
AMERICAN CORPORATE GOVERNANCE AND CHILDREN: INVESTING IN OUR FUTURE HUMAN CAPITAL DURING TURBULENT TIMES

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I. INTRODUCTION

The goal of this Article is to establish a new area of research exploring the connection between corporate governance and the well-being of children.¹ Admittedly, at first glance, the relationship between the hard-nosed world of corporate law and the welfare of our nation's most vulnerable citizens is far from obvious. We must step back to see the bigger picture—using the knowledge that we are at a historical transition from an industrial society to a knowledge-based economy.² With this wide-angled lens, we can see connections among our most basic institutions of family, work, and corporation. Specifically, each institution is simultaneously in the midst of dramatic social and economic turmoil. Yet, these disruptions are not isolated events. Rather, crucial patterns of relationships emerge across time and among nations.³

To explore how the transformations in family, work, and corporation are interwoven, we must start with the premise that human capital is the crucial factor for this nation's success in the new economy.⁴ Even for low-level jobs, the so-called knowledge worker needs math and computer literacy to problem solve and cooperate in teams.⁵ The United States has

1. At the outset, I recognize that many parents may be offended by my reference to children as "future human capital" because they do not think about their own children in these terms. Neither do I, but I use the phrase to appeal to a corporate-dominated society, just as many other work-family advocates have turned to the language of economics. See Harriet E. Gross, *Work/Family and Globalization: Broadening the Scope of Policy Analysis*, in WORKING FAMILIES: THE TRANSFORMATION OF THE AMERICAN HOME 187, 192–93 (Rosanna Hertz & Nancy L. Marshall eds., 2001) [hereinafter WORKING FAMILIES] (emphasizing the need to evaluate the relationship between "market globalization and capital flight" and apply it to work-family research); Joan C. Williams, *The Family-Hostile Corporation*, 70 GEO. WASH. L. REV. 921 (2002) (discussing the role of the corporation in terms of work-family life). The literature on children's human capital development is well respected by leading economists and thus can help to persuade business leaders that investing in parenting through work-family policies is important. Specifically, Gary Becker won the Nobel Prize in 1992 for his work applying economic theory to family life. See generally GARY S. BECKER, A TREATISE ON THE FAMILY (1981) (analyzing aspects of family through an economic theoretical framework); GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (3d ed. 1993) (analyzing human capital and the incentive to invest in human beings).

2. See MARTIN CARNOY, SUSTAINING THE NEW ECONOMY: WORK, FAMILY, AND COMMUNITY IN THE INFORMATION AGE 3 (2000); ALVIN TOFFLER, THE THIRD WAVE 25–27 (1980) (describing the end of America's "second wave," the industrial revolution, and the beginning of the "third wave," a society based on intelligence and technology).

3. See SECURING THE FUTURE: INVESTING IN CHILDREN FROM BIRTH TO COLLEGE (Sheldon Danziger & Jane Waldfogel eds., 2000) [hereinafter SECURING] (examining the link between investments in human capital and subsequent national growth).

4. See Lisa M. Lynch, *Trends in and Consequences of Investments in Children*, in SECURING, *supra* note 3, at 19, 19.

5. *Id.* at 24.

experienced remarkable economic prosperity in the past decade, but when we look into the future, a different picture begins to surface. Compared to other advanced economies, the skill proficiency of our youngest generation of workers is lacking.⁶ Given this skills deficit, a wide variety of policymakers have begun to consider the topic of human capital formation.⁷ A general consensus exists that there is a danger that America's children will be unable to meet the needs of tomorrow's flexible labor markets.

In assessing the factors that undermine human capital accumulation, experts in many fields emphasize that early childhood experience shapes the adult worker. That is, the critical basis for an employee's knowledge skills is formed during the early years of life.⁸ During this early stage, parents greatly influence life-long learning patterns. Small deficiencies in how parents transmit these skills are magnified over time and may impair the nation's stock of human capital. The most cost-effective policies to improve the development of human capital are those directed toward parents and very young children.⁹ Experts in child development agree that parenting today requires more intensive guidance of children than in the past because the economy demands a more highly skilled workforce.¹⁰ Parents are trying to do their best, yet broad socioeconomic changes make it increasingly difficult for parents to raise their children.

In analyzing these socioeconomic factors, one can see that the United States is undergoing an economic transition to the new economy and a social revolution in gender roles. Under this economic reform, corporations have sought to promote more flexible labor markets by restructuring the social contract with labor to shift much more risk onto workers.¹¹ As a

6. See *id.* at 24–26 (stating that over forty percent of U.S. employers report that three-quarters of frontline workers use computers, but that young American workers are far more likely to have minimal math skills).

7. See *id.* at 19.

8. See ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 8 (2001) (“By some estimates, even in the most industrialized countries the total hours spent on unpaid household work—much of it associated with child-rearing—amount to at least half of the hours of paid work in the market.”). See generally SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN: REVIVING THE ROLE OF FAMILY IN THE POST-INDUSTRIAL AGE 1–7* (1997) (characterizing the family as the primary mover of economic growth and child-rearing parents as large producers of national wealth).

9. See James J. Heckman & Lance Lochner, *Rethinking Education and Training Policy: Understanding the Sources of Skill Formation in a Modern Economy*, in *SECURING*, *supra* note 3, at 47, 48–49.

10. See *infra* notes 281–87 and accompanying text.

11. See, e.g., EILEEN APPELBAUM & ROSEMARY BATT, *THE NEW AMERICAN WORKPLACE: TRANSFORMING WORK SYSTEMS IN THE UNITED STATES* 21–22 (1994); PETER CAPPELLI, LAURIE

result, employees bear more responsibility for their skill development; work longer hours; and encounter more intensified workplace demands, less job security, and stagnating wages.¹²

In times of economic upheaval, three institutions have traditionally aided workers in adapting to new labor market conditions: the state, unions, and the family.¹³ These so-called shock absorbers¹⁴ serve to buffer the individual from economic turmoil. Unfortunately, the processes of globalization have diminished the effectiveness of each of these support systems in helping workers transition to the new economy. First, the nation state's ability to regulate is severely hampered in the global economy because corporations engage in regulatory arbitrage in a world without boundaries.¹⁵ Second, union membership has declined to less than ten percent of the workforce because unions cannot prevent capital flight to countries with cheaper labor.¹⁶ This leaves the family as the most viable social institution to maintain social cohesion by cushioning the economic blows of downsizing and enabling workers to live with insecurity.¹⁷ In the midst of severe change, families have served as the shelter from economic storms by providing psychological support, social stability, and financial security.¹⁸

BASSI, HARRY KATZ, DAVID KNOKE, PAUL OSTERMAN & MICHAEL USEEM, CHANGE AT WORK 6–8 (1997); PAUL OSTERMAN, SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT 3 (1999); PAUL OSTERMAN, THOMAS A. KOCHAN, RICHARD LOCKE & MICHAEL J. PIORE, WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET 35–44 (2001); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 554–55 (2001).

12. See *infra* text accompanying notes 148–53.

13. CARNOY, *supra* note 2, at 2, 106–07.

14. See Chris Benner, *Shock Absorbers in the Flexible Economy: Dealing with the Rise of Contingent Employment in Silicon Valley* (May 1996) (unpublished manuscript, on file with author) (using the term “shock absorbers” to refer to unions, community organizations, and social policies that help workers adapt to new economies).

15. See WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 17 (1997) (“[T]he essence of what is forming now is an economic system of interdependence designed to ignore the prerogatives of nations . . .”).

16. See, e.g., Charles B. Craver, *The American Worker: Junior Partner in Success and Senior Partner in Failure*, 37 U.S.F. L. REV. 587, 590 (2003).

17. See, e.g., Judith Maxwell, *Resolving Time Deficits Key to Coping in the Risk Society*, OTTAWA CITIZEN, Dec. 10, 1996, at A13, available at http://www.cprn.com/documents/28673_en.pdf. See also Judith Maxwell, *Reconnecting Communities: Two Scenarios for the 21st Century*, PHILANTHROPIST, Sept. 1998, at 17 (finding that the family is a major institution in the relief of economic stress).

18. See Elizabeth B. Silva & Carol Smart, *The ‘New’ Practices and Politics of Family Life*, in *THE NEW FAMILY?* 1, 2–3 (Elizabeth B. Silva & Carol Smart eds., 1999) (explaining that families give support and stability outside and above economic restructuring); Judith Maxwell, *Home Is Where the Heart Is* 4, at http://www.cprn.org/documents/19567_en.pdf (Mar. 18, 2002) (“[I]f families are over-

Occurring simultaneously with this economic transition, the women's movement has spurred a social revolution as women have rejected their traditional role in providing domestic services and have entered the labor force on a larger scale.¹⁹ As a result, in less than the span of a human lifetime, women's roles have changed more than in all of history. Although this shift in the gender composition of the labor force evolved independently of globalization, these two phenomena intersect and interact.²⁰ The fact that we have major economic and technological upheaval at the precise historical moment that one-half of the human race is entering the public realm hastens and intensifies the forces reshaping the family.²¹ As a result, the husband-breadwinner, wife-homemaker family that educated prior generations of workers is no longer the norm. Our institutions have not adjusted to accommodate this change—endangering the renewal and expansion of the nation's human capital base.

In trying to solve these problems, it is not possible to turn back the clock to a past of certainty and uniformity. The job-for-life model of the industrial economy and the spouse-for-life norm of the traditional nuclear family are gone.²² Specifically, downsizing, divorce, and women in the workforce are permanent aspects of the new economic order.²³ Thus, we must accept the current realities and begin to think about how to restructure work and family life to accommodate the social and economic changes of our time. Most of the current reform efforts, however, focus on neatly defined, discrete issues within a single discipline. The results are piecemeal solutions designed for a much slower and more stable society.²⁴ It is

stretched by their work arrangements, . . . they may find it impossible to create a home that supports human development. In short, we may be poisoning our own future.”).

19. See *infra* notes 158–62 and accompanying text.

20. See, e.g., ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* 104–05 (Mark Ritter trans., Sage Publ'ns 1992) (1986).

21. *Id.*

22. See ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 91 (1998) (“We should be clear first of all how implausible the idea of returning to the traditional family is.”); Stephanie Coontz, *Nostalgia as Ideology*, *AM. PROSPECT*, Apr. 8, 2002, <http://www.prospect.org/print-friendly/print/V13/7/coontz-s.html> (explaining that marriage is no longer the main source of stability in family life). See generally ARLENE SKOLNICK, *EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY* (1991) (explaining that in any period of social transformation, people look at the recent past with nostalgia and seek to retain old forms before developing new ones).

23. See FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER* 41, 95, 105 (1999).

24. See, e.g., Gross, *supra* note 1, at 195 (“Understanding the structural forces threatening job security, on which requests for all other measures directed at work and family depend, moves policy considerations from piecemeal requests—this or that corporation ‘fix-it.’”); *id.* at 199 (“Piecemeal ‘fix-

necessary to gain a panoramic view of the upheavals in the institutions of family, work, and corporations to evaluate how shifts in one area impact change in another. By keeping the well-being of children at the center of the inquiry, we can begin to evaluate these connections to formulate broader policy adjustments that ensure the renewal of the United States' human capital base during these turbulent times.

This Article encourages corporate governance scholars to ask a new set of questions based on this understanding.²⁵ The field of study concerning employees and corporate governance needs to focus on three issues.²⁶ First, the prevailing ideas about the employee's role in the American corporation seem to assume that the old patterns of stable employment still exist or can be reinstated.²⁷ Given that workers do not have long-term attachments to firms, it is necessary to reevaluate the employee's stake in the corporation. That is, we need to explore the new

its' do little to empower working families—to enable them to erect institutions able to counter the influence of concentrated capitalist corporate dominance over their lives.”).

25. Much of my scholarship over the past fifteen years has focused on the broad field of “employees and corporate governance.” See generally Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993) [hereinafter *Human Capital*] (outlining a new model of corporate governance for the United States that includes workers); Marleen O'Connor, *Labor's Role in the Shareholder Revolution*, in WORKING CAPITAL: THE POWER OF LABOR'S PENSIONS 67 (Archon Fung et al. eds., 2001) [hereinafter WORKING CAPITAL] (reviewing labor's role in the shareholder revolution); Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345 (1997) (reviewing the political economy surrounding unions' use of pension power); Marleen A. O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, in PROGRESSIVE CORPORATE LAW 219 (Lawrence E. Mitchell ed., 1995) (examining why fiduciary law is a better alternative than contract law to aid displaced workers); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991) (proposing new laws to help long-term employees who face job loss); Marleen A. O'Connor, *Rethinking Corporate Financial Disclosure of Human Resource Values for the Knowledge-Based Economy*, 1 U. PA. J. LAB. & EMP. L. 527 (1998) (surveying the practices of Fortune 500 companies in disclosing human capital values); Marleen A. O'Connor, *A Socio-Economic Approach to the Japanese Corporate Governance Structure*, 50 WASH. & LEE L. REV. 1529 (1993) (discussing labor's role in the Japanese corporate governance structure).

26. See Deborah A. DeMott, *Fluid Relationships in Transitional Times: A Comment on Employees and Corporate Governance*, 22 COMP. LAB. L. & POL'Y J. 149, 155–56 (2000) (noting that current thinking does not incorporate unstable employment and women in workforce). For a discussion of the role of human capital in the corporation, see generally THE NEW RELATIONSHIP: HUMAN CAPITAL IN THE AMERICAN CORPORATION (Margaret M. Blair & Thomas A. Kochan eds., 2000) [hereinafter THE NEW RELATIONSHIP] (attempting to explain human capital's role in the changing corporation); Janis Sarra, *Corporate Governance Reform: Recognition of Workers' Equitable Investments in the Firm*, 32 CAN. BUS. L.J. 384 (1999).

27. See *Human Capital*, supra note 25, at 907 (“Questions regarding the employees' role in the corporate structure are not appropriate if the employment relationship merely consists of workers exchanging a certain amount of labor for specific market-determined wages.”).

system of employment instability in order to alleviate the hardships imposed on working families. Second, the academic literature on employees and corporate governance does not account for women's workforce participation. In other words, the model of the worker used is a male.²⁸ If we look through the eyes of women workers, we can discover new issues and viewpoints that have not been previously explored in the corporate governance literature.²⁹ Third, most research on labor market flexibility uses the firm as the basic unit of analysis. Yet, complex networks of organizing production blur the boundaries between firms and change the nature of the employment relationship.³⁰ Thus, an understanding of how these networks operate can aid our knowledge of the employee's role in this new system.

I assert that corporations face a fundamental long-term paradox in undermining the production of the future human capital on which success depends.³¹ Specifically, changes in corporate governance focus on promoting short-term stock prices, which in turn produces volatility in labor markets. Firms need flexible labor markets to compete in global markets, yet the new employment relationship adds pressures on working families that may undermine the reproduction of human capital. Considering the realities of corporate power³² and our history of limited government, this Article maintains that corporations have a responsibility

28. See, e.g., Joanne Conaghan, *The Invisibility of Women in Labour Law: Gender-Neutrality in Model-Building*, 14 INT'L J. SOC. L. 377, 377-78 (1986) (explaining that labor law reflects the career patterns of men, not women).

29. See CYNTHIA FUCHS EPSTEIN, CARROLL SERON, BONNIE OGLENSKY & ROBERT SAUTE, *THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER* 5-6 (1999) (noting that lifestyle issues have been placed on the agenda by women).

30. See Kathleen Barker & Kathleen Christensen, *Controversy and Challenges Raised by Contingent Work Arrangements*, in *CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION* 1, 5-7 (Kathleen Barker & Kathleen Christensen eds., 1998) (discussing how temporary workers have relationships with the temporary agency and the client firm). For path-breaking articles examining the virtual corporation, see generally Claire Moore Dickerson, *Corporations as Cities: Targeting the Nodes in Overlapping Networks*, 29 IOWA J. CORP. LAW 533 (2004) (analyzing the similarities between networks in cities and in multinational corporations); Claire Moore Dickerson, *Spinning Out of Control: The Virtual Organization and Conflicting Governance Vectors*, 59 U. PITT. L. REV. 759 (1998). See also Susan Helper, John Paul MacDuffie & Charles F. Sabel, *The Boundaries of the Firm as a Design Problem*, in *THE SLOAN PROJECT ON CORP. GOVERNANCE AT COLUMBIA LAW SCH., CORPORATE GOVERNANCE TODAY* 157 (1998) [hereinafter *SLOAN PROJECT ON CORP. GOVERNANCE*].

31. See generally DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976) (explaining that capitalism undermines the social culture that it needs to prosper).

32. See LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* 2 (2001) (discussing negative corporate influence); Lawrence E. Mitchell, *Preface* to *PROGRESSIVE CORPORATE LAW*, *supra* note 25, at xiii ("The very power that corporations have over our lives means that, intentionally or not, they profoundly affect our lives.").

to invest in the necessary skills that our children and grandchildren need to succeed as an essential part of the nation's infrastructure.³³

I believe that it is the appropriate time to revisit the perennial question of the corporation's role in American society in light of the synchronicity of two events: September 11, 2001 and Enron.³⁴ September 11 caused many of us to stop and ask whether we are living our lives in a manner that corresponds with our priorities; for many people this means spending more time with their families, especially their children.³⁵ Often, however, the need to make a living and the constant fear of job loss causes us to lose sight of these priorities and take our families for granted. A few weeks later, the Enron scandal began and developed into a "perfect storm" metaphor for the numerous corporate debacles that followed.³⁶ Enron raises profound questions about the legitimacy of the American model of corporate governance. Rather than creating the paper profits and virtual wealth that caused the corporate meltdown of Enron,³⁷ we should focus on true productivity in terms of promoting human capital development. Given the combination of September 11 and the Enron scandals, I have hope³⁸ that corporate governance scholars will begin to question how we can create corporate cultures that foster human capital development.

33. For other scholarship suggesting that corporations take on the roles previously provided by government, see GIDDENS, *supra* note 22, at 125 (arguing that private firms need to take a larger role in activities that governments once provided); Ellen Galinsky & James T. Bond, *The Role of Employers in Addressing the Needs of Employed Parents*, J. OF SOC. ISSUES, Fall 1996, at 111, 132-34 (arguing that employers must take on efforts to address family and personal needs).

34. For other corporate governance scholars looking at these two events, see Kent Greenfield, *September 11th and the End of History for Corporate Law*, 76 TUL. L. REV. 1409 (2002); Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001*, 76 TUL. L. REV. 1579 (2002).

35. See, e.g., SYLVIA ANN HEWLETT, CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN 26 (2002) ("In a post-September 11 world, we may be able to better appreciate how much we need our children."); Judith Maxwell, *What Path Will We Choose for 21st-Century Canada?*, TORONTO STAR, Jan. 5, 2002, at A17, available at http://www.cprn.org/documents/8775_en.pdf.

36. Many commentators have used this phrase to refer to the proliferation of corporate scandals. See, e.g., John A. Byrne, Louis Lavelle, Nanette Byrnes, Marcia Vickers & Amy Borrus, *How to Fix Corporate Governance*, BUS. WK., May 6, 2002, at 68.

37. See William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1283 (2002) (noting that Enron's "earnings numbers were soft and [its] liabilities understated"); Kahn, *supra* note 34, at 1588-89 (noting that Enron's implosion was triggered by financial misstatements and omissions, hidden liabilities, and "self-dealing transactions").

38. For an insightful account of hope in negotiations, see Jennifer Gerarda Brown, *The Role of Hope in Negotiation*, 44 UCLA L. REV. 1661 (1997) (discussing the different roles of hope in bargaining).

In evaluating the political feasibility of this proposal, I also have hope because parents have started to form a grass roots political movement.³⁹ This Article is also written so that these advocates can learn how to use the tools of corporate governance to achieve their policy goals.⁴⁰ Leading work-family scholars identify the corporation as the institution that impedes progress. Specifically, these scholars assert that shareholder wealth maximization should encompass care for families.⁴¹

Recognizing the importance of the corporation's role, work-family advocates are turning to business metaphors to get their messages across. They suggest that we need to invest in parenting because we all reap the rewards provided by the next generation.⁴² This metaphor is appropriate in many ways. Specifically, many American working families own stock indirectly through their pension plans and mutual funds.⁴³ These so-called institutional investors wield significant power over corporate management.⁴⁴ The institutional shareholder movement has grudgingly prodded major companies to take responsibility in previously uncharted territory, providing a model for others to follow. Rather than promoting short-term stock prices, these institutional investors should be concerned

39. For more information about a possible parenting movement, see Raymond Seidelman, *The Paths From Here*, in TAKING PARENTING PUBLIC: THE CASE FOR A NEW SOCIAL MOVEMENT 209, 210–17 (Sylvia Ann Hewlett et al. eds., 2002) [hereinafter PARENTING]; National Parenting Association's website, at <http://www.parentsunite.org/CFparentsunite/index2.cfm> (last visited Aug. 27, 2004). See also *infra* text accompanying notes 474–87.

40. Many scholars focus on how social policy in the United States needs to change to take into account the needs of working families in the United States. See generally ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (2001) (evaluating the economic opportunity cost of motherhood); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2001) (looking at the economic role of the family); MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* (1999) (promoting better childcare); DANA MACK, *THE ASSAULT ON PARENTHOOD: HOW OUR CULTURE UNDERMINES THE FAMILY* (1997) (discussing how parents in the United States are at a disadvantage compared to parents in other advanced economies); THEDA SKOCPOL, *THE MISSING MIDDLE: WORKING FAMILIES AND THE FUTURE OF AMERICAN SOCIAL POLICY* (2000) (discussing how politicians target the rich and poor and calling for broad-based social change to help working families); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) (discussing the need for gender equality at home and at work); Symposium, *Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture*, 8 AM. U. J. GENDER SOC. POL'Y & L. 1 (2000) (discussing the need for gender equality at home and at work); Symposium, *The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389 (2001) (same).

41. See, e.g., Gross, *supra* note 1, at 192–93 (emphasizing the need to evaluate the relationship between “market globalization and capital flight” and apply it to work-family research).

42. See Ruth A. Wooden, *Taking Parenting Public*, in PARENTING, *supra* note 39, at 275, 282.

43. See Chairman Harvey L. Pitt, Remarks Before the Council of Institutional Investors' Fall Conference, at <http://www.sec.gov/news/speech/spch582.htm> (Sept. 23, 2002) (describing institutional investors as “major shareholders” that “play a vital role in monitoring the stewardship of companies”).

44. See *infra* text accompanying note 440.

with the long-term development of human capital.⁴⁵ Viewed in this light, institutional investors need to comprehend the real-world situation of the vast bulk of American workers who live by wages and struggle with the everyday stresses that families bear. In turn, understanding the practical workings of the institutional shareholder movement could “give mothers and fathers real leverage in the corridors of [corporate] power.”⁴⁶ Thus, I do not mean to replace other methods of achieving social change. Rather, I present a plan on how to use the power of institutional shareholders as part of a comprehensive strategy that includes lawsuits for employment discrimination against parents,⁴⁷ political protests and demonstrations,⁴⁸ and pushes for legislation⁴⁹ to redefine the corporation’s role in shifting patterns of family and work life.

Part II sets the stage for this Article by providing background. I start by acknowledging that much of my thinking has been influenced by my own experience as the mother of two children in a dual-earner marriage. This Part also defines the terms “care,” “family,” and “gender analysis” in analyzing this complex subject. Finally, this Part explains the scope of this Article.

Part III provides a historical overview of how the family has had essential and intricate relationships with economic growth during the agricultural economy, industrial society, and knowledge-based economy. Distinct types of family structures and family life evolved to support different modes of economic production. In turn, conceptions of childhood also adjusted to prepare the future workforce for new methods of economic production. This historical perspective provides much insight concerning

45. See *infra* text accompanying notes 442–45.

46. Sylvia Ann Hewlett & Cornel West, *Preface* to PARENTING, *supra* note 39, at xv, xx. See generally SYLVIA ANN HEWLETT & CORNEL WEST, *THE WAR AGAINST PARENTS: WHAT WE CAN DO FOR AMERICA’S BELEAGUERED MOMS AND DADS* (1998) (discussing how American parents are at a disadvantage compared to parents in other advanced economies).

47. Parents are beginning to sue for employment discrimination based on their status as parents. See Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 2–3 (2003) (stating that roughly twenty cases and ten different legal theories have provided potential recovery for workplace discrimination against parents based on state common law and federal and state antidiscrimination and labor statutes).

48. Someday, I hope to see a “Million Mom March” for work-family benefits. For more information on a mothers’ organization for gun control safety, see the Million Mom March Website, at <http://www.millionmommarch.com> (last visited Aug. 27, 2004) [hereinafter Million Mom March]. I took my daughter Sarah, then five years old, to march on Capitol Hill for this event.

49. California has enacted a six-week paid family leave. S. 1661, 2002 Leg., Reg. Sess. (Ca. 2002). See also *California Paid Family Leave Law Is First in the Nation*, at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=316> (Oct. 3, 2002) (explaining the new law and how it makes family leave more friendly).

the relationship between economic production in the knowledge-based economy and the work of “social reproduction,” that is, caring for children.

Part IV asks the fundamental question: what is happening to America’s children? This Part discusses the effects of poverty, inadequate childcare, longer working hours, and divorce on the well-being of children. Although this Part presents disturbing trends in the United States’ renewal of human capital, traditional economic measures such as gross domestic product (“GDP”) do not account for these factors. This Part considers how organizations around the world are developing new indicators of sustainable economic development that evaluate the well-being of children as a critical aspect of future economic progress.

Part V explores how other advanced economies have different relationships among family, work, corporation, and government. This Part reveals that the United States has made some of the most advanced moves toward flexible labor markets, divorce, and women’s workforce participation—with the lowest levels of governmental support for families. Viewed in light of children’s human capital development, these trends pose serious questions about the sustainability of the United States’ economic position in the global economy.

Part VI discusses how to harness the power of the pension funds of American working families to promote the well-being of children through the institutional shareholder movement. Given that circumstances differ among corporate cultures, this Part suggests that institutional shareholders encourage firms to use outside intermediaries that can mold work-family policies to suit the needs of individual firms. Through a data collection process that benchmarks progress and publicizes the best practices, this approach can facilitate experimentation with different methods to support working families in fostering children’s human capital development during these turbulent times.

II. OVERVIEW OF THE CURRENT APPROACH TO CORPORATE GOVERNANCE AND CHILDREN

A. VIEWING INDIVIDUAL STRUGGLES WITHIN THE BROADER SOCIOECONOMIC CONTEXT

Let me introduce myself.⁵⁰ I am the mother of two children, Sarah and Alison, ages nine and eight. My husband is an attorney whose job does not allow as much “flexibility” as mine. Born in the early sixties, I was raised on the notion that women were the same as men and that I could have it all—a healthy career and a family life. I received tenure before I was thirty and before I had children. I smugly thought that most women have children, so it must not be that hard. When my first child was born, I felt that I had crashed into a brick wall. I have always considered myself to be organized, focused, and hard-working, but these traits were kicked into overdrive in trying to balance work and family. I found myself running as fast as I could, but no matter how organized I was, I still felt I was not doing a good job at home or at work. Specifically, I wanted to bestow lavish amounts of time and attention on my offspring; at the same time, I wanted to pursue my “calling” by undertaking the very time-consuming task of writing more law review articles.

Although I was aware that external factors affected my life, at first I sought answers from within. I doubled my endeavors to become better organized, delegate chores, and multitask. Of course such efforts failed,

50. In explaining my approach to this Article, I share how my personal experiences brought me to explore the work-family issue from a corporate governance perspective for three reasons. First, I disclose upfront that the choices I made in this Article are influenced by my own situation and background. Although I will never know what it is like to walk in another person’s shoes, I strive to respect what Joan Williams calls “other people’s truths.” WILLIAMS, *supra* note 40, at 244 (“[T]ruths are made by human hands. . . . [T]he philosopher’s role is not to deduce truths through logic but to tease out the ‘precious values embedded in our traditions.’” (quoting JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 26 (Beacon Press 1948) (1920))).

Second, I use my own story to make a critical observation—the turmoil of these socioeconomic changes are played out in individual and family conflict. Thus, questions about corporate governance are not just about the relationship between managers and shareholders. Rather, corporate governance influences the nature of the employment relationship, which, in turn, affects the quality of our private, everyday lives. The fact that corporate governance impacts the concerns of working American families is not often acknowledged in the bottom line world of corporate law.

