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Symposium:

## Workplace Restructuring to Accommodate Family Life

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ARTICLE

THE RHETORIC OF ACCOMMODATION:  
CONSIDERING THE LANGUAGE OF  
WORK-FAMILY DISCOURSE

KIRSTEN K. DAVIS\*

I wish to begin with the basic point that as human beings we perpetually imagine and reimagine the world and reflect what we imagine in the ways we talk.

—James Boyd White<sup>1</sup>

Law is more than a set of rules, institutions and processes; it is also a means of constituting community through a “common language [that describes a] common past, present, and future.”<sup>2</sup> Stated another way, the words of cases, statutes and regulations “verbal[ize] and rational[ize] . . . acts, attitudes, and policies,” and “coach[ ] . . . attitude[s]” by “deliberately inventing new abstractions” that draw upon already circulating legal abstractions.<sup>3</sup> Those legal abstractions make up a “weighted vocabulary”—

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1. James Boyd White, *Imagining the Law*, in *THE RHETORIC OF LAW* 29, 29 (Austin Sarat & Thomas R. Kearns eds., 1994). See also JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 36 (1985) (stating that law is “a way of talking about real events and actual people in the world”).

2. WHITE, *HERACLES' BOW*, *supra* note 1, at 28–29, 33, 38. See also Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job*, 26 *HARV. WOMEN'S L.J.* 77, 113 (2003) (noting that “[t]heorists have long recognized that law serves an expressive function and is constitutive of who we are”).

3. KENNETH BURKE, *ATTITUDES TOWARD HISTORY* 254, 291, 322 (3d ed., U. of Cal. Press 1984) (1937) (describing the law as “the efficient codification of custom”). See also KENNETH BURKE, *PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE* 187 n.2 (3d ed., U. of Cal. Press 1984) (1954) (describing the law as “an implement for the molding of custom”). Notably, law is what Burke calls “secular prayer,” which he defines as “the *coaching of an attitude* by the use of mimetic and verbal language.” BURKE, *ATTITUDES TOWARD HISTORY*, *supra* at 322. According to Burke, law is a resource to be “cashed in on” to invent new abstractions by analogy to existing abstractions, and legal language “take[s] up the slack,” between what is desired and what is got

speech that is “loaded with judgments” and composed not only of “words alone, but [also of] the social textures, the local psychoses, and the institutional structures [whose] purposes and practices . . . lie behind these words.”<sup>4</sup> This vocabulary forms a “terministic screen,” which is a filter of experience that not only “singl[es] out or highlight[s] certain aspects [of experience] for focused attention,” but also makes invisible other aspects.<sup>5</sup> As such, the vocabulary that makes up the terministic screen both “en-able[s] . . . observations” and “sets limits on what observations are possible.”<sup>6</sup>

Work-family discourse in the law is a terministic screen that filters the experience of work and family. This discourse orients its participants to particular ways of thinking about the interconnectedness and segmentation of work and family, the conflicts between these realms,<sup>7</sup> and the ways in which individuals navigate boundaries<sup>8</sup> between the two. The language of courts, legislators and regulators reflects and highlights certain realities about what is possible for work and family and, at the same time, deflects and makes invisible other work-family realities.

As a starting point for examining the terministic screen of work-family discourse in the law, the word “accommodate” might be considered. “Accommodate,” the verb, and “accommodation,” the noun,<sup>9</sup> are words that are sometimes used in describing how to improve the relationship between work and family by pursuing “workplace restructuring”<sup>10</sup> to accommodate family life,” as the title of this symposium suggests. In this context, “accommodate” has been associated with a legal duty of employers to engage in affirmative behaviors that allow employees who are caregivers to “par-

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. . . by . . . introduc[ing] . . . legal fictions and judicial ‘interpretations’ that . . . bridge the gap between principle and reality.” *Id.* at 291.

4. BURKE, PERMANENCE AND CHANGE, *supra* note 3, at 182.

5. DAVID BLAKESLEY, THE ELEMENTS OF DRAMATISM 95 (2002).

6. *Id.*; see also KENNETH BURKE, A GRAMMAR OF MOTIVES 59 (U. of Cal. Press 1969) (1945) (“Men seek vocabularies that will be faithful *reflections* of reality. To this end, they must develop vocabularies that are *selections* of reality. And any selection of reality must, in certain circumstances, function as a *deflection* of reality.”).

7. For a discussion of theories about the mechanisms for linking work and family, including interconnection, segmentation, and conflict, see Jeffrey R. Edwards & Nancy P. Rothbard, *Mechanisms Linking Work and Family: Clarifying the Relationships Between Work and Family Constructs*, 25 ACAD. OF MGMT. REV. 178 (2000).

8. For a discussion of the relationship between work and family as “role transition” or “boundary-crossing,” see Blake E. Ashforth, Glen E. Kreiner, & Mel Fugate, *All in a Day’s Work: Boundaries and Micro Role Transitions*, 25 ACAD. OF MGMT. REV. 472 (2000).

9. “Accommodate” and “accommodation” will be used interchangeably throughout this article.

10. Compare Naomi Cahn & Michael Selmi, *The Class Ceiling*, 65 MD. L. REV. 435, 457 (2006) (encouraging work-family scholars to do more than “concentrat[e] . . . efforts on restructuring the workplace”), with Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 431 (1990) (arguing that “[n]othing less than a restructuring of the workplace is necessary” to resolve the conflict between work and family).

ticipate fully in market work.”<sup>11</sup> While some have promoted policies that “accommodate” family life in the workplace,<sup>12</sup> others have criticized “accommodation” as insufficient to capture the most beneficial ways for thinking about the overlapping experiences of work and family.<sup>13</sup>

“Accommodate” is not only used in discussing the relationship between work and family and what legal approaches are necessary for improving that relationship. Rather, “accommodate” is a term also used in other areas of legal discourse and, as a result, is a “weighted” term that carries with it the rhetorical baggage of its use in those contexts. Exploring existing legal uses of “accommodate,” then, can help to make sense of how meaning is “drawn from”<sup>14</sup> those contexts, is transferred into new conversations about work and family, and affects thinking about work-family policies.

In thinking about how to engage in legal talk about work and family and how to craft future policies that affect work-family issues, it is important to ask questions that reveal the rhetoric of “accommodation” in currently circulating legal texts. In other words, how does accommodation’s multiple uses in the law shape the meaning of the term before it is even uttered in the discussion of work-family law and policies? What images, ideas and meanings are evoked when work-family policies seek “accommodation” of family in the workplace? And, can other terms be substituted for, or used in conjunction with, “accommodate” that will alter the “terministic screen” for talking about and experiencing work and family?

This article proposes that “accommodation” has multiple express and implied meanings and associations arising from its use in legal texts, particularly in those texts that address employer and employee relationships. As a result, using “accommodation” to talk about policies for workplace restructuring sends particular but sometimes conflicting messages about how to

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11. Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345, 347 (2000).

12. See, e.g., Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443 (asserting that Title VII of the Civil Rights Act’s religious accommodation provision offers a workable model for accommodating workers’ family demands); see also Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305 (2004); cf. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law Women’s Cultural Caregiving, and the Limits of the Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001) (arguing for the Americans with Disabilities Act as the model for work-family accommodation policies).

13. See Arnow-Richman, *supra* note 11, at 345, 349 (writing about the “limitations of mandated accommodation as a unitary strategy for redressing workplace disadvantage attributable to caregiving”); Williams & Segal, *supra* note 2, at 80 (criticizing the use of an accommodation model for work-family policy proposals).

