half a decade behind these conventions in the U.S.[148] and more than a decade later in some other developed nations,[149] while discriminatory effects were not clearly illegal until 1970 in the United States and later in other countries.[150]

Despite what may be viewed as a textual lack of clarity within Convention 111, it is clear that Convention 111 and Equal Remuneration Convention, ILO 100,[151] which together underpin the ILO's fundamental principle of freedom from "discrimination in . . . employment and occupation,"[152] have a dramatically different aim than

142 *Id.* art. 1.

143 *Id.* at 844-85.

144 Convention 111, *supra* note 133, art. 1. This grammatical construction, defining a discriminatory effect as one that reduces or eliminates equal opportunity and treatment, is present in all official translations of this convention.

145 Nielsen, *supra* note 140, at 844-45.

146 Convention 111, *supra* note 133, art. 1.

147 *See* ICCPR, *supra* note 86; ICESCR, *supra* note 87.

148 Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d) (2012)); Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2012)).

149 *See, e.g.*, Sex Discrimination Act, 1975, c. 65 (U.K.); 1976 O.J. (L 76/207/EEC) 39 (European Union).

150 *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); FREDMAN, DISCRIMINATION LAW, *supra* note 22, at 106-08; Sex Discrimination Act, 1975 (U.K.).

151 Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951, *supra* note 26.

152 *See* Int'l Labour Org., *Declaration on Fundamental Principles and Rights at Work*, *supra* note 7.

earlier restrictive-protective ILO instruments relating to women workers. As discussed above, early ILO instruments prioritized women's reproductive role over that of paid worker. Legal restrictions on working would tend to suppress female workforce participation and entrench gender disparity in reproductive and productive labor. The anti-discrimination instruments, however, both permit and encourage greater female workforce participation by requiring removal of sex-based "distinctions, exclusions, or preferences" in the workplace, which would include bans on night work for women. Compared to the dampening effect on female wages produced by the restrictive-protective stance in earlier international instruments, simple economics suggests that the removal of formal barriers to work required by Convention 111 should produce higher wages and greater opportunities in paid work for women.[153] In turn, such incentives would likely result in higher female labor force participation.[154]

3. Increasing Visibility of Productive-Reproductive Conflict

The first explicit recognition in international law of family responsibilities (beyond a limited period around childbirth) presenting a barrier to participation in market work came with the ILO's non-binding Recommendation 123 in 1965, known as the Women with Family Responsibilities Recommendation.[155] This Recommendation has been superseded,[156] but, as the first international legal instrument explicitly targeting the intersection of work and family, it remains an important interpretive guide to the conception of appropriate gender roles at the time. Recommendation 123 is targeted at women workers as illustrated in both its title and content. In intriguing echoes of the Night Work for Women Convention discussed above, the female object of Recommendation 123 unproblematically assumes the primary role of reproductive laborer, so that the focus of the instrument becomes naturally one of protecting the reproductive role of women who are also

153 *See, e.g.*, EHRENBERG & SMITH, *supra* note 74, at 182.

154 *Id.*

155 Recommendation Concerning the Employment of Women with Family Responsibilities, ILO Recommendation No. 123, *adopted* June 22, 1965, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312461:NO [hereinafter ILO Recommendation 123].

156 Recommendation Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, ILO Recommendation No. 165, *adopted* June 23, 1981, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312503:NO [hereinafter ILO Recommendation 165].

engaged in paid market labor. In the language of Recommendation 123, work-family conflict presents "special problems" for women in paid employment.[157]

Recommendation 123 notes an increase in women in paid employment and that "many such women have special problems arising out of the need to reconcile their dual family and work responsibilities."[158] One can observe here a distinct contrast in treatment between women's family responsibilities (presumed to exist) and their engagement in paid employment and experience of work-family conflict (contingent). Although targeted at women, the Recommendation notes that the conflicts between work and family responsibilities "are not problems peculiar to women workers but are problems of the family and society as a whole."[159] In the context of the instrument as a whole, however, this statement signals not a radical design to "share the care" among mothers, fathers and the state, but an attempt to legitimate its recommended measures of state and market support for women's "new" dual roles as wage-earners and home-makers.

Recommendation 123 recommends a range of strategies including legal protections and limited social supports to address work-family conflict. The strongest legal protection recommended by Recommendation 123 is that governments should enable "women with family responsibilities who work outside their homes to exercise their right to do so without being subject to discrimination."[160] The other suggested legal protections would boost female re-entry into employment after child bearing through a "reasonable further period" of job-protected leave after maternity leave expires, and a right to return to a job from maternity leave similar to that for workers who were made redundant or laid off.[161]

Social policy recommendations in Recommendation 123 include governments facilitating or creating "services to enable women to fulfill their various responsibilities at home and at work harmoniously."[162] It recommends research into and campaigns of public information and education on the "problems of women workers with family responsibilities."[163] Recommendation 123 also suggests that

157 ILO Recommendation 123, *supra* note 155, pmbl.

158 *Id.*

159 *Id.*

160 *Id.* ¶ 1(a) (citing Convention 111, *supra* note 133).

161 ILO Recommendation 123, *supra* note 155.

162 *Id.* ¶ 1(b).

163 *Id.* ¶ 2.

governments encourage and organize childcare services "to meet the special needs of working parents."[164] A suite of measures generally facilitating entry into employment are recommended, including education and training without discrimination, as well as counseling and placement services for all job seekers.[165] Finally, it suggests governments and social partners promote miscellaneous social services, such as public transportation, the "harmonization" of work hours with those of school and childcare, and low-cost provision of "facilities required to simplify and lighten household tasks,"[166] all of which benefit multiple social groups.

Overall, Recommendation 123 missed the mark. Recommendation 123 is meritorious for finally naming the "elephant in the room": calling attention to the importance of the work-family problem to women and society. However, Recommendation 123's focus on women (rather than all) workers fails to question family obligations as women's responsibility and to acknowledge the persistent structural disadvantage this creates for sexual equality in work and life. In other words, there is no attempt to remove the now-visible elephant from women's shoulders. Although Recommendation 123 does recognize the importance of women to a national workforce, its measures seem tepid and tentative—especially when compared to the tenets of the ICESCR adopted by the U.N. only one year later.

In significant part, this tepid impression is created because the Preamble does not provide a strong statement in support of women workers with family responsibilities and does not take hold of the work-family problem as an equality issue. Instead, the Preamble merely recites that the increasing number of women working outside the home is a growing social phenomenon to which governments should pay attention.[167] Locating the problem in the sphere of demographic change weakens its impact and permits treatment of the work-family conflict issue as lesser in importance. As feminist and critical race legal scholars have noted, naming and claiming a "right" often gives impetus to its realization.[168] Contributing to the weak impression is also the instrument's focus on data collection to ascertain the scope of work-family conflict and local needs.[169] Thus, the entire Recommendation

164 *Id.* ¶¶ 4-6.

165 *Id.* ¶¶ 8-10.

166 *Id.* ¶¶ 11-12.

167 *Id.* pmbl.

168 *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 148-53 (1992).

169 ILO Recommendation 123, *supra* note 155, ¶¶ 2(b), 3(a), 3(b).

could be, at worst, dismissed as unnecessary (depending on local conditions) and, at best, considered as merely responding to a new social phenomenon causing potential (and possibly temporary) disruption to work, rather than to a persistent source of structural disadvantage for worker-carers and women in the paid workforce. As will be discussed below, Recommendation 123 was relatively quickly seen as an inadequate response to the problem of workers with family responsibilities.

C. Late 20th Century and CEDAW: A More Complex Vision of Gender Equality in Family & Work

Arguably the most visible international instrument to address the work-family intersection is the U.N.'s Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[170] CEDAW, often described as a "Women's Bill of Rights,"[171] is a core U.N. human rights treaty created subsequent to the first World Conference on Women (1975) and grounded in decades of effort by the United Nations Commission on the Status of Women.[172] Like its cousins, the "universal" treaties discussed above, CEDAW casts a wide net in its approach to human rights.[173] However, CEDAW focuses on issues creating or increasing disadvantages to women and addresses distinct concerns of women, which were either buried in or absent from the

170 CEDAW, *supra* note 19. The U.S. signed the Convention on July 17, 1980, but has not ratified it. *Convention on the Elimination of All Forms of Discrimination Against Women, Status of Ratification, Reservations and Declarations*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf (last visited Jan. 20, 2014). For an account of the history of CEDAW in the U.S. Congress, see Marjorie Cohn, *Resisting Equality: Why the U.S. Refuses to Ratify the Women's Convention*, 27 T. JEFFERSON L. REV. 15 (2004).