Finally, I think personal stories are important to bring out the human experience behind the statistics for work-family issues. Numbers fail to reveal the harshness of the individual choices made in a world where gender norms are changing and workplace pressures are mounting, while at the same time institutional reforms to support these new forms of work and family life are lagging far behind. We can become desensitized to numbers. A single story, however, may create images that ring true and can lead us to empathize with others’ experiences.

producing anger, guilt, and sadness that I directed mostly inward. I had profound “working mother guilt” and envied the stay-at-home mothers who could spend long afternoons in the park playing with their toddlers. Occasionally, my guilt was compounded when I aimed these negative feelings toward family members—blaming my spouse or children. In addition, I found myself resenting my male colleagues who had no idea of what it was like to go home to a “second shift”⁵¹ of endless meal preparation, homework, and laundry. After a few years of a frenzied life on a never-ending treadmill, I felt ready to collapse. My depression was magnified because I am a well-educated, elite, white woman with tenure married to a progressive spouse. I wondered how a high-school-educated, single, African American woman with children could possibly cope with much greater demands.

I decided to take a more scholarly approach to rethink my life. Thus, I began looking at the work-family literature to solve personal issues, not to write an academic paper about corporate governance.⁵² I had several “a-ha” moments reading Ulrich Beck, Martin Carnoy, Martha Fineman, and Joan Williams. These scholars emphasize that rather than viewing these matters as only private struggles, we need to understand them through a broader social-economic lens. Specifically, the historic transformations taking place in markets and families are reflected in disputes that erupt in the households of ordinary people on a daily basis. Yet, this self-directed focus is largely unwarranted.⁵³ I do not mean to suggest that we should use the mantra “It’s society’s fault” as a scapegoat to avoid parental responsibility and accountability. Given the prevalence of these issues, we need to acknowledge that what appears as a private matter also has a socioeconomic side. Private turmoil is aggravated because the United States, unlike other advanced economies, lacks institutional supports for the new systems of work and family life.⁵⁴

51. See ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (referring to the job that working parents do at home before and after work as the “second shift”).

52. This literature has helped me see ways to navigate the work-family balance terrain more skillfully. See generally PETER MEIKSINS & PETER WHALLEY, *PUTTING WORK IN ITS PLACE: A QUIET REVOLUTION* (2002) (discussing individual strategies to attain a balance between work and family).

53. According to Alvin Toffler, we are the final generation of an old civilization and the first generation of a new one, and . . . much of our personal confusion, anguish, and disorientation can be traced directly to the conflict within us, and within our political institutions, between the dying Second Wave civilization and the emergent Third Wave civilization that is thundering in to take its place.

TOFFLER, *supra* note 2, at 28.

54. See ULRICH BECK & ELISABETH BECK-GERNSHEIM, *THE NORMAL CHAOS OF LOVE* 28 (Mark Ritter & Jane Wiebel trans., 1995).

The crisis in the family is also exacerbated because psychology encourages family members to blame each other.⁵⁵ Promoting a different approach, Mary Pipher asserts that when the enemy is a clearly identifiable event like the Great Depression or a hurricane, families pull together to weather the storm; “[w]hen the external enemy is confusing, the family doesn’t unite but rather blames itself, and falls apart from within.”⁵⁶ She concludes that

[t]here is a lesson for modern families in this business of external vs. internal enemies. Families fail when they attack each other from within. Families do better if they can unite against outside forces. We are all immigrants today living in a culture whose stories are not our stories and whose values are not our values. Families are stronger when they acknowledge this and unite to resist the messages and influences that would harm them.⁵⁷

Thus, Pipher emphasizes that society needs to send a different message to working families—socioeconomic changes are the external enemy.⁵⁸ Pipher recognizes that this insight leads to a political perspective: families need to pull together and direct our frustrations outward to seek broad institutional change.⁵⁹

Reading this literature from the viewpoint of a scholar who has spent fifteen years writing about how to make corporations more responsible toward workers,⁶⁰ I realized that the solution was not to “fix” me, but to fix our system of corporate governance. I began to see that my knowledge as a corporate governance scholar could be used to create a more balanced economy. Part VI recommends how to take part in this effort to push for change. But I am getting ahead of myself. Before we can address such questions, I need to further explain the choices made in translating the outlook gained from my personal experiences into a broader view of the American corporation’s role in our changing patterns of family and work life.

55. See MARY PIPHER, *THE SHELTER OF EACH OTHER: REBUILDING OUR FAMILIES* 79 (1996).

56. *Id.*

57. *Id.* at 81.

58. See *id.* at 79.

59. See *id.* at 81. See also GIDDENS, *supra* note 22, at 98 (“Strong family ties can be an effective source of civic cohesion only if they look outwards as well as inwards—this is what I mean by the socially integrated family. Family relations are part of the wider fabric of social life.”).

60. See *supra* note 25.

B. DEFINITION OF BASIC TERMS

1. “Care”

This Article focuses on children, but recognizes that caretaking of other family members is also important. As such, the term “care” encompasses not only raising children, but also includes caring for elderly, ill, or otherwise dependent family members.⁶¹ Indeed, many parents of the “sandwich generation” are faced with elder care and childcare at the same time. I am sympathetic to arguments that family-friendly policies operate to the detriment of workers without children.⁶² But I believe that such caring work is valuable because it is what makes us human; we need more time in this hectic world to focus on such issues. I want to emphasize that caring for children deserves special attention for two reasons. First, caring for children is crucial for sustaining the economy in the future. Second, the most intensive years of child raising are critical for human capital development. These years, however, often occur during a period of the life cycle when tensions between the obligations of work and child rearing are particularly intense—the so-called crunch years.

2. “Family”

Part III explains how family structure has varied over time to meet the different periods of economy. The definition of the family used in this Article includes the new types of families that have arisen—those beyond the traditional nuclear, heterosexual family. I seek to include many kinds of alternative families such as single-parent households, cohabiting couples with children, and gay and lesbian couples with children. Rather than focusing on form, I believe that it is more useful to examine the roles that the diverse types of families fulfill in raising the next generation.⁶³ In this

61. See Martha M. Ertman, *Changing the Meaning of Motherhood*, 76 CHI.-KENT L. REV. 1733, 1737 (2001).

62. I recognize that workers without children have a legitimate objection when employers force them to take on the workload of working parents. Elinor Burkett argues that family-friendly policies shift the burden of parenthood off parents and onto the shoulders of their childless friends, coworkers, and peers. See ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* 1–21 (2000). See also Lisa Belkin, *Your Kids Are Their Problem*, N.Y. TIMES, July 23, 2000, § 6 (Magazine), at 30 (criticizing parenting leaves for punishing child-free workers). I assert, however, that workers without children should turn the spotlight on their employers, rather than on working parents, to seek relief from overwork.

63. See Silva & Smart, *supra* note 18, at 7 (asserting consensus that “diverse patterns of family life exist and that notwithstanding this, people still define particular aspects of their lives as ‘family life’ and feel committed to families”).

context of fluid and changing definitions of families, a basic core remains that emphasizes sharing of resources, caring, responsibilities, and obligation.⁶⁴

3. "Gender Analysis"

Gender refers to socially constructed differences⁶⁵ about what it means to be masculine or feminine.⁶⁶ Joan Williams talks about gender pressure as "a force field exerting a steady pull in the direction of conventional behavior, enforced by sanctions."⁶⁷ Gender analysis emphasizes that eighty-five percent of women are mothers⁶⁸ and young girls are socialized to be mothers.⁶⁹ At the outset, it is important to emphasize that men have gender too. Thus, this Article examines literature in the new field of "masculinities" which directs us to consider how gender constrains men in their role as breadwinners in the new economy and as

64. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 11–65 (1995) (discussing the abandonment of a focus on the traditional family to a focus on caretaking).

65. Sociobiologists address the question of whether gender differences are genetic or socially constructed. See, e.g., Francis Fukuyama, *Is It All in the Genes?*, COMMENTARY, Sept. 1997, at 30; Francis Fukuyama, *Women and the Evolution of World Politics*, FOREIGN AFFAIRS, Sept./Oct. 1998, at 24, 30. One notion is that females invest more in their children, and because of this, female psychology has evolved to suit a caretaking position. Francis Fukuyama states that "hard-wired" differences, or those stemming from genetics, are not endlessly malleable. Fukuyama, *Is It All in the Genes?*, *supra*, at 31. Resocializing men to be more like women may run into limits. If men continue to dominate for a long time, cooperative tendencies will be overcome by aggressive male tendencies. See *id.* at 34. That is, attitudes toward power are not wholly the products of a patriarchal culture, they are rooted in biology. See *id.* In contrast, I believe we can overcome our Darwinian past because "we really do have the ability to override our genetic heritage." JANE GOODALL, *REASON FOR HOPE: A SPIRITUAL JOURNEY* 144 (1999).

66. Central to feminist analysis is the differentiation of sex from gender. Gender denotes the socially constructed categories of woman and man, feminine and masculine, while sex denotes the biologically determined categories of female and male. For a further discussion of the differences between sex and gender, see Mary Ann C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 9–18 (1995).

67. WILLIAMS, *supra* note 40, at 246. Williams also discusses how social cognition theory shows how traditional stereotypes affect both men and women in their evaluations of women's job performances. For example, experiments using the same résumé but changing the gender of the applicant yielded more favorable responses, from both men and women, for the man's résumé over the woman's. See *id.* at 248.

68. Williams, *supra* note 1, at 923.

69. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978) (discussing how girls' upbringings are influenced by an emphasis on preparation for motherhood). Mothers' work has been constructed as women's work and many women are socialized to do it. MARJORIE L. DEVAULT, *FEEDING THE FAMILY: THE SOCIAL ORGANIZATION OF FAMILY AS GENDERED WORK* (1991).

fathers in changing patterns of family life.⁷⁰ This field is extremely important because a one-sided view of women's gender restrains the use of gender as an analytical tool.⁷¹ Specifically, changing gender patterns for men is one of the most critical factors not only for work and family life, but also for conceptions of their role in corporate society.⁷² Indeed, under one view, men are hurt even more by gender roles because they have a smaller range of acceptable gender performance than women.⁷³

In discussing gender roles, I do not mean to imply that all men and women conform to these stereotypes. Yet many scholars acknowledge, and this Article employs the notion, that many women experience a similar essence of femininity and many men share some essence of masculinity.⁷⁴ Of course, gender roles are malleable over time and traditional gender roles

70. For other commentary on the changing norms of masculinity, see SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* (1999); MICHAEL S. KIMMEL, *THE GENDERED SOCIETY READER* (2000); LIONEL TIGER, *THE DECLINE OF MALES* (1999). For literature on the changing notions of fatherhood, see DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995); SUZANNE BRAUN LEVINE, *FATHER COURAGE: WHAT HAPPENS WHEN MEN PUT FAMILY FIRST* (2000); JAMES A. LEVINE & TODD L. PITTINSKY, *WORKING FATHERS: NEW STRATEGIES FOR BALANCING WORK AND FAMILY* (1997); Berit Brandth & Elin Kvande, *Masculinity and Child Care: The Reconstruction of Fathering*, 46 SOC. REV. 293 (1998); Lynne M. Casper & Martin O'Connell, *Work, Income, the Economy, and Married Fathers as Child-Care Providers*, 35 DEMOGRAPHY 243 (1998); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994); William Marsiglio, Paul Amato, Randal D. Day & Michael E. Lamb, *Scholarship on Fatherhood in the 1990s and Beyond*, 62 J. MARRIAGE & FAM. 1173 (2000); Joseph H. Pleck, *Are "Family-Supportive" Employer Policies Relevant to Men?*, in *MEN, WORK, AND FAMILY* 217 (Jane C. Hood ed., 1993); Susan Chira, *War Over Role of American Fathers*, N.Y. TIMES, June 19, 1994, at A22; Tamar Lewin, *Creating Fathers out of Men with Children*, N.Y. TIMES, June 18, 1995, at A1; Sandra L. Hofferth, *Race/Ethnic Differences in Father Involvement in Two-Parent Families: Culture, Context, or Economy* (Inst. for Soc. Research, Univ. of Mich., 2001) (unpublished manuscript, on file with author). Several organizations exist to encourage fathers to take a more active role in parenting such as the National Fatherhood Initiative, the Institute for Responsible Fatherhood, and Promise Keepers. For an interesting paper looking at work-family issues focusing on fathers and single parents, see Nancy Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work-Family Policies* 3 (2004) (unpublished manuscript, on file with author).

71. Focusing on the gender constraints on men is important for four reasons. First, opening up the discussion over gender roles to include men may make work-family perspectives more appealing to a wider audience. Second, this focus emphasizes the important role that men need to play as fathers in the care work involved in families. Third, this literature discusses how men tend to overidentify with work, which leaves men feeling alienated and women bearing the greater burden of caring for families. Finally, this analysis highlights that men suffer even more than women in the wage market when men perform caring work in the family. For these reasons, a focus on how gender affects men is necessary to achieve the goal of greater gender equity at home and at work.

72. HOCHSCHILD & MACHUNG, *supra* note 51, at 11–12.

73. WILLIAMS, *supra* note 40, at 245–46.

74. Whether this results from a person's respective reproductive functions or the socially constructed norms considered appropriate for such functions is not a question that needs to be addressed in this Article.

have undergone profound change in the last thirty years. At the same time, such roles are slow to change; economic and biological influences lead to the continuation of traditional gender roles.⁷⁵ As a result, today individual and societal attitudes concerning appropriate gender roles are complex and contradictory.

Scholars have formulated new theories of the masculine dimensions of public life and the feminine aspects of private life that are useful in analyzing the corporation.⁷⁶ These theories highlight the masculine meaning and bias that imbued and supported gender-neutral understandings of reason, morality, cognitive development, and progress. Much of the recent discussion on the topic of the differences between women and men is attributed to the “relational-voice” proponents, starting with Carol Gilligan in *In a Different Voice*.⁷⁷ This work influenced gender theory because it suggested that models of moral development did not account for women’s distinct patterns of moral reasoning. Gilligan found that women place a primary emphasis on care, connection, and taking responsibility for the needs of others.⁷⁸ Men, on the other hand, emphasize individual values such as rights. Using this line of research, relational scholars argue that the law reflects male values. By bringing women’s values and experiences to the law, relational scholars argue for the creation of a legal system that supports the values of connection, responsibility, care, and affirmative governmental obligation.⁷⁹ Using the authority of the “moral mother,” however, may reinforce traditional gender roles.⁸⁰ We need to change the societal view that the only good mother is the saintly figure who performs the moral, caring work of society at the expense of her own equality and

75. WILLIAMS, *supra* note 40, at 245–46.

76. Robin West has identified “essential” differences between women and men, rooted not only in culture, but also in their material or biological experiences. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2–3 (1988). She argues that men are fundamentally separate selves, while women are essentially “connected” to other human life. *Id.* Thus, law is “essentially and irretrievably masculine” in its model and fails to reflect women’s lives and experiences. *Id.* at 2. In contrast to such masculine modes of understanding the world, West identifies the centrality of relationships to women’s ways of living. This “relational” feminist thought emphasizes care and relationships rather than masculine norms of rights, justice, and autonomy. *See id.* at 28.

77. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

78. *See id.* at 17–19.

79. *See id.* For these reasons, relational scholars have proposed looking to the mother-child relationship as a model for other forms of relationships. *See, e.g.,* Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989).

80. A critic of the relational position, Catharine MacKinnon tells her reader to “take your foot off our necks, then we will hear in what tongue women speak.” CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 45 (1987).

aspirations. Robin West emphasizes that fear turns women into self-sacrificing, giving objects.⁸¹ Recognizing this danger, this Article seeks to avoid associating women with care in a manner where care is not a virtue, but a deficit.

Using gender as a lens brings many issues to the fore,⁸² and this Article focuses on how work patterns create painful conflicts between work and personal life for both women and men. I conclude that a new “gender contract”⁸³ will be an essential part of the dialogue developing a vision for making flexible labor markets sustainable. Thus, the so-called gender wars will involve a long conflict that will impact economic development and, in turn, will be influenced by such economic development.⁸⁴

C. SCOPE OF THIS ARTICLE

Given that dramatic changes in the economy are occurring simultaneously in the areas of family, work, and corporations, untangling and clarifying the connections among these basic institutions is a difficult task. By focusing on the well-being of children, this Article attempts to synthesize knowledge about a wide range of issues such as income inequality, poverty, longer working hours, the gender gap in housework, divorce, new measures of economic well-being, and the processes of globalization. To keep the analysis within the space of a single article, it has been necessary to compress volumes of literature from several disparate fields. The goal of this Article is to start a conversation between those concerned with the well-being of children and those who are experts in corporate governance. As a result, scholars in each area may find the treatment of their own topic too basic. The point of this Article, however, is to weave together strands from what we know of numerous disciplines to

81. See West, *supra* note 76, at 44.

82. Amir Licht evaluates how different corporate governance systems incorporate the masculine trait of “[v]aluing achievement, heroism, assertiveness, and material success versus” the feminine trait of valuing “relationships, modesty, caring for the weak, and interpersonal harmony.” Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 173 (2001). It appears that corporations are male institutions. This is not surprising because corporations have historically been run by men, with rules and norms formulated and interpreted by men. Specifically, the men who ran corporations in the past were traditionally white, married, middle-class, and could rely on stay-at-home wives to raise their children and take care of all domestic matters. With this perspective, it is apparent that the American corporate governance system is more masculine than others. *See id.* at 180.

83. Jacqueline O’Reilly & Claudia Spee, *Regulating Work and Welfare of the Future: Towards a New Social Contract or a New Gender Contract?* (Soc. Sci. Research Ctr. Berlin, Discussion Paper I97-201, 1997), at <http://www.skylla.wz-berlin.de/pdf/1997/i97-207.pdf> (last visited Sept. 20, 2004).

84. See BECK, *supra* note 20, at 110–11.

highlight the need for corporations to take responsibility for children's human capital development. It is my hope that this Article will inspire future scholarship that cuts deeper paths in this conversation between diverse specialties about the co-evolution of corporate governance, flexible labor markets, work-family balance, and the well-being of children.

This Article uses gender analysis as a new approach to analyzing corporate governance.⁸⁵ In the future, we need to focus more on how race,⁸⁶ class,⁸⁷ ethnicity,⁸⁸ age,⁸⁹ and sexual orientation⁹⁰ shape individual identities, family life, and organizational cultures. Scholars have developed much knowledge about how these factors influence devising work-family strategies, but these issues are beyond the scope of this Article. The role of

85. I have been involved with a movement in corporate law academia called "progressive corporate law," which has sought to challenge the hegemony of the neoclassical approach to the discipline and its seemingly narrow, value-free analysis. *See generally* PROGRESSIVE CORPORATE LAW, *supra* note 25. For a criticism of progressive corporate law scholarship, see Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997) (book review). Progressive corporate scholars point to the role of economic discursive practice in reinforcing the domination of the short-term shareholder value concept, which led to the Enron era of corporate scandals. A few of these progressive scholars have used gender analysis, and this Article follows in their footsteps. *See, e.g.*, Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way up from the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1 (1994); Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1 (1995); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992); Terry O'Neill, *The Patriarchal Meaning of Contract: Feminist Reflections on the Corporate Governance Debate*, in PERSPECTIVES ON COMPANY LAW 2, 27 (Fiona Macmillan Patfield ed., 1997).

For the past four years, Martha Fineman has had annual workshops on a "Feminist Analysis of Corporations and Capitalism." For an overview of these proceedings, see Janis Sarra, *Martha's Garden: Cultivating and Nurturing Alternative Visions of Corporate Law Through the Feminism and Legal Theory Workshop* (2003) (unpublished manuscript, on file with author).

86. Cheryl Wade has taken the lead in bringing a critical race perspective to corporate law. *See* Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461 (2002).

87. *See, e.g.*, BARBARA R. BERGMANN, *SAVING OUR CHILDREN FROM POVERTY: WHAT THE UNITED STATES CAN LEARN FROM FRANCE* 49 (1996) (arguing that high quality day care leads to proper socialization, which reduces the next generation's level of poverty).

88. *See generally* LILLIAN B. RUBIN, *FAMILIES ON THE FAULT LINE: AMERICA'S WORKING CLASS SPEAKS ABOUT THE FAMILY, THE ECONOMY, RACE, AND ETHNICITY* (1994) (discussing stories of the daily lives of poor families).

89. *See, e.g.*, *FRONTIERS IN THE ECONOMICS OF AGING* (David A. Wise ed., 1998) (discussing the economic and behavioral effects of age-related expenditures, such as the taxation of personal retirement plans and medical costs). For a discussion of the potential political alliance between the parenting movement and the Association for the Advancement of Retired Persons ("AARP"), see *infra* notes 479–83 and accompanying text.

90. For interesting work in the corporate governance field, see Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002).

the community in supporting the family also needs further exploration.⁹¹ Finally, the family not only plays a critical role in generating human capital, but it also is the primary producer of social capital. Corporations need social capital to survive, but this theme also awaits future research.⁹²

III. THE INTEGRATED STRUCTURES OF FAMILY, WORK, AND CORPORATION: A HISTORICAL OVERVIEW

This part examines the interconnected structures of family, work, and corporation during three broad economic phases: (1) agricultural society,

91. See Gross, *supra* note 1, at 197 (discussing the “underdevelopment of community-based responses to work-family concerns”).

92. By social capital, I refer to the informal values or norms shared among members of a society that permit cooperation. Fukuyama writes that nations with higher levels of social capital have economic advantages. Specifically, social capital creates economic value because it promotes honesty, reciprocity, keeping of commitments, hard work, and loyalty. See FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995) (discussing the emergence of these traits as characterizing the Great Disruption).

Fukuyama notes that the concurrent economic and social revolutions have led to the decline in social capital. Specifically, since the 1960s, crime has increased, family breakdowns have increased, and levels of trust have decreased—three indicators of a decline in social capital since that time. See generally FUKUYAMA, *supra* note 23 (discussing these three factors in detail). Robert Putnam writes that available evidence in the United States points to a dramatic decline in membership in voluntary associations as a result of individualistic values, time constraints, and dual-job families. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). He notes that women once had a long tradition of volunteer work in the form of participation in many important neighborhood and community-preserving services. *Id.* at 194. Putnam maintains that the movement of married women out of the home and into the paid labor force has led to a decline in women’s investment in social capital. *Id.* at 194–96. It is important to note, however, that he finds that women’s entry into the workforce plays a modest role in decreasing amounts of civic participation. Thus, community is hard to come by in our transient and work-harried culture. Indeed, traditional notions of community in America have long depended on women having the free time to build informal networks. Now that fewer women have free time our communities are less cohesive.

The decrease in social capital in the United States leaves many people without community support. Richard Sennett agrees that community is hard to come by in our transient and work-harried culture. See RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* (1998) (asserting that work has an impact on moral character and that flexible labor markets destroy character and community). Sennett looks at how the high rates of divorce and corporate downsizing result in a lack of long-term relationships for many people. See *id.* at 24–27. As such, he maintains that people lack life-long witnesses to their lives, which increases stress and leads to a decline in basic moral values. Corporate scholars recognize the importance of social capital in evaluating the role of trust in business. For the importance of trust in business relationships, see Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Bruce Chapman, *Trust, Economic Rationality, and the Corporate Fiduciary Obligation*, 43 U. TORONTO L.J. 547 (1993); Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425 (1993); Symposium, *Trust Relationships Part 1 of 2: Preface to a Conference in Trust*, 81 B.U. L. REV. 329 (2001).

(2) industrial economy, and (3) knowledge-based era.⁹³ Although history is made of many factors, this part focuses on how the dominant mode of production in each time period shaped family life.⁹⁴ This part surveys the relationships between extended family units of the agricultural society, the nuclear family of the industrial economy, and the new types of families in the information age. In turn, this part analyzes how concepts of child development shift as the socioeconomic context transforms.⁹⁵ Specifically, child rearing intensifies over these three economic stages as the skills necessary to take a productive role in the economy increase. In surveying different economies, this part also evaluates the prevailing gender roles and notions of time.⁹⁶ In order to humanize these vast economic periods, this part tells stories about Joe and Betty to see how their lives change in each era.⁹⁷

A. AGRICULTURAL SOCIETY AND EXTENDED FAMILIES

During the agricultural society prevailing in the United States until the mid-nineteenth century, farming required large investments of unskilled labor. Multigenerational extended families provided this labor—with grandparents, aunts, uncles, nieces, and nephews working together in a

93. For an overview of the interconnectedness of economic eras, see Julie Matthaei, *Healing Ourselves, Healing Our Economy: Paid Work, Unpaid Work, and the Next Stage of Feminist Economic Transformation*, 33 REV. RADICAL POL. ECON. 461 (2001).

94. For a path-breaking synthesis of a socioeconomic approach to the relationship between markets and families, see LYNNE A. DALLAS, *LAW & PUBLIC POLICY: A SOCIOECONOMIC APPROACH* (forthcoming 2005) (describing how our notions of the family as an institution are not static, but are constantly subjected to processes of negotiation and redefinition).

95. See Terry Arendell, *Conceiving and Investigating Motherhood: The Decade's Scholarship*, 62 J. MARRIAGE & FAM. 1192, 1194 (2000) (“Intensive mothering ideology both assumes and reinforces the traditional gender-based division of labor.”); Margaret Beale Spencer & Dena Phillips Swanson, *Promoting Positive Outcomes for Youth: Resourceful Families and Communities*, in SECURING, *supra* note 3, at 182, 192; Anita Iltis Garey & Terry Arendell, *Children, Work, and Family Some Thoughts on “Mother-Blame”*, in WORKING FAMILIES, *supra* note 1, at 293, 298 (“Researchers are also culturally situated . . . [w]estern biases . . . affect research paradigms” (quotation omitted)). See also CHILDREN’S CHILDHOODS: OBSERVED AND EXPERIENCED (Berry Mayall ed., 1994) (reviewing historical changes in the meaning of childhood); CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD (Allison James & Alan Prout eds., 1997) (same).

96. See, e.g., TOFFLER, *supra* note 2, at 268 (“For when we touch on time we touch on all of human experience.”); Phyllis Moen, *Introduction to IT’S ABOUT TIME: COUPLES AND CAREERS 4* (Phyllis Moen ed., 2003) [hereinafter IT’S ABOUT TIME] (stating that time is “hidden, precisely because it is so deeply embedded in our taken-for-granted systems of meaning: the ways we act and the ways we expect others to act”).

97. Parts of these stories were originally told to or by other authors, and I provide attribution where appropriate.

single household.⁹⁸ This family produced and consumed the basic necessities of food, clothing, and shelter.⁹⁹ Because production occurred within the home, the family did not rely much on the market.¹⁰⁰ Gender roles were strict and highly unequal.¹⁰¹ The father was a patriarch and women had no control over the number of children they had.¹⁰²

Parents viewed children as future laborers and put them to work as soon as possible.¹⁰³ Parenting involved little anxiety because children inherited their class status. Due to the self-sufficiency of households, inadequate parenting did not hurt society as a whole.¹⁰⁴ Thus, the extended family of the agricultural era was both a production and consumption unit; reproduction met the needs of farming in a cohesive pattern. Notions of time were based on planting and harvesting—time was viewed as abundant, organic, cyclical, and marked by the passing seasons.¹⁰⁵

Picture Joe. He is born into a large family on a farm. No one ever questions grandfather's authority. The whole family must pitch in to do the farm work—collecting eggs, planting, harvesting, sewing, fixing equipment, curing meat, treating sickness, and building furniture. Older relatives look after the children until they are old enough to work. Joe begins doing fieldwork at age four. He eventually marries a girl from a neighboring farm—Betty. They have six children. As parents, Joe and Betty worry about their children's physical survival from farming accidents, illness, and hurricanes. Weather and seasons influence Joe's family directly.

B. INDUSTRIAL SOCIETY AND NUCLEAR FAMILIES

The three main institutions of the industrial economy were the giant corporation, the assembly line factory, and the nuclear family, which fit together “like a machine” into a coherent social system.¹⁰⁶ A major theme

98. See TOFFLER, *supra* note 2, at 37.

99. See *id.* (“[L]and was the basis of economy, life, culture, family structure, and politics.”).

100. See *id.* at 38 (stating that “each community produced most of its own necessities”).

101. See, e.g., CARNOY, *supra* note 2, at 6, 107.

102. See *id.* at 6.

103. At this point, childhood was not viewed as a distinct life stage. TOFFLER, *supra* note 2, at 56.

104. See, e.g., *id.* at 60 (“Each home remained a decentralized unit engaged in biological reproduction, in child-rearing, and in cultural transmission.”).