14. BURKE, PERMANENCE AND CHANGE, *supra* note 3, at 104 (“Abstraction means literally a ‘drawing from.’ Whenever a similar strain can be discerned in dissimilar events (‘drawn from’ them) we can classify the events together on the basis of this common abstraction. And the particular strains which we select as significant depend upon the nature of our interests.”).

improve the relationships between employers and employees concerning work-family issues, and may impose certain limits for thinking about how employees can successfully enact their work and family roles. This article suggests that other terms for expressing the relationship between employers and employees can reflect different ideas for workplace restructuring and expand the possibilities for policies to help employees and employers manage the intersection between work and family life.<sup>15</sup>

The article heeds the exhortation that studies of work-family issues must do more than employ traditional legal analysis in exploring the possibilities for restructuring the workplace.<sup>16</sup> Accordingly, the article employs Kenneth Burke's "cluster" method of rhetorical criticism to explore the contingencies, hidden meanings and paradoxes of the words "accommodate" and "accommodation" as they are used in four areas of legal discourse. Cluster analysis is useful for understanding these words as used in the work-family context because cluster analysis gets at our "schema[s] for orientation"<sup>17</sup> about "accommodation" by asking what "goes with," is implied by, and follows from the use of "accommodation" in a text.<sup>18</sup>

Using these inquiries as guides for investigation, this article first examines some notable legal sources for the meaning of "accommodate." The article then examines how these meanings may affect how we understand "accommodate" when it is used in work-family discourse. Finally, the article offers "facilitation" and "negotiation" as possible alternative or additional terms for talking about the relationship between employees and employers and restructuring the workplace for family obligations. The article concludes that although "negotiation" and "facilitation" presume a parity between employee and employer not required by "accommodation," the terms open up the possibility of envisioning workplace restructuring as a process simultaneously enacted by both employee and employer, where both share responsibility for and commitment to the restructured environment. Moreover, the terms imply good faith interaction between employees and employers and provide a vehicle for thinking about work and family as constituents of individual identity rather than as conflicting spheres to be managed.<sup>19</sup>

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15. This article does not directly address using theories of discrimination under Title VII of the Civil Rights Act to remedy mistreatment of caregivers in the workplace. *See, e.g.,* Williams & Segal, *supra* note 2, at 116 (describing "discrimination language" as helping to "define work-family conflict as a structural problem that demands structural solutions"). This author acknowledges that "discrimination" can be another terministic screen for understanding work-family issues.

16. *See* Dowd, *supra* note 10, at 431.

17. BURKE, PERMANENCE AND CHANGE, *supra* note 3, at 76.

18. BLAKESLEY, *supra* note 5, at 196.

19. Erica L. Kirby, Stacey M. Weiland, & Chad McBride, *Work/Life Conflict*, in THE SAGE HANDBOOK OF CONFLICT COMMUNICATION: INTEGRATING THEORY, RESEARCH, AND PRACTICE 342 (John G. Oetzel & Stella Ting-Toomey eds., 2006) (discussing role and identity management in the context of work-family issues).

The goal of this article is not to answer the question of *what* policies to pursue to restructure the workplace. Further, this article does not seek to set out a definitive meaning of any term or to suggest foreclosing the use of any particular term in the pursuit of workplace restructuring. Instead, the article considers *how* using "accommodate" as a key term in policy discussions affects ways of envisioning the roles, relationships and possibilities for work and family. Ideally, this article will not discourage pursuing multiple avenues for improving the relationship between work and family, but rather will encourage careful thinking about language choices in the pursuit.

### I. "ACCOMMODATION" IN THE LAW—CONFLICTING RHETORICS

"Accommodation" derives meaning—explicitly and implicitly—from four noteworthy legal uses.<sup>20</sup> The first three meanings of accommodation emanate from statutory provisions that impose obligations upon an employer to accommodate certain employee characteristics or activities. Two of these statutes have been used as models for accommodating families in the workplace;<sup>21</sup> the third statute expressly addresses the relationship between work and family. First, "accommodation" is used in the Americans with Disabilities Act<sup>22</sup> to describe the duty of an employer to adapt a workplace to provide "reasonable accommodations" to workers with disabilities who are otherwise qualified for employment.<sup>23</sup> Second, the word is used in connection with the "religious accommodation" requirement of the Civil Rights Act of 1964, which requires employers to make "reasonable accommodations" for employees to engage in religious observances or practices.<sup>24</sup> Third, the Family and Medical Leave Act<sup>25</sup> requires employers to accommodate the medical and family needs of employees by giving up to twelve weeks of unpaid leave for specific medical problems and child care needs.<sup>26</sup>

A fourth way "accommodation" is used in the law is to describe a place or location, as in the phrase "public accommodation." For example, this phrase is used in both the Civil Rights Act of 1964<sup>27</sup> and the Americans with Disabilities Act<sup>28</sup> to describe certain kinds of locations (other than places of employment) where discrimination is prohibited.

20. There may be, of course, other contexts in which the term is used that may deserve exploration and could increase understanding of the meaning of "accommodation."

21. "Theorists typically conceptualize the needs of family caregivers within the framework of 'accommodation[.]' . . . [which] is drawn from the Americans with Disabilities Act and Title VII's provision requiring accommodation of religion." Williams & Segal, *supra* note 2, at 79–80.

22. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

23. 42 U.S.C. §§ 12111, 12112(b)(5)(A).

24. 42 U.S.C. § 2000e(j).

25. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000).

26. 29 U.S.C. § 2612(a)(1).

27. 42 U.S.C. § 2000a(b).

28. 42 U.S.C. §§ 12181–12182.

A. "Accommodation" in the Americans with Disabilities Act

The Americans with Disabilities Act (ADA) requires employers to modify working conditions to "reasonably accommodate" employees with disabilities who can perform the essential functions of the job<sup>29</sup> if the employer does not incur "significant difficulty or expense" (i.e. an "undue hardship")<sup>30</sup> in making these changes. The United States Supreme Court has said that "accommodation" means that an employer may treat "an employee with a disability differently, i.e., preferentially," and that preferential treatment is not in and of itself "unreasonable."<sup>31</sup> The ADA does not, however, define "reasonable accommodation";<sup>32</sup> rather, the ADA offers a list of examples of accommodations that would meet the reasonableness standard. Examples of "accommodation" include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [or] the provision of qualified readers or interpreters . . . ."<sup>33</sup> Generally, in cases where an employee alleges that an employer has failed to make reasonable accommodations for an employee's disability, the burden of proof first rests with the employee to demonstrate that a requested accommodation is "reasonable."<sup>34</sup> If the employee can meet this burden, then the burden of proof shifts to the employer to show that the accommodation would pose an "undue hardship" for the employer.<sup>35</sup> The statute recites a number of factors to consider in determining whether an employer faces an undue hardship, including "the nature and cost of the accommodation needed[;] . . . the overall financial resources [of the employer;] . . . [the] number of its employees[; and] the number, type, and location of its facilities . . . ."<sup>36</sup>

In addition to its association with "preference," three characteristics of "accommodate" emerge from the way it is used in the ADA to describe the employer's requirement to modify the workplace. First, because the adject-

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29. 42 U.S.C. § 12111(8).

30. 42 U.S.C. § 12111(10)(A).

31. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).

32. See Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1441 (1991).

33. 42 U.S.C. § 12111(9)(B). See also, e.g., *Pantazes v. Jackson*, 366 F. Supp. 2d 57, 69 (D.C. 2005) (noting that "accommodation" means that an "employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work").

34. See JOHN J. COLEMAN, III, *DISABILITY DISCRIMINATION IN EMPLOYMENT: LAW AND LITIGATION* § 6:2 (Thomson West 2006) ("Most courts agree that the employee first must make at least some showing that specific effective accommodation is possible; then, . . . the employer [must] carry the] burden of showing that a reasonable accommodation would impose undue hardship . . . .").

35. *Id.*

36. 42 U.S.C. § 12111(10)(B).

tive "reasonable" is attached to "accommodation" in the statute, the statute implies that without the limits imposed by the adjective "reasonable," an accommodation is inherently "unreasonable" or, at the very least, ambiguous as to its reasonableness, even in the presence of an "undue hardship" standard. A case from the United States Court of Appeals for the First Circuit demonstrates the rhetorical connection between an accommodation's unreasonableness and the employer's "undue hardship," as those concepts function to frame the meaning of "accommodation," even though they designate different burdens of proof. In *E.E.O.C. v. Amego, Inc.*,<sup>37</sup> the EEOC sued on behalf of a terminated employee who alleged that her former employer discharged her because of her clinical depression and refused to provide the reasonable accommodation of transferring her to a different position.<sup>38</sup> The First Circuit considered whether transferring the employee to a different position was a reasonable accommodation.<sup>39</sup> In considering the question, the court held that transferring the employee to the new position could not be a reasonable accommodation because "[t]here was no accommodation that [the employer] could make to the [new] position that would not cause it undue hardship."<sup>40</sup> The court said that making the accommodation would require [the employer] to hire new staff, which was a cost that the small, non-profit employer could not be expected to bear.<sup>41</sup>

The analysis in the *Amego* case shows that the question of whether an accommodation is "reasonable" is inextricably tied to the question of whether an accommodation poses an "undue hardship." Thus, even though the United States Supreme Court has stated that "reasonable accommodation" is not the "simple . . . mirror image" of "undue hardship,"<sup>42</sup> the link between "unreasonableness" and "undue hardship" reinforces the conclusion that inherent in the term "accommodation" is an uncertainty about whether the term, standing alone, reflects reasonableness. Arguably, given the way the statute has been interpreted, "unreasonableness" and "undue hardship" are sufficiently related such that evaluating accommodations for any "undue hardships" they may impose might be enough to protect an employer from unreasonable demands. Yet, "reasonableness" is central to the ADA's protections and is key in the term of art "reasonable accommodation." As such, its presence suggests that accommodation is sufficiently vague and limitless in scope that, even with the undue hardship standard operating as an express limit on the kinds of accommodations that are re-

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37. 110 F.3d 135 (1st Cir. 1997).