171 Elizabeth Evatt, *Eliminating Discrimination Against Women: The Impact of the U.N. Convention*, 18 MELB. U. L. REV. 435, 435 (1992)

172 *See* Hilary Charlesworth & Sara Charlesworth, *The* Sex Discrimination Act *and International Law*, 27 U. NEW S. WALES L.J. 858, 858-59 (2004); Evatt, *supra* note 171, at 435-36. The year 1975 was designated as International Women's Year by the United Nations. *See* World Conference of the International Women's Year, June 19 – July 2, 1975, *Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace*, U.N. E/Conf.66/34 (July 2, 1975).

173 CEDAW was in development at the same time as ILO 156 but was ratified first and specifically cited in the Preamble to ILO 156. *See* ILO 156, *supra* note 2, pmbl.; *see infra* Parts III.A, III.B. Therefore, CEDAW is discussed here as a precursor to ILO 156, although the chronological development of the two conventions overlaps and was mutually influencing.

"universal" human rights instruments.[174]

Explicitly drawing on the UDHR, the ICCPR, and the ICESCR, CEDAW contains both human rights norms and policy objectives to "ensure" that women as well as men "enjoy all economic, social, cultural, civil and political rights."[175] The Convention prohibits "discrimination" and affirms a broad equality between the sexes.[176] CEDAW alludes to a social inclusion model of sex equality at the outset, with the need for "full development of the potentialities of women" and "maximum participation of women on equal terms with men in all fields."[177] Women's "maximum participation" in society is linked to national and international economic prosperity and proffers a vision of equality in productive labor and public life.[178] In this context, CEDAW provides a stronger statement on women's equality than the instruments that preceded it.[179] By the creation of the CEDAW Committee and with the processes of the Optional Protocol to the Convention, CEDAW also provides a stronger framework for the realization of that equality than did previous instruments.[180]

CEDAW also contains a more nuanced treatment of women's family roles and their relation to paid work than did previous Conventions. The Preamble to CEDAW clearly signals the importance of family responsibilities to the attainment of equality in work and public life for women. Noting the "social significance of maternity and the role of both parents in the family and in the upbringing of children,"[181] the Preamble goes beyond acknowledging women's role in childbearing and childrearing (as is consistent with prior instruments), and, in the words of Joan Williams, advocates for an "equal parenting"[182] social model as necessary to the attainment of equality. The Preamble of CEDAW states:

174 For a comprehensive treatment of CEDAW, and the Committee on the Elimination of Discrimination Against Women that oversees it, see THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY (Marsha A. Freeman et al. eds., 2012).

175 CEDAW, *supra* note 19, pmbl.

176 *Id*. pmbl., arts. 1, 2.

177 *Id*. pmbl.

178 *Id.*

179 *See* Charlesworth & Charlesworth, *supra* note 172.

180 CEDAW, *supra* note 19, arts. 17-22; Optional Protocol to CEDAW, G.A. Res. 34/180, U.N. Doc. A/RES/54/4, 2131 U.N.T.S. 83 (Oct. 6, 1999) [hereinafter Opt. Protocol to CEDAW].

181 CEDAW, *supra* note 19, pmbl.

182 WILLIAMS, UNBENDING GENDER, *supra* note 3.

> [T]he upbringing of children requires a sharing of responsibility between men and women and society as a whole[;] . . . a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women . . . .[183]

Put another way, CEDAW's goal of women's "maximum" participation can be realized only if women are not disparately burdened with family responsibilities, which in turn requires an equal parenting model reflecting a change in traditional gender roles.[184]

Family responsibilities within the articles of CEDAW continue to be framed in the context of an equal parental responsibility/"shared care" model and the goal of high female engagement in the paid labor force. Parties to the Convention are required to institute educational and other measures to change stereotyped sex/gender roles and to recognize the "common responsibility of men and women in the upbringing and development of their children."[185] States must take measures to eliminate discrimination on "matters relating to marriage and family relations," including equal rights and responsibilities "during marriage and at its dissolution" and "the same rights and responsibilities as parents."[186]

In the area of work, CEDAW obliges party-states to take measures to "eliminate discrimination against women" in employment, by providing women with rights equal to those of men in "employment opportunities," "free choice of profession and employment," promotion, job security, and equal treatment.[187] Relevantly, a woman's right to work is asserted not only as a stand-alone right but also in the context of family, by requiring states to afford husbands and wives "the same personal rights," including the right to choose a profession and occupation.[188] States are required to adopt measures, including legislation, to prohibit discrimination against women and establish legal protections for women's rights "on an equal basis with men."[189]

CEDAW defines discrimination similarly to the ILO's Anti-Discrimination Convention 111, but with some distinct differences. It

183 CEDAW, *supra* note 19, pmbl.

184 *See* CHARLESWORTH & CHINKIN, *supra* note 70, at 217 (CEDAW recognizes that "for women, protections of civil and political rights are meaningless without attention to the economic, social and cultural context in which they operate").

185 CEDAW, *supra* note 19, art. 5.

186 *Id.* arts. 16(1)(c), (d).

187 *Id.* art. 11(1). Article 11 also provides for a right to protection for pregnancy and reproduction within work. *Id.* arts. 11(1)(f), 11(2)(d).

188 *Id.* art. 16(1)(g).

189 *Id.* art. 2.

defines "discrimination against women" as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[190]

Although repeating the "distinction or exclusion" formula contained in ILO 111, which suggests equality is defined in formal terms, the remainder of the definition expands that language to include a more substantive model of equality. Prohibiting both the "purpose" and "effect" of impairing or nullifying women's rights and freedoms indicates that the outcome of an act is to be viewed as separate from and equally relevant as its intention. Defining an effect as discriminatory means that facially neutral treatment may nevertheless constitute discrimination, and this provision opens the door to different treatment of the sexes in order to achieve equality. (Temporary special measures to accelerate equality are excluded from "discrimination" as defined in CEDAW.)[191]

CEDAW repeatedly links work and family in their impact on women's equality. Like the proclamation of work rights in the context of family noted above, CEDAW requires states to provide for family obligations to "ensure the effective right to work" for mothers and married women.[192] States must prohibit dismissal from employment on the grounds of pregnancy, maternity leave, or marital status; provide job-protected maternity leave with pay or social benefits; and "encourage social supports [especially childcare] to enable parents to combine work and public obligations with family life."[193] Although CEDAW is not the first international legal instrument to express the interdependence of family and work obligations for women,[194] it is the first whose text clearly ties the impact of the work-family link to sex equality.

Yet, it remains unclear what model of "equality" CEDAW's

190 *Id.* art. 1.

191 *Id.* art. 4.

192 *Id.* art. 11(2).

193 *Id.* These substantive provisions, along with the complaints and inquiry process of CEDAW's separate Optional Protocol, are the subject of interpretation and implementation by experts, as members of the U.N. Committee for the Elimination of Discrimination Against Women (confusingly, also called CEDAW). *Id.* arts. 17-22; Opt. Protocol to CEDAW, *supra* note 180.

194 See the discussion of ILO Recommendation 123, *supra* Part II.B.3.

language conceptualizes.[195] The substantive provisions of CEDAW repeatedly employ language suggestive of comparison between women and men. As discussed above, CEDAW frames equality as women's participation on "equal terms with men." The phrase "equality of men and women" appears in eight different articles,[196] while similar phrases appear in two more.[197] The phrases "on equal terms with men" and "equal rights with men" each appear in two articles,[198] while the word "same" (referring to men's rights and freedoms) appears nine times.[199]

The repetition of this language in CEDAW constructs equality as a comparative or relative concept—where women's rights are measured against those of men. Men's rights and freedoms remain structurally the norm by which "equality" is defined.[200] As discussed above, though the definition of sex discrimination has expanded beyond the focus on "equal treatment" in Convention 111, the heart of the definition remains grounded in formal equal treatment. While the goal of "equality" proffered by CEDAW is women's "maximum participation," that participation is framed by comparison to men's, rather than as a freestanding attainment.

Reliance on a norm of formal equality is reinforced by the use of different language for *sui generis* sex-linked traits. Notably, where CEDAW asserts women's rights with regard to conditions such as pregnancy and lactation, the "equality/same" language does not appear.[201] Instead, sex-linked rights are asserted on their own, without the male comparator context. At a practical level, these provisions merely recognize that some biological traits are inherently inapplicable to men and thus not logically comparable. However, they also suggest a conceptual distinction between sex-based and gender-based equality, where gender-based equality is constructed as formal and comparative, while sex-based equality is constructed as substantive and outcome-focused. This possible distinction sits uncomfortably with CEDAW's

195 CEDAW is now generally considered to require both formal and substantive equality. Charlesworth & Charlesworth, *supra* note 172. However, since the aim here is to trace conceptions over time, the language and construction of the instrument itself form the most relevant source of its equality framework.