105. *Id.* at 67 (“[Time] flowed from the rhythm of the seasons and from biological processes, from the earth's rotation and the beat of the heart.”); *id.* at 121 (noting that “time was felt to be plentiful and was associated with the unchanging cycle of the soil”).

106. TOFFLER, *supra* note 2, at 38 (“Industrialism was more than smokestacks and assembly lines. It was a rich, many-sided social system that touched every aspect of human life . . .”).

of this era is uniformity—in terms of standardized time, family forms, work patterns, lifestyles, and gender roles.

1. Welfare Capitalism and Lifetime Employment

During the industrial era, the limited liability corporation arose to concentrate pools of capital for large scale operations in factories.¹⁰⁷ Efficiency gains were sought through assembly lines engaged in mass production, manufacturing ever larger quantities of standardized products with lower unit costs.¹⁰⁸ Corporations grew in size as firms became vertically integrated, acquiring the means to construct both the finished product as well as many of the component parts.

Along with the limited liability corporation, a key feature of the industrial period was a managerial system designed by Frederick Taylor in the early twentieth century known as “Taylorism.”¹⁰⁹ Taylorism sought to maximize productivity by creating shop-floor practices that involved a high degree of specialization among workers. In general, this system separated “thinking” work from “doing” work. Each step of production was broken down into small segments and standardized; work on the assembly line involved low-skilled, repetitive labor.¹¹⁰ Harry Braverman emphasizes that the “separation of hand and brain is the most decisive single step” in industrial production.¹¹¹ To meet the needs of this production system, firms needed a stable workforce with the skills of punctuality, obedience, and discipline for rote, redundant jobs.¹¹²

In the 1920s, the threat of unions led firms to develop a new social contract with labor known as “welfare capitalism.”¹¹³ Under this system,

107. For classic reading on the history of the corporation, see JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 43–45 (1970) (discussing the fear of large firms gaining too much power); Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403 (1997) (discussing the early treatment of the corporation by the federal government); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (discussing the adoption of the legal fiction that treats the corporation as a person).

108. See ALFRED D. CHANDLER, JR., *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* 21–31, 65–68 (1990).

109. See generally FREDERICK TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911). For a detailed historical account of Taylorism, see DANIEL NELSON, *FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT* (1980).

110. See Taylor, *supra* note 109, at 39.

111. HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 126 (1974).

112. See TOFFLER, *supra* note 2, at 45.

113. See SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* 3–4 (1997).

Sanford Jacoby emphasizes that firms gave workers the benefits they would have received from unions.¹¹⁴ Thus, the corporation, rather than the government or unions, became the source of security for most workers.¹¹⁵ Specifically, corporations became the main risk-bearing institution in the economy by providing long-term employment. Under these employment relations, “internal labor markets”¹¹⁶ developed within firms to shield workers from outside market forces. Managers could provide job security because firms competed in stable, oligopolistic markets and shareholders were dispersed and passive.¹¹⁷ Although welfare capitalism existed in other advanced economies, it particularly suited the structure of large firms, small unions, and limited government in the United States.¹¹⁸ Another factor leading to long-term employment under welfare capitalism was the need to decrease labor turnover.¹¹⁹ To do this, firms deferred wages in order to reduce workers’ incentives to leave. Promotions were made from the existing workforce in order to motivate workers under “job ladders” developed as a part of internal labor markets.¹²⁰ In this way, Sanford Jacoby asserts that corporations were “modern manors” because firms sought to bind workers the way that serfs were bound to estates.¹²¹

2. Nuclear Families: Breadwinners and Homemakers

The rise of the factory system dramatically influenced family structure in three ways. First, the factory detached work from the household, transforming the family from a self-sufficient production and consumption unit to a consumption division. Indeed, buying consumer durables became an important new function of the family to support the economy.¹²² Second, work and family became distinct spheres segregated by gender: fathers labored in factories and mothers reared children to grow up to work in factories. Parenthetically, note that this division of productive from

114. *See id.* at 20–21.

115. *Id.*

116. *See generally* PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971) (reviewing how firms set up job ladders to motivate workers); Paul S. Osterman, *Internal Labor Markets: Theory and Change*, in LABOR ECONOMICS AND INDUSTRIAL RELATIONS: MARKETS AND INSTITUTIONS 303 (Clark Kerr & Paul D. Staudohar eds., 1994) (discussing implicit employment agreements between employees and employers for wages lower than the marginal product produced for firm by younger workers).

117. SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900–1945, at 85–97 (1985).

118. *Id.*

119. *Id.* at 87.

120. *Id.*

121. *See* JACOBY, *supra* note 113, at 4.

122. TOFFLER, *supra* note 2, at 42.

reproductive work along gender lines during the industrial era sets the stage for many of the conflicts in the new economy.¹²³ Finally, families grew smaller as women began taking steps to control fertility.¹²⁴ Thus, the nuclear family with a breadwinner-father, housewife-mother, and a few children became the norm.¹²⁵

Under welfare capitalism, the corporation and family were linked through the male breadwinner. That is, corporations paid men a “family wage,” so that a high-school-educated father could make enough to sustain a family consisting of a homemaker mother and two children.¹²⁶ Viewed in this light, the nuclear family “allowed employers to count on men to work where and when needed and to count on women to raise the next crop of male wage workers and female home workers.”¹²⁷ Alvin Toffler writes that this type of family “became the standard, socially approved, ‘modern’ model” because its structure perfectly fitted the needs of a mass production society.¹²⁸

Society dealt with the harshness of the transformation from the agricultural society to the industrial economy by infusing women’s domestic work with new symbolic meaning under the “cult of domesticity.”¹²⁹ The cult of domesticity depicted the homemaker as an “angel in the hearth,” creating a haven from the heartless world of the marketplace. Under this notion, “a women’s place was in the home,” using her special talents to instill moral values in her husband and children. In the 1950s, the cult of domesticity deepened in response to the Depression and World War II. This idealized version is portrayed in television shows such as *Ozzie and Harriet* and *Father Knows Best*.¹³⁰ The hard labor involved in the daily grind of laundry, meal preparation, housecleaning, and shopping was not regarded as contributing to the economy for two reasons. First,

123. See CARNOY, *supra* note 2, at 111 (“How that largely reproductive work became divided into different activities based on gender is a crucial part of the story of work and the family.”); TOFFLER, *supra* note 2, at 60–61 (“[T]he modern ‘battle of the sexes’ can be traced in large measure to the conflict between two work-styles, and beyond that to the divorce of production and consumption.”).

124. See CARNOY, *supra* note 2, at 113.

125. TOFFLER, *supra* note 2, at 44–45.

126. See Matthaeci, *supra* note 93, at 6.

127. CARNOY, *supra* note 2, at 112.

128. TOFFLER, *supra* note 2, at 44–45.

129. See Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought*, 16 SIGNS: J. WOMEN CULTURE & SOC’Y 463, 465 (1991).

130. We should not get too nostalgic about the 1950s *Ozzie and Harriet* family. See STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 23–41 (1992).

homemaking did not produce wages from an employer.¹³¹ Second, the cult of domesticity characterized women's labor as spiritual—as expressions of love for family.¹³²

3. Childhood in the Industrial Era

The industrial system introduced upward class mobility in two ways. First, a worker could raise his status by outperforming his peers in lockstep promotional patterns under job ladders.¹³³ Second, as waves of immigrant workers came to this country to perform menial jobs with no opportunity for advancement, they worked hard with the hope that some day their children could reach the upper class.¹³⁴ Thus, the American Dream, where every generation builds on the next, encouraged parents to delay gratification and live through their children so that they could earn more than their parents and move up the consumption ladder.

The family wage, the cult of domesticity, and upward class mobility contributed to a new conception of childhood in the industrial era.¹³⁵ A major transition to the industrial era involved the enactment of child labor laws so that children were no longer viewed as means of production.¹³⁶ During this time, sociologists note the socialization of children's lives, as society began to idolize children as valued and treasured innocents.¹³⁷

With fewer adults in the home, the mother became much more responsible for raising children. The goal of a mother's efforts was to secure her children's future success—for boys this entailed obtaining jobs in factories and for girls this involved finding and supporting a husband.¹³⁸ For the most part, working class parents used an authoritarian "command

131. Many scholars are working on methods of valuation for housework. *See, e.g.*, Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1620–27 (1996). If included in gross national product, housework and childcare done in industrialized countries are estimated to constitute between twenty-five and forty percent of the economy. *See* SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 204 n.48 (1989). The economic contribution of the housewife is largely undervalued. Folbre, *supra* note 129, at 465.

132. *See* Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 23 (1996).

133. Osterman, *supra* note 116, at 306–07.

134. Matthaai, *supra* note 93, at 467–68.

135. *See* RICHARD ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 8–9 (1985).

136. *See* CARNOY, *supra* note 2, at 113.

137. *See* ZELIZER, *supra* note 135, at 11 (“In an increasingly commercialized world, children were reserved a separate noncommercial place . . .”).

138. *See* TOFFLER, *supra* note 2, at 58–61 (explaining that boys have been prepared from boyhood to move to the factory, whereas women have been prepared from girlhood for the tasks of reproduction).

and control” style that suited the needs of the industrial system by creating generations of obedient workers for assembly lines.¹³⁹ For middle and upper class families, society viewed higher education levels for women as necessary to raise future business and political leaders.

4. Uniformity of Time and Standardization of Lifestyles

The Industrial Revolution profoundly altered people’s mental images of time. Rather than the natural flow of abundant time in the agricultural society, the industrial era synchronized time to mold human behavior to the time-obsessed rhythms of the machine. Time was packaged into discrete intervals in a linear fashion around the workday and workweek.¹⁴⁰ Daily life was divided into constant and uniform patterns for work, play, and sleep.¹⁴¹

The industrial era also standardized lifestyles into a “one-size-fits-all” life cycle biography.¹⁴² In this way, the industrial society provided assurance, even in the midst of extreme social change.¹⁴³ This certainty resulted from secure employment in paternalistic corporations and stable home life by homemaker wives.

Picture Joe. He just graduated from high school. Joe goes to work at the same plant where his father works. Joe’s job consists of standing at an assembly line turning screw number ninety-nine. Joe saves up enough money and eventually marries Betty, his high school sweetheart. Joe continues to do his boring job everyday because he makes a decent living that allows Betty to stay at home and take care of the children—Sam and Susan. Sam and Susan have few toys; they spend their time outside of school playing with each other in the backyard and riding their bikes in the neighborhood. Joe comes home by 5:30 p.m. in time for family dinner and to play baseball with Sam, getting him ready for the big Saturday game. Susan is in Girl Scouts and sells cookies by herself, going door-to-door in her neighborhood. Joe and Betty sacrifice because they dream of Sam going to college one day. Hopefully, Susan will get a job as a secretary and meet a nice, white-collar boy and settle down in style. Joe and Betty’s dreams come true and Joe retires after forty years with a gold watch and a good pension. Life is hard, but clear-cut.

139. *Id.* at 45–46.

140. *See id.* at 67–69 (observing that life was clock-driven and shaped by a nine-to-five workday, workweeks, lunch hours, holidays, and dinner times).

141. *Id.* at 262.

142. *Id.* at 208–10.

143. *Id.* at 31.

If Joe goes to college, he can get a white-collar management job. He would still come home by 5:30 p.m. for family dinner. He would have a slightly larger house and a nicer backyard. He would still be married to Betty for life. Joe and Betty's dreams for their children would be the same. Joe would still retire after forty years with the same company. Life would be somewhat easier, but still clear-cut.

C. THE NEW ECONOMY AND NEW FAMILIES

The previous section discussed how the nuclear family, strict gender roles, the factory system, internal labor markets with stable employment, and the vertically integrated, paternalistic corporations were interrelated aspects of a cohesive system of industrial society.¹⁴⁴ This section reviews how the nonnuclear family, changing gender roles, flexible labor markets, and the "lean-and-mean" shareholder-oriented corporation are interwoven features of the new economy.

1. Shareholder Value Ideology and Flexible Labor Markets

Compared to the industrial era, shareholders have gained much more power in the new economy beginning in the late 1980s for two reasons.¹⁴⁵ First, pension funds developed into large-block shareholders; these pension funds overcame their collective action problems to exert pressure on managers to increase the bottom-line. Second, a unified global capital market arose¹⁴⁶ that permits these large shareholders to transfer capital with the click of a computer mouse.¹⁴⁷

To improve financial performance, managers began to break implicit promises of long-term employment in the late 1980s to cut labor costs. Another factor contributing to the demise of job security was the development of a rapidly changing product market in a more competitive

144. See *id.* at 52 ("Each of these spheres performed a key function in the larger system, and could not have existed without the others.").

145. For a review of changes in corporate governance in the new economy, see generally SLOAN PROJECT ON CORP. GOVERNANCE, *supra* note 30; Robert W. Hamilton, *Corporate Governance in America 1950–2000: Major Changes but Uncertain Benefits*, 25 J. CORP. L. 349 (2000).

146. See MITCHELL, *supra* note 32, at 165–68.

147. MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 426 (1999).

global economy.¹⁴⁸ As product demand changed quickly, so did the firm's need for the skills of the workforce.¹⁴⁹

As a result, corporations promoted flexible labor markets by restructuring the social contract with labor. Specifically, firms changed course from risk-bearing organizations to risk-shifting institutions. Firms no longer buffer workers from outside market pressures; to the contrary, managers use market forces as a tool to mediate the new relationship with labor.¹⁵⁰ As a result, the job for life is gone—work is now permanently temporary.¹⁵¹

Under this new employment relationship, the average American works twenty percent more today than in 1973 and has thirty-two percent less free time per week.¹⁵² In addition, Americans work more hours than employees in other advanced industrialized nations—three more weeks than the Japanese and twelve more weeks than the Germans.¹⁵³

Not only do employees work longer hours, they encounter more intensified workplace demands, less job security, and stagnating wages. Chris Benner writes how this new “don't look down” economy requires workers to recover repeatedly from job loss.¹⁵⁴ Specifically, workers must reeducate themselves to obtain the skills necessary to have many jobs and different careers over their lifetimes. Firms promise to provide these skills under the rhetoric of “employability security,”¹⁵⁵ but studies show they do not fulfill this implicit promise.¹⁵⁶

In sum, employment has changed radically in the last fifteen years. At all income levels, employees are at risk because of rapid changes in our volatile, information-based economy. Although flexible labor markets have generated much economic success for the American economy, working

148. For a discussion of the system of globalization, see THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999) (discussing many changes brought about by the global economy).

149. See, e.g., Nicholas G. Carr, *Being Virtual: Character and the New Economy*, HARV. BUS. REV., May–June 1999, at 181, 182 (noting that “[t]he pressure to be virtual—to produce real products and deliver valuable services without a lot of fixed assets” is becoming the norm).

150. See CAPPELLI, *supra* note 11, at 93; Peter Cappelli, *Market-Medicated Employment: The Historical Context*, in *THE NEW RELATIONSHIP*, *supra* note 26, at 66, 67.

151. See CARNOY, *supra* note 2, at 79–80.

152. *Id.* at 137.

153. Williams, *supra* note 1, at 921.

154. See CHRIS BENNER, BOB BROWNSTEIN & AMY B. DEAN, *WALKING THE LIFELONG TIGHTROPE: NEGOTIATING WORK IN THE NEW ECONOMY* 11–12 (1999).

155. See Rosabeth Moss Kanter, *Nice Work If You Can Get It: The Software Industry as a Model for Tomorrow's Jobs*, AM. PROSPECT, Fall 1995, at 52, 52–53.

156. See Brian Hackett, *THE CONFERENCE BD., THE VALUE OF TRAINING IN THE ERA OF INTELLECTUAL CAPITAL, A RESEARCH REPORT* 6 (1997).

families are much less stable. Adapting to this economic uncertainty places a great deal of pressure on families that are, at the same time, adjusting to shifting gender roles. Although the breakdown of the nuclear family is occurring for many reasons,¹⁵⁷ the next section focuses on how the women's movement and the new economy interact to influence diverse family forms.

2. The Breakdown of the Traditional Nuclear Family

a. The Large Influx of Women into the Workforce

Occurring independently and before the rise of the new economy, the women's movement produced massive social change.¹⁵⁸ This movement was spurred by Betty Friedan's book *The Feminine Mystique*,¹⁵⁹ which caused national questioning of the traditional feminine role of housewife. Friedan's work was so influential because she labeled it "the problem that has no name."¹⁶⁰ Specifically, upper- and middle-class women became highly educated during the later stages of the industrial era in order to be able to raise society's male leaders. Friedan wrote how many of these educated women became depressed doing the dull, repetitive work of housekeeping.¹⁶¹ Friedan's book hit a responsive chord because she also discussed how women's economic dependence on men led to inferior positions within marriage and society. Thus, the women's movement encouraged women to enter the workforce to gain their own identities and financial security. A decade later, workplace restructuring started and corporations hired women as inexpensive, skilled, flexible workers.¹⁶²

The numbers concerning women's workforce participation tell a story of profound societal transformation. In the 1950s, approximately thirty-four percent of women were in the workforce. By 1997, the number rose to approximately fifty-nine percent.¹⁶³ In 1960, fewer than one in five married mothers with children under six was in the workforce; by the 1990s more

157. See, e.g., GIDDENS, *supra* note 22, at 89–90 ("The family is the meeting point of a range of trends affecting society as a whole—increasing equality between the sexes, the widespread entry of women into the labour force, changes in sexual behaviour and expectations, the changing relationship between home and work.").

158. See CARNOY, *supra* note 2, at 96–100 (describing how women began to redefine the concepts of mother and wife before the new information technology era).

159. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

160. *Id.* at 19.

161. *See id.* at 19–21.

162. CASTELLS, *supra* note 147, at 152.

163. CORNELL EMPLOYMENT & FAMILY CAREERS INST., *FACTS ABOUT THE DEMOGRAPHICS OF WORKING FAMILIES*, at <http://www.blcc.cornell.edu/archives/factsht/fsfeb99.pdf> (Winter 1999).

than three in five were in the workforce. The most significant rise in women's workforce participation is in married-couple families with children under the age of six, with the number of these families rising from approximately fifty-two percent to more than sixty-two percent from 1986 to 1998.¹⁶⁴ The most dramatic change in recent decades has been the entry of married mothers into the labor force who have very small children—"[w]ell over half of all mothers of infants are employed."¹⁶⁵ Thus, dual-earner families with small children now compose a majority of the families in the United States.¹⁶⁶

As a result, the nuclear family with a homemaker-mother that supported the industrial era is no longer the norm. Although gender roles have shifted, societal institutions have not accommodated the lives of employed mothers in a manner that is necessary to achieve gender equality. Shirley Burggraf perceptively notes that "[g]etting 'women's work' done when women are no longer volunteering their unpaid or underpaid labor is what much of the public discussion of family values is really about."¹⁶⁷

b. Divorce and Single-Parent Families

Divorce rates began to increase as women's financial strength allowed them to leave unsatisfactory marriages. Francis Fukuyama writes how this factor—as well as birth control and the sexual revolution—lead men to be less amenable to commit to family relationships.¹⁶⁸ Thus, high divorce rates reflect women's economic independence, but they also lower men's commitment to family.

Here again, the numbers tell a dramatic story. By 1996, half of all American marriages could be expected to end in divorce, and the ratio of divorced to married people had increased fourfold between 1960 and 1982.¹⁶⁹ Around sixty percent of divorces involve children.¹⁷⁰ Recent estimates are that about one-half of mothers with young children will become single parents by age thirty-five.¹⁷¹

164. *Id.*

165. Arendell, *supra* note 95, at 1196.

166. Tamar Lewin, *Now a Majority: Families with 2 Parents Who Work*, N.Y. TIMES, Oct. 24, 2000, at A20.

167. BURGGRAF, *supra* note 8, at x.

168. FUKUYAMA, *supra* note 23, at 101–11. "A more subtle consequence of women entering the labor force was to weaken further the norm of male responsibility . . ." *Id.* at 104.

169. DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN 49–50 (1996).

170. Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Health Statistics, *Advance Report of Final Divorce Statistics, 1989–1990*, MONTHLY VITAL STATS. REP., Mar. 22, 1995, at 1, 2.

171. SPAIN & BIANCHI, *supra* note 169, at 50.

The numbers of births taking place without marriage have also dramatically increased. In 1970, one out of ten children was born out of wedlock.¹⁷² Today, one out of three children is born out of wedlock.¹⁷³ Due to a combination of divorce and out-of-wedlock births, twenty-five percent of all families have only one parent at home, with the vast majority headed by women.¹⁷⁴ By the early 1990s, single mothers who had never married accounted for one-third of all mother-child households.¹⁷⁵ As a result of a combination of these changes, sixty percent of children will spend some time in a single-parent family.¹⁷⁶ Most of these families are headed by mothers. “Nearly half of the children currently living with single mothers are poor, even though most single mothers are employed.”¹⁷⁷

For women, having a career allows them to leave unsatisfactory marriages. As divorce rates increase, however, women are compelled to work to hedge against the risk of family break up,¹⁷⁸ given that women often depend on a husband to avoid poverty.¹⁷⁹ Indeed, motherhood is the single biggest risk factor for poverty in old age.¹⁸⁰ This historical perspective is crucial because while the public concedes that we are undergoing drastic economic change, the family values debate portrays the traditional nuclear family as an institution that is above economic forces.¹⁸¹ Many historians, however, view the new forms of family life as part of the transformation from the industrial era to the information era.¹⁸² Indeed, Martin Carnoy asserts: “This raises the question whether the present moves by business to make labor markets more flexible are entwined with, or even dependent on, new, much more ‘flexible’ families.”¹⁸³

172. Arendell, *supra* note 95, at 1195.

173. *Id.*

174. SPAIN & BIANCHI, *supra* note 169, at 38–39.

175. *Id.* at 40.

176. Garey & Arendell, *supra* note 95, at 297.

177. *Id.*

178. See David H.J. Morgan, *Risk and Family Practices: Accounting for Change and Fluidity in Family Life*, in *THE NEW FAMILY?*, *supra* note 18, at 13, 28.

179. See CRITTENDEN, *supra* note 8, at 8–9.

180. *See id.* at 6.

181. *See* Silva & Smart, *supra* note 18, at 2.

182. *See, e.g.,* CARNOY, *supra* note 2, at 113 (“[T]he other factor that changed the family was technology.”); TOFFLER, *supra* note 2, at 224 (“The fracture of the family today is, in fact, a part of the general crisis of industrialism . . .”).

183. CARNOY, *supra* note 2, at 109.

3. Feedback Between Markets and Families

This section considers the feedback effects between work and family in the new economy. The most important consequence is that people are delaying marriage and having fewer or no children.¹⁸⁴ This section first analyzes how the new employment agreement influences home life in five ways: (1) stagnating wages increase working hours, (2) new corporate cultures compete for family time, (3) work demands cause conflicts over gender roles at home, (4) family structure is related to downsizing, and (5) market values invade family life. Next, this section reviews how caregiving responsibilities impede success in the labor market by examining (1) mothers' wage penalty and (2) mothers leaving or scaling back on employment.

a. Work Influences Family Life

i. Wages Stagnate While Working Hours Increase

In single-parent families, mostly headed by women, the parent must work to support the family. In addition, even in two-parent families, as job tenure and real wages fell for men, wives and mothers took jobs to keep family income constant. Specifically, "despite the rapid influx of mothers into the workforce over the past 20 years, household income for employed families with children has not changed during that period."¹⁸⁵ Thus, for many dual-earner families, the mother's income is vital to support the family.

ii. New Corporate Cultures Compete for Family Time

Arlie Hochschild criticizes how corporations seek to mold corporate cultures so that employees arrange family life around work.¹⁸⁶ As a result of these new corporate cultures, Hochschild highlights that people enjoy work and find it tempting to focus most of their energy on their jobs.¹⁸⁷ Indeed, Hochschild finds that some employees work harder and longer at

184. *Id.* at 120–24 ("[C]onnections are becoming more temporary, people spend less time together, couples are having fewer children, financial support between spouses is eroding, and care and attention are being subcontracted. Families are accommodating to the new economy by downsizing and outsourcing the family."). See Theodore W. Schultz, *Fertility and Economic Values*, in *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN, AND HUMAN CAPITAL* 3 (Theodore W. Schultz ed., 1974) ("[T]he cost of children increases with the rise in price of human time.").

185. ELLEN GALINSKY, *ASK THE CHILDREN: WHAT AMERICA'S CHILDREN REALLY THINK ABOUT WORKING PARENTS* 12 (1999).

186. See generally ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997) (providing a detailed case study of the implementation of and reaction to company policies designed to facilitate balancing family and work).

187. See *id.* at 44.

their jobs in order to avoid conflict at home. Specifically, Hochschild asserts: “In [the] new model of family and work life, a tired parent flees a world of unresolved quarrels and unwashed laundry for the reliable orderliness, harmony, and managed cheer of work.”¹⁸⁸ In a similar vein, Ilene Philipson writes how many employees, at all income levels, seek connection and fulfillment at work.¹⁸⁹ Philipson maintains: “Paid work is increasingly where we get our emotional needs met and is surpassing neighborhood, community, and even family life, as the source of feeling alive and connected to others.”¹⁹⁰ Specifically, Philipson asserts that many employees come to view their colleagues as more “family” than their own family.¹⁹¹ In these ways, corporations influence not only the amount of time we have to care for families, but also how people perceive these issues.¹⁹²

Due to new technology, work impedes home life even when an employee is home. This new technology means that the lines between work and home life blur because people can work around the clock away from the office.¹⁹³ This technology has the positive effect of allowing parents more opportunities to combine work with raising children. On the other hand, this technology complicates the human relationship to time because it erodes the norm that work is performed at established times. For example, family dinner time is routinely interrupted by e-mails, faxes, and phone calls from work. These new time norms add to the widespread sense of overload experienced by American working families.

iii. Dual-Earner Families Face Conflicts over Gender Roles at Home

188. *Id.*

189. ILENE J. PHILIPSON, *MARRIED TO THE JOB: WHY WE LIVE TO WORK AND WHAT WE CAN DO ABOUT IT* (2002).

190. *Id.* at 37. According to Philipson,

[i]dentification with one’s corporation, feeling more alive in the workplace than at home, reliance on co-workers as one’s primary source of friendship, tying one’s self-esteem to a supervisor’s approval, and total immersion in the company culture as a substitute for embeddedness in community, increasingly characterize life in the United States today.

Id.

191. *Id.* at 48.

192. Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1443 (2001) (“[O]ur only protection today from having work swallow home life whole is our ability to generate new social norms that articulate reasonable limits on work demands in a society that works more hours even than Japan.”).

193. CARNOY, *supra* note 2, at 143.

Men and women experience the change at home and change at work in different ways.¹⁹⁴ Specifically, the gender distribution of time spent at home and at work is undergoing a dramatic transformation from that in the industrial society. This gender distinction stems from cultural pressure to maintain the breadwinner and primary caregiver roles despite the competing ideology of gender equality.¹⁹⁵ As parents prioritize their lives and make choices about how to mediate between home and work, conflicts erupt into gender wars between men and women. In many egalitarian marriages, having children causes confusion over gender roles, with traditional norms operating as a “force field.”¹⁹⁶

Viewed from the perspective of men, masculine dignity is often linked with success at work,¹⁹⁷ but many men want to be more involved than their own fathers in raising children.¹⁹⁸ Men still have the stress of being the primary breadwinner, which means less choice to drop out for family reasons and less room to choose careers based on personal interests rather than money. At the workplace, fathers are praised for short-term family commitments,¹⁹⁹ yet it is much harder for them to take advantage of family policies on a long-term basis.²⁰⁰ In addition, the gender wage gap makes it

194. Past debates over work-family issues were stalled by discussions over whether and how women are different from men. In order to avoid this obstacle, the recent exploration focuses on how changes in the workplace cause hardships for workers—both women and men—in performing their roles as parents. Williams, *supra* note 192.