38. *Id.* at 141.

39. *Id.* at 147-49.

40. *Id.* at 148.

41. *Id.*

42. *Barnett*, 535 U.S. at 400-01.



quired of employers under the ADA, the term "reasonable" must modify "accommodation" to convey its acceptability as a legal requirement.<sup>43</sup>

A second meaning implied by the use of "accommodation" in the ADA is that accommodations are acts that help employees, who might not otherwise be able to conform to the demands of the workplace, "fit" into the existing norms of worker productivity. This connotation originates from the expectation in the statute that individuals are entitled to "reasonable accommodations" only if they can perform the "essential functions" of the job.<sup>44</sup> The United States Court of Appeals for the Tenth Circuit demonstrated the link between accommodation and the maintenance of employee conformity with marketplace norms when it held that an employer is not required to sacrifice productivity in order to fit an employee into a particular job, even if the existing "norms of productivity" have been recently changed.<sup>45</sup>

In *Milton v. Scrivner*, two employees who could not meet the new production standards required for grocery selectors at their employer's grocery warehouse claimed discrimination under the ADA.<sup>46</sup> The court found that it was reasonable for the employer to increase the production standards to "improve [its] competitiveness in the marketplace."<sup>47</sup> Accordingly, because "[t]he changes were aimed at increasing efficiency and productivity . . . in order to increase profit," the court found the increase was "not an impermissible action under the ADA," and the employer was not required to accommodate employees who could not meet the new productivity requirements.<sup>48</sup>

The metaphor of a puzzle comes to mind when considering the connection between "accommodation" and productivity norms. The workplace is a puzzle and the workers are some of the pieces; if a piece does not quite fit, the employer must alter the puzzle just enough so that the piece will fit. If the puzzle requires too much alteration, however, such that the puzzle becomes unrecognizable as the traditional workplace, then accommodation is not required. Accordingly, "accommodation" as used in the ADA reflects an expectation of employee nonconformity but requires the employer to go only so far to adapt the workplace to that nonconformity.

Finally, "accommodation" as used in the ADA suggests that accommodations follow from, and rely exclusively upon, the duty of an employer

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43. At least one author asserts that, absent other limitations, "the duty to accommodate would be virtually boundless, limited only by the disabled individual's imagination." Cooper, *supra* note 32, at 1441. Cooper, however, does not find that limitation in the word "reasonable." Rather, he identifies the "essential functions" and "undue hardship" language as limits on the duty to accommodate. *Id.* at 1442.

44. 42 U.S.C. § 12111(8).

45. *Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995).

46. *Id.* at 1120.

47. *Id.* at 1124.

48. *Id.*; see also Arnow-Richman, *supra* note 11, at 364-67 (discussing cases where the norms of work are the basis for denying an accommodation).

to take some kind of action. The ADA places the responsibility of making accommodations on the employer.<sup>49</sup> The statute defines a "covered entity" as "an employer, employment agency, labor organization, or joint labor-management committee,"<sup>50</sup> and then assigns liability for discrimination to that covered entity if it fails to make a reasonable accommodation for an otherwise qualified employee.<sup>51</sup> Allocating responsibility to the employer under the ADA is not unexpected, however, because the employer is often in the best position to control the workplace and make arrangements to adapt that setting to the needs of an employee with disabilities.

In sum, the ADA's use of "accommodation" associates the word with preference; with the inherent potential for unreasonableness; with adapting the workplace to "fit" a nonconforming employee into the workplace without changing its essential productivity norms; and with employer duty, responsibility and control.

*B. "Accommodation" in the Religious Accommodation Provisions of the Civil Rights Act of 1964*

The Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of religion<sup>52</sup> and requires employers to "reasonably accommodate" employees' religious activities unless providing the accommodation would impose an "undue hardship on the conduct of the employer's business."<sup>53</sup> The language of the Civil Rights Act demonstrates that it shares the ADA's connection of "accommodation" to "reasonableness" and employer responsibility.<sup>54</sup> What is particularly important about the use of "accommodation" in the context of religious activities, however, is found first in the different level of burden it associates with making an accommodation and, second, in the distinction it highlights between accommodating an employee to "fit" into the workplace and accommodating an employee to be "separate" from the workplace.

An employer's burden of accommodation under the Civil Rights Act is notably different from that under the ADA. The ADA requires an employer to make accommodations that do not require "significant difficulty or expense."<sup>55</sup> The burden upon employers to accommodate employee religious practices has been interpreted as much lower, however; employers need only accommodate employees' religious practices if the burden on the em-

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49. See, e.g., *Wade v. DaimlerChrysler Corp.*, 418 F. Supp. 2d 1045, 1050 (E.D. Wis. 2006) (describing "accommodation" as "some concrete, specific action taken by an employer that enables a disabled person to perform the essential functions of his position").

50. 42 U.S.C. § 12111(2).

51. 42 U.S.C. § 12112(b)(5)(A).

52. 42 U.S.C. § 2000e-2(a).

53. 42 U.S.C. § 2000e(j).

54. See discussion *supra* Section I.A.

55. 42 U.S.C. § 12111(10)(A).

ployer in operating its business is “de minimis.”<sup>56</sup> The de minimis threshold has been exceeded in situations where the employer would have to bear costs imposed by an employee’s absence from the workplace, such as when “the employer would have to make do without the religious employee, where accommodation would involve the complex shuffling of employees, . . . where accommodation would cause a decrease in employee productivity, and where the employer would have to incur the cost of a replacement employee.”<sup>57</sup>

Contrasting the Civil Rights Act de minimis standard with the ADA’s “significant difficulty or expense” language shows that “accommodation,” used in the abstract, can invoke conflicting ideas about the degree of effort required to accommodate depending on the kind of accommodation that is requested. On one hand, the ADA suggests that if an employee wants to “fit” into the workplace and its existing norms of productivity, an employer should bear a burden up to a “significant difficulty or expense” in making that happen.<sup>58</sup> On the other hand, the Civil Rights Act suggests that if workers—who are already physically present and sufficiently productive in the workplace—seek an accommodation under the Civil Rights Act as a means to separate from the constraints of the workplace to engage in religious practices, the costs to employers should be only de minimis. The conflict about the degree to which an employer should incur costs in providing accommodation<sup>59</sup> based on whether it helps employees separate<sup>60</sup> from the workplace or integrate into it can create ambiguity in what “accommodation” might require as it is used in other contexts.

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56. *Trans World Airline, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding that to require an employer bear more than a de minimis cost to provide an employee days off from work for religious practices is an undue hardship); see also Kaminer, *supra* note 12, at 355–56 (providing an overview of the de minimis standard).

57. Kaminer, *supra* note 12, at 355–56 (footnotes omitted).

58. Arnov-Richman opines, however, that “most accommodations provided under the statute tend to be modest and relatively inexpensive.” Arnov-Richman, *supra* note 11, at 364 (footnote omitted).