196 CEDAW, *supra* note 19, arts. 1, 2(a), 10, 11(1), 12(1), 13, 14(2), 16(1).

197 *Id*. art. 3 ("a basis of equality with men"); *id*. art. 2(c) ("equal basis with men").

198 *Id.* arts. 7, 8, 9, 10.

199 *Id.* arts. 11(1)(b), 10(a), 10(b), 10(d), 10(e), 10(g), 15(2), 15(4), 16(1).

200 Several commentators have recognized this problem with CEDAW. *See, e.g.*, Julia L. Ernst, *Review Essay*, 13 MELBOURNE J. INT'L L. 890, 913-16 (2012) (reviewing THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY, *supra* note 174).

201 *See* CEDAW, *supra* note 19, arts. 11(2), 12(2).

novel linkage of women's equality with the work-family interface and its radical vision of gender-role deconstruction and shared parenting. CEDAW (both the Convention and the Committee) have been criticized for not going far enough to remove the "male yardstick" when establishing a worker-carer norm that realizes the goal of shared care.[202]

Ultimately, although CEDAW itself may not provide a consistent and clear model of equality, it remains an important milestone for the work-family intersection in international law. CEDAW makes clear that addressing the work-family link is a prerequisite to women's full equality in public life and in labor force participation.

IV. THE FAMILY RESPONSIBILITIES CONVENTION BRINGS A "SOFT" FOCUS ON WORK AND FAMILY

A. The Development of 156

The same year that the U.N. held the World Conference on Women, the International Labour Conference held a general discussion on gender equality in work, from which emerged the ILO's Declaration on Equality of Opportunity and Treatment for Women Workers.[203] This Declaration and the accompanying Plan of Action emphasized that women's equality in work and society could not be achieved without changing men's role in society and the family,[204] a theme that was later incorporated into CEDAW, as discussed above. Recommendation 123 does not contain any such radical ideas or language.[205] After a subsequent General Survey among ILO member states on the appropriateness of Recommendation 123,[206] the issue of workers with family responsibilities was placed on the agenda of the 1980 International Labour Conference (ILC), looking toward the development of a new instrument, to be brought about by the ILO's

202 *See* Ernst, *supra* note 200, at 913-15.

203 *See* ILO 156, *supra* note 2, pmbl; International Labour Organization [ILO], *Record of Proceedings, International Labour Conference, Sixtieth Session, Geneva 1975*, at 869, part 45 (1976), *available at* http://www.ilo.org/public/libdoc/ilo/P/09616/09616%281975-60%29.pdf.

204 ILO, *Record of Proceedings, International Labour Conference, Sixty-Sixth Session, Geneva 1980*, 6th item, at 32/2 (¶ 9), 32/3 (¶ 17), *available at* http://www.ilo.org/public/libdoc/ilo/P/09616/09616(1980-66).pdf [hereinafter ILC 66th Sess.].

205 *See supra* Part II.B.3.

206 ILC 66th Sess., *supra* note 204, at 32/1 (¶¶ 6-7, Introduction). The zeitgeist of second-wave feminism—with its emphasis on equality for women, particularly in regard to paid work—is prominent throughout U.N. activity at that time, which saw the 1970s declared the "Decade for Women" and the adoption of CEDAW in 1979. World Conference of the International Women's Year, *supra* note 172, ¶ 182.

two-year "double discussion" framework.[207]

The new "Family Responsibilities" Convention and Recommendation proposed by the Worker-members of the ILC was not popular with the Employer-members. Employers urged caution, objecting that the proposals were inconsistent with previous ILO Conventions, such as Night Work for Women, and might be "instrumental in the further disintegration of the family unit."[208] Most, though not all, Government-members favored a new Convention and Recommendation, as there "continued to be obstacles to the attainment of full equality of opportunity and treatment with respect to employment between men and women."[209] Some governments of developing nations expressed a view that "this action was not perhaps uppermost among the countries faced with problems of unemployment and underemployment."[210] Some government representatives, like India's, suggested that an approach encouraging a broad array of services to assist workers with family responsibilities made little sense when many states were unable even to apply Recommendation 123.[211] This resulted in an initial decision that the new instruments would not "replace" 123 but instead "support" it. Yet, several governments stressed, "[i]t was now becoming increasingly clear that the attainment of equality in working life was to a large extent dependent on that of equality within the family."[212]

During debate of the proposed instrument, several amendments emphasized its importance in achieving gender equality in employment.[213] Its foundation in equality was a significant step forward for ILO 156 from Recommendation 123. Delegates continued to express misgivings about language that suggested equality within the family and a change in women's traditional social roles were needed in order to effectively "secure" equality of opportunity for workers with family responsibilities; thus, the language ultimately adopted does not go this far and instead should be read "with a view to creating effective

207 ILC 66th Sess., *supra* note 204, at 32/1 (¶¶ 6-7, Introduction). In the interim, the U.N. adopted CEDAW.

208 *Id.* at 32/2.

209 *Id*. at 32/2-32/34. Ironically, Australia was among the countries that expressed a preference for a Recommendation alone, yet it is now one of the signatories to Convention 156, which is not a heavily ratified convention. *Id.* at 32/3.

210 ILC 66th Sess., *supra* note 204, at 32/2.

211 *Id*. at 32/26; *see also id.* at 38/2 (Report to the Conference).

212 *Id*. at 32/3 (¶ 17).

213 *See, e.g., id*. at 32/4 (¶¶ 27-28), 32/9 (¶ 80), 32/10 (¶ 88), 38/2. It was through these amendments that the Preamble to ILO 156 explicitly referred to the ILO's anti-discrimination Conventions 100 and 111, as well as CEDAW.

equality of opportunity and treatment."[214] However, the chair and Reporter noted in his presentation to the ILC that one objective was "to promote the idea that men and women must share equally the burden of family responsibilities as a necessary and prior step towards their effective equality of opportunities and treatment in working life."[215]

Ultimately, the Committee understood the mission of the Convention to be "to ensure . . . equality between workers with family responsibilities and those without such responsibilities."[216] In other words, the aim was not to create better working conditions overall, to address a generalized work-related phenomenon, or to provide preferential working conditions for some workers, but to level the playing field between workers with family responsibilities and those without. Chiefly, the points that made it into the draft Convention were those that, in the first phase of the "double-discussion" process,[217] passed unanimously or by a large margin—and the more controversial points were left to the accompanying Recommendation 165.[218]

B. Convention 156 as the Current International Conception of the Work-Family Intersection

The debate on the text of Convention 156 makes clear that the Committee envisioned that measures to enable workers with family responsibilities to combine employment and family obligations without conflict related to both conditions of work and social services.[219] The definition of "workers with family responsibilities" was initially quite contentious[220] but was ultimately adopted unanimously, after debate and recasting,[221] to include "workers with responsibilities in relation to their

214 *Id*. at 32/12-32/13 (¶¶ 113-114); *see also id.* at 32/15-32/16 (¶¶ 144-48).

215 *Id*. at 38/2. A "minority" report was presented on behalf of the employer-members of the Committee on Workers with Family Responsibilities. *Id.* at 38/3-38/4. In strong words, it urged member states to reject the proposed majority conclusions as too vague and not connected with the subject matter with which the Committee was charged. *Id*. at 38/3. The Worker's Adviser responded to the minority report that, since women assumed (or were presumed to have) responsibility for home and family, men were free to pursue work. *Id*. at 38/4-38/5. She continued that this gendered division of labor had adverse effects, which the proposed Convention and Recommendation was designed to address. *Id*.

216 *Id*. at 32/14 (¶ 136).

217 The ILO employs a "double-discussion" method in creating its international instruments whereby matters are considered in each year of the two-year sitting of a particular ILC. *See* NICOLAS VALTICOS & GERALDO VON POTOBSKY, INTERNATIONAL LABOUR LAW 52-54 (2d ed. 1995).

218 *See* ILC 66th Sess., *supra* note 204, at 32/28-32/29.

219 *Id*. at 32/25 (¶ 270).

220 *See id*. at 32/10.

221 *Id*. at 32/11-32/12 (¶¶ 101-103).

dependent children or other members of their immediate family who clearly need their care or support, where such responsibilities affect their possibilities of entering, participating in and advancing in economic activity."[222]

From both its title and Preamble, Convention 156 locates its measures squarely within the context of equality of opportunity and treatment at work. Convention 156 espouses "equality of opportunity and treatment" across two different dimensions: (1) between men and women workers with family responsibilities (sex equality within the group of workers with family responsibilities), and (2) between workers with family responsibilities and "other workers" (ideal workers vs. worker-carers).[223] These two aims reflect distinct underlying causes of inequality and thus may require different strategies. The first appears to require formal equal treatment of the sexes, the second to require more substantive measures. The rhetoric of "equality of opportunity and treatment" suggests ILO 156 embraces simply a formal conception of equality; however, the measures themselves are not so limited.