195. *Id.* at 1471. According to Williams, [m]en may be committed to gender equality while at the same time they feel it is too much to ask them to sacrifice their own personal dignity and their dreams—despite the fact that those dreams reflect an unrecognized sense of entitlement to a flow of family work from a [woman].
Id. at 1479.

196. *Id.* at 1471. See also Adrienne D. Davis & Joan C. Williams, *Foreword* to Symposium, *Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture*, 8 AM. U. J. GENDER SOC. POL'Y & L. 1, 4 (2000).

197. Joan Williams states:
A recent literature review concluded “[v]irtually all men believe that being a good father means first and foremost being a good provider.” [One] study of dual-earner families found that “both men and women attach different meanings to the employment of wives than to the employment of husbands. Reports from men indicated that, even when their wives were employed, they still felt a special obligation to provide.”
WILLIAMS, *supra* note 40, at 27 (first alteration in original) (quoting Robert S. Weiss, *Men and Their Work*, in SPOUSE, PARENT, WORKER: ON GENDER AND MULTIPLE ROLES 109 (Faye J. Crosby ed., 1987) (literature review quote); JEAN L. POTUCHEK, WHO SUPPORTS THE FAMILY? 4 (1997) (study quote)).

198. See LEVINE & PITTINSKY, *supra* note 70, at 17–22.

199. See CRITTENDEN, *supra* note 8, at 16 (“Men get a standing ovation if they miss a meeting because of parenting; women miss whole careers.”); *id.* at 24 (“[A] father’s every paternal gesture is interpreted as a sign of the long-awaited new man.”).

200. See Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 758–59 (2000) (discussing possible workplace repercussions for fathers taking parental leave).

impractical for many fathers to reduce their working commitment to be more involved at home.²⁰¹ Williams has written how norms of masculinity push men to work longer hours in order to be viewed as “players.”²⁰² Male peers view long working hours as a sign of masculinity and cutting back on work commitment as “unmanly.”²⁰³ As a result of these factors, fathers rarely consider the possibility of a reduced work schedule.

In dual-earner families with children under the age of eighteen, fathers average longer workweeks than mothers—an average difference of about ten hours per week.²⁰⁴ Married mothers report spending nearly an hour more than fathers each workday “caring for and doing things with” their children.²⁰⁵ On days off, the difference grows to nearly two hours per day.²⁰⁶ Thus, employed women perform a disproportionate share of the childcare and household work. Although men have increased their share of housework since the industrial era, women still perform two-thirds of housework and childcare—the “second shift.”²⁰⁷ As a result of this second shift, studies show that in many families, employed wives have less leisure and more stress than their husbands.²⁰⁸

With gender roles up in the air, spouses find themselves fighting about who does the unpaid work and whose career is more important.²⁰⁹ In many dual-earner couples, men will use the rhetoric of equality, but cultivate incompetence to avoid chores.²¹⁰ Williams asserts that, with respect to unpaid work in the home, “[w]omen know that if *they* do not sacrifice *no one* will, whereas men assume that if *they* do not, *women* will.”²¹¹ If men

201. *See id.* at 757–58.

202. *See* Williams, *supra* note 1, at 927–29 (explaining that men think about job performance as gender performance).

203. *See id.*; EPSTEIN ET AL., *supra* note 29, at 5.

204. JAMES T. BOND, ELLEN GALINKSY & JENNIFER E. SWANBERG, THE 1997 NATIONAL STUDY OF THE CHANGING WORKFORCE 36 (1998).

205. Teresa Arendell, ‘*Soccer Moms*’ and the *New Care Work* 5 (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 16, 2000), available at http://www.bc.edu/bc_org/avp/wfnetwork/berkeley/papers/16.pdf.

206. *Id.*

207. HOCHSCHILD & MACHUNG, *supra* note 51, at 8. Under this second shift, women put in an extra month of work a year after hours of wage and care work are combined. *Id.* at 3; RHONA MAHONY, KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER 1 (1995).

208. *See* Chloe E. Bird, *Gender, Household Labor, and Psychological Distress: The Impact of the Amount and Division of Housework*, 40 J. HEALTH & SOC. BEHAV. 32, 42 (1999).

209. *See, e.g.,* Matthaei, *supra* note 93, at 18 (noting arguments about career versus homelife); Williams, *supra* note 1, at 922 (noting a rise in conflicts over household chores).

210. *See* FRANCINE M. DEUTSCH, HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS 73–81 (1999) (discussing ways men resist doing care work).

211. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 831 (1989).

pick up the second shift, they will have less to show for their time than women forgoing domestic chores to participate in the workforce.²¹²

iv. Downsizing Affects the Family Unit

Studies show relationships between family structure and downsizing. Specifically, job loss is correlated with divorce—both ways.²¹³ Employees are at greater risk of losing their jobs after becoming divorced. Presumably, this stems from being distracted at work from the shocks of divorce. In addition, there is an increased incidence of divorce after people lose their jobs.²¹⁴ Perhaps this results from the marriage not being strong enough to withstand economic turmoil.²¹⁵ In analyzing this correlation between divorce and downsizing, Alan Wolfe asserts:

We like to believe that the loyalty taught in families will carry over everywhere else. More likely, the emphasis on putting one's own interest first taught in the economy will carry over into the family.

When business firms treat workers as disposable commodities, the last thing on their minds is that their actions could have an effect on the divorce rate. Americans started divorcing one another long before the current wave of corporate downsizing, but there is nonetheless a relationship between workplace disloyalty and marital disloyalty The American divorce rate is high for a reason.²¹⁶

In addition, job displacement has not been neutral with regard to family structure. Employees with children have higher displacement rates.²¹⁷ Family structure, however, is also related to financial recovery

212. Ulrich Beck states:

The *liberation* of women from housework and marital support is to be forced by the regression of men into this 'modern feudal existence' which is exactly what women reject for themselves. Historically, that is like an attempt to make the nobility the serfs of the peasants. But men are no more willing than women to follow the call 'back to the kitchen!'

BECK, *supra* note 20, at 109.

213. Paul Attewell, *The Impact of Family on Job Displacement and Recovery*, 562 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 66–67 (1999).

214. *Id.*

215. *See id.* at 80.

216. ALAN WOLFE, MORAL FREEDOM: THE IMPOSSIBLE IDEA THAT DEFINES THE WAY WE LIVE NOW 48–49 (2001). Judith Wallerstein, Julia Lewis, and Sandra Blakeslee also note how divorce is often precipitated by job loss:

It's especially tragic when divorce occurs as the sequel to a serious life crisis. The suffering person loses whatever support there was in the marriage and confronts the transition from marriage to singlehood in a depleted state. The children are badly frightened and apprehensive about what lies ahead. It's as if the entire family at its weakest point is expected to deal with an earthquake and its aftershocks.

JUDITH WALLERSTEIN, JULIA LEWIS & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY 6 (2000).

217. *See* Carolyn C. Perrucci, *Economic Strain, Family Structure and Problems with Children Among Displaced Workers*, 21 J. SOC. & SOC. WELFARE 79, 79 (1994).

from job loss.²¹⁸ Specifically, individuals in nuclear families are more likely to recover than other individuals of equivalent education, age, and work background.²¹⁹

v. Market Values Invade Family Life

Hochschild emphasizes that market values are invading family life in what she labels the “commodity frontier.”²²⁰ This section evaluates this commodity frontier by examining (1) the new efforts to buy “a wife” and (2) increasing consumerism by young children.

First, the rise of employed mothers has given rise to a new “mommy industry” for “professional households without wives.”²²¹ Specifically, many employed women have long stated that they wish they had a stay-at-home wife; increasingly, upper- and middle-class women acquire this benefit on the market.²²² The need to purchase domestic services is usually viewed as necessary for the wife to work, rather than accommodate the husband’s employment in dual-earner couples. With the increasing gap between the top twenty percent and bottom twenty percent of the income distribution, more upper- and middle-class women can afford this assistance, and poorer and marginally middle-class people are willing to supply the labor.²²³ As a result, employed women can procure many other services besides a nanny, housekeeper, cook, and gardener. Specifically, more intimate and personal services are also available, such as the following: arranging birthday parties, remembering family birthdays by sending cards and gifts, tutoring homework, chauffeuring children, decorating for holidays, and entertaining guests.²²⁴

Second, the commodity frontier may be expanding as busy parents come to believe that buying toys for children can substitute for lack of time.²²⁵ This notion is based on three factors. First, Ann Crittenden states

218. Attewell, *supra* note 213, at 79.

219. *See id.* at 86.

220. Arlie Russell Hochschild, *The Commodity Frontier* 9 (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 1, 2002) (“Capitalism is competing with the family, and particularly with the role of the wife and mother.”), available at http://www.bc.edu/bc_org/avp/wfnetwork/berkeley/papers/1.pdf. *See generally* ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS (1996) (discussing the increasing encroachment of the capitalist market system into nonmarket arenas).

221. *See* Hochschild, *supra* note 220, at 1, 8.

222. *See id.* at 8.

223. *Id.* *See also* JULIA WRIGLEY, OTHER PEOPLE’S CHILDREN 1–6 (1995) (discussing the disparate backgrounds of those who pay for and those who provide in-home childcare).

224. *See* Hochschild, *supra* note 220, at 7–8.

225. *See generally* Allison J. Pugh, *From “Compensation” to “Childhood Wonder”*; *Why Parents Buy* (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 39, 2002) (discussing the

that “[t]he idea that time spent with one’s child is time wasted is embedded in traditional economic thinking.”²²⁶ Second, advertisers increasingly aim products at very young children and as a result we see increased consumerism in very young children. Indeed, Mary Pipher reports that “[t]wo-year-olds beg parents for products they’ve seen advertised on TV.”²²⁷ Finally, stressed out parents may give into such demands to relieve their guilt for not providing enough attention to their children.²²⁸

b. Family Life Influences Work

i. Working Mothers Suffer a Wage Penalty

Caregiving responsibilities at home affect one’s success in the labor market. Jane Waldfogel found that mothers earn less money than other women, even after controlling for the fact that mothers work fewer hours.²²⁹ Specifically, married mothers earn only sixty percent of the wages of married men.²³⁰ By the early 1990s, the wage gap between mothers and nonmothers was greater than the wage gap between women and men.²³¹ Single mothers suffer the greatest wage penalty.

A wage gap exists not only between mothers and others, but also between men with employed wives and those who have stay-at-home wives. Specifically, men married to homemakers have the highest wages of all.²³² This gap may reflect the fact that although men with employed wives do not share equally in childcare and domestic labor, they do more than men whose wives stay at home. Presumably, the perception is that this leaves the husbands whose wives stay at home the freedom to “go the extra mile” at work.²³³

ii. Working Mothers Scale Back Their Employment

motivations of American parents’ “child-rearing consumption”), available at http://www.bc.edu/bc_org/avp/wfnetwork/berkeley/papers/39.pdf.

226. CRITTENDEN, *supra* note 8, at 4.

227. PIPHER, *supra* note 55, at 15.

228. See Pugh, *supra* note 225, at 10; Allison J. Pugh, *When Is a Doll More than a Doll?: Selling Toys as Reassurance for Maternal and Class Anxiety* (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 28, 2001) (discussing the relationship between working mothers’ guilt and purchasing).

229. Jane Waldfogel, *The Effect of Children on Women’s Wages*, 62 AM. SOC. REV. 209, 216 (1997).

230. Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference?*, 16 J. LAB. ECON. 505, 507 (1998).

231. See Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 148 (1998).

232. WILLIAMS, *supra* note 40, at 71–72 (“Nine out of ten men in upper-level corporate management have children and a nonworking spouse.”).

233. *Id.* at 59.

Inequalities in the workplace reflect and reinforce inequalities in the home. It is so difficult to follow male career patterns while mothering that a retreat into traditional roles becomes a tempting solution for many women.²³⁴ If a mother has lower earnings potential than the father, they may decide that it is best for the family to give priority to the father's career and assign the mother a greater share of family responsibilities.²³⁵ Williams notes that even mothers with full-time jobs do not work much overtime, finding that ninety-three percent of working mothers work less than fifty hours per week.²³⁶

4. Childhood in the New Economy

This section examines the family's new investment role in "producing ever higher *potentially productive* labor for the more flexible, competitive economy."²³⁷ As the new economy rewards different personality characteristics, parenting ideologies have also shifted to encourage these traits in children.²³⁸ Specifically, compared to parenting in the industrial era, parenting in the new economy is more anxiety-ridden, expert-driven, premeditated, structured, time-intensive, and expensive.²³⁹

First, parental anxiety has increased because middle-class parents fear that their children will not succeed in the less secure world of the new economy and divorce.²⁴⁰

234. See, e.g., TERRI APTER, *WORKING WOMEN DON'T HAVE WIVES: PROFESSIONAL SUCCESS IN THE 1990S* 69–70 (1993).

235. Studies show that overall, women are more likely than men to adjust their work and home schedules to accommodate the demands of life at home. Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 *J. MARRIAGE & FAM.* 1208, 1212 (2000).

236. Williams, *supra* note 1, at 923.

237. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *SUSTAINABLE FLEXIBILITY: A PROSPECTIVE STUDY ON WORK, FAMILY AND SOCIETY IN THE INFORMATION AGE* 39 (1997). See also Arendell, *supra* note 205, at 39 ("What mothers do serves the larger public interest: children are socialized into and prepared for the adult world where the demands of productivity, success, competitiveness, and flexibility are universal.").

238. See Arendell, *supra* note 205, at 9 ("Good childhoods are intended not only to secure children's immediate psychological well-being and growth. They also aim to prepare children for their future roles as adults."). See also Alan Prout & Allison James, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* 7, 10–22 (Allison James & Alan Prout eds., 1997) (asserting that "[t]he immaturity of children is a biological fact of life but the ways in which this immaturity is understood and made meaningful is a fact of culture").

239. See SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 97–130 (1988).

240. See, e.g., SENNETT, *supra* note 92, at 17 (discussing "[t]he American dream of upward mobility for the children"). Barbara Ehrenreich states that

[i]t is one thing to have children, and another thing . . . to have children who will be disciplined enough to devote the first twenty or thirty years of their lives to scaling the

This anxiety flows from trends established in the industrial economy.²⁴¹ Similar to past periods, when the cult of domesticity deepened, new notions about motherhood may reflect society's need to adjust to the harsher demands of current socioeconomic trends. In times of economic uncertainty, domestic life and children become idealized.²⁴² In addition, given the high rates of divorce, parents tend to focus more on children. Ulrich Beck notes that divorce makes parents more child-focused, resulting in greater "idolization" of children.²⁴³

This greater anxiety stems not only from the demands of the new economy, but also from the danger parents believe that children face from the outside world—today, children are taught to fear strangers.²⁴⁴ Frank Furedi has coined the phrase "paranoid parenting" to reflect these new norms.²⁴⁵ During the industrial society, neighborhood adults helped to keep an eye on children as they roamed the surrounding streets on their bicycles. In contrast, today most people do not know their neighbors and children are restricted to riding their bicycles in the driveway under parental supervision, wearing knee pads and helmets.²⁴⁶ Mary Pipher describes how

educational obstacles to a middle-class career. Nor is there any obvious, reliable way the older generation can help. All that parents can do is attempt, through careful molding and psychological pressure, to predispose each child to retrace the same long road they themselves once took.

Hence the perennial middle-class preoccupation with the problems of child raising.

BARBARA EHRENREICH, *FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS* 83 (1989).

241. New norms of intensive mothering reinforce this traditional gender-based division of labor. Thus, modernized childhood means an expansion of maternal labor. *See, e.g.,* Teresa Arendell, *Hegemonic Motherhood: Deviancy Discourses and Employed Mothers' Accounts of Out-of-School Time Issues* 3 (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 9, 1999) ("Intensive mothering ideology both assumes and reinforces the traditional gender-based division of labor."), available at http://www.bc.edu/bc_org/avp/wfnetwork/berkeley/papers/9.pdf; Arendell, *supra* note 205, at 2–3 (introducing a discussion of modern motherhood and modernized childhood as part of broader economic trends).

242. *See, e.g.,* GIDDENS, *supra* note 22, at 92 ("We now live in the era of the 'prized child', where children are no longer an economic benefit but instead a major economic cost. The nature of childhood and child rearing has changed profoundly."); Garey & Arendell, *supra* note 95, at 297 (noting that a child development focus may serve "a 'therapeutic function' by addressing the uncertainty and uneasiness people feel in response to the rapid social changes of the period"); Hochschild, *supra* note 220, at 11, 12 (discussing that the symbol of the mother is a "psychological 'holding ground'" and "[t]he harsher the environment outside the home, the more we yearn for a haven inside the home").

243. *See* BECK, *supra* note 20, at 106, 118 ("Partners come and go. The child stays.").

244. *See* PIPHER, *supra* note 55, at 86 ("Most children think they are in danger.").

245. *See* FRANK FUREDI, *PARANOID PARENTING: WHY IGNORING THE EXPERTS MAY BE BEST FOR YOUR CHILD* 22–24 (2002). *See also* JOEL BEST, *THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS* 137–41 (1990) (evaluating how claims about threats to children are processed by society); Arendell, *supra* note 205, at 10 ("Fears about children's safety in urban, industrial societies . . . have become 'urban legends,' influencing parents' decisions about their children's activities and locations.").

246. *See* FUREDI, *supra* note 245, at 6–7.

this loss of freedom to explore the neighborhood at a young age represents a lost opportunity for learning self-sufficiency: “[A child] could develop a sense of competency as he navigated his small world. He learned to structure his own time and he learned that his own behavior determined his successes or failures.”²⁴⁷

Second, many parents turn to experts in the search for the best methods.²⁴⁸ Developments in child psychology reflect the new socioeconomic conditions. Parenting books by T. Berry Brazelton, Penelope Leach, and Benjamin Spock discuss the new scientific discoveries about brain development during the early childhood years, and encourage what Sharon Hays calls norms of “intensive mothering,” which assume that childcare is primarily the responsibility of the mother.²⁴⁹ Penelope Leach discusses how female biology demands that mothers be ever present and always responsive to their children.²⁵⁰ As a result of higher demands on employed mothers, we are witnessing the professionalization of motherhood—that is, applying managerial skills to mothering—as an adaptation to the increasing complexity of raising children in the new economy.²⁵¹

Third, child development experts encourage parents to relate to their children in a purposive and calculated manner.²⁵² These experts discourage parents from taking the role of the drill sergeant who threatens physical punishment for failing to obey.²⁵³ Rather, experts recommend a “warm-restrictive” approach that involves explaining and negotiating prosocial behavior to encourage children to internalize values.²⁵⁴ These new methods are more hands on, emotionally draining, and time-intensive.²⁵⁵ For example, it is much easier to order a child to stop doing something in a

247. PIPHER, *supra* note 55, at 20.

248. Today’s parents often rely more on child experts than their own parents did in seeking advice for how to raise their children. *See* EHRENREICH, *supra* note 240, at 83 (“Nor, in the middle class, is childraising a matter that can be entrusted to parents alone . . .”).

249. HAYS, *supra* note 239, at 13.

250. PENELOPE LEACH, CHILDREN FIRST: WHAT OUR SOCIETY MUST DO—AND IS NOT DOING—FOR OUR CHILDREN TODAY 33 (1994).

251. Arendell, *supra* note 205, at 11–14 (describing the managerial tactics used by a selection of working mothers).

252. *See id.* at 6–7 (“Good childhoods do not just happen spontaneously or serendipitously. Rather, they come about through deliberate and ongoing orchestration.”).

253. *See id.* (noting the “focus on the ‘development of reasoning’ in which ‘talking is a crucial part of discipline’” (quoting Annette Lareau, *Contours of Childhood: Variations in Pace, Performance, and the Texture of Family Life* (1999) (unpublished manuscript, on file with author))).

254. *See id.*

255. *See id.* at 6.

sharp tone or to say “No, because I said so” than to reason with a child so that the rule makes sense to them.

Fourth, compared to the industrial era, children’s time is organized around involvement in extracurricular lessons, sports, and other activities.²⁵⁶ This is occurring for two reasons: (1) children need structured activities because it is not safe to just go outside and play, and (2) children need preparation for the new economy. Conversation among parents about these activities can take on a contagious sense of anxiety.²⁵⁷

Fifth, as a result of the combination of these new aspects of parenting in the new economy, parenting is much more expensive than it was in the past. One estimate is that it takes \$170,000 to raise a child, excluding college tuition.²⁵⁸

In sum, growing up today is very different than just a generation ago. Children’s schedules leave little time for free play or simple relaxation. Theresa Arendell explains: “The changes in children’s lives—the intensification of children’s time use, adult intrusiveness into their lives and oversight of their actions, and their exposure to adult culture and increasingly sophisticated technology—have led to much hand wringing about ‘the disappearance of childhood.’”²⁵⁹ One author laments: “‘Child energy is not frittered away in idle play or innocent enjoyment. Children work. They are very busy indeed: scheduled in school and in so-called ‘leisure’ activities so that childhood is an ordered, regulated period, where children depend on the clock in a measure comparable with adults.’”²⁶⁰ Sylvia Hewlett and Cornel West describe the situation as “stressed-out parents and underachieving, unhappy kids.”²⁶¹

5. The Time Bind and Diversity in Life Cycle Biographies

The new economy has a completely different sense of time than the industrial society, altering most basic social rhythms.²⁶² This is reflected in two phrases: (1) “no time”—reflecting a person’s hurried, frenzied

256. For other discussions concerning the new trends in child rearing that emphasize these extracurricular activities, see Janet S. Dunn, David A. Kinney & Sandra L. Hofferth, *Parental Ideologies and Children’s After-School Activities*, 46 AM. BEHAV. SCIENTIST 1359 (2003).

257. Arendell, *supra* note 205, at 8–10.

258. CRITTENDEN, *supra* note 8, at 165.

259. *Id.* at 3–4.

260. *Id.* at 7 (quoting Judith Ennew, *Time for Children or Time for Adults*, in CHILDHOOD MATTERS: SOCIAL THEORY, PRACTICE, AND POLITICS 125, 143 (Jens Qvortrup et al. eds., 1994)).

261. Hewlett & West, *supra* note 46, at xv–xvii (discussing how economic markets do not reward the nonmarket work of nurturing).

262. See TOFFLER, *supra* note 2, at 262–63.

existence on a daily basis and (2) “no long term”—revealing the increasing uncertainty over the course of a person’s life cycle.²⁶³

The sense of the lack of time in the new economy has been termed “time bind” by sociologist Hochschild.²⁶⁴ Hochschild reports that time bind mainly flows from the longer hours Americans work and women’s entry into the workplace.²⁶⁵ The notion of the time bind reflects how time has taken on greater importance as we struggle to make every minute count. In this sense, attuning our lives to the new economy means living in a constant state of hyper-drive.²⁶⁶ The new notion of multitasking highlights how we strive to accomplish more work in a single day.

Although the time bind is widely publicized, it is only part of how we have restructured time in the new economy.²⁶⁷ In contrast to the earlier agricultural and industrial eras, where gender roles and life cycle stages were well-settled, today individuals face many more choices in work and family life. Thus, no one gets a map; we are “off script.”²⁶⁸ On the upside, this lifestyle holds promise for greater self-fulfillment because weaving together a life story is much more personalized than in the past.²⁶⁹ On the downside, developing this life course is also much more uncertain than in the past because life entails much more risk—the job-for-life and spouse-for-life are gone.²⁷⁰

As a result of these new customized life trajectories, it is much harder to paint a picture of Joe’s and Betty’s lives in the new economy. Both Joe

263. See, e.g., Phyllis Moen & Stephen Sweet, *The New Workforce, the New Economy and the Lock-Step Life Course: An American Dilemma* (Working Paper 2002).

264. HOCHSCHILD, *supra* note 186, at 45–46. But see JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 5* (1997) (arguing that “Americans have more free time than they did 30 years ago and that free time is likely to increase even more in the future”). See also Jerry A. Jacobs & Kathleen Gerson, *Overworked Individuals or Overworked Families?: Explaining Trends in Work, Leisure, and Family Time*, 28 *WORK & OCCUPATIONS* 40, 41–47 (2001) (summarizing the debate and offering a synthesis of the opposing views).

265. See HOCHSCHILD, *supra* note 186, at 6.

266. See Moen, *supra* note 96, at 3 (contemplating “the millions of Americans . . . with too much to do and too little time to do it, often with the need and desire to be at two places at once”).

267. Moen & Sweet, *supra* note 263, at 3.

268. PIPHER, *supra* note 55, at 11. See TOFFLER, *supra* note 2, at 182 (“Instead of merely receiving our mental model of reality, we are now compelled to invent it and continually reinvent it.”); Moen, *supra* note 96, at 2 (observing that the radical transformation of work and lifestyle is “at odds with the script of the traditional life courses of everyone: men, women, and children—regardless of age, ethnicity, gender, education, or occupation”).

269. See CARNOY, *supra* note 2, at 134 (explaining that flexible labor markets offer opportunities for better work-family balance).

270. See Benner, *supra* note 14.

and Betty may live in many different types of households and have many jobs and careers in their lifetimes. Joe and Betty may have extended durations of single life or they may cohabit without marriage, have several marriages, engage in single parenting, and live in various stepfamilies.²⁷¹ Joe and Betty will likely work for employers for a shorter duration, endure months of unemployment, and face mounting obstacles in gaining employment as they age.²⁷² In addition, their lifestyles may be dramatically different depending on the level of their education and talent in the new economy.²⁷³

Picture Joe. He is college-educated and married to Betty in a dual-earner marriage with two children, Susan and Sam. He has a job as a middle manager of a large software company. Betty is a lawyer at a small law firm. Joe has had to move his family around the country for career advancement. As a result, they do not know their neighbors and do not have roots in the community. His company was recently sold and is in the midst of downsizing once again. He goes to work every day fearing that it will be his last. Since his co-workers were fired, he has had to do the work of three people. As a result, he has to work twelve-hour days, six days a week. Last year, he had to work both Thanksgiving and Christmas. He has little time or energy for family. He feels that he must support his family, but to do that, he is gone all the time and he does not know his family. He states, "I come home shelled. . . . I have the least to give to the people I love the most."²⁷⁴

Even with both Joe and Betty working, money is tight.²⁷⁵ Their home is nicer than they can afford, but they want a safe neighborhood for the children. Money is also important to give the children the lessons and educational opportunities so that they will have the right friends.²⁷⁶

With Joe working so much, Betty is essentially a single parent. She scales back her career when the children are young. She cuts back on sleep, she never exercises, and does not have time for friends, hobbies, or reading.

271. Sennett states: "What's peculiar about uncertainty today is that it exists without any looming historical disaster; instead it is woven into the everyday practices of a vigorous capitalism. Instability is meant to be normal . . ." SENNETT, *supra* note 92, at 31. *See also* Carr, *supra* note 149, at 190 ("As we spend our days toiling in virtual companies, are we fated to become virtual men and women, efficient and adaptable but without substance?").

272. Carr, *supra* note 149, at 190.

273. For more on working class parents, see LAWRENCE E. MITCHELL, *STACKED DECK: A STORY OF SELFISHNESS IN AMERICA* 31-38 (1998).

274. *See* PIPHER, *supra* note 55, at 51 (quoting interviews with real-life Bettys and Joes).

275. *See id.* at 50.

276. *See id.* at 77.

She rushes to leave the office by 4:00 p.m. to take the children to their lessons. In order to do this, she works through lunch and brings work home. Sam takes violin and tennis lessons. Susan has piano, ballet, and soccer. Betty feels guilty for going home early; when she stays late at work, she feels guilty because she worries the babysitter will feed the children junk food and park them in front of the TV. For dinner, she gets fast food on the way home from lessons or fixes a simple dinner in the microwave. When they get home, she takes on the second shift of laundry, bill paying, and cleaning. The children also have a pile of homework that she needs to supervise. After homework, she bathes the children and puts them to bed. When the children are asleep, she goes into her study to finish office work. She runs errands and does shopping on the weekends. She states, "I never get fifteen minutes for myself. I'm always in a hurry. I'm always exhausted. I never have time to eat or go to the bathroom."²⁷⁷

Joe and Betty are working very hard and they are tired. They get pressured at work and barely see each other. They talk to each other a few minutes at night. Their conversations are often limited to whose turn it is to take the children to school and who will call the plumber. They fight over chores. When one of the children gets sick, they fight over who has to take time off from work to take the child to the doctor.