59. See Smith, *supra* note 12, at 1479–80 (recognizing the contrasting interpretations).

60. Religious discrimination claims under Title VII are not limited to situations where an employee is denied time away from work or altered work schedules for religious practices. Other situations include, for example, where an employee refuses to wear clothing or jewelry required by the employer, *Kreilkamp v. Roundy’s, Inc.*, 428 F. Supp. 2d 903 (W.D. Wis. 2006) (employee refusing to wear holiday necklace), or where an employee does not comply with workplace “grooming requirements,” *Brown v. F.L. Roberts & Co., Inc.*, 419 F. Supp. 2d 7 (D. Mass. 2006) (employee refusing to shave and cut hair on religious grounds). It is possible to also characterize those situations as ones where employees assert a kind of “separateness” (i.e., a separateness in “norms” of workplace appearance) that demand a lesser standard of employer burden. The idea generally is that when an employee privileges those actions or characteristics deemed “private,” rather than associated with market work, the employer need incur only a minimal burden as a result.

C. "Accommodation" and The Family and Medical Leave Act

The Family and Medical Leave Act<sup>61</sup> (FMLA) directly addresses the relationship between employers and employees with respect to the management of work and family. The FMLA requires employers to permit certain qualified workers to take unpaid leaves of absence from work for expressly defined health problems and child care obligations.<sup>62</sup> Unlike in the ADA and Civil Rights Act, the words "accommodation" or "accommodate" are not routinely used as terms of art in the statute and regulations or when discussing the FMLA.<sup>63</sup> The act, however, gives meaning to "accommodate" in four ways.

First, the FMLA expressly positions the expectations of employers against the needs of workers with respect to accommodation. The "Findings" section of the FMLA explains that the statute was necessary because there was "[a] lack of employment policies to accommodate working parents" that could "force individuals to choose between job security and parenting."<sup>64</sup> In contrast, the "Purposes" section of the FMLA recognizes that permitting employees to take "reasonable [medical and child care] leave" must be done "in a manner that accommodates the legitimate interests of employers,"<sup>65</sup> which, according to the Code of Federal Regulations, are in "high-performance organizations."<sup>66</sup> Thus, the FMLA can be viewed as the means by which Congress intended to simultaneously "accommodate" the "legitimate interests" of employers in "high-performance" workplaces and the needs of employees in meeting both work and family obligations.<sup>67</sup>

Second, the FMLA implies that its statutory accommodations are for family crises rather than family routines.<sup>68</sup> The stated purpose of the FMLA

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61. 29 U.S.C. § 2601.

62. 29 U.S.C. §§ 2611-2612.

63. The word "accommodate" is used in the "Findings and Purposes" sections of the FMLA, as discussed *infra*, and is also used in the FMLA's language that permits an employer to assign an employee to an "available alternative position" when that position would "better accommodate" intermittent leave schedules. 29 U.S.C. § 2612(b)(2)(B). *See also, e.g.*, 29 C.F.R. § 825.117 (2007); 29 C.F.R. § 825.215 (2007) (stating that the "FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave . . .").

64. 29 U.S.C. § 2601(a)(3).

65. 29 U.S.C. § 2601(b)(2)-(3).

66. 29 C.F.R. § 825.101(b).

67. *See also* Arnow-Richman, *supra* note 11, at 357 (stating that the FMLA provides a "fixed accommodation . . . to employees with particular family caregiving responsibilities") (emphasis added).

68. *See* Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 124 (2000) (noting that the Act "provides leave only in crisis situations"). Legal scholars have also recognized that the FMLA is based on a medical model; that is, the FMLA limits the worker's legally cognizable role as a family member to one who deals with serious, intermittent family medical issues rather than one who handles the routine issues of caregiving. *See, e.g.*,

is to reassure employees "that they will not be asked to choose between continuing their employment and meeting their personal and family obligations" when "a family emergency arises."<sup>69</sup> As such, the FMLA reaches only "serious health conditions" of an employee or a statutorily defined family member that require "inpatient care in a [medical facility]" or "continuing treatment by a health care provider."<sup>70</sup> The Department of Labor defines "continuing treatment" as that which involves, among other things, incapacity of "more than three consecutive calendar days" or any period of incapacity that results from a "chronic serious health condition."<sup>71</sup> Thus, the FMLA does not cover short-term, common, acute illnesses, such as a cold or the flu, that require the worker to be away from work for a day or two at a time,<sup>72</sup> and it does not provide a worker-parent with unpaid leave for the minor childhood illnesses that routinely require a parent to stay home with a sick child for a day or two.<sup>73</sup> Moreover, although the FMLA leave is permitted for the birth or adoption of a child, that twelve weeks of leave must be taken within the first twelve months following birth or adoption.<sup>74</sup> This limitation suggests that the critical demands upon a worker of having a new child in the family is time-limited; the routine demands imposed upon a family member by a child, such as school conferences, doctor's appointments, or vacations and holidays where child care is unavailable, are not recognized by the FMLA.<sup>75</sup>

Third, the content of the FMLA's requirements suggests that accommodating family life in the workplace means maintaining a distinct boundary between work and family; it provides detailed language describing the role of employers and employees in navigating that boundary when neces-

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Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 *Ohio St. L.J.* 133 (1998).

69. 29 C.F.R. § 825.101(b).

70. 29 U.S.C. § 2611(11).

71. 29 C.F.R. § 825.114(a)(2).

72. See 29 C.F.R. § 825.114(c) (stating that "[o]rdinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, [and] headaches other than migraine . . . do not qualify for FMLA leave").

73. For example, many child care facilities and schools prohibit a child from returning to school or daycare until the child has been fever-free for twenty-four hours. A child who has had a mild cold with a fever, for example, likely will be required (if the parents and the child care facility or school are following the rules) to stay home one additional day after the fever passes. Thus, minor childhood illnesses can require a parent to find alternative care for a child for at least two days. Multiplying these days by multiple sicknesses and multiple children can significantly increase the amount of time a worker could need to be absent from work to attend to a sick child, even though those illnesses are not considered "serious."

74. 29 U.S.C. § 2612(2).

75. State statutory schemes have attempted to partially fill the gap left by the FMLA. See, e.g., 149 MASS. GEN. LAWS ch. 149, § 52D (2007) (providing twenty-four hours of leave for worker to attend child's school activities or doctor's appointments); OR. REV. STAT. § 659A.159 (2005) (requiring employers to provide leave to employees to "care for a child of the employees who is suffering from an illness, injury or condition that is not a serious health condition but that requires home care").

sary. Under the FMLA, an employer accommodates an employee's "separation" from the workplace for medical and child care crises by providing a leave of absence and then subsequently "fitting" the employee back into the workplace when the crisis has ended. As in the ADA and the religious accommodation provisions of the Civil Rights Act, the degree of burden required by the employer in providing accommodation is connected to whether the employee is physically separated from work or seeking continued access to it.

An employer is required to give only unpaid leave to accommodate an employee when she "separates" from work to attend to family life.<sup>76</sup> When the employee wants to come back to work, however, the FMLA requires the employer to take more significant steps to "fit" the worker back into the workplace. In most cases, the FMLA requires the employer to restore the employee to the same position as before the FMLA leave or to another position with equivalent "benefits, pay, and other terms and conditions."<sup>77</sup> This is true even if the employer replaced the employee or restructured the workplace to deal with the employee's absence.<sup>78</sup> Moreover, an employer may be required to continue to pay other benefit premiums while the employee is on leave to ensure that the employee will have those same benefits on return.<sup>79</sup> The employer, then, faces a potentially greater administrative or economic burden to accommodate the return of the employee to the workplace because the demands are more onerous than simply providing unpaid leave.

Finally, discussions surrounding the FMLA reinforce the idea that "accommodation," standing alone, carries with it a potential for "unreasonableness" that must be addressed by imposing strict limits on what actions of accommodation are statutorily required. Public discussions about the FMLA reveal concerns that employees abuse the FMLA.<sup>80</sup> The Wage and Hour Division of the Department of Labor recently requested public comments on the FMLA, noting that "[e]mployers contend that one of the unin-

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76. 29 U.S.C. § 2612(c). An additional requirement is that the employee's "group health plan" coverage must be continued during the unpaid leave. 29 U.S.C. § 2614(c)(1). If, however, an employee fails to return from unpaid leave in certain circumstances, the employer can "recover the premium that the employer paid for maintaining [the employee's] coverage" during the leave, 29 U.S.C. § 2614(c)(2), thereby reducing the employer's cost if the employee does not return to the workplace.