The Preamble sets out the reasons for the convention—particularly sex and gender equality—and the importance of the strategies contained in it.[224] The Preamble recites its reliance on several ILO instruments and Declarations that support or impact the subject matter of workers with family responsibilities in Convention 156.[225] Notably absent is any reference to the International Bill of Rights, although there is reference to CEDAW.[226] The Preamble to 156 begins with the Declaration of Philadelphia's[227] acknowledgment of a right to pursue "material well-being" (implicitly through work) free from discrimination on the basis of sex, "in conditions of freedom and dignity, of economic security and equal opportunity."[228] Thus, in a dramatic departure from Recommendation 123, the principle of equality is declared foundational to Convention 156. Further, it is relevant that "material well-being" and economic security are claimed upfront as rights in this context, since the measures in Convention 156 attempt to reconcile the demands of both productive and reproductive labor.

The Preamble then notes ILO measures toward equality for women in the workplace, situating Convention 156 as building on these

222 *Id.*
223 ILO 156, *supra* note 2, pmbl.
224 *Id.*
225 *Id.*
226 *See id.*
227 ILO Constitution, *supra* note 67, Annex ("Declaration of Philadelphia").
228 ILO 156, *supra* note 2, pmbl.

previous measures.[229] Noting that ILO Convention 111 does not expressly cover family responsibilities, ILO 156 states that "supplementary standards" are needed, although without further explanation.[230] In an even more oblique reference, "changes" since the adoption of Recommendation 123 in 1965 are noted without explaining the nature of the "changes" and resulting deficiencies in the existing instrument.[231] Closing the references to employment equality in the Preamble are the two dimensions of equality discussed above: sex equality within the group of workers with family responsibilities and gender equality between ideal workers and worker-carers.[232]

As noted above, the only non-ILO instrument alluded to in the Preamble is CEDAW. The fact that CEDAW is the only international instrument directly used to support Convention 156 that does not derive from the ILO itself highlights the significance of the reference to CEDAW and lends it greater emphasis. In a striking observation, Convention 156's Preamble quotes Paragraph 14 of the CEDAW Preamble, which claims that a "change in the traditional role of men as well as women in society and family is needed to achieve full equality between the sexes." Though succinct, this reference suggests a radical project for Convention 156: troubling the boundaries of work and family, destabilizing gender roles, and exploring the meaning of "full" sex equality.

Only toward the close of the Preamble does Convention 156 raise issues other than sex/gender equality with regard to workers with family responsibilities. The Preamble somewhat fuzzily claims that the "problems of workers with family responsibilities are aspects of wider issues which should be taken into account in national policies" and notes that the situation of workers with family responsibilities can be improved by measures improving the conditions of all workers, as well as "measures responding to their [unspecified] special needs." The concept of "special needs" departs from the language of formal equality and alludes to the notion of "full" sex equality discussed above. The reference to improving working conditions for all workers embraces matters such as working time and suggests the potential for movement away from a male norm for work. However, ILO 156 does not take the

229 The Preamble includes the ILO's 1975 Declaration on Equality of Opportunity and Treatment for Women Workers and corresponding Plan of Action; the principle of "equality of opportunity and treatment" based on sex in ILO Conventions 100 and 111; the Human Resources Development Recommendation 1975; and Recommendation 123. ILO 156, *supra* note 2, pmbl.

230 *Id.*

231 *Id.*

232 *Id.*

necessary further step of recasting work norms to acknowledge the vulnerability of all workers to the need to care or the need for care, which would ground "full" sex equality in universal and more urgent terms.[233]

A source of controversy during Committee debates,[234] the definition of "workers with family responsibilities" includes workers of both sexes in all branches of economic activity[235] who have responsibilities for "their dependent children,"[236] or "other members of their immediate family who clearly need their care or support,"[237] where such responsibilities restrict their possibilities of preparing for, entering, participating in, or advancing in economic activity.[238] "Dependent" children and "other members of their immediate family who clearly need care or support" are left to be defined at the national level, as appropriate for national conditions.[239] This definition of "workers with family responsibilities" is broad, without restriction as to the age or condition of the person to be cared for, the residence of the family member, or the "primary" (or other) status of the carer. The key concept is that the family responsibilities limit the worker's labor-force participation at any stage. Thus, Convention 156 could pertain to at least a significant percentage of, if not most, workers.

Measures that ILO 156 puts forward to reconcile conflicting work and family responsibilities may be classified into broad categories of (1) management or regulation of the work relationship; and (2) encouragement or provision (whether market or state-sourced) of education, information, and social services to assist accomplishment of concurrent obligations.[240] ILO 156 does not attempt to cross the public-private regulatory divide, other than through soft-law "suasion" measures by state-parties.

The measures directed at management or regulation of the work relationship require member states to "make it an aim of national policy" to "enable those with family responsibilities who are engaged or wish to engage in employment" to "exercise their right to do so without

233 See discussion of Martha Fineman's work, *supra* Part I.

234 ILC 66th Sess., *supra* note 204.

235 ILO 156, *supra* note 2, art. 2.

236 *Id.* art. 1.

237 *Id.*

238 *Id.*

239 *Id.*

240 Articles 9-19 contain technical provisions on how Member States may implement these measures (quite wide) and the formal processes of ratification, denunciation, and reporting. *Id.* arts. 9-19. As the technical provisions are common to many ILO Conventions and do not directly implicate the subject matter of the Convention, these articles are not discussed here.

being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities."[241] In order to create "effective equality of opportunity and treatment" between men and women workers, parties should enact measures to "enable workers with family responsibilities to exercise their right to free choice of employment" and "take account of their needs in terms and conditions of employment."[242] However, the Convention provides no mechanism, process, or system for achieving these aims. While the goal of enabling worker-carers to engage in employment "without conflict" between their employment and family responsibilities is laudable, the lack of any specific measures attached to this goal renders it little more than a statement of good intentions.[243]

ILO 156 is at its most concrete in its prohibitions on discrimination and the use of family responsibilities as a "valid reason for termination of employment."[244] "Discrimination" is as defined in Convention 111.[245] This definition encompasses discrimination on the ground of family responsibilities per se and on the ground of perceptions of what caring responsibilities a worker will or may face.[246] By its reference to Convention 111, Convention 156 adopts its limited model of formal equality—equality of opportunity and treatment—as the gauge of discrimination. In the context of the sex and gender-based differences in circumstances that exist between workers with family responsibilities and other workers, defining discrimination in terms of equal treatment and opportunity renders ILO 156's anti-discrimination protections quite limited.

ILO 156 envisions some degree of irreducible conflict between work and family responsibilities. Enabling workers to fulfill dual roles "without conflict" is strong language, but this forceful obligation is limited to the extent it is "possible" to eliminate conflict between work

241 ILO 156, *supra* note 2, art. 3.

242 *Id.* art. 4.

243 Certainly the termination provision in ILO 156, Article 8, has direct relevance to the ILO's Termination of Employment Convention 158. Convention Concerning Termination of Employment at the Initiative of the Employer 1982, ILO Convention No. 158, *adopted* June 22, 1982, art. 5, *available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312303:NO (declaring family responsibilities not to constitute a valid reason for termination). However, in broader terms, Article 8 can be considered a form of prohibiting discrimination by terminating a worker on the ground of family responsibilities.

244 ILO 156, *supra* note 2, art. 8.

245 *Id.* art. 3. For discussion of Convention 111, see *supra* Part II.B.2.

246 This provision would thus encompass protection against discrimination through sex-role stereotyping.

and family responsibilities.[247] An obligation to eliminate conflict if possible may suggest a higher obligation than eliminating conflict to the extent "reasonable," "practicable," or "without undue hardship," but it does presuppose some persistence in work-family conflict despite action. The nature of the irreducible conflict remains unstated, although one possibility—leave from work—is alluded to within the text of the convention. To provide training for the purpose of a worker's "re-entry" into the labor force after a period of absence,[248] this provision suggests workers with family responsibilities will often or inevitably need to take "leave" from work, but no mention is made of leave within the convention. Leave is left, instead, as an implicit assumption.[249]

Ratifying member-states also "shall take" measures to provide a broad suite of educational, informational, and social services to support the worker-carer. The public information and education campaigns should "engender broader public understanding" of sex equality in employment and "the problems of workers with family responsibilities" and foster "a climate of opinion conducive to overcoming these problems."[250] These "soft law" measures relying on persuasion to change behavior and institutional structures are indeed important and useful; however, given that the institutions of work and family as presently constituted are longstanding and circumscribed by law, it is unlikely that suasion campaigns, without any incentives or pressures, can significantly reshape the underlying gendered social structures[251]—and certainly not in a timely fashion. Slightly more direct measures require states to "take account of the needs of workers with family responsibilities in community planning" and to develop or promote relevant community services "such as child-care and family services and facilities."[252] Interestingly, tax/benefit schemes receive little attention in Convention 156 proper. Only the "social security" needs of worker-carers are mentioned within the text of the Convention.[253] As the Organisation for Economic Co-operation and Development's (OECD) recent focus on the work and family issue has made clear, tax/benefit policies can have a significant effect on work and family

247 ILO 156, *supra* note 2, art. 3.

248 *Id.* art. 7.