They worry that they are headed for a divorce. They worry about losing their jobs. They worry that their children will grow up to be poorer than they are. They worry about having to work later in life instead of retiring. Life is risky and uncertain and Joe and Betty are scared and frazzled.

In sum, the point of this part is to emphasize that the concept of childhood is an interconnected part of the prevailing form of production. We see that ideas about childhood change because families equip children with the skills needed later in life.²⁷⁸ We expect parents to do more in raising children in terms of human capital production for the new economy, but socioeconomic factors converge to make it harder for parents to do their job. Specifically, the new employment relationship penalizes workers who take time to care for children. At the same time, high rates of divorce make it increasingly risky for workers to leave the labor force to allocate

277. See generally Juliet Schor, *Time Crunch Among American Parents*, in PARENTING, *supra* note 39, at 83 (assembling data on the rise in work hours).

278. See Sharon Landesman Ramey & Craig T. Ramey, *Early Childhood Experiences and Developmental Competence*, in SECURING, *supra* note 3, at 130, 147; Arendell, *supra* note 205, at 4, 9–10.

time to caring for children.²⁷⁹ Fundamentally, we are still trying to fit twenty-first century parents of dual-earner families into jobs designed for men with stay-at-home wives raising the children and managing the household.²⁸⁰

IV. REPRODUCTION OF HUMAN CAPITAL AND SUSTAINABLE ECONOMIC DEVELOPMENT

This part discusses the need to evaluate the human capital development of the future workforce as a necessary component of long-term economic growth. Traditional economic indicators, such as GDP, do not take this factor into account. This part reviews efforts to develop new languages of accountability using the concept of sustainable development that incorporates the well-being of children.

A. CHILDREN'S HUMAN CAPITAL DEVELOPMENT

The current skills deficit among younger workers in the United States has led to much research evaluating children's human capital. Specifically, early child neurodevelopment sets the stage for later skills as an adult.²⁸¹ Scientists explain: "In a sort of 'neural Darwinism,' the synapses that are not utilized through the child's experience tend to wither. . . . In other words, the young brain is the ultimate 'use it or lose it' system."²⁸² Much of the analysis focuses on the mother, leaving a large gap in the literature concerning the father's role in child development.²⁸³ "[P]arent-child interactions in the first year have a special and lifelong influence on children's development."²⁸⁴ A mother's sensitivity to her child is linked to cultivating a love of learning because the child's brain connects cause and effect to pleasure.²⁸⁵ This learning of cause and effect builds other

279. According to Beck, individualization means that men and women are released from the gender roles prescribed by industrial society for life in the nuclear family. At the same time, and this aggravates the situation, they find themselves forced, under pain of material disadvantage, to build up a life of their own by way of the labor market, training, and mobility, and if need be to pursue this life at the cost of their commitments to family, relations, and friends. See BECK, *supra* note 20, at 104, 109–13.

280. See Edward N. Wolff, *The Economic Status of Parents in Postwar America*, in PARENTING, *supra* note 39, at 59, 68–69.

281. See Barry Zuckerman & Robert Kahn, *Pathways to Early Child Health and Development*, in SECURING, *supra* note 3, at 87, 89.

282. *Id.* at 90.

283. See Audrey Fisch, *Where's Poppa?*, at http://www.salon.com/mwt/feature/2002/08/05/care_study (Aug. 5, 2002) (noting the scarcity of studies on the father's role in parenting).

284. Zuckerman & Kahn, *supra* note 281, at 92.

285. See *id.*

foundations for later abilities, such as confidence, curiosity, self-control, and communication skills. In this way, scientists note that “early child health and development in general, and the developing brain in particular, can be viewed as a most critical economic asset.”²⁸⁶ Thus, parenting matters in the new economy more than ever.²⁸⁷

A consensus has recently emerged that investments in early childhood are cost-effective and produce long-lasting returns.²⁸⁸ Scientists emphasize that the time to start intervention is at birth; learning builds on itself and gaps are hard to fill if children are not reached as early as possible.²⁸⁹ This research recognizes that the trends in family structure and pressures on families from the new economy impede children’s human capital development.²⁹⁰ Thus, an effective strategy to boost human capital development in children focuses on relieving the economic and social stresses on parents.²⁹¹ Specifically, these researchers focus on the role of maternal health as a central mediator,²⁹² because “[m]aternal depression has long been identified as a risk factor for children’s cognitive development and behavioral adjustment.”²⁹³ Hopefully, this knowledge about children’s human capital development will allow policy discussions

286. *Id.* at 91.

287. Sylvia Ann Hewlett and Cornel West assert:

Whether Johnny can read; whether Johnny knows right from wrong; whether Johnny is a happy, well-adjusted kid or sullen, self-destructive, and violent has a whole lot to do with the kind of parenting Johnny has received. If Johnny’s mom and dad have been able to come through with sustained, steadfast, loving attention, the odds are Johnny is on track to become a productive, compassionate citizen. If they have not, Johnny is in trouble—and so is our nation.

Hewlett & West, *supra* note 46, at xvi. See RUBIN, *supra* note 88, at 244 (discussing the problem of affordable childcare for working class families); RUTH SIDEL, *WOMEN & CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 106 (listing unemployment as a primary reason why poor males fail to pay child support).

288. See Sheldon Danziger & Jane Waldfogel, *Investing in Children: What Do We Know? What Should We Do?*, Introduction to SECURING, *supra* note 3, at 1, 6.

289. See Zuckerman & Kahn, *supra* note 281, at 90.

290. See Lynch, *supra* note 4, at 28.

291. See Heckman & Lochner, *supra* note 9, at 48 (arguing that policies directed toward families may be better than direct expenditures on teachers’ salaries or new computers); Lynch, *supra* note 4, at 38, (advocating investments in young children as the most cost-effective policy for intervention); Ramey & Ramey, *supra* note 278, at 126 (“Biosocial developmental contextualism emphasizes that the developing child is part of multiple, dynamic, and interrelated systems.”).

292. See Zuckerman & Kahn, *supra* note 281, at 102 (“The close relationship between women’s health and well-being and child outcomes can also be framed in the context of broader discussions of the investments that adults make in their children. . . . [Women’s] ‘health capital’ . . . has a powerful and persisting influence on early child well-being.”).

293. Danziger & Waldfogel, *supra* note 288, at 6.

to avoid “mother blame” and focus on the crucial issue—the well-being of children.²⁹⁴

B. FACTORS INFLUENCING THE WELL-BEING OF CHILDREN IN THE UNITED STATES

This section analyzes how the concurrent socioeconomic revolutions of flexible labor markets and women’s workforce participation impact children. Parents today have fewer children and better education, which are positive indicators for children’s development.²⁹⁵ This section analyzes four factors that affect the well-being of children: (1) poverty, (2) work pressures, (3) childcare, and (4) divorce.

1. Child Poverty

Income inequality in the United States is greater than in any other advanced industrial nation.²⁹⁶ Carnoy warns that work-family pressures pose a danger to future generations, “as home environments deteriorate in low-income families, but are maintained in high-income families able to provide better childcare and private education.”²⁹⁷ As a result, the United States may see even higher levels of inequality in future generations because the new economy demands higher skills even for low-level jobs.

In addition, the United States has more children living in poverty than any other advanced industrial nation.²⁹⁸ One in six children grows up in poverty and one in three is an African American child.²⁹⁹ Poverty has negative effects on children—greater than race and household structure.³⁰⁰ In addition, children in persistent poverty average lower IQ scores, but

294. Ramey & Ramey, *supra* note 278, at 135 (“Somewhat remarkably, most public policies have tended to view the provision of childcare as simply a necessity to help mothers enter and remain in the workforce, rather than as an important means for protecting and even improving the future development of children themselves.”); Garey & Arendell, *supra* note 95, at 293 (“Avoiding mother-blame *does* mean refusing to perpetuate the idea that mothers, as a group and a social position, are the cause of individual or social outcomes.”).

295. It is worth noting, however, that youth suicide has tripled in the last fifty years. In addition, only twenty-five percent of American high school students can write at an adequate level. Hewlett & West, *supra* note 46, at xv. We must also consider the conditions that gave rise to the tragedy at Columbine High School.

296. Edward N. Wolff, *How the Pie is Sliced: America’s Growing Concentration of Wealth*, AM. PROSPECT, Summer 1995, at 58, 59.

297. CARNOY, *supra* note 2, at 115.

298. DALLAS, *supra* note 94, at 19.

299. *Id.* at 20.

300. See Zuckerman & Kahn, *supra* note 281, at 94.

these negative effects can be reversed by raising income levels.³⁰¹ Experts agree that the most effective way to fight poverty is to invest in children.³⁰²

2. The Childcare Crisis

Part III discussed how more than sixty percent of mothers of young children are in the workforce.³⁰³ As a consequence, most preschool children are not cared for by a full-time, stay-at-home parent. Many parents cannot afford high quality childcare and are forced to leave their young children in care arrangements that are less than ideal.³⁰⁴ While studies show that good quality childcare allows children to thrive,³⁰⁵ approximately fifty percent of childcare is of poor quality.³⁰⁶ Specifically, a study by the U.S. Department of Health and Human Services in 2000 found that sixty-one percent of America's children are in childcare arrangements with scores of one or two on a scale of four.³⁰⁷ The care for infants and toddlers receives many of the lowest ratings. Childcare is of such poor quality that child development is at risk; children suffer under the current system in terms of achieving cognitive and social skills. Low-income families are particularly hurt by low-quality childcare.³⁰⁸ This poor-quality care is not limited to children of poverty, however, but extends to childcare used by many middle-class families.³⁰⁹

301. See *id.* (noting that children in persistent poverty averaged 9.1 IQ points less than children who were never poor, while doubling of income to twice the poverty line increases IQ 3.6 points at age 5).

302. See BERGMANN, *supra* note 87, at 131, 150–51 (arguing that high quality day care leads to proper socialization, which reduces the next generation of poverty); Danziger & Waldfogel, *supra* note 288, at 12.

303. See *supra* notes 158–67 and accompanying text.

304. See SUZANNE W. HELBURN & BARBARA R. BERGMANN, AMERICA'S CHILD CARE PROBLEM: THE WAY OUT 29–30 (2002). See also *Making Quality Child Care a Reality for America's Low-Income Working Families*, THE ANNIE E. CASEY FOUND., 1998 KIDS COUNT ONLINE, at <http://www.aecf.org/kidscount/kc1998/overview.htm> (last visited Aug. 29, 2004) (espousing the need for quality childcare, especially for lower-income families).

305. See NAT'L RESEARCH COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 9–10 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

306. See HELBURN & BERGMANN, *supra* note 304, at 94.

307. NAT'L INST. OF CHILD HEALTH & HUMAN DEV., THE NICHD STUDY OF EARLY CHILDCARE 5 (2000).

308. See HELBURN & BERGMANN, *supra* note 304, at 5.

309. Ramey & Ramey, *supra* note 278, at 135.

3. Longer Working Hours

Given the intensifying resources of the workplace, the constant threat of downsizing, and stagnating wages, many parents feel regret not being able to spend time with their children because they need to earn a living. Additionally, when parents do spend time with their children, the strain of work may spill over to how they relate to their children. The time bind that parents face raises serious questions about how this impacts the well-being of children.

a. Effects of Maternal Employment

Studies persistently show that maternal employment, in and of itself, does not harm children.³¹⁰ While maternal employment alone does not hurt children, much depends on income, attitudes toward working, stresses and satisfactions that parents take home from their work, and the quality of childcare.³¹¹ Polls reveal that approximately fifty percent of the public believes that a preschool child is likely to suffer when her mother works.³¹² Ellen Galinsky reports, however, that

[o]ver time, there has been a steady increase in the number of people who feel that employed mothers can have just as good a relationship with their children as at-home mothers. I attribute this largely to the gradual social and cultural change as women have moved into the work force in larger and larger numbers and as families have become more dependent on their income.³¹³

In a recent study, the National Institute of Child Health and Human Development measured the impact on cognitive skills of maternal employment in a child's first year.³¹⁴ This study found negative effects on children whose mothers worked thirty hours or more per week in the first nine months—even after controlling for childcare quality and the quality of the home environment.³¹⁵ The study found that for women who worked full-time in the first nine months, by the time their children were age three, they were providing less sensitive care than women who had not worked in the first year.³¹⁶ Over time, this negative effect is offset because maternal

310. See GALINSKY, *supra* note 185, at 54.

311. See *id.* at 10.

312. See SPAIN & BIANCHI, *supra* note 169, at 182–83.

313. GALINSKY, *supra* note 185, at 4.

314. See Jeanne Brooks-Gunn, Wen-Jui Han & Jane Waldfogel, *Maternal Employment and Child Cognitive Outcomes in the First Three Years of Life: The NICHD Study of Early Child Care*, 73 CHILD DEV. 1052 (2002).

315. See *id.* at 1067.

316. See *id.*

employment brings advantages such as higher income and maternal self-esteem. Waldfogel surmises that working full-time in the first year may lead some employed mothers to be more stressed when they are with their child.³¹⁷ Thus, Waldfogel indicates that some children may fare better if their mothers could stay home the first year after giving birth.³¹⁸

b. Parenting Time: Quantity and Quality

Research reveals contradictory results about the amount of time parents have with children. Although there are some studies documenting a serious decline in the time parents spend with their children, other investigations find that this is not the case.³¹⁹ On the one hand, a 1999 study by the Council of Economic Advisers reported that over the past three decades the average American family has lost twenty-two hours a week of parenting time.³²⁰ One of the leading experts on time studies, Juliet Schor, asserts that the data do not show a decrease in time parents spend with children.³²¹ This is because parents cut back on other activities. Working mothers especially cut back on sleep and “time for self.”³²² In addition, parents cut back on their time as a couple, which may lead to divorce.

Schor warns that data about the average time parents spend with children may hide the fact that some children are receiving less parental attention.³²³ Thus, she suggests more study is needed, especially with regard to single-parent families. One single mother described her experience:

317. See Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, FUTURE OF CHILD., Spring/Summer 2001, at 99, 100.

318. See *id.* at 104.

319. A recent study suggests that parental time with children did not decrease from 1981 to 1997, and that in two-parent families the time mothers spent with children actually increased. John F. Sandberg & Sandra L. Hofferth, *Changes in Children's Time with Parents, U.S. 1981–1997*, at 32 (May 2, 2001) (unpublished manuscript). Another study showed that although mothers employed outside the home spent fewer hours with their children overall than mothers who are not employed outside the home, the amount of time spent in direct interaction did not vary. Sandra L. Hofferth, *Women's Employment and Care of Children in the United States 9* (Working Paper 1999).

320. See COUNCIL OF ECON. ADVISORS, *Executive Summary to FAMILIES AND THE LABOR MARKET, 1969–1999: ANALYZING THE “TIME CRUNCH”* (May 1999) (attributing a loss of parental time to an increase in hours that mothers spend in paid work combined with the shift toward single-parent families during the period between 1969 and 1999).

321. See Schor, *supra* note 277, at 93.

322. See *id.* at 95–96 (noting that a “case study . . . and anecdotal evidence suggest that a subset of children may be experiencing high levels of parental absence, which is masked by the stability of averages”).

323. See *id.* at 96.

“It’s hard to describe how bone tired I am at the end of the afternoon. . . . I catch myself moaning aloud, I am so out of my skull with exhaustion. Most days I walk into my house knowing there’s not a prayer I can be a good parent to my kids.”³²⁴

Even if parents make extra time for their children by taking it away from themselves, they may not have the energy when they come home from work to focus on their children.³²⁵ In a national study, Galinsky asked children what they thought about their parents working. Children emphasized that they wanted “focused” time—time spent communicating and connecting and being attuned to their needs.³²⁶ Researchers measure “negative spillover” from work to homelife that influences parents’ ability to provide this focused time to their children.³²⁷ Many children report that their parents are distracted or noncommunicative when they have had a bad day at work.³²⁸ The children wished that their parents were less tired and stressed from work.³²⁹ Galinsky states that the quality of time matters to children as well as the quantity of the time.³³⁰ Yet, Galinsky recognizes that to have quality time with children, it is necessary to have quantity as well.³³¹

Recent surveys reveal that ninety percent of parents say that this time scarcity is the worst thing in their lives.³³² In addition, surveys suggest that employed parents feel strongly that they do not have enough time to spend

324. Hewlett & West, *supra* note 46, at xviii.

325. Zuckerman & Kahn, *supra* note 281, at 95.

326. GALINSKY, *supra* note 185, at 91.

327. *See id.* at 195–97.

328. *See id.* at 199–200.

329. *Id.* at 93–95.

330. *Id.* at 92 (finding that children need “focused times and hang-around times”). Enola Aird writes:

It is in the small, ordinary, unglamorous, and sometimes tedious experiences of everyday family life that our children become anchored, learn who they are, and discover what is truly important in life and what is expected of them. It is in hearing and reading stories, sharing meals, walking hand in hand, visiting with grandparents and extended family and friends, learning and being steeped in traditions and customs, working around the house, sharing thoughts and comparing notes at the end of the day, and taking part in the countless other activities of ordinary life that children discover how to be and how to behave.

. . . These experiences can be marvelously enriching . . . or sorely impoverished. If they are done in relative peace and calm, they can offer opportunities for a wonderful companionship through which children can learn from being with and observing their parents. If they are done in a hurried and perfunctory way, they can send a clear and painful message to our children that they are not important enough to us to deserve what is perhaps the most precious gift of all because it cannot be replenished—our time.

Enola G. Aird, *On Rethinking a Spirit of “Home Training”: A Mother’s Notes from the Front*, in PARENTING, *supra* note 39, at 19–20 (second omission in original).

331. GALINSKY, *supra* note 185, at 92 (“[T]he quantity of time isn’t enough. Its very hard to create quality without quantity.”).

332. HEWLETT & WEST, *supra* note 46, at 110.

with their children: two-thirds of working parents believe that they do not spend enough time with their children.³³³

4. Divorce

There is a strong case for the importance of a stable two-parent family structure for children's development.³³⁴ That is, children tend to have better financial and emotional well-being when their parents are married to each other.³³⁵ Specifically, studies find more psychological disorders and behavioral problems—such as teenage pregnancy, dropping out of school, substance abuse, unemployment, and marital breakups—among the children of divorced parents compared to the children of nondivorced parents.³³⁶

Even when economic factors are not present, divorce can hurt children emotionally. Judith Wallerstein writes about how individuals are affected by their parents' divorce twenty-five years later.³³⁷ Her findings are summarized by the characteristic statement of a child of divorce: “The day my parents divorced is the day my childhood ended.”³³⁸ Wallerstein states: “The world is newly perceived as a far less reliable, more dangerous place because the closest relationship in their lives can no longer be expected to hold firm.”³³⁹ Rather than being subsumed in a single traumatic event, the original divorce resurfaces repeatedly throughout life in the form of chronic self-doubts and worries about betrayal and instability.

One of the main ways that divorce affects young children is that it usually diminishes the kind of nurturing care that they received during their parents' marriage. Children who were under six when their parents divorced often suffer the most. They often lose the relationship with their father, and mothers may “desperately struggle to raise their children alone,

333. *Id.*

334. Children do not do as well in single-parent families as in two-parent families. *See, e.g.,* SARA McLANAHAN & GARY SANDEFOR, *GROWING UP WITH A SINGLE PARENT* (1994).

335. *See generally* WALLERSTEIN ET AL., *supra* note 216 (recounting the adverse effects of divorce). *But see* Stephanie Coontz, *Divorcing Reality*, CHILD. ADVOC., Jan.–Feb. 1998, (criticizing Wallerstein's work on the long-term effects of divorce), *available at* <http://www.4children.org/news/198coon.htm>.

336. *See* WALLERSTEIN ET AL., *supra* note 216, at 15.

337. *See id.* at xxvi–xxvii.

338. *Id.* at 26.

339. *Id.* at 27.

but owing to work, dating, or their own emotional state, they cannot keep up the same level of attention and order.”³⁴⁰

Divorce is not universally detrimental to children.³⁴¹ Yet, overall, unlike other social ills such as poverty, in which the interests of parents and children converge, divorce can benefit adults while being detrimental to the needs of children. Wallerstein suggests that we are increasingly ending marriages that, from the standpoint of child well-being, could and should be saved.³⁴² Although conservatives use Wallerstein’s study to promote laws to make divorce more difficult, Wallerstein herself opposes such notions.³⁴³ Such efforts to restore the nuclear family are short-sighted. These proposals misdiagnose the entire problem, and reflect a misunderstanding of the wide-scale changes necessary to support the nuclear family in an era of historical socioeconomic change.³⁴⁴ This Article takes the view that, given that good marriages are healthy for children, the most constructive way to support modern marriages is to improve work-life policies so that couples can spend more time with each other and their children.³⁴⁵ This suggests that corporations could include marriage education in work-family policies.

In sum, this section looks at many indicators that American children are negatively affected by the dramatic changes in the economy and social environment. The next section connects this discussion to new measures of economic well-being for the nation by evaluating some ideas concerning sustainable economic development.

C. SUSTAINABLE ECONOMIC DEVELOPMENT AND HUMAN CAPITAL

The notion of sustainability became prevalent at the international level in the late 1980s when the United Nations defined the term as the

340. *Id.* at 137.

341. *See generally* E. Mavis Hetherington, *Marriage and Divorce American Style*, AM. PROSPECT Apr. 8, 2002 (noting that statistics that indicate there is more happiness and wealth in married families are misleading), *available at* <http://www.prospect.org/print/v13/7/Hetherington-e.html>.

342. *See* WALLERSTEIN ET AL., *supra* note 216, at xxxiii–xxxiv.

343. *Id.*

344. *See* TOFFLER, *supra* note 2, at 225 (“Blind to the ways in which historical waves of change influence us, [people] come up with well-intentioned, often inane proposals that utterly miss the target.”).

345. *See generally* Arlie Hochschild, *Taking Care*, AM. PROSPECT, Apr. 8, 2002 (arguing that economic policy and not traditional ideas of “family values” will help to strengthen marriages), *available at* <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=6233>. Good marriages are good for the parents as well. *See, e.g.*, LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 68, 95, 105 (2000) (arguing that married people are happier, healthier, live longer, and are better off financially).

following: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”³⁴⁶ In general, sustainable economic development seeks to balance economic growth with social and ecological concerns. Early thinking about sustainability focused on environmental concerns; ecological economists emphasized that economic growth cannot continue indefinitely because the planet has a limited amount of natural resources.³⁴⁷ Essentially, sustainable development reflects long-term concern about the world we are creating for our children and grandchildren.

Recent thinking on sustainable development has expanded beyond environmental concerns to consider how economic growth affects peoples’ daily lives. This broader perspective is based on the need for a better measure of national well-being than the GDP.³⁴⁸ Criticism of GDP comes in three forms. First, GDP does not take into account the psychological, social, and environmental costs of economic growth. Second, GDP does a poor job of measuring economic welfare itself because GDP reflects the philosophy that more of anything is good, no matter what it is. Thus, GDP in the United States reflects that Exxon spent \$2.1 billion to clean up the Valdez oil spill and that the United States has the largest prison system in the world.³⁴⁹

Third, rising GDP does not necessarily mean that the people of a nation are happier. The notion of sustainable economic development tries to capture the notion that the quality of our society is different from our gross national product.³⁵⁰ Traditional economic indicators do not capture a series of standard economic factors that fundamentally shape the quality of life. Among these factors are the following: wages, income distribution, income inequality, job insecurity, and the rise of temporary, part-time and other forms of contingent employment.

346. WORLD COMM’N ON ENV. & DEV., OUR COMMON FUTURE 43 (1987).

347. The leading thinker in this field is Herman Daly. *See, e.g.*, HERMAN E. DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT (1996) [hereinafter BEYOND GROWTH]; FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE (Herman E. Daly and John B. Cobb, Jr. eds., 1994); TOWARD A STEADY-STATE ECONOMY (Herman E. Daly ed., 1973).

348. In discussing the need to improve the GDP as a measurement, feminist economists discuss how GDP does not take into account nonmarket work. *See* MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS 309–12 (1988). *See also supra* text accompanying notes 163–67.

349. *See* Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 29–30 (2001).

350. *Id.*

This is not to say that wealth is unrelated to human happiness, but this factor does not contribute to personal well-being as much as the American culture assumes.³⁵¹ What is more important to individual happiness is one's relative position in the economy, not whether the economy as a whole is better off.³⁵² Thus, rising income levels in the United States are not associated with increased levels of happiness.³⁵³ Recent American scholarship by commentators such as Schor³⁵⁴ and Robert Frank³⁵⁵ emphasizes that the American ideology that promotes fulfillment through consumer goods is harmful to society because it pressures people into a "work and spend" cycle that leads to a pervasive sense of alienation. They point out that Americans live to shop and do not know how to stop.

In developing tools to rectify these defects of GDP, recent proponents of sustainable development seek to reduce economic and social imbalances.³⁵⁶ This section examines the different definitions of sustainable economic development used by the United Nations, businesses, and communities with a focus on how the concept relates to human capital development. Specifically, the United Nations recognizes that human capital, social capital, and economic growth may all act as rough estimates of social progress, but countries that appear similar on one scale may be grossly disparate by other standards.³⁵⁷ This broader perspective, called "sustainable human development," ("SHD") recognizes that "[t]he real wealth of a nation is its people. And the purpose of development is to create an enabling environment for people to enjoy long, healthy and creative lives. This simple but powerful truth is often forgotten in the

351. See Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30, 30 (Martha Nussbaum & Amartya Sen eds., 1993).

352. See, e.g., JEROME KAGAN, *THREE SEDUCTIVE IDEAS* 141 (1998) (describing the psychological stress of identifying with a less-advantaged social class).

353. See Richard A. Easterlin, *Will Raising the Incomes of All Increase the Happiness of All?*, 27 *J. ECON. BEHAV. & ORG.* 35, 37 (1995). But see Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 *J. MARRIAGE & FAM.* 527, 535 (1998) (reporting that "health and financial satisfaction were the two principle predictors of happiness").

354. See generally JULIET SCHOR, *THE OVERSPENT AMERICAN* (1999) (examining how Americans "live" to spend money).

355. See generally ROBERT H. FRANK, *LUXURY FEVER: MONEY AND HAPPINESS IN AN ERA OF EXCESS* (1999) (describing excessive consumption patterns produced by American culture).

356. Herman Daly states: "I believe these social costs are of enormous importance, that the increase of product at the expense of human well-being should cease." *BEYOND GROWTH*, *supra* note 347, at 164. He emphasizes that "each human being is constituted by relationships to others, and this pattern of relationships is at least as important as the possession of commodities." *Id.*

357. See UNITED NATIONS DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 1999*, at 129 (1999); Manuel R. Agosin, David E. Bloom & Eduardo Gilti, *Globalization, Liberalization and Sustainable Human Development: Analytical Perspectives* 13-14 (U.N. Conference on Trade & Dev., Occasional Paper).

pursuit of material and financial wealth.”³⁵⁸ The United Nations Development Programme is working on a “human development index” (“HDI”) to measure “the most basic human capabilities—leading a long life, being knowledgeable and enjoying a decent standard of living.”³⁵⁹ The HDI focuses on measures such as life expectancy at birth, educational attainment, and income per capita.³⁶⁰ This index recognizes factors such as the development of the family, the rights of women, and social disintegration—especially levels of crime and corruption. Other international organizations, such as the International Labor Organization,³⁶¹ Organization for Economic Coordination and Development,³⁶² and the World Trade Organization,³⁶³ take similar approaches.

Businesses play an important role in promoting sustainable development and many are taking steps to encourage a broader notion of economic growth. Specifically, these firms recognize that promoting short-term shareholder value may not coincide with social welfare.³⁶⁴ In 1991, fifty companies adopted the Declaration of the World Business Council for Sustainable Development in anticipation of the upcoming World Summit on Environment and Development. According to Sustainability, Ltd., a British consulting company, few companies do much beyond required compliance with environmental, health, and safety laws.³⁶⁵ The most progressive firms, such as Procter & Gamble, recognize that economic growth needs to ensure a “better quality of life for everyone.”³⁶⁶ The

358. UNITED NATIONS DEV. PROGRAMME, *supra* note 357, at 1.

359. *Id.* at 127.