77. 29 U.S.C. § 2614(a)(1). One commentator notes that the legislative history of the FMLA characterizes the "equivalency" standard a "stringent" one. *THE FAMILY AND MEDICAL LEAVE ACT* 256 (Michael J. Ossip & Robert M. Hale eds., 2006).

78. 29 C.F.R. § 825.214(a) (2007); *but see* Kaminer, *supra* note 12, at 355-56 (describing the development of case law under the Civil Rights Act that expressly establishes that employers are not expected to bear these burdens in accommodating religious practices).

79. *See* *THE FAMILY AND MEDICAL LEAVE ACT*, *supra* note 77, at 256.

80. *E.g.*, Molly Sevin, *Family Leave Act Being Reviewed: Businesses' Complaints That Workers Abuse the Law Prompt the U.S. to Seek Public Comment*, L.A. TIMES.COM, Feb. 6, 2007 (noting that "managers say [that] workers' abuse of the law causes scheduling nightmares, lost productivity and often escalates into costly lawsuits").

tended consequences of the FMLA regulations has been that employers have little recourse to prevent those employees who take FMLA leave improperly from doing so . . . .”<sup>81</sup> In the same request for information, the Department of Labor asked for commentary on the minimum days of incapacity required for a “serious medical condition” and on whether “intermittent leave” for things like chronic health conditions is overly burdensome on employers.<sup>82</sup> Some organizations support regulatory changes that would increase the number of days of incapacity for an illness to qualify for leave under the FMLA and would restrict the ability to take intermittent leave.<sup>83</sup>

These criticisms and potential changes to the FMLA reinforce the idea that “accommodation” is seen as reasonable and manageable only when, paradoxically, an employee faces something so serious that the employee must separate from the workplace for a lengthy time. Conversely, the concerns voiced about the FMLA’s requirements that employees be given intermittent leave for chronic conditions show that “accommodation” may be associated with unreasonableness when it is linked with the more frequent concerns or more mundane events of an employee’s family life. Adding this to the FMLA’s stated purpose that it seeks to accommodate the needs of workers in their family lives demonstrates that the FMLA envisions accommodations as reasonable when they are for family events that are extraordinary but not routine.

In sum, although “accommodate” is not used as a term of art in the FMLA, it still obtains much of its legal meaning from the ways in which the FMLA implicitly defines the term. The FMLA envisions accommodations for work and family as demanding recognition not only of the employee’s family needs but also of the employer’s interest in “high performing” organizations. As part of this overt recognition of the employer’s needs, the FMLA implicitly limits the meaning of the phrase “family life” to crisis situations and downplays the demands of routine family matters. The FMLA also treats family and work as mutually exclusive realms and places different burdens of accommodation on the employer depending on whether the employee is separating from or re-entering the workplace. Finally, the FMLA associates accommodation with potential unreasonableness resulting from workplace adjustments to address routine family issues.

#### *D. Public “Accommodation” Under the ADA and the Civil Rights Act*

A final area for interrogating the meaning of “accommodation” that may not be immediately obvious, but is significant, is where the term is used to describe a “place” where certain types of discrimination are prohibited. In

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81. Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69,504, at 69,507 (Dec. 1, 2006).

82. *Id.*

83. *See, e.g.,* Sevin, *supra* note 80.

particular, the ADA and the federal Civil Rights Act of 1964 prohibit discrimination in places of "public accommodation."<sup>84</sup> When "accommodation" as a term is associated with a place, it invokes meanings that are not traditionally associated with the employer-employee relationship.

First, "accommodation" as place in the ADA and Civil Rights Act implies a host-guest relationship between the party providing the accommodation, the host, and the party invited to use the accommodation, the guest. The ADA includes in the definition of "public accommodation" private entities that "serv[e] food or drink,"<sup>85</sup> provide "exhibition or entertainment,"<sup>86</sup> provide a "place of public gathering,"<sup>87</sup> act as a "service" or "social service" establishment,<sup>88</sup> or provide "a place of exercise or recreation."<sup>89</sup> The Civil Rights Act includes similar entities and further mentions that "public accommodations" include establishments that "serv[e] patrons."<sup>90</sup>

The Civil Rights Act and the ADA require a public accommodations provider to make available without discrimination the "goods, services, facilities, privileges, [and] advantages" at the place of public accommodation.<sup>91</sup> Imposing this duty upon the public accommodation provider makes sense under the circumstances; there is little, if any, authority that an individual, acting as a guest or patron, can exercise over the kinds of places described in the statutes, including, for example, inns, restaurants, theaters, stadiums, parks, train stations, libraries or day care centers.<sup>92</sup>

Second, not only does the term "accommodation" as place invoke ideas of service and patronage, it includes locations that are used for activities of relaxation, pleasure and entertainment. The Civil Rights Act generally categorizes public accommodations as "inn[s]"—places to sleep; "restaurant[s]"—places to eat; or "places of . . . entertainment"<sup>93</sup>—places to play. Within this scheme, certain types of locations fall outside this meaning of accommodation. For example, one court held that although the Civil Rights Act could include "health spas, golf clubs, and beach clubs," the

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84. 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation . . ."); 42 U.S.C. § 2000a(a) ("All persons shall be entitled to the full and equal enjoyment of . . . any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion or national origin.").

85. 42 U.S.C. § 12181(7)(B); 42 U.S.C. 2000a(b)(2) ("selling food for consumption on the premises").

86. 42 U.S.C. § 12181(7)(C); 42 U.S.C. § 2000a(b)(3).

87. 42 U.S.C. § 12181(7)(D).

88. 42 U.S.C. § 12181(7)(F), (K).

89. 42 U.S.C. § 12181(7).

90. 42 U.S.C. § 2000a(a)(4).

91. 42 U.S.C. § 2000a(b); 42 U.S.C. § 12182(a) (discrimination prohibited "by any person who owns, leases . . . or operates a place of public accommodation").

92. See 42 U.S.C. § 12181(7).

93. 42 U.S.C. § 2000a(b). The ADA definition provides a more expansive list of places for recreation or entertainment and also includes service, sales, rental, and social service establishments in its definition. 42 U.S.C. § 12181(7).



definition of "accommodation" under the statute was not broad enough to include retail stores such as barber shops because a barber shop was not a "place of entertainment."<sup>94</sup>

Finally, implicit in "accommodation" as place is the idea that the guest is being passive or engaging in activities of diversion. One federal district court, for example, interpreted "place of entertainment" under the Civil Rights Act to include "'establishments [that] present shows . . . to a passive audience.'"<sup>95</sup> Another case defined "entertainment" under the statute as an "agreeable occupation for the mind; diversion; amusement . . . ."<sup>96</sup>

In sum, meanings associated with "accommodation" as place invoke images of a host-guest relationship where the emphasis is often on relaxation, amusement and entertainment—terms not generally used in describing the relationship between employer and employee or in describing the workplace. Both the ADA and the Civil Rights Act distinguish between discrimination in places of employment and places of public accommodation,<sup>97</sup> which further demonstrates that "accommodation," as a legal term, can have multiple connotations depending upon the nature of the relationship it mediates.

## II. ACCOMMODATION RHETORIC: IMPLICATIONS FOR WORK-FAMILY DISCOURSE

As the previous sections describe, a rhetoric of "accommodation" exists from its current uses in legal discourse and provides "a set of topics, a set of terms . . . , and some general directions as to the process of thought"<sup>98</sup> for discussing and ultimately implementing policies to "restructure the workplace to accommodate families." This section offers some thoughts on what topics and terms "accommodation" brings into focus for attention, what it hides from view, and what conflicting meanings, ambiguities, and processes of thought it might create when used in work-family discourse.

"Accommodation" in the legal discourse discussed above is used in a way that it refers to both employee nonconformity and to an envisioned "ideal." For the ADA, the nonconformity at issue is a disability that requires alteration of the workplace; for the Civil Rights Act, it is a religious

94. *Halton v. Great Clips, Inc.*, 94 F. Supp. 2d 856, 862 (N.D. Ohio 2000). Notably, the ADA expressly includes barber shops in its delineation of "public accommodations." 42 U.S.C. §12181(7)(F).

95. *United States v. L.C. Vizena*, 342 F. Supp. 553, 554 (W.D. La. 1972) (quoting *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 350–51 (5th Cir. 1968) (en banc)).

96. *Halton*, 94 F. Supp. 2d at 862.