249 Although leave from work is not explicit in ILO 156, it is possible that the particular "needs" of workers with family responsibilities noted in Article 4 may encompass leave as a specific measure. *Id.* art. 4.

250 *Id.* art 6.

251 *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009).

252 ILO 156, *supra* note 2, art. 5.

253 *Id.* art. 4.

issues;[254] they are thus a noticeable omission from ILO 156. However, its accompanying Recommendation 165 does give some attention to tax/benefit strategies.[255]

Overall, Convention 156 is ambitious, but fuzzy, and ultimately of little use to state-parties. ILO 156 confirms the importance of its project to reconcile work and family responsibilities by claiming equality as its aim and justification. Conceptually more sophisticated than Recommendation 123, ILO 156 acknowledges the need to address gender roles in caring obligations in order to achieve the aim of sex equality. Explicitly acknowledging that women's caring labor directly affects the attainment of women's human rights generally is crucial to the development of an effective international instrument. As Rittich has argued, "framing claims as rights" invests them with "foundational rather than merely instrumental status."[256] Declaring that the achievement of women's equality depends upon resolving competing work and care demands places the conflict between work and care at the center of public debate.

While ILO 156 mandates broad policy aims for governments, it offers little by way of concrete measures or substantive targets to achieve. The open-endedness of the instrument likely reflects a desire to permit the widest flexibility possible for member states, but it was criticized at the time as too vague.[257] The attempt at flexibility here has not succeeded in garnering broad ratifications by ILO member states. Instead, its broad-brush approach has sapped ILO 156 of vigor and urgency. Without processes, protocols, targets, or rights, ILO 156 remains largely hortatory, aside from its limited and vague anti-discrimination protections.

C. ILO Recommendation 165 Adds Little Specificity

ILO Convention 156 is accompanied by a voluntary, non-binding Recommendation (No. 165).[258] Given the breadth and open-endedness of ILO 156, its accompanying Recommendation 165 should offer state-

254 *See* BABIES AND BOSSES SYNTHESIS, *supra* note 3.

255 *See infra* Part III.C.

256 Rittich, *supra* note 123, at 65. A similar "dual agenda" of improving gender equity, as well as workplace performance, is at the heart of the work and family studies by Rhona Rapoport and her colleagues. Rapoport concluded that family-friendly culture change on the level of the firm depends upon an explicit goal of gender equity in order for the culture change to retain momentum. RAPOPORT, ET AL., *supra* note 3, at 60-62.

257 ILC 66th Sess., *supra* note 204, at 38/3-4.

258 ILO Recommendation 165, *supra* note 156. Recommendation 165 supersedes Recommendation 123. *Id*. para. 35.

parties more specific guidance for movement toward the aims of the convention. Recommendation 165 does expand the ideas contained in ILO 156 somewhat, although without any prioritizing of or strategy for the implementation of measures. Recommendation 165, like the Convention it accompanies, lacks adequate focus. The Preamble and definitions of Recommendation 165 track those of ILO 156, with additions from technical matters confirming that provisions "consistent with national conditions" may be applied by various methods and in stages "if necessary." A broad "National Policy" section also begins by repeating Article 3 of ILO 156, asserting an aim of "effective equality" between the sexes, achieved through a national policy prohibiting discrimination against workers with family responsibilities and enabling carers, to the extent possible, to work without conflict between their employment and family responsibilities.[259] These repetitions ground Recommendation 165 in an equality framework, but its specific measures are insufficiently tied to this goal.

In the area of work, Recommendation 165 clarifies that marital status and family responsibilities are not an appropriate basis for discrimination in or termination of employment.[260] Further, workers with family responsibilities should have "equal opportunity and treatment" in preparation for, access to, advancement in, and security of employment.[261] These measures are, like those in ILO 156, necessary for the protection of worker-carers but do not add needed specificity to the Convention. Moreover, the language appears linked to a model of formal equality, rather than substantive equality, as a standard against which to measure discrimination.

The most detailed and specific measures in Recommendation 165 aim to improve the terms and conditions of employment for workers with family responsibilities, requiring that "all" measures compatible with national conditions and "the legitimate interests of other workers" should be taken to "ensure" that "terms and conditions of employment are such as to enable" workers with family responsibilities to "reconcile" their work and family responsibilities.[262] Specifics of such

259 *Id.* para. 6. The Recommendation also restates several measures contained in Convention 156: vocational training and guidance for worker-carers; taking account of the needs of worker-carers in terms and conditions of employment and social security; free choice of employment; development or promotion of childcare and community services; and public information and education. The Recommendation then adds an element from Recommendation 123: promotion of research into employment of workers with family responsibilities, to generate information on which to base "sound policies." *Id*. paras. 9-11, 24.

260 *Id.* paras. 7-8, 16.

261 *Id.* para. 15.

262 *Id.* para. 17.

reconciliation measures include improvement of general working conditions of all workers, such as reduction of hours and "more flexible" work arrangements; taking worker needs into account in shift and night-work assignment; and considering family needs when transferring workers to other locations.[263] Relevantly, leave of absence from work for caring responsibilities, which is only alluded to within Convention 156, is recommended to include (1) job-protected parental leave by either parent following maternity leave;[264] and (2) leave of absence from work where a "dependent child" or "other member of the worker's immediate family" has an illness.[265] Training and employment issues are grounded in the recommendation to integrate and retain worker-carers in the labor force and reintegrate them upon return from leave.[266] The duration and conditions of the leave are left to be determined in each ratifying country.[267] The Recommendation also links reconciliation of work and family responsibilities to various forms of insecure employment (part-time, temporary, and home-work), since many such workers use contingent employment to permit flexibility for family responsibilities.[268] To strengthen the economic usefulness of insecure forms of work, Recommendation 165 rather tepidly recommends that insecure work should be "adequately regulated" and that its workers should receive entitlements equal to those of secure workers "to the extent possible" on a pro-rata basis.[269] In an unusually concrete measure, the Recommendation provides that part-time workers should have the right to return to full-time work, where a vacancy exists and the circumstances necessitating the part-time employment have abated.[270]

The social security measures in Recommendation 165 represent scattered ideas, rather than a coherent set of tools a state may use to shape a modern labor force. Tax/benefit policies are largely absent from the text of ILO 156 and remain quite weak in Recommendation 165, despite current recognition that such policies offer important mechanisms in the construction of the labor force.[271] No specific tax/benefit strategies are proposed, aside from the mild suggestion that

263 *Id.* paras. 18-20.
264 *Id.* para. 22.
265 *Id.* para. 23.
266 *Id.* paras. 12-14.
267 *Id.* paras. 22-23.
268 *Id.* para. 21.
269 *Id.*
270 *Id.*
271 *See, e.g.*, BABIES AND BOSSES SYNTHESIS, *supra* note 3; K. Lee Adams & Chris Geller, *Work and Family: Seeking Solutions*, 20 AUSTRALIAN J. LAB. L. 312 (2007).

social security "may" be used to protect workers on caring leave and that social security benefits and tax relief should be available for workers with family responsibilities "when necessary."[272] Indeed Recommendation 165's tax/benefit suggestions function, not as new social security measures per se, but as mere anti-discrimination provisions for extant social benefit systems, by urging state-parties to take family responsibilities into account when deciding whether to terminate or initiate benefits. For example, the most useful measures proposed for social security support of worker-carers recommend that worker-carers should not be excluded from social security coverage based on the occupational activity of their spouses and that family responsibilities should be a relevant consideration when determining whether offered alternative employment is "suitable" during unemployment.[273] These recommendations importantly acknowledge the disproportionate negative effects that facially neutral rules can have on workers with family responsibilities, although the practical usefulness of such measures is undercut by flexibility provisions falling back on a nation's pre-existing social security arrangements.[274]

Finally, Recommendation 165 directs states to "promote such public and private action as is possible to lighten the burden" of family responsibilities.[275] States are advised to encourage the development of childcare and family services and facilities free of charge or at a reasonable charge.[276] Noting that such measures would improve life for all workers, authorities are directed to "promote" public and private community services, such as public transportation, "home-help and home-care services," convenient water and energy, and labor-saving housing.[277] Like the social security measures above, the suggestions given are scattershot. More damaging, however, is the overall impression left by Recommendation 165: that its largely unspecific "measures" are little more than best practices for general labor policy than clear steps toward the necessary achievement of gender equality.