360. *Id.* at 127–28.

361. The International Labor Organization’s webpage is located at <http://www.ilo.org/public/english/protection/ses/index.htm> (last visited Sept. 1, 2004).

362. The Trade Union Advisory Council, the labor organization advising the Organization for Economic Coordination and Development (“OECD”), is having joint labor-management meetings on sustainable development indicators to examine the social aspects of sustainable development. *See* OECD Labour Management Programme and Trade Union Advisory Committee to the OECD, *TUAC Summary Conclusions of the Meeting on: “Use and Limits of Sustainable Development Indicators”*, at <http://www.tuac.org/news/n2002concl.htm> (Feb. 11, 2002).

363. The group at the World Bank is called Environmentally and Socially Sustainable Development. Their homepage is located at <http://lnweb18.worldbank.org/ECA/ECSSD.nsf> (last visited Sept. 1, 2004).

364. MEREDITH ARMSTRONG WHITING & CHARLES J. BENNETT, *THE ROAD TO SUSTAINABILITY: BUSINESS’ FIRST STEPS* 20–32 (2001).

365. *See id.* at 12.

366. *Id.* at 27–28 (discussing how Procter & Gamble has adopted the UK Strategy for sustainable development). A Conference Board Report states that in early 1999, Procter & Gamble shifted from a definition of sustainable development that focused just on the environment to a more “holistic” approach. *Id.*

Director of Corporate Sustainable Development at Procter & Gamble states: “Our embrace of sustainability is founded on a determination and a belief that we can build business, shareholder, and stakeholder value from a holistic approach to social economic and environmental development.”³⁶⁷ Such ideas are more widespread among European businesses than those in the United States.³⁶⁸

Thus, sustainable economic development refers to enhancing the quality of life for working families, rather than just promoting a higher standard of living based on consumer goods alone. I argue that rather than judging our economic performance on shareholder value and GDP alone, we should look at social indicators—focusing particularly on the well-being of children.³⁶⁹ Supporting the thesis that sustainable economic development should focus on children, the “new growth theory” posits that social equity is associated with higher long-term growth.³⁷⁰ This literature emphasizes path-dependence; countries characterized by greater economic equity grow faster, other things being equal. This is because economic growth is strongly determined by the intergenerational transmission of human capital. Thus, equality of income assures that more families can afford to educate their children in a manner that will contribute to the economy in the future.³⁷¹

367. *Id.* at 27.

368. *See id.* at 10.

369. For general information on the well-being of children in the United States see CHILD TRENDS, ANNUAL REPORT 2001: RESEARCH IN THE SERVICE OF AMERICA’S CHILDREN (2001); *Children’s Defense Fund, Everyday in America*, at <http://www.childrensdefense.org/data/keyfacts/everyday.asp> (last visited Sept. 1, 2004); *Federal Interagency Forum on Child and Family Statistics*, at <http://childstats.gov/whatisit.asp> (last visited Sept. 1, 2004).

370. *See* Phillippe Aghion, Eve Caroli & Cecilia Garcia Penalosa, *Inequality and Economic Growth: The Perspective of the New Growth Theories*, 37 J. ECON. LITERATURE 1615, 1654–55 (1999); Alberto Alesina & Dani Rodrik, *Distributive Politics and Economic Growth*, 109 Q.J. ECON. 465, 465 (1994).

371. Child outcomes are monitored and evaluated through instruments such as the National Longitudinal Survey of Children and Youth, the Panel Study of Income Dynamics, and other such research tools. Groups undertaking these new measurements assert:

Although the primary reason for measuring child outcomes is to ensure that the life circumstances of children improve, the focus on outcome goals also helps to mobilize action by employers, voluntary organizations, and others in the community. These child development surveys look at the way in which time, money and parenting styles at the family level are linked to the cognitive and behavioral development of children. These studies acknowledge that events such as (un)employment, divorce, birth of a child, and geographic setting affect family economic status and time use, which influence expenditures, stress and parenting style. These, in turn, affect the cognitive, socio-emotional and behavioral characteristics of children.

Child Development Supplement to the Panel Study of Income Dynamics, PANEL STUDY OF INCOME DYNAMICS, at <http://psidonline.isr.umich.edu> (last visited Sept. 1, 2004).

We need more research like this to assess the situation of American children compared to other advanced countries. Since we pride ourselves on being “number one,” shouldn’t we think about being the best place in the world to raise children?

Corporations need workers with an array of values—hard work, honesty, loyalty—that are essential for raising productivity. If such qualities can best be nurtured within reasonably stable families, then how families function in this new environment should be a corporate governance concern. In thinking about future competitiveness of the U.S. economy, rather than focusing on GDP or stock prices, we need to look at the well-being of children. Should families not emerge from the current transition reconstructed and healthy, there could be potentially ruinous implications for the development of highly competitive, yet socially stable knowledge-based societies. The short-term benefits of flexible labor markets are borne long-term by children; that is, these forms of work organization, driven by the demand for short-term shareholder value, may raise profits in the short-term, but the aftermath of this drive for higher share prices depends on what happens to these children.

V. CORPORATE RESPONSIBILITY AND INVESTMENTS IN CHILDREN’S HUMAN CAPITAL

In making the connection between corporate responsibility and the well-being of children, policymakers acknowledge the following: (1) the importance of parenting in the first few years for children’s skill levels later in life, (2) the current skills deficit in the United States among young workers compared to their counterparts in peer nations, and (3) the greater investments in children’s human capital by our peer nations through parental support programs, as discussed below. Although these points are accepted, other issues need further exploration. Specifically, while research indicates that children would benefit from such programs,³⁷² data linking corporate policies to child outcomes are not available at this point. In addition, statistical studies measuring whether work-family programs increase the bottom line for firms are mixed. So far, these evaluations have methodological flaws, and the correlations can be interpreted in different ways.³⁷³ Therefore, this part cannot present a precise model about specific

372. See Waldfogel, *supra* note 317, at 104.

373. See Eileen Appelbaum, Tom Bailey, Peter Berg, & Arne Kalleberg, *Organizations and the Intersection of Work and Family: A Comparative Perspective* (forthcoming in THE OXFORD HANDBOOK ON WORK AND ORGANIZATION (Paul Thompson et al. eds.)) (manuscript at 12–13, on file with authors).

corporate programs that produce better results for children and more profits for firms. Rather, this part provides the reasoning behind the approach to corporate governance and children and highlights where more inquiry is needed.

This part develops the justification for corporate responsibility for investments in children's human capital through a five-step analysis:

(1) It reviews how the United States lags behind peer nations in providing support to parents.

(2) It notes that, as I have emphasized earlier, the development of children's human capital is important for long-term economic growth of the nation.

(3) Because federal legislation providing greater parental support is unlikely at this time, it makes the case that corporations should bear this responsibility. The United States has a history of welfare capitalism, which looks to the corporation, rather than big government or unions, as a source of advantageous employment practices.³⁷⁴

(4) To push corporations to implement parental support policies, it turns to the power of the pension funds of American working families. As long-term players in the economy, these institutional shareholders should evaluate the impact that children's human capital development has on dynamic economic growth in the United States.

(5) It discusses two political factors that favor using this shareholder strategy. First, the recent proliferation of corporate scandals has created a legitimacy crisis in corporate governance; thus, institutional shareholders may be receptive to promoting children's human capital as a means to restore credibility in the eyes of their beneficiaries.³⁷⁵ Second, parents are forming a political coalition that could lobby pension fund trustees to encourage corporate managers to adopt parental support programs.³⁷⁶ Part

374. See *supra* text accompanying notes 113–21.

375. See Diane B. Henriques, *CalPERS Knew of Problem But Kept Silent: State Pension Fund Didn't Share Data on Executives' Conflicts*, S.F. CHRON., Feb. 5, 2002, at A1 (discussing the California Public Employees' Retirement System's ("CalPERS") inaction after learning of Enron's chief financial officer's conflicts of interest), available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/02/05/MN161209.DTL>; Sharon L. Crenson, *CalPERS: Enron Deals a Mistake*, AP ONLINE, July 18, 2002 (noting that CalPERS's board also had conflicts of interest—five members of the board owned stock also owned by CalPERS and received political campaign contributions from companies in which they invested), at 2002 WL 23898219. See generally Mark J. Roe, *Backlash*, in SLOAN PROJECT ON CORP. GOVERNANCE, *supra* note 30, at 791 (discussing some business laws that result from avoiding backlash).

376. See *infra* Part V.E.2.

V provides more detail about the legal and political aspects of this shareholder approach.

A. LABOR MARKETS AND FAMILY STRUCTURE IN PEER NATIONS

To set the stage, recall from Part IV that scientists emphasize that family life in early childhood heavily influences the acquisition of knowledge.³⁷⁷ Yet, these first few years of parenting usually coincide with demanding years of labor force participation, leading to the so-called crunch years of the life cycle for many parents. In addition, Part IV evaluated how divorce and longer working hours in the United States may have negative impacts on children's well-being.

In comparing peer nations, some countries such as Spain, Italy, and Japan have low labor market flexibility, but retain the traditional nuclear family—that is, they have relatively low rates of divorce and low participation of women in the labor force.³⁷⁸ Public day care and other family support are available, but not as much as that provided by other peer nations with greater market flexibility and more diverse family forms.³⁷⁹ Although this labor market and family structure may provide stability for children's human capital development, two factors disfavor rigid labor markets. First, this structure is not competitive in the global economy. Second, this structure excludes women from labor force participation and thus is not compatible with women's needs to seek identities outside the home.

Other peer nations, such as Germany, France, Sweden, Denmark, and Norway have taken greater steps to transition to flexible labor markets.³⁸⁰ These countries also have moved away from the traditional nuclear family as the norm. Specifically, these countries have both high rates of divorce and high rates of women's workforce participation.³⁸¹ Although these countries have more flexible labor markets and diversified forms of family life, they have greater parental support programs that may offset the negative effects on children's human capital development.³⁸² These

377. See *supra* notes 281–94.

378. See CARNOY, *supra* note 2, at 110, 125.

379. See *id.* at 125.

380. See *id.*

381. See *id.*

382. See *id.*

government support programs for parents take two forms: (1) parental leave and (2) childcare policies.³⁸³

With respect to parental leave, peer nations average ten months paid leave.³⁸⁴ Specifically, the Nordic countries have generous leave policies ranging from eighteen months in Denmark and Sweden to three years in Norway and Finland.³⁸⁵ Such lengthy leaves, however, may negatively impact gender equity at work and at home. In looking at countries considered to be the most similar to the United States, Canada provides six months of parental leave, paid at fifty-five percent of earnings.³⁸⁶ In addition, the United Kingdom recently has implemented an eighteen-week leave with some wage replacement.³⁸⁷ The percentage of women taking advantage of these paid leaves rises as the level of wage replacement increases.³⁸⁸ Men, however, do not usually take advantage of these policies. Sweden has taken the farthest steps to encourage fathers to take parental leave, under a “use it or lose it system,” but so far this policy has not had much effect.³⁸⁹ With respect to childcare, many peer nations provide publicly-funded childcare, covering between sixty-eight and one hundred percent of the cost.³⁹⁰ In the Nordic countries, the portion of children up to age three using this system is twenty percent in Norway and forty-eight percent in Denmark; the portion of children three- to six-years-old is sixty-three percent in Norway and eighty-two percent in Denmark.³⁹¹ In Germany and France the rates of children in public daycare are low for the age bracket up to three years old: two percent in Germany and twenty-three percent in France. Yet the portion of children aged three to six is high: seventy-eight percent in Germany and ninety-nine percent in France.³⁹²

383. Waldfogel, *supra* note 317, at 99. For a more in-depth account, see ORG. FOR ECON. CO-OPERATION & DEV., *BABIES AND BOSSES: RECONCILING WORK AND FAMILY LIFE: AUSTRALIA, DENMARK AND THE NETHERLANDS* (2002).

384. Waldfogel, *supra* note 317, at 99.

385. *Id.* at 102–03.

386. *Id.*

387. *Id.*

388. *Id.* at 102.

389. In Sweden, leave is available to both parents—though not at the same time—reimbursed at eighty-percent of salary for twelve months. Importantly, some leave is set aside for fathers only and is lost if not taken. This policy encourages fathers to become involved early in their children’s lives. In addition, parents of young children have the right to work only six hours a day and have leave time to attend to sick children. Sweden views childcare as a public good essential for the sustainability of the economy. Sweden has a broad-based day care system supported by the government. *Id.* at 102–03, 106.

390. *Id.* at 105 (using the figures for the Nordic countries and France).

391. *Id.*

392. *Id.*

Compared to peer nations, the United States (1) has taken the most dramatic steps towards flexible labor markets and (2) has among the highest rates of divorce and women's workforce participation.³⁹³ The United States is unique among its peer nations in two respects. First, the United States has increased the average number of hours worked; as discussed in Part III, average working hours in the United States exceed other advanced nations. Second, social legislation supporting the family in the United States is far less than that provided by other advanced countries.³⁹⁴ Specifically, in terms of parental leave, the United States has the least family-friendly policy. It took three decades to pass the Family and Medical Leave Act ("FMLA") of 1993,³⁹⁵ which allows twelve weeks of unpaid leave. The FMLA has had little effect because taking leave without pay is not an option for most families.³⁹⁶ The United States also offers tax credits for childcare for families at all income levels; one estimate is that government aid in the United States covers approximately twenty-five to thirty percent of the cost of childcare.³⁹⁷ Although the U.S. government provides far less support to parents during the critical stages of children's development compared to peer nations, the next section examines how corporations do not make up for this deficit.

B. CORPORATE WORK-FAMILY POLICIES IN THE UNITED STATES

A review of the literature on work-family policies offered by firms reveals that managers have difficulty recognizing that the family lives of employees should concern corporations.³⁹⁸ As reported by the Families and Work Institute, one-third of companies are "barely aware" of work-family issues and forty-six percent still view work-family balance as women's problems.³⁹⁹ Few firms provide daycare; instead, most work-family

393. CARNOY, *supra* note 2, at 125.

394. *Id.*

395. The Family Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2000).

396. Waldfogel, *supra* note 317, at 101–02.

397. *Id.* at 104–05 (stating that such aid includes tax credits, direct subsidies, and government purchased or subsidized childcare).

398. For an international comparison of the voluntary family programs adopted by firms, see JOHN M. EVANS, FIRMS' CONTRIBUTION TO THE RECONCILIATION BETWEEN WORK AND FAMILY LIFE 18 (Org. for Econ. Co-operation and Dev., Labor Market and Social Policy, Occasional Papers No. 48, Working Paper, Feb. 28, 2001) (concluding that employers in Australia, Japan, the United Kingdom, and the United States are more likely to make changes in working hours, such as flex-time or part-time work, than to offer extra family leave or help with childcare), available at [http://www.oecd.org/OLIS/2001DOC.NSF/LINKTO/DEELSA-ELSA-WD\(2001\)1](http://www.oecd.org/OLIS/2001DOC.NSF/LINKTO/DEELSA-ELSA-WD(2001)1).

399. BOND ET AL., *supra* note 204, at 37.

programs offer flexible work hours.⁴⁰⁰ At this time, only two percent of employers have the most progressive type of work-family policies according to the Families and Work Institute.⁴⁰¹ For example, the SAS Institute, a computer firm in North Carolina, has a mandatory work week of thirty-five hours.⁴⁰²

Four factors impede employees from taking advantage of work-family policies. First, managers usually only grant accommodations to highly skilled workers. Second, workers do not want to take advantage of flex-time because they are afraid they will receive less desirable work assignments and lower performance reviews. Thus, people do not use work-family policies because they fear it will hurt their future with the company. Third, men are particularly unwilling to take advantage of flexible work arrangements and paternity leaves.⁴⁰³ Finally, many executives view flex-time as a way to cut benefits; corporations exact wage penalties that far exceed the costs of work-family accommodations.⁴⁰⁴

In sum, this section shows how the investment that the United States makes in early human capital development lags behind its peer nations. As Hewlett and West state: "Americans are seriously disadvantaged when they embark on the serious business of raising a child."⁴⁰⁵ Explaining why this is so, Carnoy points to path dependence: "[I]n the free market Anglo-American model, collective society pays little attention to the crucial early years of a child's learning. Again, this is an attitude left over from

400. HELBURN & BERGMANN, *supra* note 304, at 39–40.

401. Eileen Appelbaum states that there are two main kinds of strategies that help workers balance their work and family lives: caregiver replacement and flexible scheduling. Appelbaum et al., *supra* note 373, at 4–5.

The first, caregiver replacement, provides "life sustaining" activities such as buying food, paying bills, and running errands. *Id.* Childcare is available for sick children, as a backup when the regular caregiver is not available, and for overnight care. *Id.* at 14. These benefits are often part of the cafeteria plans that enable employees to select from a menu of fringe benefits. *Id.* at 11. The goal of these caregiver replacement policies is to allow the company to maintain its traditional schedules and processes. *Id.*

The second type of aid companies provide is flexible scheduling such as telecommuting, flex-time, adjustment of hours, having workers select their own schedules, job sharing, and paid family and medical leaves. *Id.* at 5. Flexibility is less costly in terms of aid, but makes extensive demands on managers' abilities to coordinate production or service delivery and requires significant changes in other production and workplace practices. *Id.* at 10.

402. See Leslie Kaufman, *Some Companies Derail the 'Burnout' Track*, N.Y. TIMES, May 4, 1999, at A1.

403. This pattern threatens to reinforce gender inequality. See Selmi, *supra* note 200, at 755–56.

404. See *id.* at 737–38.

405. Hewlett & West, *supra* note 46, at xv.

preindustrial and industrial society, when how much knowledge children acquired in school was far less important to their work lives.”⁴⁰⁶

C. THE EFFICIENCY BENEFITS OF WORK-FAMILY POLICIES

This section presents arguments for the efficiency benefits of work-family programs at both the firm level and societal level using game theory.⁴⁰⁷ For the firm level, work-family policies may increase the bottom line, but firms do not adopt these policies because a “prisoners’ dilemma” game, explained below, exists between managers and employees. Even if work-family policies are not efficient for individual firms, two arguments can be made that such programs are efficient at the societal level, but are impeded because a prisoners’ dilemma exists (1) among employees as a group and (2) among firms as a group.

1. Work-Family Policies and the Bottom Line

Although the data are mixed, work-family advocates provide strong arguments that family-friendly policies will increase the bottom line for corporations. In making the business case, Williams emphasizes the high costs of attrition.⁴⁰⁸ The costs of efforts to recruit, retain, and advance women in employment are significant. Williams states that employers pay between seventy-five percent and one hundred and fifty percent of employees’ annual salaries to replace them when they leave.⁴⁰⁹ Williams notes that in the struggle to hire the most talented workers, firms get “caught in a cycle of skyrocketing salaries and skyrocketing attrition.”⁴¹⁰ Specifically, she cites an American Management Association survey that found firms could reduce turnover by providing work-family benefits rather than higher salaries.⁴¹¹ Other studies find that the lack of adequate childcare poses serious costs for corporations in terms of absenteeism, turnover, and lost productivity—an estimated loss of \$3 billion a year.⁴¹²

406. CARNOY, *supra* note 2, at 146.

407. For an introduction to game theory and the prisoners’ dilemma, see DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELLING* 28–41 (1990); ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 27–30 (1989).

408. See Williams, *supra* note 1, at 924–25.

409. *Id.* at 924.

410. Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms: The Project for Attorney Retention: Final Report Third Edition*, 8 WM. & MARY J. WOMEN & L. 357, 362 (2002).

411. *Id.* at 368.

412. *The Need for Child Care*, THE ANNIE E. CASEY FOUND., 1998 KIDS COUNT ONLINE, at <http://www.aecf.org/kidscount/kc1998/over2.htm> (last visited Sept. 1, 2004).

I offer an additional argument concerning the efficiency benefits of a work-family program at the firm level. Such policies may be efficient at the firm level, but a prisoners' dilemma may exist between managers and workers. Work-family programs can be viewed as a prisoners' dilemma game played by employees and managers making strategic decisions that are characterized by both conflicting and common goals. Specifically, work-family programs may allow employees to put in less "face time" based on an understanding that they will produce good quality work. Thus, these programs require managers to trust that workers will not shirk their work and require workers to trust managers not to penalize them in performance reviews. Under this game, workers and managers make basic choices about whether to cooperate or defect in deciding the amount of work effort and the quality of working conditions. Of course, the optimal solution involves employees and managers bargaining for the highest level of effort in return for the best working conditions. Yet, the players face difficulties in reaching the optimal solution because they cannot credibly commit to achieve this outcome using traditional contractual safeguards.

Because transaction costs impede efforts to make credible commitments, both workers and managers may have to trust each other, but each recognizes that they may gain more by defecting. If both managers and workers cooperate, each receives a higher payoff than if both defect. But if one player defects while the other cooperates, the defecting player receives the highest return available, while the cooperating player receives the lowest return possible. Under this game, the dilemma arises because each player has an opportunity to receive the larger return at the other's expense by exploiting trusting behavior. Because each player is uncertain how the other will behave, distrust leads each player to pursue the strategy that maximizes individual gain while reducing the risks of opportunism. Under this strategy, each player perceives that, regardless of whether the other player decides to cooperate or defect, the decision to defect produces a higher return than the decision to cooperate. This type of reasoning leads each player to defect, producing an inferior outcome for both parties referred to as the prisoners' dilemma solution.

The problem here lies in the fact that work-family policies represent a redistribution of power from managers to workers. Viewed in this light, employees and managers may be caught in a prisoners' dilemma in that cooperation through parental policies could yield gains for the firm as a whole, but it requires a certain degree of trust between management and employees. Managers recognize that if they provide work-family policies, it increases the risk of opportunism from workers. In game theory terms,

managers have a “first mover advantage” in implementing work-family policies, but under the prisoners’ dilemma scenarios, they will act “rationally” and refuse to trust workers by establishing these programs. This prisoners’ dilemma notion highlights why the shareholder strategy, outlined in Part VI, is necessary to push managers to take this first step.

2. Work-Family Policies and Societal Welfare

Even if work-family policies are not profitable at the firm level, such policies may be efficient at the societal level. Although such policies may benefit society, this section examines prisoners’ dilemmas existing (1) among workers in competition for longer working hours and (2) among firms in competition for higher profits.

a. The “Arms Race” of Longer Hours

Amy Wax maintains that workers as a group may be caught in a prisoners’ dilemma.⁴¹³ She explains that many employees desire to work less and spend more time with their families, even if this entails less compensation. Employees have difficulty achieving this goal, however, due to employment practices imposed through so-called tournament structures.⁴¹⁴ Under these tournaments, firms seek to avoid the expense of monitoring employee performance by using evaluations systems where an employee’s success depends on their relative positions in competition with their colleagues.⁴¹⁵ Thus, firms simply put workers in competition with each other and promote the best performers. Workers are rank-ordered and evaluated relative to others, and rewarded accordingly with pay and promotion.⁴¹⁶ Workers see themselves in a competition with colleagues and try to outperform them. Thus, the same individual performance may yield different outcomes depending on the strategies pursued by other workers.⁴¹⁷

413. Amy Wax, *Family Friendly Workplace Reform: Prospects for Change* 16 (Working Paper July 13, 2004).

414. For more on the tournament structure, see generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM*, 70–102 (1991); Marc S. Galanter & Thomas M. Palay, *Large Law Firm Misery: It’s the Tournament, Not the Money*, 52 VAND. L. REV. 953 (1999); David B. Wilkins, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998); David B. Wilkins and G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CAL. L. REV. 493, 519–20 (1996).

415. Wax, *supra* note 413, at 10–11.

416. *Id.*

417. *Id.*

Because employees compete against each other for raises and promotions,⁴¹⁸ individual workers cannot trust that their colleagues will work shorter hours. Then employees as a group are caught in a prisoners' dilemma because an individual worker may be better off defecting and working longer hours. Because other employees recognize this, they also defect and do not refrain from working long hours. In the end, the winners of this arms race of escalating hours may gain, but these benefits may be outweighed by costs to other employees.⁴¹⁹

Thus, by examining the dynamic of the collective action problem faced by employees as a group, Wax posits that even if work-family policies are more expensive at the firm level, such policies are still good for society as a whole.⁴²⁰ This Article adopts this reasoning and maintains that work-family policies may boost children's human capital, adding to the long-term growth of the economy.⁴²¹ Wax raises critical points about how tournament structures impede work-family policies; Part VI considers this point in devising the shareholder strategy to induce firms to adopt work-family programs.

b. Free Rider Problems Among Firms

I offer another game theory argument in favor of the efficiency benefits of work-family programs at the societal level. This argument emphasizes that American cultural norms, conventions, and institutions increase the transaction costs involved in introducing work-family benefits at the firm level. Given current business norms demanding long work hours, an individual firm may be reluctant to deviate from the traditional practices because they fear reputational sanctions for violating the norm. In terms of evolutionary economics, firms may get locked into inefficient paths because network externalities block the ability of individual firms to change established business practices.⁴²² Given these reputational sanctions, free rider problems prevent firms from undertaking the steps necessary to transform the existing customs to favor better parental support policies.

In altering conventions, game theory reasoning suggests that an individual firm will not necessarily switch to the superior option of parental programs, since it is not a preferable alternative unless other firms also

418. *Id.*

419. *Id.* at 19.

420. *Id.* at 38.

421. *Id.* at 16.

422. *Human Capital*, *supra* note 25, at 943–44.

move and thereby modify the prevailing terms of the social contract with labor.⁴²³ But other firms will not move unless each firm can be persuaded that the other firms will also reposition simultaneously. In addition to these free rider problems, each firm has the incentive to hang back because each one may seek to promote short-term stock prices, rather than incur the expenses in creating more family-friendly corporate cultures. In this way, we see that the contemporary socioeconomic environment legitimates current practices and imposes costs in moving firms to alternative practices.⁴²⁴

Thus, groups of firms are better able to redefine the general standard of fairness in employment relations, rather than a single firm acting alone. The main reason is that a single firm is more likely to find the redistribution of power acceptable if it is approved by other comparable firms in a local region. Part VI takes this factor into account in formulating a shareholder strategy around clusters of firms in a local economy.

D. AMERICAN VALUES: FAMILY, GOVERNMENT, AND CORPORATIONS

This section posits that using pension power to encourage corporations to invest in children incorporates American values. Specifically, this plan encompasses American beliefs about the following: (1) the difficulties of balancing work-family in the new economy, (2) keeping government intervention to a minimum, and (3) permitting shareholders to exercise their voices through tools of corporate democracy.

1. Parenting in the New Economy

In evaluating views on work and family, polls reveal that Americans view children as a private responsibility.⁴²⁵ Since the Nixon era, the so-called nanny state has been viewed as communistic. In addition, “two-thirds of Americans believe that it would be best for women to stay home and care for family and children.”⁴²⁶

Notions about working mothers are slowly changing over time as more mothers are pushed into the labor market.⁴²⁷ As discussed previously, many parents cannot afford the luxury of staying home to care for children

423. *See id.* at 925–27.

424. *Id.*

425. WILLIAMS, *supra* note 40, at 31; Kathleen Sylvester, *Caring for Our Youngest: Public Attitudes in the United States*, FUTURE OF CHILD., Spring/Summer 2001, at 53, 53–55.

426. WILLIAMS, *supra* note 40, at 49.

427. *See, e.g.*, GALINSKY, *supra* note 185, at 4–7.

in the new economy and many middle-class parents are forced to place their children in inadequate childcare facilities.⁴²⁸ This Article does not seek to undermine parental responsibility, but rather seeks to create more favorable conditions to allow parents to perform their responsibilities adequately.⁴²⁹

Theda Skocpol explains that social benefits in the United States have been morally justified in the past in exchange for important contributions to the socioeconomic infrastructure.⁴³⁰ Work-family advocates rely on the theme in public discourse that the most important job anyone has in society is being a parent.⁴³¹ These scholars urge more explicit attention to supporting the work that families perform in fostering children's future ability to perform in the new economy as well as their "capacities for self-government."⁴³² Historically, Skocpol emphasizes that the most successful social policies have been universal welfare, not merely welfare for the poor.⁴³³ This Article adopts a position in accord with this view. That is, Americans favor investing in children as a way to promote equal opportunity in the next generation over redistributing resources to reduce disadvantages among adults.⁴³⁴

2. Governmental Deregulation

Galinsky notes that executives maintain that the government should take responsibility for the healthy development of children.⁴³⁵ Given the current political climate, however, it is unlikely that we will see legislation mandating family-friendly workplace practices. American cultural norms favor deregulation of markets. Although labor market flexibility operates to

428. See *supra* text accompanying notes 303–09.

429. See Judith Maxwell, *Investing in Children Should Be Our Next Priority*, CAN. BUS. ECON., Feb. 2000, at 11, 12 ("Families have meaningful choices about how to raise their children and can make what they believe to be the best choices, not forced choices, for their children and families.").