97. The ADA separates "public accommodation" from "employment" in its list of critical areas where "society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12111(a) (2000). In the Civil Rights Act, discrimination in employment and in public accommodations are treated in separate subsections. *See* 42 U.S.C. § 2000a to 2000a-6 (public accommodations); 42 U.S.C. § 2000e to 2000e-17 (employment).

98. WHITE, HERACLES' BOW, *supra* note 1, at 41.

practice that normally would not be acknowledged in the workplace; for the FMLA, it is the state of having serious health conditions or new children that, without accommodation, might result in the employee either continuing to work as “normal” or leaving the workplace permanently. In combination, these uses demonstrate that “ideal” workplaces have “ideal workers”<sup>99</sup> whose work lives are not affected by disabilities, religious practices, serious health conditions or children *unless* an employer is specifically directed to accommodate those nonconforming traits or states in the workplace. Rachel Arnow-Richman posits that the ADA, for example, could envision “accommodation” as “job restructuring and modified work schedules,” and could “challenge features of work rooted in the ‘ideal worker’ norm” but does not.<sup>100</sup> Thus, using “accommodation” to describe work-family relationships conjures up two competing meanings. On one hand, “accommodation” calls attention to the fact that traditional notions of workers, workplaces and workplace standards do not accurately reflect reality. On the other hand, “accommodation” perpetuates the idea that the “ideal worker” exists, and only through exceptions in the form of accommodations can other workers who are not “ideal” be included in the workplace.

“Accommodation” also carries with it the difficulty of having multiple meanings regarding the kinds of activities that the word encompasses. That is, accommodation is expressly linked to the notion of “crisis,” particularly in the FMLA, and it is also linked to ideas of relaxation, entertainment, diversion or passiveness when it is used to describe a place. Interestingly, what might result from these conflicting meanings is that “accommodation” may prove difficult to associate with the routine and mundane matters of everyday life. Accommodation’s link to “crisis” may draw attention to the kinds of extraordinary (and often temporary) medical and family crises. Conversely, “accommodation” as relaxation and entertainment focuses on ways to escape from the demands of everyday life. Neither of these uses connote that “accommodation” should apply to the needs of employees in managing their routine obligations to both their families and employers.<sup>101</sup>

Moreover, what follows from the FMLA and the employment discrimination provisions of the ADA and the Civil Rights Act is ambiguity about the nature of the employer’s burden in a statutory scheme that requires the employer to accommodate family in the workplace. For both the ADA and Civil Rights Act, accommodations must not impose an “undue hardship”;

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99. Joan Williams describes one view of the “ideal worker” as one who “works full time and overtime and takes little or no time off for childbearing or child rearing.” JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1 (2000). See also *infra* note 106 (describing the ideal worker).

100. Arnow-Richman, *supra* note 11, at 366–67.

101. For example, neither view of accommodation would encompass an “employee who returns from FMLA leave following the birth of a child [who could use assistance] in balancing her job and the care of a three-month-old infant.” Arnow-Richman, *supra* note 11, at 368 (describing the limits of the FMLA).

what counts as "not undue" ranges from a burden just short of a "significant difficulty or expense" to no more than a *de minimis* burden. One perspective is that accommodations are expensive, and Joan Williams and Nancy Segal have argued against an accommodation model for work-family restructuring because the "traditional assumption [in the context of workplace restructuring is] that accommodation is costly."<sup>102</sup> Alternatively, accommodations can be viewed as inexpensive, and employers making accommodations could be subject to the *de minimis* burden under the Civil Rights Act, which has been described as so insignificant that it "renders the accommodation requirement virtually useless . . . ."<sup>103</sup>

Given these conflicting burdens associated with accommodation, there exists no certainty about how policies seeking "accommodation" for family demands in the workplace will be interpreted. Particularly, if the kinds of accommodations requested include those that reflect routine family matters, then it is possible that the burden associated with "accommodation" would be closer to *de minimis* because a routine matter is not a crisis. Whether an employer should bear *de minimis* or significant burdens in accommodating family in the workplace is certainly debatable. Regardless, when using the word "accommodation" in the work-family debate, one is left with the question of which view of "accommodation" will be taken. Will the burden on employers be viewed as substantial or as small and insignificant? Depending on the way the ambiguity is resolved, what does this mean for the kinds of accommodations that can result?

The shifting degree of burden placed upon an employer in making "reasonable accommodations" also implies that the meaning of "accommodation" changes based on whether the conflict between employer and employee is resolved more in favor of the employer's interest in maintaining norms of productivity and high performance or more in favor of the employee's interest in dealing with family issues. Under the ADA, when personal characteristics in the form of a disability limit an otherwise qualified employee from performing a job, greater responsibility is placed upon the employer to accommodate that employee's "fit" into the workplace. Here, the ADA suggests that the "fit" will "necessarily reflect dominant norms and expectations about work,"<sup>104</sup> which means that "accommodation" is seen as upholding the employer's expectations of traditional worker productivity. Conversely, under the Civil Rights Act, when religious practices interfere with work obligations, an employer is expected to incur only *de*

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102. Williams & Segal, *supra* note 2, at 86.

103. See Smith, *supra* note 12, at 1479 n.201 (recognizing and citing commentators that make this assertion). Smith also attempts to reconcile these competing meanings by suggesting that "accommodation" in the context of work-family policies should impose a "moderate" cost upon employers. *Id.* at 1480. This is a useful suggestion, but it does not resolve the problem of the multiple meanings associated with the cost of accommodation; instead, it adds a third meaning.

104. Arnow-Richman, *supra* note 11, at 367.

minimis costs to privilege an employee's personal or private obligations. In that case, "accommodation" suggests the personal interests of the employee take precedence over the dominant norms about work, but only at a minimal cost to the employer.

Under the FMLA, this boundary between work and family and the relationship between the burden and direction of movement—either into or out of the workplace—is even more intensely highlighted. Where the employee privileges family over work—for example, to take a leave of absence to care for a new baby—the employer has more limited obligations. Yet, when the employee privileges work over family obligations when returning to work, the employer has the obligation of making the employee's job available to her.<sup>105</sup> In these situations, the burden faced by the employer is arguably tied to whether the accommodation is viewed as consistent or inconsistent with the employer's interests in workplace productivity.

"Accommodation" in the context of work-family issues also implies that employees' needs and legitimate employer expectations for high performance are in conflict. The phrase "reasonable accommodation" in the ADA and Civil Rights Act suggests that an employee's request for an accommodation, without limits, is unreasonable (and even abusive) or, at the very least, is inconsistent with the employer's goals. This concern about unreasonableness is further perpetuated when an employer's expectation of a "highly performing" workplace under the FMLA is joined with accommodation's connection to entertainment, rest, passiveness and diversion in the context of "public accommodation." Combining these meanings suggests that accommodating employees' family demands could mean providing those things that are counter to "high performance" in the workplace, such as intensity, focus and assertiveness. Moreover, to the extent that routine matters are envisioned as something to be accommodated, the association of "accommodation" with "diversion" might suggest that employees are seeking accommodations for those things that (regularly and perhaps unnecessarily) "divert" them from workplace duties and activities. It would not be a stretch, then, to expect that if "accommodation" is viewed through this filter, some audiences would be inclined to view policies seeking accommodations as antithetical to employers' goals. At the very least, this sense of "accommodation" ties directly to concerns employers have expressed with respect to the FMLA of employees' abusing the accommodations provided under the statute.