V. A REVISED FAMILY RESPONSIBILITIES CONVENTION IS NEEDED

As discussed above, ILO 156, and its accompanying

272 ILO Recommendation 165, *supra* note 156, paras. 27-28.

273 *Id.* para. 29.

274 *Id.* para. 31. Paragraph 31 provides that a nation with an "insufficiently developed" economy may consider its national resources and social security arrangements in providing tax/benefit policies for worker-carers.

275 *Id.* para. 32.

276 *Id.* paras. 24-25. Ratifying states are also advised to regulate these services. *Id.* para. 26.

277 *Id.* paras. 33-34.

Recommendation 165, were important steps in the right direction toward equality for women and workers with family responsibilities. However, they were always of limited clarity and practical use, and now appear quite outdated. No new binding comprehensive international instruments on work and family have been developed since 1981. Major international instruments impacting particular aspects of work-family conflict have been revised or adopted since that time, although they have tackled only specific issues, rather than taking a holistic approach to the work-family problem.[278] On this thirtieth anniversary of ILO 156's coming into force, the international community should take the opportunity to revise the Family Responsibilities Convention to clearly define equality as social inclusion, to harmonize ILO 156 with more recent international standards in the work-family intersection, and to offer more practical and specific processes to guide member states in reducing work-family conflict.

A. A Revised Instrument Could Clarify a Social Inclusion Model of Equality

ILO 156 claims sex and gender equality as its foundation. However, the notion that the ability to manage work and family responsibilities is a matter of human rights has not taken root. The OECD has found that "gender equity objectives appear to be incidental rather than serve as primary policy objectives [driving work-family reconciliation] in most OECD countries."[279] Sex inequality persists in labor-force participation, in the performance of caring labor, and in economic outcomes for worker-carers.[280] The equality foundation for ILO 156 has not had a strong impact, in part because its vision of equality—formal or substantive—is unclear. The tension that appears to exist between its equality aims would diminish if ILO 156 clearly incorporated a social inclusion model of equality. A clear link to basic equality rights would strengthen the Convention.

In order to achieve effective sex and gender equality in work and

278 *See, e.g.,* Maternity Protection Convention, 2000, *supra* note 61; Convention Concerning Part-Time Work, ILO Convention No. 175, *adopted* June 24, 1994, 2010 U.N.T.S. 51 [hereinafter ILO 175]. Note that the U.N.'s International Convention on the Rights of the Child does not directly address the work-family issue, although children are clearly important stakeholders affected by work-family conflict. *See Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44 Sess., U.N. Doc. A/44/49 (1989), Nov. 20, 1989, 1577 U.N.T.S. 3, *entered into force* Sept. 2, 1990.

279 BABIES AND BOSSES SYNTHESIS, *supra* note 3, at 14.

280 *See, e.g.*, LINDA HANTRAIS, FAMILY POLICY MATTERS: RESPONDING TO FAMILY CHANGE IN EUROPE 76-97 (2004); BABIES AND BOSSES SYNTHESIS, *supra* note 3, at 41-68.

care, ILO 156 should not produce, entrench, or increase sex inequality between those who work and care, or cause unsustainable economic outcomes for those who try to manage both spheres of obligation. Instead, the provisions of the instrument should be designed to produce greater equality between men and women in the capability to work and care. Applying a social inclusion perspective to the intersection of men, women, work, and family would clarify that all workers should expect to take on the roles of worker and carer, so as to facilitate the performance of work and care by both sexes.

Measuring equality as social inclusion for worker-carers supports deep change in the social norms of both family care and work.[281] A social inclusion perspective would take account of the different capabilities of workers with family responsibilities to participate in the paid labor force, and would highlight the structural barriers that currently keep *workers* from properly attending to families and *carers* from securing and maintaining adequate work. Additionally, the social inclusion model has the advantage of being flexible enough to apply to LGBT and other non-traditional families that do not conform to a classic "breadwinner-homemaker" structure. Social inclusion is also consistent with the aim of increasing overall labor-force participation and economic productivity. Perhaps most importantly, clarifying that ILO 156 requires a social inclusion model of equality would provide its state-parties with both a catalyst for deconstructing barriers and a yardstick against which to measure progress. To accomplish these tall aims, two specific revisions are suggested here.

First, both the Preamble and a new Article should clarify that ILO 156 is an integral part of achieving sex equality and, as such, should be considered along with ILO 105 and 111 as a fundamental convention creating the ILO's core labor standard of anti-discrimination.[282] These parts of the Convention should also define equality as the full participation of workers with family responsibilities in the labor force, recognizing the vital economic importance of their labor to the families they support. Explicit recognition should also be given to the economic and social value of family care and to a principle of enabling families to manage work and care in the long run.

Second, it is time to jettison the equivocating aim of "a view to equality of opportunity and treatment" language in Articles 3 and 4.

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281 *See, e.g.*, EILEEN APPELBAUM ET AL., SHARED WORK, VALUED CARE: NEW NORMS FOR ORGANIZING MARKET WORK AND UNPAID CARE WORK 14 (2002) (stating that "increased responsibilities" for both paid work and unpaid family care "call for a new set of social norms").

282 *See supra* Part II.B.2.

Instead, language should be inserted that is closer to the language originally proposed and more consistent with a social inclusion view of equality. This new language should convey that the purpose of the Family Responsibilities Convention is "to secure equality" for workers with family responsibilities and then explicitly ground this equality in the universal human need to give and receive care over a lifetime. In this way, family responsibility measures properly can be seen not as a "privilege" for middle-class parents, but as a mechanism for reducing the inequalities in time and resources that arise from class and economic position, as well as sex. A revised Family Responsibilities Convention should acknowledge and claim a foundation in essential humanity—its benefits accessible to *every* worker, at some point in the course of his or her working life.

B. A Revised Convention Could Better Integrate and Harmonize with Subsequent International Instruments

Although (as noted above), no new international instruments have been specifically developed to address multiple aspects of work and family responsibilities, international attention to the problem of work-family conflict is at an all-time high. Particularly under the auspices of the United Nations CEDAW Committee, the international community has continued to raise awareness of the role of family responsibilities in gender inequality over the more than twenty-five years since the adoption of the CEDAW Convention.

The U.N.'s Fourth World Conference on Women adopted strategic objectives for reconciling work and family responsibilities in the (non-binding) Beijing Declaration and Platform for Action.[283] The Platform for Action declares that "equal sharing of responsibilities for the family by men and women . . . are critical to their well-being and that of their families."[284] In 2004, the United Nations Commission on the Status of Women published a statement, "The Role of Men and Boys in Achieving Gender Equality," which reaffirmed the need to share family and household responsibilities, as well as to promote reconciliation of paid work and family responsibilities.[285] The OECD has published a series of studies on several aspects of the work and family intersection

[283] Beijing Declaration and Platform for Action, G.A. Res. 50/203, U.N. Doc. A/CONF.177/20/Add.1 (1995).

[284] *Id.* ¶ 15.

[285] R.W. CONNELL, U.N. DIV. FOR THE ADVANCEMENT OF WOMEN ET AL., THE ROLE OF MEN AND BOYS IN ACHIEVING GENDER EQUALITY, at 12-16, U.N. Doc. EGM/Men-Boys-GE/2003/BP.1 (Oct. 7, 2003).

and maintains a statistical database on family outcomes and policies across its member nations.[286] The ILO, too, regularly produces reports on work-family issues.[287]

Despite the limited ratifications to ILO 156 itself, the subject it addresses has only increased in significance and urgency on the international stage since its entry into force.

Several ILO Conventions promulgated since 1981 have an impact on the work-family intersection.[288] The *Part-Time Work Convention 1994* notes that protections for part-time workers are important to workers with family responsibilities.[289] The *Maternity Protection Convention 2000* relies "in particular" on ILO 156.[290] The recent *Domestic Workers Convention 2011* (No. 189), which enters into force this year, regulates atypical modes of work, often undertaken to accommodate a worker's family responsibilities, and acknowledges its connection to ILO 156.[291] Other ILO conventions with similar functions and impacts on work and family responsibilities are also connected to the work-family intersection. For example, the *Home Work Convention, 1996* (No. 177) governs types of paid work that may offer a more flexible means of obtaining income for workers with

286 To access these studies, visit *OECD Family Database*, OECD.ORG, http://www.oecd.org/social/family/oecdfamilydatabase.htm (last visited Jan. 20, 2014). The OECD began a multi-volume study in 2001 on work and family with its Babies and Bosses series, culminating in BABIES AND BOSSES SYNTHESIS, *supra* note 3. Recent OECD works addressing the work-family intersection also include OECD, DOING BETTER FOR FAMILIES (2011) and OECD, CLOSING THE GENDER GAP: ACT NOW (2012).