430. SKOCPOL, *supra* note 40, at 27.

431. Fineman posits that society should view children as a public good because children represent the nation's cultural and economic future. See Martha Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1405–06 (2001). Specifically, the caring work performed within families is a public good necessary for social reproduction and to foster human and social capital.

432. Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1677 (2001). See also John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 788 (1997) ("[O]ne of [the family's] main roles is to be the basis of the orderly production and reproduction of society and its culture from one generation to the next. . . . Thus, reproductive labor is socially necessary labor.").

433. See Theda Skocpol, *What It Will Take to Build a Family-Friendly America*, in PARENTING, *supra* note 39, at 219, 222–23.

434. Danziger & Waldfogel, *supra* note 288, at 2.

435. See GALINSKY, *supra* note 185, at 2.

impede work-family balance at this time, this could provide greater possibilities for parents than the rigid, lock-step career model of the industrial era.⁴³⁶ Specifically, if new policies favored parents, flexible labor markets could accommodate the needs of American working families in a manner that promotes the well-being of children.⁴³⁷

At a time when the government is reducing its support of the family, we need a national dialogue about the corporation's obligation to provide "shock absorbers" for the new economy.⁴³⁸ The notion that corporations owe duties to society accords with the long-standing tradition of welfare capitalism that suits the United States' model of limited government, small unions, and large corporations.⁴³⁹ Thus, the concurrent economic and social revolutions require that corporations assume greater responsibility for children's human capital development to meet the needs of tomorrow's flexible labor markets.

3. Exercising Voice Through Shareholder Mechanisms

Recall from Part III that shareholders as a class have gained power in the new economy through the institutional shareholder movement. These institutional shareholders are the pension funds of average American families. The deferred savings of American working families, through their pension funds, now exceeds \$7 trillion. If these funds acted in concert, they would represent the largest pool of capital in the world. These institutional shareholders have become the dominant owners in corporate America; the one thousand largest companies in the United States have an average institutional ownership of sixty percent.⁴⁴⁰

Because pension funds have diversified portfolios and long-term investment horizons, they are in a unique position to improve the economic performance of individual firms and society as a whole by promoting the development of human capital. For this reason, in considering the long-term retirement security of these Americans, pension fund trustees need to show concern for the real world situation of the vast number of ordinary American families who struggle to make a living and raise their children.

436. Moen & Sweet, *supra* note 263, at 86.

437. See CARNOY, *supra* note 2, at 140–41.

438. See Benner, *supra* note 14 (discussing how to increase job security for contingent workers in the Silicon Valley).

439. See *supra* text accompanying notes 113–21.

440. *Institutional Investors—Especially the Top 25—Are Gaining More Power and Control over the Largest U.S. Companies*, PR NEWSWIRE, Aug. 20, 1998.

Using provisions under the federal securities laws that promote corporate democracy, shareholder activists have a long history of successfully pushing corporations to adopt changes in policy.⁴⁴¹ Union pension funds, social investing funds, and religious-affiliated funds promote shareholder proposals on many corporate social responsibility issues such as diversity, the environment, anti-tobacco, and sweatshops and child labor abroad.

Union pension funds have taken the lead in using these provisions to harness the power of these funds to promote workers' interests. Union leaders emphasize that "[a]ll too often, investments made with [workers' deferred] savings yield short-term gains at the expense of working Americans and their families."⁴⁴² Media reports suggest that pension funds are "cannibalistically" driving the downsizing phenomenon.⁴⁴³ In addition, post-Enron executive compensation continues to skyrocket, while the wages of average workers stagnate.⁴⁴⁴ I assert that the proliferation of recent corporate scandals should lead institutional shareholders to engage in critical self-reflection about how they invest. Specifically, pension funds need to find ways that "align workers' savings with workers' values."⁴⁴⁵

This strategy is consistent with principles of American capitalism. It also accords with long-standing traditions allowing shareholders to raise public policy questions in the corporate forum. Viewed in this light, the democratic processes governing shareholder debate are important because they serve as an outlet for American workers' growing frustrations with corporate America.

441. David Vogel remarks: "The extent to which [social activists'] demands addressed to the corporation anticipate the substance of subsequent government regulations of business is indeed striking." DAVID VOGEL, *LOBBYING THE CORPORATION: CITIZEN CHALLENGES TO BUSINESS AUTHORITY* 14 (1978).

442. Leo W. Gerard, *Foreward* to *WORKING CAPITAL*, *supra* note 25, at vii.

443. See Robyn Meredith, *Executive Defends Downsizing*, N.Y. TIMES, Mar. 9, 1996, at D4. One reporter suggests that

standing behind those institutional investors are American workers who have sunk their retirement savings into mutual stock funds and are fighting to be sure they get the best returns possible. . . . Those are some of the same workers who in turn have been laid off as their employers struggle to please investors

Id.

444. See Susan J. Stabile, *One for A, Two For B, and Four Hundred for C: The Widening Gap in Pay Between Executives and Rank and File Employees*, 36 U. MICH. J.L. REFORM. 115, 146 (2002).

445. Gerard, *supra* note 442, at vii.

E. REASONS FOR HOPE THAT CORPORATIONS WILL PROVIDE PARENTAL SUPPORT

This part explains why I have hope in turning to corporate governance to mitigate the hardships that working families face in investing in their children. Specifically, I think that the synchronicity of September 11 and Enron highlight the need to reassess the short-term focus of American corporations. In addition, I have hope because a parenting movement is forming that could push the agenda of increasing corporate responsibility for investment in children's human capital.

1. The Synchronicity of September 11 and Enron

a. The Beginning of the History of Corporate Governance

Prior to the Enron era of corporate scandals, the opinion concerning American corporate governance did not offer much room to consider reform proposals. This atmosphere of closed debate is exemplified by the statements of free market scholars who declared the "end of corporate law."⁴⁴⁶ This phrase intended to signal that the discussion about the merits of the shareholder value approach was over. These words were used as a play on economist Fukuyama's hypothesis that the decline of communism meant an "end of history," because public dialogue would no longer consider alternatives to capitalism. Thus, some corporate scholars looked to differences among types of capitalism and proclaimed an "end of history." The events surrounding September 11 and the Enron scandals shatter this confident image of the future. This Article takes the position that these events show that the corporate governance history is far from over. Rather, it has only just begun.

446. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001). Henry Hansmann & Reinier Kraakman state that shareholder value maximization "serve[s] the interests of society as a whole." *Id.* The authors state:

The point is simply that now, as a consequence of both logic and experience, there is a convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.

Id. They also assert that a cross-country study "lends credence to the view that adherence to the standard [shareholder value] model promotes better economic outcomes." *Id.* at 450. For criticism of this view of the shareholder value model, see Greenfield, *supra* note 34, at 422–23. Mark Roe also takes quite a different view. In discussing how social democracies impede public firms, he states: "Life may well be better for more people, but the internal structure of public firms must necessarily be weaker for shareholders." Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 543 (2000).

September 11 raised the question, “Why do they hate the United States so much?” This event has led to introspection by business leaders.⁴⁴⁷ Many executives recognize that the resentment that others in the world have toward the United States may stem from attempts to accelerate globalization with its resulting inequalities of wealth. Faith Kahn, a corporate law scholar, writes how terrorists targeted the World Trade Center because it was a symbol of American capitalism in one of its most visible manifestations—the hegemonic power of American financial markets and shareholder value.⁴⁴⁸ In this way, the horrific destruction of the Twin Towers reveals that we cannot assume an “end of history” where ideological debate ceases.

Following a few months later, the Enron debacle broke the hegemony of the shareholder value mantra by starkly demonstrating how free markets are not perfect.⁴⁴⁹ The Enron era showed severe flaws in the American corporate governance system held up to the world as the best. It highlighted that financial techniques to promote short-term stock prices can overshadow the focus on making long-term investments for real productivity gains.⁴⁵⁰

b. Remembering Our Priorities

A crisis such as September 11 jolts people into taking a hard look at their lives. The trauma forces us to recognize how quickly life can change and how valuable every moment is. We are often so stressed and harried that it takes such a tragedy to force us to slow down and focus attention on what really matters. Thus, September 11 provided an opportunity for Americans to step back for collective reflection and consider where our choices have taken us. As we search for meaning in the aftermath of September 11, this period of deep questioning allows us to evaluate the

447. For criticisms of globalization, see BENJAMIN R. BARBER, *JIHAD V. MCWORLD* (1995) (analyzing how globalism and tribalism are reshaping the world); SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY* (1998); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 *YALE L.J.* 1 (1998).

448. Kahn, *supra* note 34, at 1600 (“In this silent subversion of the proper operation and legal dictates of truly representative, democratic government, Enron posed a threat to the nation’s security and core values that was no less real than that posed by Al Qaeda.”).

449. See generally Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 *COLUM. L. REV.* 1253 (1999) (discussing the role of social norms in shaping the motivations of corporate managers); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 *U. PA. L. REV.* 1619 (2001) (arguing that corporate governance is properly dictated by nonlegal norms); Symposium, *Norms & Corporate Law*, 149 *U. PA. L. REV.* 1607 (2001) (discussing the role of nonlegal norms in corporate governance).

450. See Bratton, *supra* note 37, at 1296.

changes we need to enjoy our lives. For many parents, this means spending more time with their children.

Enron and other corporate scandals also serve as a wake-up call. The collapse of Enron was so vast and so penetrating that it profoundly shakes our belief in the integrity of large publicly-held corporations. While the Sarbanes-Oxley Act⁴⁵¹ was quickly enacted in the aftermath of Enron, it is unfortunate that the congressional hearings did not consider broader questions about the theory of the firm and the role of the corporation in society.⁴⁵² Specifically, we need to question whether our corporate governance system reflects the values and desires of American society.⁴⁵³

This Article acknowledges that we also need different cultural views and new corporate cultures. At the same time, societal norms and corporate cultures interact to foster habits of thought and institutional routines that impact how we view the family. By promoting work-family policies, corporations can set the tone for promoting family values and start a positive feedback loop. I take the position that corporate recognition of the importance of children will shift norms away from excessive individualism and toward greater commitments to parenting. In addition, this strategy will help make flexible labor markets sustainable by relying on corporations to take a role in building the intangible asset of resilient families.

c. Redirecting the Convergence Debate to Focus on Human Capital

451. Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. (2002).

452. For the history of this question, see generally William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737 (2001) (examining the debate at the turn of the century concerning the role of corporations).

453. Historically, periods of economic and social change have led corporate scholars to ask the perennial question: what role does the corporation play in modern society? William Bratton states that “[i]f prominent business people pursue self-interest according to values materially different from those held outside of the corporation, legal endorsement of their conduct injures the community’s wider sense of itself.” William W. Bratton, *Public Values and Corporate Fiduciary Law*, 44 RUTGERS L. REV. 675, 680 (1992). We as a community may decide to be less well off in order to pursue a notion of the good. *See id.* Corporate law results from conversations within the community. In our society, corporate power depends to some extent on ongoing consent. *See id.* at 689–90. Corporate law has an internal public interest component; this component has only two generally accepted zones of outcome determination—the charitable contribution privilege and the duty to obey the law. It does not follow that corporate law should proceed only from inside values. “Corporate law conversations, like all legal conversations, are public events.” *Id.* at 696. This public aspect triggers evaluation in terms of public values. It contributes to a harmony of values, which, in the long run, enhances the political legitimacy of corporate ventures. Corporate law needs to integrate smoothly with the fabric of life in the stronger communities outside.

For a view of the workplace as a part of civil society and an essential component of building community, see generally DAVID SCIULLI, *CORPORATE POWER IN CIVIL SOCIETY: AN APPLICATION OF SOCIETAL CONSTITUTIONALISM* (2001). *See also* Cynthia L. Estlund, *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331, 337–38 (noting that the workplace is an important arena of ethnic diversity).

This part reviewed how other advanced economies have different relationships among family, work, corporations, and government than the United States. This analysis sheds new light on the debate about the convergence of corporate governance systems. Specifically, many scholars posit that the corporate governance systems of these peer nations will move toward the shareholder value model of corporate governance in the United States. These scholars make this assertion because the United States has outperformed its peer nations in terms of profitability and innovation over the last ten years. They do not consider, however, how American companies affect the daily lives of working families in the United States. Indeed, Hochschild, a sociologist, states: “While the mass media so often point to global competition as the major business story of the age, it is easy to miss the fact that corporate America’s fiercest struggle has been with its local rival—the family.”⁴⁵⁴ Thus, European⁴⁵⁵ and Japanese⁴⁵⁶ policymakers may admire the stock market, job creations, and low unemployment in the United States, but many resist the shareholder value mantra because they perceive that it produces high social costs.⁴⁵⁷ They recognize that American corporate governance leads to longer working hours, stagnating wages, and greater insecurity, impairing family life.⁴⁵⁸

This Article suggests the need for a more sophisticated understanding of the topic of convergence by considering the factors that affect the renewal of our nation’s human capital base. Evolutionary economics highlights that the comparative advantage for advanced economies has

454. HOCHSCHILD, *supra* note 186, at 203–04.

455. There has been a growing focus on shareholder value in Germany. See generally Thomas J. Andre, Jr., *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, 73 TUL. L. REV. 69, 109–16 (1998) (explaining that German companies are reluctant to embrace the idea of shareholder value due to a “social consensus mentality” and loyalty to their workers).

456. On the Japanese system of corporate governance, see Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 509–10 (1999) (noting that the dark side of the Japanese system is the restriction of labor mobility); Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2087–95 (2001) (discussing the importance of nonlegal norms in the Japanese system); Marleen A. O’Connor, *A Socioeconomic Approach to the Japanese Corporate Governance Structure*, 50 WASH. & LEE L. REV. 1529, 1559–61 (1993) (discussing interrelationships between the main bank system and lifetime employment).

457. See CARNOY, *supra* note 2, at 11. For a history of the corporate social responsibility movement, see generally Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605 (2001) (describing reforms for an expansion of corporate responsibility beyond shareholders); Douglas M. Branson, *Corporate Responsibility Redux*, 76 TUL. L. REV. 1207, 1207 (2002) (stating that in contrast with the past, corporate social responsibility is converging with good corporate governance today).

458. See CARNOY, *supra* note 2, at 11.

fluctuated over time and will continue to change in the future. Although we cannot predict the future, demographers emphasize that the United States will have a much younger workforce than its competitors.⁴⁵⁹ Birth rates have fallen below population reproduction levels in most of Europe and Japan. American fertility rose almost to the replacement rate.⁴⁶⁰ That is, in both Europe and Japan, the populations will be aging, while America's will stay much younger. If we can remedy the skills deficit, demographics could offer a basis for the future growth of our nation's stock of human capital and thereby ensure our continued economic success. Thus, demography raises the importance, yet again, of work-family accommodations that allow parents to invest in their children's human capital. As Robert Reich emphasizes, "our economic future must be rooted in the only resource that will remain uniquely American: Americans themselves."⁴⁶¹

2. A New Political Coalition of Parents

In evaluating the political feasibility of turning to corporations to take responsibility for children's human capital development, this section evaluates a new political coalition of parents called the National Parenting Association.⁴⁶² This movement is based on the notion that being a good parent means challenging aspects of the prevailing socioeconomic order that harm children.⁴⁶³

Political analysts recognize that this parenting movement is an important addition to the political scene for five reasons. First, parents represent a large demographic group.⁴⁶⁴ If parents act in concert, they could exercise considerable clout. In 2000, seniors sixty-five and older comprised fourteen percent of the electorate and union households comprised twenty-six percent, compared to parents at thirty-nine percent.⁴⁶⁵ Although parents have poor voter turnout at this point,⁴⁶⁶ this

459. *Id.* at 129.

460. *See id.* at 123.

461. ROBERT B. REICH, *THE NEXT AMERICAN FRONTIER* 13 (1983).

462. *See generally* Raymond Seidelman, *The Paths from Here*, in *PARENTING*, *supra* note 39, at 209 (discussing the likelihood of forming a coherent parents' movement).

463. Nancy Rankin, *Introduction* to *PARENTING*, *supra* note 39, at 1, 2 ("Taking parenting public' . . . is about parents, ourselves, giving our roles as mothers and fathers more priority in our personal lives. It is about raising our voices and speaking out loud about our concerns as parents.").

464. Parents have declined as a share of the eligible electorate from a majority of fifty-five percent in 1956 to thirty-six percent in 1996. Ruy Teixeira, *Political Trends Among American Parents: The 1950s to 1996*, in *PARENTING*, *supra* note 39, at 121, 121.

465. *Parent Data at a Glance*, PARENTSUNITE.ORG, at <http://www.parentsunite.org/Cfparentsunite/press/ParentData090601.html> (Sept. 5, 2001).

could dramatically reverse if they had a political lobby to represent their interests.

Second, political scientists reveal that parents think of themselves as parents when they enter the voting booth—even more than they think of themselves as members of a particular race or gender.⁴⁶⁷ As a group, parents favor measures to improve work-family balance and improve public schools.⁴⁶⁸ In terms of parents' views about corporations, sixty-two percent “agreed that downsizing ‘American companies are choosing to boost short-term profits . . . at the expense of their employees’” and fifty-four percent “thought that working hard often isn’t enough anymore, because employers aren’t loyal to their employees.”⁴⁶⁹

Third, neither conservatives nor liberals meet the needs of parents.⁴⁷⁰ Although both parties try to appeal to “soccer moms,” Ruy Teixeira and Joel Rogers emphasize that the middle class must be broken down into the working class and professional middle class.⁴⁷¹ Importantly, the working class, those with incomes mostly between \$15,000 and \$75,000, represents a majority of voters.⁴⁷² For this reason, the parenting movement seeks to build bridges across class, race, and ethnic lines based on the emotional concerns parents share about their children. As Crittenden suggests, after

466. Teixeira, *supra* note 464, at 122 (stating that parental turnout was lower than nonparental turnout by sixteen points in the 1990 elections and twelve points in the 1996 elections because parents may not be citizens or may be younger individuals who vote less often).

467. *See id.* at 131–32 (showing a greater increase in support by parents for President Clinton between the 1992 and 1996 elections than any increase in support based on race or gender demographics).

468. *See id.* at 132–33.

469. *Id.* at 134.

470. *See generally* SKOCPOL, *supra* note 40, at 1–10.

471. *See* RUY TEIXEIRA & JOEL ROGERS, AMERICA’S FORGOTTEN MAJORITY: WHY THE WHITE WORKING CLASS STILL MATTERS 3–4 (2000); MICHAEL ZWEIG, THE WORKING CLASS MAJORITY: AMERICA’S BEST KEPT SECRET 20–34 (2000).

472. Teixeira and Rogers state:

The conventional view of the suburban electorate—affluent soccer moms, executive dads, and so on—is drawn from wealthy suburban towns like Bethesda (Maryland) and Fairlawn (New Jersey), and it doesn’t come close to presenting an accurate picture. The suburban electorate is in fact composed mostly of . . . two-earner families of low to moderate education and income, generally working in low-level white-collar, service, and skilled blue-collar jobs. . . . [T]hey remain members of a new white working class whose economic interests and experience diverge fundamentally—in terms of culture, class, and history from soccer moms in Bethesda, suburban independents in Fairlawn, and wired cyber-professionals in Silicon Valley.

TEIXEIRA & ROGERS, *supra* note 471, at 17–18.

all, whether a person is a Democrat or a Republican, black or white, rich or poor, or a doctor or janitor, they are still “daddy” or “mommy.”⁴⁷³

Fourth, historically and globally, parents—especially mothers—have had a long tradition of using their moral authority to transform society.⁴⁷⁴ During the Industrial Revolution, mothers used this political power to push for welfare legislation in the United States. Society dealt with the shock of the new capitalist system by seeking to preserve moral virtues by associating them with women.⁴⁷⁵ Thus, women became “moral mothers” as their work took on new ideological significance.⁴⁷⁶ Mothers used this moral authority as social housekeepers to criticize aspects of the emerging capitalist system.⁴⁷⁷ Maternal selflessness has endowed mothers with a unique moral authority, which in the past has been used to promote temperance, maternal and child health, kindergartens, and a more lenient juvenile justice system. Most recently, mothers have used this political persuasion to combat drunk driving and lax gun control laws.⁴⁷⁸

Finally, the parenting movement aims to model itself after the Association for the Advancement of Retired Persons (“AARP”)⁴⁷⁹ by making it easy to join and offering various shopping discounts to parents. As soon as new parents have babies in the hospital, they could receive membership applications along with various coupons for diapers and other

473. See CRITTENDEN, *supra* note 8, at 14. See also Wooden, *supra* note 42, at 275 (“Few situations generate more passionate feelings among adults than being a parent. Parenting is one of the most intense experiences of our lives . . .”). Hewlett and West state:

[T]here is enormous unity across race, class, and gender [and parents] are ready to rally behind a common agenda.

. . . Millions of moms and dads across the nation are facing the same set of urgent concerns. If they can somehow band together and find collective strength, they stand a much better chance of persuading political leaders to provide the serious support they so desperately need.”

Hewlett & West, *supra* note 46, at xx.

474. See, e.g., THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 311–480 (1992) (describing the history of women that shaped maternalist social policies in the early twentieth century). See generally SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE (1989) (analyzing how characteristics of mothering should be used to influence social policy).

475. See WILLIAMS, *supra* note 40, at 31.

476. See *supra* text accompanying notes 76–81.

477. Williams, *supra* note 192, at 1444–45.

478. See Million Mom March, *supra* note 48.

479. See generally CHARLES R. MORRIS, THE AARP: AMERICA’S MOST POWERFUL LOBBY AND THE CLASH OF THE GENERATIONS 15–21 (1996) (describing the political and social goals of the AARP and its members). In the past, child advocates often criticized the AARP as “greedy geezers,” highlighting the fact that the annual cost of Social Security and Medicare for each senior is considerably more than twice what America spends to educate each of its children. *Id.* at 96, 112. Edward Wolff shows that the relative well-being of parents has been continuously eroding over the past three or four decades, especially in comparison to that of the elderly. See Wolff, *supra* note 280, at 59.

baby gear. Important opportunities exist to ally with the AARP—the “‘eight-hundred-pound gorilla’ in Washington politics”⁴⁸⁰—on three issues of common ground: (1) family care, (2) part-time jobs, and (3) love of children. First, one of the greatest fears of many elders is to be placed in a nursing home. Many senior citizens would prefer home care, but often their own children are too caught up with their work lives to be able to provide this type of care.⁴⁸¹ Second, parents share common ground with senior citizens because both groups often want to work part-time.⁴⁸²

Third, Charles Morris, an expert on elder law, writes how the AARP wants to reach out to children as mentors, tutors, and caregivers.⁴⁸³ Since many AARP members are also grandparents, they may support a parenting coalition for the benefit of their children and grandchildren.

Forming a cohesive political group is not necessary for the shareholder activism strategy. If parents form a united block, however, they could make more credible demands for legislation. Even if this type of legislation does not pass, the threat of legal change is a powerful force in motivating corporations to take voluntary action suggested by shareholder proposals. Specifically, the issues that institutional shareholders choose to address are affected by the amount of political pressure placed on the trustees of these funds.

This parenting coalition could also take three other steps to promote the shareholder strategy. First, they could play a lead role in educating parents who have pension funds about the nature of shareholder rights and the tremendous power these funds have over American corporate governance. The coalition could follow the lead of the American Federation of Labor-Congress of Industrial Organizations (“AFL-CIO”) in using the Internet to encourage parents to write to pension fund managers

480. MORRIS, *supra* note 479, at xii.

481. *See id.* at 72 (discussing fear of nursing homes and Alzheimer’s); *id.* at 148 (“The lack of attention being paid to the long-term care problem is the more striking because there is probably no issue of greater salience to the aged.”).

482. *See, e.g.*, Robert M. Hutchens & Emma Dentinger, *Moving Toward Retirement*, in IT’S ABOUT TIME, *supra* note 96, at 259 (noting that seventy-three percent of workers between the ages of fifty-one and sixty-one want part-time jobs); Phyllis Moen, *The Gendered Life Course*, in HANDBOOK OF AGING AND THE SOCIAL SCIENCES 179, 187 (Robert H. Binstock & Linda K. George eds., 5th ed. 2001).

483. Elders could be a big help to working parents by teaching children to read. If the person is too old to help in childcare, the children would have an audience for shows and the children can read to them. In the end, both elders and children would watch less television. Elders could teach children things to do before television existed. Children could teach elders about computers.

to communicate their views about work-family issues.⁴⁸⁴ Second, this organization could publicize a list of the most family-hostile corporations.⁴⁸⁵ Finally, this organization could help parents file lawsuits for employment discrimination against them as parents.

These steps of pushing for legislation, educating parents about shareholder lists, shaming family-hostile corporations, and suing for parental discrimination in employment are key features of a large-scale campaign to push corporations to take more responsibility for children's human capital investments. The next part details the legal and political obstacles of harnessing parents' pension power.

VI. THE INSTITUTIONAL SHAREHOLDER STRATEGY FOR PARENTAL SUPPORT PROGRAMS

This part explains how to use shareholder rights to push corporations to implement better work-family policies in two steps. First, this part provides an overview of the institutional shareholder movement, detailing the legal and political obstacles of this strategy. This discussion notes several post-Enron events that provide greater possibilities for using this shareholder approach. Second, this part explains three specific features of this shareholder strategy: (1) using intermediaries to study corporate cultures and change promotion and compensation practices to facilitate work-family policies; (2) targeting corporations in a local area to coordinate changes in work-family policies; and (3) promoting greater diversity on corporate boards by including more women, especially mothers, as directors.

A. OVERVIEW OF THE INSTITUTIONAL SHAREHOLDER MOVEMENT

This section first reviews two legal issues that work-family advocates need to address in submitting shareholder proposals to encourage corporations to implement better parental support programs. This section also discusses the political factors that work-family advocates must consider to encourage other shareholders to vote in favor of their shareholder proposals.

484. See *Executive Paywatch*, at <http://www.aflcio.org/corporateamerica/paywatch/index.cfm> (last visited Sept. 2, 2004).

485. See Williams, *supra* note 1 (coining the term "family-hostile" corporations for employers with policies that cause stress, conflict, and divorce for families).

1. Shareholder Activism for Work-Family Policies

Under Rule 14a-8,⁴⁸⁶ a shareholder who owns \$2000 worth of stock for one year is eligible to submit a shareholder proposal in management's proxy statement on which fellow shareholders vote.⁴⁸⁷ Essentially, this rule seeks to establish a system of corporate democracy whereby shareholders can express recommendations to managers. Under this rule, shareholders cannot order managers to make certain business decisions, but precatory shareholder proposals on issues of "social policy" as opposed to "ordinary business" are allowed. Work-family advocates need to consider two legal issues pertaining to the strategy of using shareholder activism to promote work-family balance: first, the Security and Exchange Commission's ("SEC") policies concerning employment-related shareholder proposals, and second, pension fund managers' fiduciary obligations in voting proxies.⁴⁸⁸

a. Matters of Ordinary Business Versus Social Policy

Under the federal proxy rules, managers can exclude shareholder proposals that relate to ordinary business, but not if they raise issues of social policy. A proposal raises significant social issues if it transcends the day-to-day business matters and raises policy issues so significant that it would be appropriate for a shareholder vote. The SEC decides what is a significant social issue.

This role of mediator has caught the SEC in the midst of much political turmoil. In the last two years, the SEC has decided that auditor selection, director election, and option expensing are matters of ordinary business and should be left to management to decide.

Although this strategy requires submitting proposals to the same corporation year after year, these efforts reward persistence through incremental progress over time. Persistent efforts can push corporations to become more socially responsible on issues such as the environment, diversity in the workforce, and eliminating sweatshops and child labor

486. 17 C.F.R. § 240.14a-8 (1998).