Relatedly, "accommodation" suggests that employers, not employees, are exclusively responsible for and have the duty of extending "preferences" to accommodate family in the workplace. As such, using the term "accommodation" in work-family discussions necessarily means talking

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105. Arnov-Richman notes, however, that the judicial interpretation of the reinstatement provisions has limited their scope. *Id.* at 369-73.

about extending accommodations—that is, preferential treatment—from work to family because the norm is that “ideal workers” should have no family demands that impact them in the workplace and thus need no preferential treatment.<sup>106</sup> In that construction, employers will be expected to take the lead in making those changes while employees are divested of agency in the process. Moreover, “accommodations” have been characterized as actions that “contradict business judgment.”<sup>107</sup> Because “accommodations” are deemed to contradict business judgment, because the employer has been described as bearing all of the burdens for making accommodation, and because accommodations can be seen as “preferences,” the discussion can then turn, as it has in the discussion surrounding the FMLA, on the need for protecting employers against unreasonableness, abuse and loss of “high performance.”<sup>108</sup> And, where the language of “accommodation” implies that employers may be subjected to unreasonable demands of employees in the absence of express limits, it may be difficult to use the term to craft policies that avoid characterization as “preferences” and that reconcile an employer’s good business judgment with the employee’s need to effectively manage work-family issues.<sup>109</sup>

As is always true, more investigation might lead to finding other ways “accommodation” is used in legal discourse and to further interpreting the term in the context of policies to restructure the workplace for the benefit of families. The discussion above, however, attempts to demonstrate that a “terministic screen” has developed around the word “accommodation” as it is used in legal discourse that is a “*selection*[ ] of reality” and simultaneously “a *deflection* of reality.”<sup>110</sup>

In sum, the forgoing discussion should serve as a reminder of the meanings that can be conveyed when “accommodation” is used in work-family talk. If “accommodation” is associated with “nonconformity,” then using “accommodation” in work-family policies might convey the idea that workers who have family obligations are outside the norm. Requests for

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106. The “ideal” worker is an individual unencumbered by child care or other nurturing responsibilities. Kessler, *supra* note 12, at 430; *see also* Faye J. Crosby, Joan C. Williams & Monica Biernat, *The Maternal Wall*, 60(4) J. Soc. ISSUES 675, 677 (2004) (“Workplace ideals . . . are still defined around men’s bodies—since men need no time off for childbirth—and men’s life patterns, as American women still do 70% to 80% of the child rearing.”); WILLIAMS, *supra* note 99, at 20–24 (discussing the dominant view that employers are entitled to ideal workers).

107. Arnow-Richman, *supra* note 11, at 373.

108. *See* Bornstein, *supra* note 68, at 90 (noting that “the Act’s twin goals—to ‘simultaneously preserve the integrity of the American family and promote business interests’—are inconsistent and incompatible, setting up a clash between market driven policy and family values which results in a limited, incoherent policy”) (citations omitted).

109. For an example of a policy that does both, see Project for Attorney Retention, *The Business Case for a Balanced Hours Program for Attorneys*, [http://www.pardc.org/LawFirm/Business\\_Case.htm](http://www.pardc.org/LawFirm/Business_Case.htm) (noting that a business case for “balanced hours” is different from “special accommodation”).

110. BURKE, A GRAMMAR OF MOTIVES, *supra* note 6, at 59.

accommodation might be heard as requests for preferential treatment or to fulfill employees' needs for relaxation, entertainment or diversion rather than to meet important, but routine, family demands. Conversely, the term can invoke images of crisis rather than routine, thus limiting which employees' needs as family members might be accommodated. In the absence of the word "reasonable," a workplace restructuring policy seeking accommodations might be seen as potentially unreasonable or fraught with opportunities for employee abuse. Accordingly, the focus of debate might be on the kinds of limitations to place upon accommodations rather than on the ways for making the relationship between work and family most productive for both employers and employees. Accommodations might be seen as overly expensive for employers or, alternatively, as requiring employers to carry only a very small burden, particularly where "accommodation" means permitting employees to leave work to attend to family responsibilities. Policies seeking accommodations may be deemed a demand placed upon employers that creates no concomitant responsibility for employees to participate in making the relationship between work and family a workable one.

### III. WHAT ELSE BESIDES "ACCOMMODATION?"—ALTERNATIVE TERMS, DIFFERENT SCREENS

Other than using "accommodation" as a key term in pursuing workplace restructuring, what other terms might usefully fill the blank in the phrase "workplace restructuring to \_\_\_\_ family life?" This section offers some preliminary thoughts on "facilitate" and "negotiate" as potential alternative terms for work-family dialogue. These terms can offer "an alternate vocabulary [for] speaking and being"<sup>111</sup> that might transform both identity and experience in the context of work and family.

"Facilitate" and "negotiate" are not interchangeable terms, and in some contexts, one term might work better than the other in describing work-family policies. In combination, however, they suggest a collaborative, consensus-building relationship between employers and employees where the employer assists the employee in meeting both work and family responsibilities, where the employee has a voice in and shares responsibility for the conditions in which those obligations are met, and where the emphasis in successfully navigating work and family is, in part, based on assisting employees in managing their identities—not just their logistical difficulties—as both workers and family members. Thus, alternative phrases employed in discussing potential workplace restructuring may be "workplace restructuring to facilitate movement between work and family life" or "workplace

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111. Sarah J. Tracy & Angela Trethewey, *Fracturing the Real-Self? Fake-Self Dichotomy* → *Moving Toward "Crystallized" Organizational Discourses and Identities*, 15(2) COMM. THEORY 168, 170 (2005).

restructuring to help employees negotiate their identities as workers and family members.”

“Facilitate” is generally associated with making the performance of something easier or “lessening . . . resistance.”<sup>112</sup> In the legal context, one state Administrative Procedure Act defines a “facilitator” as one who is “impartial,” “assist[s] . . . to achieve consensus,” and “coordinate[s].”<sup>113</sup> Other statutes connect the term to “develop[ing] guidelines, policies, and procedures [to] allocat[e] . . . available resources,”<sup>114</sup> to providing education and documents, setting up schedules, and providing assistance;<sup>115</sup> and to helping with understanding and communication to enable another “to participate as fully as possible.”<sup>116</sup> “Facilitation” has also been statutorily defined as “enabl[ing an individual] to . . . participate . . . in the decisions and choices that effect his or her life.”<sup>117</sup> Importantly, “facilitate” has not been interpreted as a guarantee of success in a given situation; rather, it has been seen as a way “to make easier, to aid, to assist.”<sup>118</sup>

“Negotiate” is associated with “confer[ring], bargain[ing], or discuss[ing] with the view to reach an agreement” and, with respect to space or location, “succeed[ing] in crossing, surmounting, or moving through.”<sup>119</sup> Statutes have defined it to mean “transfer[ring] . . . possession” in the traditional context of “negotiable” transactions,<sup>120</sup> “confer[ring] or offer[ring] advice,”<sup>121</sup> and making a “good faith effort to reach [an] agreement [that will] . . . be[ ] binding.”<sup>122</sup> With respect to ethics, “negotiate” has been associated with qualities such as truthfulness, fairness, candor, respect,

112. See, e.g., WEBSTER'S NEW WORLD DICTIONARY (3d ed.) (1988) (defining “facilitate” and “facilitation”); WEBSTER'S UNABRIDGED DICTIONARY 690 (2d ed.) (2001) (defining “facilitate” as “to make easier or less difficult; help forward”). See also *Bruno v. United States*, 259 F.2d 8, 10 (9th Cir. 1958) (citing *Webster's Unabridged Dictionary* for the “common and ordinary definition [of facilitate] as ‘[t]o make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task’”). *Black's Law Dictionary* defines “facilitate” solely in the context of criminal offenses, stating that “facilitate” means to “[t]o make the commission of a crime easier.” BLACK'S LAW DICTIONARY 610 (7th ed. 1999).

113. ALASKA STAT. § 44.62.760 (2006) (describing the role of a facilitator for rule-making).

114. ALA. CODE § 12-15-171 (2007) (describing the duties of a children's services facilitation team).

115. CAL. FAM. CODE § 10004 (2007) (describing duties of a “family law facilitator”).

116. CAL. PROB. CODE § 1954.5 (2007) (describing the duties of a probate facilitator).

117. CAL. WELF. & INST. CODE § 4512(g) (2007).

118. See *In re Doe*, 805 P.2d 1215, 1221 (Haw. Ct. App. 1991) (interpreting HAW. REV. STAT. § 571-63 (1985), which provides that a judge can terminate parental rights only after finding that it was necessary to “facilitate the legal adoption of the child”).

119. See, e.g., WEBSTER'S NEW WORLD DICTIONARY 907 (3d ed.) (1988); see also WEBSTER'S UNABRIDGED DICTIONARY 1268 (2d ed.) (2001) (defining “negotiate” as “to arrange for or bring about by discussion or settlement of terms”).