287 *See, e.g.*, *Supporting Workers with Family Responsibilities: Connecting Child Development and the Decent Work Agenda* (ILO/UNICEF, Working Paper, 2013); Laura Addati, *Work and Family, A Crucial Balance*, ILOBLOG.ORG (July 8, 2013), http://iloblog.org/2013/07/08/work-and-family-a-crucial-balance/.

288 *See, e.g.*, Night Work Convention, 1990, *supra* note 67; ILO 175, *supra* note 278; Convention Concerning Home Work, ILO Convention No. 177, *adopted* June 20, 1996, 2108 U.N.T.S. 161; Maternity Protection Convention, 2000, *supra* note 61; Convention Concerning Decent Work for Domestic Workers, ILO Convention No. 189, *adopted* June 16, 2011 [hereinafter ILO 189]; *see also* Recommendation Concerning Home Work, ILO Recommendation No. 184, *adopted* June 20, 1996; Recommendation Concerning the Revision of the Maternity Protection Recommendation 1952, ILO Recommendation No.. 191, *adopted* June 15, 2000.

289 ILO 175, *supra* note 278, pmbl; *see also* ILO, TIME FOR EQUALITY AT WORK 75 (2003), *available at* http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_publ_9221128717_en.pdf.

290 Maternity Protection Convention, *supra* note 61, pmbl.

291 ILO 189, *supra* note 288, pmbl. For commentary on this most recent ILO convention, *see* Adelle Blackett, *The Decent Work for Domestic Workers Convention and Recommendation, 2011*, 106 AM. J. INT'L L. 778 (2012); Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 EMP. RTS. & EMP. POL'Y J. 159 (2011).

family responsibilities.

The current Preamble to ILO 156 (as with most ILO Conventions) notes only those international instruments and declarations on which it relies for its legitimacy.[292] In the case of a revised Family Responsibilities Convention, this is insufficient linkage. ILO 156 holds a unique position as an umbrella convention, addressing a widespread and comprehensive equality issue, while other conventions address more specific features of the work-family intersection. Because of this posture, a revised Family Responsibilities Convention's Preamble should note not only the predecessor instruments on which it relies, but also those instruments that regulate aspects of work-family conflict in particular situations and are thus linked to the achievement of full equality for women and workers with family responsibilities. In this way, once a revised Family Responsibilities Convention is explicitly adopted as a core non-discrimination convention, the profile, status, and importance of the related conventions mentioned would rise. Explicitly linking together those conventions that recognize and support the reproductive roles of workers acknowledges their importance to the achievement of gender equality at work. Specifically, it is recommended that the *Part-Time Work Convention 1994*, *Home Work Convention 1996*, *Maternity Protection Convention 2000*, and *Domestic Workers Convention 2011* be noted in any revision of ILO 156. Further appropriate efforts should be made to link these instruments explicitly together in educational and technical materials, in order to form a coherent package of forward-looking strategies for achieving gender equality through the reconciliation of work and family obligations.

C. Rhetoric Without Rights: Providing Systems and Processes Would Strengthen the Convention

The relatively small number of ratifications of ILO 156 suggests that specifying particular substantive outcomes or mandating expenditures for workers with family responsibilities is not likely to result in wider acceptance of this convention. That does not mean, however, that there is no effective avenue for international labor standards to take. Richard Freeman has suggested that labor standards that take the form of required procedures, rather than specified outcomes, are appropriate subjects for international regulation and often

292 *See* ILO 156, *supra* note 2, pmbl.

can be considered "fundamental social rights."[293] Adding procedural rights to ILO 156 is both consistent with a gender equality justification for protections for workers with family responsibilities and politically and economically more palatable for member states than is asking them to set arbitrary or unrealistic objectives.

The process-oriented rights that profitably might be added to a revised ILO 156 include a right to request flexible working arrangements and a right to convert back to previously existing terms and conditions of work if such a job is available, based on legislation enacted in the United Kingdom.[294] In addition, the Convention should contain a right for workers with family responsibilities to seek job-protected leave when caring duties become especially burdensome. Specifics of possible leave strategies may best be left to a Recommendation, but the Family Responsibilities Convention should make explicit its present assumption that workers with family responsibilities may require reasonable terms of leave beyond the immediate period of maternity in order to accommodate their caring obligations.

Joan Williams has argued that restructuring market work to accommodate caring obligations requires granting workers flexibility in structuring their work hours and carrying out their work duties.[295] Reasonable flexibility in work is needed for workers with family responsibilities as perhaps the single most effective way to allow them to meet their dual responsibilities concurrently.[296] Several developed nations, particularly within the European Union, have enacted legislation providing flexibility in work at the initiation of the employee.[297] The United Kingdom's legislation providing a worker with the "right to request" to work flexibly allows parties to craft terms and conditions appropriate for the specific situation within a well-developed process and could provide a useful model for international

293 Richard B. Freeman, *A Hard-Headed Look at Labour Standards*, *in* INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE 79, 89 (Werner Sengenberger & Duncan Campbell eds., 1994).

294 Employment Act, 2002 (U.K.) (amending Employment Rights Act, 1996 (U.K.)) and subsequent amendments, discussed *infra*.

295 WILLIAMS, UNBENDING GENDER, *supra* note 3, at 84-100.

296 *See, e.g.*, APPELBAUM ET AL., *supra* note 281, at 14-20.

297 *See generally*, LEWIS, *supra* note 3; BABIES AND BOSSES SYNTHESIS, *supra* note 3.

regulation.[298] A process-based right is adaptable to different national conditions, labor regimes, and institutions; it leaves outcomes in the hands of good faith negotiation between workers and employers; and it offers concrete pathways through which to work toward restructuring work to accommodate care. A formalized right to seek flexible means or times of working is useful because, as Mark Freedland has observed, "the rules of work are essentially the employer's rules, and the right to vary the terms and conditions of employment is normally reserved to the employing entity rather than the worker."[299]

The U.K.'s right to request legislation is a form of "light touch" regulation[300] that imposes primarily procedural obligations on employers. Eligible worker-carers, as defined in legislation or regulations, can formally pursue the statutory right to request flexibility in their terms and conditions of work, and this formal request triggers both a duty for employers to respond through a set process (subject to penalties) and certain anti-discrimination and retaliation protections for workers who seek the protection of the statute.[301] The employee's "right to request" is just that—there is no corresponding legal duty on

298 *See* Employment Act, 2002 (U.K.) [hereinafter Employment Act, 2002]. For extensive discussion of this legislation, *see generally* LEWIS, *supra* note 3; Collins, *The Right to Flexibility*, *in* LABOUR LAW, WORK AND FAMILY, *supra* note 3, at 99; Ariane Hegewisch, *Flexible Working Policies: a Comparative Review* 16 (Equality and Human Rights Comm'n, Research Report, 2009); Lucy Anderson, *Sound Bite Legislation:* The Employment Act 2002 *and New Flexible Working 'Rights' for Parents*, 32 INDUS. L. J. 37 (2003); Grace James, *The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?*, 35 INDUS. L. J. 272 (2006).

299 FREEDLAND, *supra* note 36, at 240.

300 The U.K. government itself has characterized the right to request as "light touch" regulation. DEP'T OF TRADE AND INDUSTRY, WORK AND FAMILIES: CHOICE AND FLEXIBILITY: GOVERNMENT RESPONSE TO PUBLIC CONSULTATION ¶ 7.21 (Oct. 2005), *available at* http://www.berr.gov.uk/files/file16317.pdf.