487. The securities regulations pertaining to shareholder proposals require managers to include such proposals in a corporation's proxy statement and to schedule a vote on the matter at the annual shareholders' meeting. In this way, shareholder activists can avoid the expense of preparing their own proxy statement and soliciting their own proxies. For an in-depth discussion on how the shareholder proposal rule functions, see RANDALL S. THOMAS & CATHERINE T. DIXON, ARANOW & EINHORN ON PROXY CONTESTS FOR CORPORATE CONTROL ch. 16 (3d ed. 1998).

488. I discuss these obstacles and how to work around them for high-performance workplace practices in Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345, 1357-73 (1997).

abroad. In many cases, social proposals do not always need majority support to effect change because when investor support starts to approach ten percent, some companies start taking the issue more seriously.⁴⁸⁹ Managers usually view these proposals as involving emotional issues, however, brought by gadflies seeking publicity for quixotic causes. In response to this criticism, social activists point to many victories. Social activists recognize that managers eventually respond to their requests as a means to avoid negative publicity or diffuse political pressure that can lead to increased legislation.

In an historic first, a social issue opposed by management won a proxy contest (that is, majority shareholder approval) in November 2002.⁴⁹⁰ In a decade-long effort, the New York City Employees Retirement System (“NYCERS”) submitted a nonbinding shareholder proposal recommending that the managers at Cracker Barrel Old Country Stores (“Cracker Barrel”) implement nondiscriminatory policies relating to sexual orientation. After the proposal passed with fifty-eight percent of the shareholder vote, the company agreed to amend its written equal opportunity policy to state that the company does not discriminate based on sexual orientation. Since Cracker Barrel was among the most egregious corporations concerning its treatment of gay rights, this shareholder victory will lead many other corporations to amend their nondiscrimination policies to include sexual orientation.⁴⁹¹ This victory offers hope to other social activists: “If we can change Cracker Barrel, we can change anybody.”⁴⁹²

The SEC has had a particularly troublesome time classifying shareholder proposals as either ordinary business or social policy. Generally, the SEC allows managers to exclude proposals that pressure them to reach collective bargaining agreements with unions.⁴⁹³ As public opinion has evolved and issues receive national attention, the SEC has allowed certain employment-related shareholder proposals to be deemed social policy, such as those concerning equal employment and affirmative action. Given the current socioeconomic revolution, the SEC should find

489. See Fran Teplitz, *Social and Governance Concerns Converge in Wake of Scandals*, IRRS CORP. GOVERNANCE BULL., Mar.–May 2003, at 12, 12.

490. William Baue, *Record Shareowner Vote Prompts Cracker Barrel to Bar Sexual Orientation Discrimination*, SRI World Group, at <http://www.sri-advisor.com/article.mpl?sfArticleId=988> (Dec. 12, 2002).

491. See Deb Price, *Perseverance Gains Cracker Barrel Gift*, DETROIT NEWS, Dec. 23, 2002, at 11A.

492. *Id.*

493. See, e.g., General Motors Corp., SEC No-Action Letter (Feb. 27, 1978), 1978 WL 12352, at *5.

that work-family shareholder proposals raise issues of significant social policy. Currently, the SEC is considering abandoning the ordinary business exclusion.⁴⁹⁴ If this change takes place, this rule will no longer present an obstacle in using shareholder proposals to push corporations to implement work-family policies.

b. Pension Fund Trustees' Fiduciary Obligations

In order for shareholder proposals to pass, work-family advocates need other shareholders to vote in favor of their proposals. Most shareholders are pension fund managers whose primary mission is financing retirement for their fund beneficiaries. Thus, work-family advocates must consider whether voting for such shareholder proposals would fall within their fiduciary duties to vote proxies consistent with this primary mission. A "prudent person" standard of fiduciary conduct requires managers to act in the long-term best interest of plan participants. Under these rules, it is not acceptable to attempt to secure beneficiaries' jobs or raise their wages. Importantly, however, pension fund managers may promote a company's "investment in training to develop its work force, other workplace practices and financial and non-financial measures of performance."⁴⁹⁵ Fortunately, shareholder proposals promoting work-family policies fall within these fiduciary guidelines.

In the past, pension fund trustees could vote in favor of other social proposals involving protection for the environment and elimination of discrimination.⁴⁹⁶ I maintain that voting in favor of work-family shareholder proposals would fall within the pension fund trustees' fiduciary obligation because these proposals would promote investments in children's human capital, which is critical for the long-run success of the economy. Such proposals are also consistent with the fiduciary responsibility to take a long-term perspective on how social policy concerns can affect the bottom line for companies.⁴⁹⁷

2. Political Obstacles: The World of Institutional Shareholder Activism

This next section discusses the political obstacles that work-family advocates need to overcome in submitting shareholder proposals. The

494. See Notice of Solicitation of Public Views Regarding Possible Changes to the Proxy Rules, SEC Release No. 34-47778, 68 Fed. Reg. 24,530, 24,530-01 (May 7, 2003), available at <http://www.sec.gov/rules/other/34-47778.htm> (May 1, 2003).

495. 29 C.F.R. § 2509.94-2 (1994).

496. See Teplitz, *supra* note 489.

497. See *id.*

leading agents of the shareholder movement are public pension funds and union pension funds. These shareholders focus mainly on corporate governance issues such as director independence and executive compensation. Historically, these large shareholders have not voted in favor of social proposals, but this is changing in the wake of the Enron era of corporate scandals.

Among public pension funds, the CalPERS and the NYCERS are among the most active in sponsoring shareholder proposals.⁴⁹⁸ The most active unions in this shareholder movement include the Teamsters, the Service Employees, the Union of Needle Trades, Industrial & Textile Employees, and the United Brotherhood of Carpenters and Joiners of America. Although private pension funds hold a great deal of stock, these funds do not engage in much shareholder activism.⁴⁹⁹ Unlike public funds, corporate management appoints private pension fund trustees. For this reason, private trustees do not challenge corporate managers by engaging in even mild proxy activity.⁵⁰⁰

Last year, the AFL-CIO and social activists joined together to push for proxy voting disclosure by mutual funds. This was an important step because mutual funds have the votes to swing proxy contests.⁵⁰¹ In the past, mutual funds have not played a role in the institutional shareholder movement because they are often beholden to corporate managers for side business. For this reason, the fiduciaries of mutual funds objected to disclosing instances in which they did not follow their own proxy voting guidelines when a conflict of interest arose. Such cases included, for example, when the fiduciaries were managing money, like 401k plans, for companies in their portfolios.⁵⁰² Now that mutual funds need to disclose their proxy voting to the public,⁵⁰³ they may be more inclined to favor social policy proposals in work-family issues.

498. See Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 801–02, 804 (1993).

499. See, e.g., Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, CORP. GOVERNANCE ADVISOR, Jan./Feb. 1999, at 14, 15 (finding that only thirteen institutional investors out of a sample of 975 submitted proposals during 1986–94).

500. See Mark J. Roe, *The Modern Corporation and Private Pensions*, 41 UCLA L. REV. 75, 93 (1993).

501. See Russ Wiles, *Proxy Battles Less Likely to Be Dull, Secret*, ARIZ. REP., Feb. 15, 2003, at 1D.

502. Carolyn Mathiasen, *Some Funds Castigate Voting Disclosure Proposal*, IRRP CORP. SOC. ISSUES REP., Dec. 2002, at 9, 9.

503. 17 C.F.R. § 270.30b1-4 (2003).

Public pension funds and union pension funds have long-term investment horizons, and when they are dissatisfied with a firm's performance, they may not be able to sell stock without depressing the market price. Rather than taking the "Wall Street Walk," institutional shareholders have revolutionized corporate governance by attempting to make the entire corporate herd run to focus on creating shareholder value.⁵⁰⁴ Their activism comes in the form of targeting underperforming companies with shareholder proposals to promote good corporate governance practices that make managers more accountable to shareholder interests. For the most part, these public funds focus on process issues that apply to a broad range of corporations, rather than analyzing particular business strategies on a case-by-case basis. Accordingly, public pension funds and union pension funds use voting guidelines that concentrate on the structure and competence of boards of directors, such as redeeming poison pills, limiting executive compensation, declassifying boards, and enhancing board independence. Recently, the topic of expensing stock options has also received majority support.⁵⁰⁵

Historically, the social policy and corporate governance areas of shareholder activism have operated separately with different issues and actors. Yet, a new stage of shareholder activism seems to be emerging where public pension funds favor more social proposals.⁵⁰⁶

Specifically, in the wake of the corporate governance scandals, major institutional shareholders support social issues, or the so-called cross-over resolutions.⁵⁰⁷ These cross-over proposals involve shareholder resolutions that raise both corporate governance and social concerns, such as gender

504. See, e.g., Jayne Elizabeth Zanglein, *From Wall Street Walk to Wall Street Talk: The Changing Face of Corporate Governance*, 11 DEPAUL BUS. L.J. 43, 46-47 (1998).

505. See Gary Rivlin, *Intel Balks at a Request to Expense Stock Options*, N.Y. TIMES, May 20, 2004, at C1 ("Although Intel strongly opposed the shareholder proposal, 54 percent of the 5.7 billion votes cast backed the advisory referendum calling on the board to establish a policy expensing all future stock options, the company said. The vote represented a symbolic victory for those advocating the expensing of options.").

506. See CAROLYN KAY BRANCATO, INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE: BEST PRACTICES FOR INCREASING CORPORATE VALUE 85 (1997) ("A small number of public pension funds have gone beyond targeting corporations for governance intercession by looking at their historic, cumulative shareholder returns. They are now pressing for meetings with senior management . . . to discuss the strategic direction of the company . . . [including] nonfinancial measures of corporate performance . . ."); CAPPELLI ET AL., *supra* note 11, at 277 ("[Q]uestions may expand from whether the professional money managers are achieving maximum private return to whether they are fostering maximum public good.").

507. See Teplitz, *supra* note 489, at 13.

and racial diversity on boards of directors.⁵⁰⁸ In addition, leading public funds, such as CalPERS, are beginning to vote in favor of social proposals dealing with sweatshops and child labor.⁵⁰⁹ Given that more public pension funds are voting in favor of social proposals, mutual funds may follow their lead.⁵¹⁰

3. Steps to Educate Pension Fund Trustees About Work-Family Issues

With this background, it is possible to see how to use the power of institutional shareholders to gain leverage over managers concerning work-family issues. Parenting advocates will need the support of other institutional shareholders for their shareholder proposals to pass. It is difficult to raise new issues for institutional shareholders to consider because pension funds use proxy voting guidelines that will not cover these work-family policies. Thus, before submitting their shareholder proposals, work-family advocates need to spend significant time educating the major institutional investors so that they will revise their proxy voting guidelines to support work-family proposals. Work-family advocates can coordinate these efforts by giving lectures at the Council of Institutional Investors, a Washington-based group of activist funds and by lobbying Institutional Shareholder Services, a proxy consulting firm.

The institutional shareholder circle is a close-knit community and opinion leaders are very influential in establishing norms for this powerful group. Once work-family advocates can persuade one institutional investor, like CalPERS, others are likely to follow the lead. Union pension funds are concerned with issues pertaining to workers and would be sympathetic to proposals concerning work-family issues.⁵¹¹ Other social advocates such as

508. *Id.* at 12. Ten cross-over proposals were filed at Boeing, Citigroup, Coca-Cola, Conseco, FleetBoston Financial, Unocal, and AOL/Time Warner and received an average of ten percent support. *Id.*

509. The passing vote at Cracker Barrel is credited to the new SEC rule requiring mutual funds to disclose how they vote proxies. This new rule has triggered a review of proxy voting guidelines that is altering votes. At this point, mutual funds have a mixed track record in voting for social proposals; they inconsistently vote for or against social policy issues. Carolyn Mathiasen, *More Investors Report Proxy Votes on Record*, IRRRC CORP. SOC. ISSUES REP., Dec. 2002, at 5.

510. *Id.*

511. The AFL-CIO has developed guidelines on proxy voting for union-pension trustees. For the most part, these guidelines are not controversial because they do not differ from the guidelines established by other activist funds seeking to promote shareholder value. In other cases, however, the AFL-CIO's intention to promote worker interests through the proxy voting guidelines is clearly highlighted. The guidelines assert that fiduciaries should not seek to maximize short-term gains if it conflicts with the long-term economic best interests of the participants and beneficiaries. As an example of these long-run interests, the guidelines include corporate policies that affect employment security and wage levels of plan participants. To promote these long-run interests, the guidelines support proposals

the Interfaith Center for Corporate Responsibility could also provide guidance and resources to work-family advocates in promoting this new type of shareholder proposal. Work-family advocates' activism concerning shareholder proposals should receive much media attention. This work-family activism would have important symbolic value in highlighting that American working families are the beneficiaries of many institutional shareholders.

At the beginning of their shareholder activism, work-family advocates should submit proposals to both companies known for excellent work-family practices and those with poor work-family practices. These shareholder proposals could request information to be publicly disclosed about companies' work-family programs.⁵¹² I conducted a review of the Fortune 500 companies' practices about voluntary disclosure concerning employment-related matters⁵¹³ and noted that several companies mentioned that the magazine *Working Mother* listed them as one of the best companies for parents. Once data are collected about various programs, work-family advocates could promulgate lists of best practices for other firms to follow.

In sum, it is an opportune time to consider this shareholder strategy because reforms in the aftermath of Enron have created new ways to use the institutional shareholder movement to push the work-family agenda. Specifically, four events or trends favor using the power of institutional shareholders in the area of work-family balance: (1) social proposals are beginning to pass, (2) major institutional investors are voting in favor of more social proposals, (3) the SEC is studying whether to eliminate the

promoting high-performance workplace practices such as employee training, direct employee involvement in decisionmaking, compensation linked to performance, employment security, and a supportive environment. In addition, the guidelines also state that the corporation should not use suppliers who employ forced labor, child labor, or otherwise violate workers' rights under international law. Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMP. LAB. L. & POL'Y J. 97, 121 (2000) (citing AFL-CIO proxy voting guidelines).

512. For a discussion of disclosure as a corporate governance tool, see Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335 (1996). For the importance of disclosure as a tool of corporate social responsibility, see Faith Stevelman Kahn, *Legislatures, Courts and the SEC: Reflections on Silence and Power in Corporate and Securities Law*, 41 N.Y.L. SCH. L. REV. 1107, 1141 (1997) (discussing the lack of express limits for required corporate disclosures and its effect on social transparency for corporations); Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 624-25 (1997) (stating that disclosure of corporate charitable contributions furthers managerial responsibility); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999).

513. See Marleen A. O'Connor, *Rethinking Corporate Financial Disclosure of Human Resource Values for the Knowledge-Based Economy*, 1 U. PA. J. LAB. & EMP. L. 527, 535 (1998).

ordinary business exception, and (4) mutual funds must disclose how they vote proxies.

a. Redesigning the American Corporate Culture to Allow Parents to Care for Their Children

This section highlights three aspects to this shareholder strategy to push corporations to implement family-friendly policies. First, shareholders should encourage firms to use intermediaries to study their corporate culture and understand the roadblocks preventing parents from using these policies. Second, shareholders should encourage corporations in a local area to work together in formulating policies to reduce expenses and avoid duplication of efforts. Third, shareholders should encourage corporations to include more women—especially mothers—on their corporate boards to bring a necessary perspective to the important human resource issue of work-family balance.

i. Using Intermediaries to Change Tournament Structures

Part IV discussed Amy Wax's analysis of the arms race of long hours that locks workers into a system that forces them to work more hours than they want.⁵¹⁴ Moving beyond this tournament structure will not be easy for two reasons. First, scholars studying tournament structures report that a firm may use gender and race as factors in promotion decisions without hurting the bottom line.⁵¹⁵ Second, many workers, especially men, may not work long hours just for the money. Joan Williams surmises that the incentive to stay in the tournament stems from the need to boost one's ego, that is, the need to feel that one is a major "player."⁵¹⁶ This demonstrates the need not only to reform tournament structures, but also to change the norms that drive employees to engage in these competitions to the detriment of their families.

To reconstruct corporate cultures to accommodate family life, two areas need to change. First, corporate norms involving long work hours need to change. Lotte Bailyn, a leading human resources expert, writes that long hours and face time do not lead to higher productivity. In many workplaces, long hours are the sign of a star performer, yet this face time may not indicate the quality of the work performed.⁵¹⁷ Indeed, Bailyn discusses experiments demonstrating that people complete the same jobs in

514. Wax, *supra* note 413, at 16.

515. See, e.g., Wilkins & Gulati, *supra* note 414, at 600–02.

516. See Williams, *supra* note 1, at 927–28.

517. LOTTE BAILYN, *BREAKING THE MOLD: WOMEN, MEN, AND TIME IN THE NEW CORPORATE WORLD* 77–78 (1993).

varying amounts of time, depending on the time they are given to finish. Thus, Bailyn argues that we need to view long hours as a sign of inefficiency, rather than of commitment and motivation. In addition, Williams emphasizes how changing these norms is critical to promoting gender equity.⁵¹⁸ Second, employers need to pay benefits according to hours worked because some corporations introduce flex-time and part-time work, not to accommodate workers, but as a means to cut costs.⁵¹⁹

In redesigning corporate cultures to achieve these goals, this Article adopts Susan Sturm's approach to eradicating gender discrimination.⁵²⁰ Sturm emphasizes that organizations have eliminated most of the blatant types of discrimination, but that subtle forms are prevalent. To prevent this more subtle form of discrimination, she argues that "command-and-control" legislation will not work because each organization develops its own norms.⁵²¹ Rather, she suggests using outside intermediaries to investigate the workplace culture, such as Catalyst, the Families and Work Institute, and The Center for the Study of Gender in Organization. These intermediaries have the expertise to question employees to find out about these workplace norms and to suggest changes aimed at eliminating these subtle discriminatory forces.⁵²² Once changes are put in place, middle managers should be given certain goals to ensure that the policies are implemented. Through objective performance measures, data tracking, and feedback, these outside intermediaries can change underlying corporate norms that impede the success of work-family policies.⁵²³

518. See Williams, *supra* note 1, at 929–30.

519. See Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 461 (1998).

520. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–74 (2001). This subtle type of discrimination usually stems from norms that appear gender-neutral on their face, but unintentionally hurt women. In one example, an organization concerned about high turnover of women and difficulty in recruiting women found that some of the problems arose because the corporate culture had a norm of allowing people to call meetings on an informal basis at any time. *Id.* This norm operated to the detriment of women, but men also found the norm disruptive. Identifying this issue and changing the norm benefited all employees in the organization and thus improved organizational effectiveness. *Id.* Thus, in evaluating these norms, scholars note that many organizational practices create barriers to women's advancement because these norms have been created by and for men and are based on male experience. It is important to state at the outset that, as the previous example demonstrates, such norms do not mean that men are at fault or that men necessarily benefit from them. *Id.*

521. See *id.* at 475–78.

522. See *id.* at 524–25.

523. For a system of measuring the success of part-time programs, see Williams & Calvert, *supra* note 410.

ii. Targeting Networks of Firms to Coordinate Work-Family Policies

Part V highlighted the need for coordinated effort by firms in a local area to reduce the costs for individual firms of adopting more family-friendly policies.⁵²⁴ Institutional shareholders can foster the coordination of these reform efforts by establishing clearing houses to publicize best practices.

This approach could also encourage local firms to follow the recommendation of Katherine Stone, a labor scholar, for “employer-financed, cross-workplace childcare centers.”⁵²⁵ These childcare centers would be available to employees of firms in a local area. This type of facility would ease transitions from job to job under flexible labor markets. Specifically, Stone points out that it would enable a worker to locate to a new job without having to move her child from the current childcare situation. Stone recommends that these childcare centers could also provide “care for older children, such as after-school programs, school vacation and snow day coverage, educational programs, and homework assistance.”⁵²⁶

iii. Promoting Diversity on Corporate Boards

Shareholder proposals to implement work-family policies should recommend nominating more women, and particularly mothers, to corporate boards.⁵²⁷ To support this view, Catalyst states that corporations with more female executives and board members tend to have progressive work-family programs, although it cannot determine which comes first.⁵²⁸ More women on corporate boards are needed to present different perspectives about work-family policies. Work-family scholars report that one of the main problems preventing the successful implementation of work-family programs is that CEOs set the tone of the corporation’s culture and most CEOs simply do not “get it.” Many corporate officers have stay-at-home wives and do not understand the issues in raising children while

524. See *supra* notes 422–24 and accompanying text.

525. Stone, *supra* note 11, at 642.

526. *Id.*

527. For other articles concerning diversity on boards, see Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1383–85 (discussing diversity as a way to learn about the needs of shareholders, consumers, and employees); Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306–07 (2003) (discussing diversity as a means to prevent groupthink on boards); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 96–97 (2000) (claiming that board diversity may increase a company’s bottom line).

528. CAROLYN KAY BRANCATO & D. JEANNE PATTERSON, BOARD DIVERSITY IN U.S. CORPORATIONS: BEST PRACTICES FOR BROADENING THE PROFILE OF CORPORATE BOARDS 7–8 (1999).

trying to advance a career. Eighty percent of CFOs have stay-at-home wives and sixty-four percent of male executives with children under age thirteen have nonworking spouses.⁵²⁹ A high percentage of women who rise to the top levels of management are unmarried or do not have children.⁵³⁰

Women hold twelve percent of the seats on the boards of directors for Fortune 500 companies.⁵³¹ In the 1970s, Rosabeth Moss Kanter surmised that gender influences are proportional to the gender composition of the group.⁵³² Subsequent studies of small groups support this proposition. Specifically, race and gender do not affect group decisionmaking unless the percentage of women or minorities in the group rises above the critical level of twenty percent.⁵³³ Thus, having one woman candidate on an average board consisting of eleven people may not produce the efficiency benefits of diversity.⁵³⁴

As Catalyst points out, there is a bit of a “chicken and egg” problem. That is, efforts to increase diversity on boards are laudable, but will fail to place more women on corporate boards until corporations implement more effective work-family programs. As Williams perceptively states: “[T]he glass ceiling is alive and well in America. But most women never get near it because they are stopped long before by the maternal wall.”⁵³⁵ Male executives state that they are eager to find women who “think like we do”; Crittenden points out that these are men “who see their children a few minutes a day and on weekends.”⁵³⁶ Thus, working mothers who are trying to have a balanced life are the least likely people to think like “they” do.⁵³⁷

In the past, shareholder activists viewed promoting diversity on boards as a corporate social responsibility issue. Increasingly, diversity is seen as a cross-over issue that affects corporate governance. Diversity has been the leading cross-over issue supported by CalPERS, the Teachers Insurance

529. CRITTENDEN, *supra* note 8, at 17–18.

530. *See, e.g.*, HEWLETT, *supra* note 35, at 86 (noting that forty-two percent of high-earning women are childless in corporate America).

531. The 2001 Catalyst Census of Women Board Directors reports that in the United States, the percentage of women on boards is 12.4%, up from 11.7% in 2000 and 11.2% in 1999. CATALYST, 2001 CATALYST CENSUS OF WOMEN BOARD DIRECTORS 2 (2001).

532. *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 208 (1977).

533. *Id.* at 209.

534. One woman director described her experience of being the sole woman on a corporate board as “like going into a locker room where everybody all of a sudden shuts up.” CATALYST, *supra* note 531, at 22.

535. Williams, *supra* note 47, at 1.

536. CRITTENDEN, *supra* note 8, at 29–30.

537. *Id.*

and Annuity Association-College Retirement Equities Fund (“TIAA-CREF”), the Council of Institutional Investors, and the National Association of Corporate Directors. Shareholder proposals calling on companies to increase gender and racial diversity on their boards have received some of the highest levels of approval among the social policy resolutions.⁵³⁸ Diversity is becoming a corporate governance issue in order to foster divergent thinking that may contribute to board effectiveness and ultimately shareholder value. A recent Conference Board report maintains that diversity on boards enhances shareholder value because of the additional experience and knowledge.⁵³⁹

The Enron-type corporate scandals provide an opportunity for promoting more women on corporate boards because incumbent directors have become reluctant to remain on boards.⁵⁴⁰ In addition, some firms seek to restore investor confidence by appointing more women to the board to create the appearance of more ethical decisionmaking.⁵⁴¹

VII. CONCLUSION

The United States is in the midst of redefining the nature of the employment relationship at the same time that it is defining gender relations and family life. Just a generation ago, concepts of a job-for-life and a spouse-for-life prevailed. Today, an individual faces not only

538. See, e.g., Meg Voorhes, *Social Proposals Get New Levels of Support*, IRRIC CORP. SOC. ISSUES REP., May 2002, at 2, 3 (stating that a shareholder proposal asking for a report on board diversity at the EMC corporation received support from thirty-two percent of the shareholders in 2002).

539. BRANCATO & PATTERSON, *supra* note 528. Although statistical data do not exist for showing that the presence of diversity on boards increases firm performance, the Conference Board found it noteworthy that the top ten Fortune companies in terms of profitability all have a woman on their boards, and eight out of these ten have more than one woman on their boards. *Id.* at 8. Three economic considerations pushed senior managers to widen their horizons about the types of people who are the right fit on corporate boards. First, some corporations consider the notion of “market reciprocity”; if women make up half the consumer base of a corporation, then that corporation’s board should have proportional representation. *Id.* at 8–9. Second, corporate boards recognize that cultural diversity is important in the global economy to attract business from other parts of the globe. *Id.* Finally, some firms place women and minorities on the board for a less virtuous reason, as a method to mitigate litigation arising from employment discrimination. *Id.*

540. See Susan Stellan, *Executive Life; Directors Ponder New, Tougher Roles*, N.Y. TIMES, June 30, 2002, at C16. See also *The Fading Appeal of the Boardroom*, ECONOMIST, Feb. 10, 2001.

541. See Kelly Pate, *Corporate Woes Spell Opportunity for Women*, DENVER POST, Aug. 2, 2002, at C-01; Mary Williams Walsh, *Preparing a Corps of Women for Corporate Responsibility*, N.Y. TIMES, Aug. 13, 2002, at C4. The State of Connecticut pushed for diversity on boards for a better reflection of a company’s workforce, customers, and community. Denise L. Napier, *Bringing Diversity to the Boardroom: Connecticut’s Unique Partnership*, IRRIC CORP. GOVERNANCE BULL., Mar.–May 2003, at 9, 9. “Diversity in the boardroom creates a culture in which directors question policies and plans and hold each other accountable for decisions that are made.” *Id.*

unstable employment, but also unstable family life. Thus, individuals face more risk at home in personal relationships and at work in employment matters.

In this Article, I focus on how to use corporate governance mechanisms to alleviate the struggles in the daily lives of working families during this historical period of socioeconomic upheaval, which was caused by the transition to the knowledge-based economy. By looking at the connections between the family, work, and the corporation, this Article begins an analysis that has much potential. It is my hope that this Article will encourage researchers to focus on the changing institutions of work and family to align our corporate governance system with the human capital needs of the knowledge-based economy. Specifically, corporate governance scholars need to join child development experts, labor scholars, feminist legal scholars, and work-family advocates to consider the role of the family in the new economy. This type of conversation has implications for many important issues, including reducing income inequality,⁵⁴² promoting gender and racial equity in the workplace,⁵⁴³ creating more ethical corporate cultures,⁵⁴⁴ and rebuilding communities.

542. See *supra* text accompanying notes 296–302.

543. Tournament structures lead to gladiator-like corporate cultures that tend to exclude women and minorities. See O'Connor, *supra* note 527, at 1313–15.

544. See Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 969–72 (2002). In addition, the tournament structure may lead to unethical corporate cultures—Donald Langevoort points to this structure, rather than short-term shareholder value, as the prime factor in creating Enron-type scandals. The reason is that tournaments promote superstars. Yet, to retain his status, the superstar must continuously outdo himself and others. *Id.* at 973–75. In such a competitive environment, the constant “What have you done for me lately?” stress may lead the superstar to worry that he may lose his status. Social psychologists explain that when people perceive that they may lose existing benefits, they may take higher risks to maintain the benefit than they would take to obtain it in the first place. *Id.* Langevoort also writes how tournament survivors tend to be “high ego” types who suffer from an overconfidence bias. *Id.* Thus, tournaments may foster pathological behavior. Donald C. Langevoort, *Diversity in the Workplace: Grease and Grit* (Working Paper 2003).