120. See, e.g., ALA. CODE § 7-3-201 (2007).

121. See, e.g., ARIZ. REV. CODE § 20-281(10) (2007) (in the context of insurance dealings).

122. CAL. GOV'T CODE § 3540.1(h) (2007) (in public education employment statutes); see also D.C. CODE § 2-301.07 (2007) (in a procurement statute, meaning “to determine the terms and conditions of a contract”).

good faith, connection, mindfulness, harmony, and “treating the other . . . as a person.”<sup>123</sup>

With these definitions in mind, how is it that “facilitate” and “negotiate” might perform as “terministic screens” in the work-family context? As a starting point, using the word “facilitate” to describe the relationship between employer and employee in the work-family context places the employer in a position of responsibility for “assisting” the employee in managing both work and family life. This makes sense, of course, because the employer has power to change the structure of the workplace in a way that an employee does not. Yet, instead of placing the employer in the position of guaranteeing “accommodation” of family life at work, “facilitate” suggests the employer’s duty is one of “empowerment”—to assist employees in their own processes of successfully blending work and family—similar to the role that facilitators in other contexts play. “Facilitate” subtly offers that the employee and the employer are working together to develop a plan to allocate available resources for managing work and family, and the employer is helping the employee lessen resistance in the movement between family and work rather than giving an employee preferential treatment that other employees do not receive. Thus, instead of promoting policies that “accommodate” family life in the workplace, which arguably suggests that the burden is exclusively on the employer to “give up” something for the benefit of the employee, policies might be recast in terms of “facilitating transitions” between work and family to increase the level of performance and productivity in both settings.

Instead of a one-way guarantee implied by the use of “accommodation,” “facilitate” offers that work-family relationships can be the result of “two-way” communication between workers and employers. Moreover, “facilitate” includes in its meaning the kinds of actions employers might take in helping employees manage work and family—educating, providing documents, scheduling, communicating—all in an effort to help employees with decisions and choices that affect their lives. Taking a “facilitation” view of work and family may promote as policy what employees and employers already often do informally—work together to come up with arrangements that are beneficial to both employees and employers in pursuing their interests.

Unlike the language of “accommodation” in the FMLA, which implies a tension between employees’ family needs and employers’ interest in “high performance organizations,” using “facilitate” to describe the effort to manage work and family life implies that the interests of employers and workers can be coextensive and pursued in tandem. For example, Naomi Cahn and Michael Selmi use the language of “facilitation” to suggest that

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123. See generally John D. Feerick, *What's Fair: Ethics for Negotiators*, 18 GEO. J. LEGAL ETHICS 251 (2004) (discussing the writings of scholars exploring the area of negotiation ethics).



more work-family policies are needed to “*facilitate* women’s commitment to the workplace.”<sup>124</sup> “Facilitation” can be used to describe work and family as complementary goals rather than as goals that require one party in the relationship to neglect some interests in order to advance others. In other words, “facilitate” can convey a sense that the work-family relationship is more than a “zero-sum” game where every accommodation comes at a related burden. Rather, “facilitate” reflects the reality that employers are primarily in charge of workplaces but that workplace and family goals can be coordinated and jointly advanced.

Similarly, work-family policies might be described as those that allow workers to more easily “negotiate” their identities or roles as workers and family members. Work-family scholars writing in the communication field suggest that the focus in reforming the relationship between work and family should not be exclusively on enacting policies that address logistical concerns or promote the idea of “balance;”<sup>125</sup> rather, they assert that the goal of work-family scholars should be to understand how the identities of workers as family members are negotiated through language.<sup>126</sup>

Using a “negotiating identity” lens to examine work-family conflict can open the language for discussing work-family policies in a way that “accommodation,” as currently constructed in legal discourse, has difficulty achieving. For example, “negotiating” identity requires a holistic view of the individual that accounts for both crisis events and routine family obligations as part of the employee’s identity. In this way, a “negotiation” lens moves the talk away from describing the relationship between work and family as a process of “separating from” and “fitting into” the workplace, with different burdens attached to each direction of movement, towards talk that focuses on work and family as an integrated whole. Moreover, this lens moves the discussion away from the conflict between “ideal” and “nonconforming” workers to focus instead on putting in place mechanisms that allow for individualized and multiple “ideal” work-family relationships.<sup>127</sup> Thus, instead of framing “family” as pieces that “fit” or do not “fit” into the existing “work” puzzle, the term “negotiate” reorients the discussion around opportunities to design new puzzles with pieces that can fit together in multiple and equally useful ways.

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124. Cahn & Selmi, *supra* note 10, at 450 (emphasis added) (discussing the needs of working-class women in the pursuit of balancing work and family and concluding that working-class women need policies that enable them to work more hours rather than less—including improved access to higher education, more public day care and longer school days).

125. Erika L. Kirby, Annis G. Golden, Caryn E. Medved, Jane Jorgenson & Patrice M. Buzanell, *An Organizational Communication Challenge to the Discourse of Work and Family Research: From Problematics to Empowerment*, in 27 COMMUNICATION YEARBOOK 1, 16 (Pamela J. Kalbfleisch ed., 2003).

126. See generally *id.*

127. See Ashforth, *supra* note 8, at 488 (arguing that employees should be given more autonomy in negotiating the relationship between work and family life).

Additionally, “negotiate” suggests that the employer and employee are conferring about ways to effectively transition between or “move through” work and family life, are seeking in good faith to reach agreement on these issues, and intend to reach an agreement that does not allow either to fall short on fulfilling duties and responsibilities.<sup>128</sup> One work-family commentator has implicitly recognized the need for a “negotiation” frame for talking about work-family issues by advocating for “collective action” to increase “dialogue between companies and their workforce . . . [that] identify[ies], implement[s], and monitor[s]” work-family policies.<sup>129</sup> The emphasis on collective action also raises the possibility of giving employees more agency in the process of rethinking workplace norms. Similar to “facilitate,” then, “negotiate” implies what “accommodation” does not—a correspondence of interests, reciprocal responsibilities and an emphasis on communication.

“Facilitate” and “negotiate” are not necessarily ideal terms that can solve all of the difficulties one might have in envisioning new ways for talking about work-family issues. For example, “facilitate” is linked with “impartiality” of the facilitator, and that connection may not accurately reflect the relationship between employee and employer. “Negotiate” has a similar problem; it suggests a relatively level playing field between employer and employee that may not actually exist in many employee-employer relationships. Yet, “facilitate” and “negotiate” are rhetorically powerful in the context of discussing work-family issues precisely because they overtly draw attention to the relationships of power in the employee-employer relationship and the possibilities for redefining that relationship. “Negotiate” is particularly useful for imagining alternative relationships between employees and employers. That is, unlike “accommodation,” which can be associated with unreasonableness and a need to impose limits to keep an employee from abusing an accommodation, “negotiation” carries with it connotations of reasonableness, consensus and good faith. Accordingly, “negotiate” as a term for work-family policymaking brings with it a potential “code of ethics” for employer-employee dealings regarding work-family issues—a code that might require mutual respect, honesty, candor, and the pursuit of harmony. Framing the relationship between employers and employees within a harmonizing ethic may not only provide powerful language to create policies that equalize the bargaining power between worker and employer but also combat the idea that, if given the opportunity,

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128. See, e.g., *Fargo Educ. Ass'n v. Paulsen*, 239 N.W2d 842, 847 (N.D. 1976) (defining “negotiate in good faith” to mean that the agreement reached does not need to cause “either side [to] surrender . . . any of its duties and responsibilities”).

129. Arnow-Richman, *supra* note 11, at 409. Arnow-Richman also carefully reviews the possibilities and challenges of reinvigorating collective bargaining as a means to achieve work-family goals. *Id.* at 409–16.

employees abuse policies that promote better movement between work and family.

#### IV. CONCLUSION

The law offers a language for talking about work and family. This language shapes reality and thus calls out for examination, interpretation and criticism. When seeking policy changes to affect work-family relationships, the choice of terms can expand or limit the possibilities for action; the terms become the screen for seeing the problem and crafting a solution. As such, sensitivity to the language chosen for expressing those policies is necessary. The term "accommodate" is imbued with existing meanings emanating from legal discourse that may affect the discussion about work-family policies in both intended and unintended ways. Considering language that describes workplace restructuring as an effort to "facilitate" an improved relationship between work and family or to "negotiate" one's identity as worker and family member might help to expand the boundaries for imagining what is possible for legal and policy approaches to work and family issues.