301 Employment Act, 2002, c. 22 (amending the Employment Rights Act, 1996, c. 18 (U.K.)). *See* IMELDA WALSH, DEP'T FOR BUS. ENTER. & REGULATORY REFORM, RIGHT TO REQUEST FLEXIBLE WORKING: A REVIEW OF HOW TO EXTEND THE RIGHT TO REQUEST FLEXIBLE WORKING TO PARENTS OF OLDER CHILDREN 22 (2008); *Flexible Working, Step 4: After the Application*, GOV.UK, https://www.gov.uk/flexible-working/after-the-application (last visited Jan. 21, 2014); *Flexible Working, Step 5: Appeals*, GOV.UK, https://www.gov.uk/flexible-working/appeals (last visited Jan. 21, 2014). The U.K. legislation and regulations require the worker to make a dated request to the employer in writing, which explains the worker's eligibility to seek the request, the change to work terms and conditions that the employee requests, the date the change is sought to begin, and the effect that "the employee thinks the change applied for would have on [the] employer and how . . . any such effect might be dealt with." *See* Employment Act, 2002, § 80F(2)(a)-(d); *Flexible Working, Step 4: After the Application*, *supra*; *Flexible Working, Step 5: Appeals*, *supra; Flexible Working (Procedural Requirements Regulations 2002* 4 & 5. If the parties reach an agreement on working flexibly, it creates a permanent change of the terms and conditions of the employee's contract of employment. Workers may not tender a formal request for flexible working earlier than twelve months from any preceding request. *Id.*

the employer to grant the request, although there is said to be an obligation for the employer to "seriously consider" the request.[302] Eligibility to invoke the process has been expanded over time to include more than a third of the U.K.'s total workforce—now including those who are parents of children under 18 or who are in a close family relationship with an adult needing care.[303] The U.K. government also provides advice and education to stakeholders and the general public about the right to request flexible work, eligibility, and how to apply and respond, including a telephone helpline and online and mobile interactive tools.[304]

Scholars have been divided on the effectiveness of the U.K. legislation. According to government figures, eighty percent of requests made under the legislation are agreed to, with a further ten percent

302 British Airways v. Starmer, [2005] U.K. Employment Appeal Tribunal 0306_05_0607, ¶¶ 12-13 (appeal taken from Eng.). The legislation does limit the employer to certain business reasons (such as higher costs or reduced performance) for refusal. Employment Act, 2002, § 80G(1)(b); Employment Rights Act, 1996, c. 18 (U.K.), § 80G(1)(b). Permitted reasons for refusal must be stated in writing within a specified time and explain "why those grounds apply" to the worker's request. Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, § 5. The limitation of grounds does not substantially reduce the employer's discretion to refuse a request, however, since the grounds are drawn broadly and represent the most common business reasons employers would refuse flexible work. Hugh Collins, *The Right to Flexibility*, *in* LABOUR LAW, WORK, AND FAMILY, *supra* note 3, at 99, 120. Moreover, there is no ability for the employer's decision to be overturned—appeals simply enforce adherence to the process. *See* Commotion Ltd. v. Rutty, [2005] U.K. Employment Appeal Tribunal 0418_05_1310; LEWIS, *supra* note 3, at 112; Anderson, *supra* note 298.

303 *See* Employment Rights Act, 1996, pt. 6A (U.K.); *Flexible Working Rights Extended*, DIRECT.GOV.UK (Feb. 10, 2009), http://webarchive.nationalarchives.gov.uk/20090215180949/direct.gov.uk/en/employment/employees/workinghoursandtimeoff/dg_10029491. However, there have been calls to extend the right to request flexible working to all workers, in order to reduce industrial tensions with workers who are not eligible. LEWIS, *supra* note 3, at 175. Steps toward targeted expansion of the right to request, by including rights to request flexibility for studying or training as the U.K. has done, might be profitably included in a revised ILO Recommendation. For comment, *see* Lisa Rodgers, *Time to Train Rights: A New Impetus for Skills Development in the Workplace?*, 39 INDUS. L.J. 312 (2010); *10 Million Parents Now Have "Right to Request" Flexible Working*, FLEXIBILITY.CO.UK (Apr. 6, 2009), http://www.flexibility.co.uk/flexwork/general/flexible-right-to-request-2009.htm.

304 *See, e.g.*, *Flexible Working*, DIRECT.GOV.UK, https://www.gov.uk/flexible-working/overview (last updated Dec. 23, 2013); *Putting Together a Case for Flexible Working*, DIRECT.GOV.UK (Mar. 9, 2011) http://www.direct.gov.uk/en/Diol1/EmploymentInteractiveTools/DG_10028030; *Flexible Working*, BUSINESS LINK, http://webarchive.nationalarchives.gov.uk/20120823131012/http://www.businesslink.gov.uk/bdotg/action/layer?r.l1=1073858787&r.l2=1084822788&r.s=tl&topicId=1084822805 (last visited Jan. 21, 2014); *Follow Directgov* (Oct. 3, 2012), http://webarchive.nationalarchives.gov.uk/20121015000000/http://www.direct.gov.uk/en/Hl1/Help/Socialbookmark/DG_192933.

reaching agreement based on modifications to the employee's initial request.[305] Jane Lewis argues that the U.K. law is insufficient to provide employee-led flexibility and notes that other scholars have called the U.K.'s right to request "anaemic."[306] However, Mark Freedland suggests that, despite the lack of a substantive check on the employer's business judgment, the right to request offers a real benefit to worker-carers, since employers have a "concrete duty to exercise a discretion in favour of the worker, in the absence of justification for refusal . . . ."[307]

Of course, many workers are already able to ask for more flexible terms and conditions of work on an informal basis without formal process rights. So what good does a "right to request" do? Hugh Collins has said that "the novel legal idea of an employee's right to flexibility . . . introduces a seismic shift" within the contract of employment.[308] The right to request provides a structured process that requires the parties to the work relationship to consider alternatives to the typical mode of working, as well as the perspective of the other party. This formal process and "enforced" change of perspective may have a significant effect, as the figures on agreements to flexible working suggest. The terms of a legal right to request should also afford protections to the worker from adverse employment actions taken on the grounds of seeking a flexibility request and protect the employer from repeated "pestering" by informal requests to change the terms and conditions of work. Anti-discrimination protections are necessary for the worker to ensure the effective operation of the right to request and to prevent adverse perception of a worker-carer's commitment and contribution to the job. Further, a formal ability to allow individualized terms for workers, subject to their own request, could allow for greater individual flexibility in labor regimes that are governed by centralized processes and collective agreements.

Analogous to the right to request flexible working discussed above, a process-based right for workers with family responsibilities to seek temporary leave from work, in order to accommodate their caring duties, should be developed and included in a revised Family Responsibilities Convention. Family caring leave is left implicit in ILO 156, although it is mentioned in Recommendation 165. This measure

305 *See* WALSH, *supra* note 301, at 14. The Walsh review states that men are twice as likely as women to have their requests to work flexibly refused. *Id.* at 11.

306 LEWIS, *supra* note 3, at 112, 185.

307 FREEDLAND, *supra* note 299, at 289.

308 Collins, *supra* note 302, at 100.

should become part of the Convention itself, as well as the Recommendation.

This right to request caring leave would be available to both sexes as a separate matter from any obligations or rights under the ILO's Maternity Protection Conventions. The right to request caring leave would parallel similar procedural rights and duties of the right to request flexible working, but it would be tied to acute needs for family care when the concurrent performance of work and care is impossible for the worker-carer. For example, caring leave could take the form of reduced hours or time off when family members are acutely ill or at the time of an adoption.[309] To permit the greatest flexibility for state-parties, the revised Convention could set out only the general principles and processes for requesting family caring leave. Criteria and bases for leave, duration of leave, support measures, and other specifics could be set forth in an accompanying Recommendation. However, it should be clear within the Family Responsibilities Convention itself that all workers have a protected right to seek caring leave that should carry a right of return to work within a reasonable period of time. As with other right-to-request measures, anti-discrimination and anti-retaliation provisions should also be included as part of the Convention, in order to ensure effective access to the right.

VI. CONCLUSION

By reflecting on the development of international law with regard to the work-family intersection, this article has shown that gender norms are embedded in its international instruments. ILO 156 is a reflection of these norms and the limitations in approach that have blocked its reach and effectiveness. We might usefully consider ILO 156 as a product of its time—reaching toward the problem of work-family conflict, but failing to go far enough. Thirty years on, it is time to address the underlying theoretical and practical problems with ILO Convention 156, so that a more effective and inclusive instrument might be drafted. A revised Family Responsibilities Convention should be an instrument guided by the principles of social inclusion to enable the concurrent performance of a person's obligations to both work and care. A revised Family Responsibilities Convention could integrate more fully and

309 Neither of these circumstances are covered under the Maternity Protection Convention 2000, or any other ILO convention, although the ILO Maternity Protection Recommendation 2000 (No. 191) recommends that nations with legal adoption should permit access to the same leave rights as are provided for maternity under the convention. Maternity Protection Recommendation, *supra* note 288, art. 10.

profitably with recent specialized conventions that impact work-family conflict. And, importantly, a revised Family Responsibilities Convention would provide concrete means to address work-family conflict, by the addition of process-based rights, such as the right to request flexible working and the right to seek caring leave beyond the immediate period of maternity.

Addressing the needs of workers with family responsibilities is a necessary component of the achievement of women's equality in both international and national law and, as such, deserves renewed attention and a more prominent focus in international human rights law. An effectively revised Family Responsibilities Convention would assist the international community to move toward gender equality for all workers and carers.