Work and Family Identities in Regulatory Rulemaking:

A Rhetorical Analysis of the Family and Medical Leave Act

Regulatory Rulemaking Process

by

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ABSTRACT

This dissertation explores the discursive construction of work and family identities in the Family and Medical Leave Act (FMLA) regulatory rulemaking process. It uses dramatism and public sphere theory along with the critical legal rhetoric perspective to analyze official FMLA legal texts as well as over 4,600 public comments submitted in response to the United States Department of Labor's 2008 notice of proposed rulemaking that ultimately amended the existing FMLA administrative regulations. The analysis in this dissertation concludes that when official and vernacular discourses intersect in a rulemaking process facilitated by the state, the facilitated public that emerges in that discourse is bounded by official discourses and appropriated language. But individuals in the process are able to convey and contest a range of work and family identities that include characteristics of public, private, abuse, accountability, sacrifice, and struggle. It further demonstrates that different circumferences for crafting work and family identities exist in the regulatory rulemaking process, including national, international, and time-bounded circumferences. Because the law is a discourse that has far-reaching rhetorical implications and the intersect between vernacular discourses and legal discourses is an underexplored area in both communication and legal studies, this dissertation offers a contribution to the ongoing work of scholars thinking about work and family identities, the material consequences of the intersect of work and family, and the rhetorical implications of legal discourse.

DEDICATION

This project is dedicated to Chris, for his strength; Casey, for his joy; and workers, families, and employers everywhere, in hopes of a good life for all.

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Chapter 1

INTRODUCTION

"There are few accounts of how law creates spaces that both enable and obstruct real people in their work of improvising lives, families, and communities in what is often a hostile world." ~ (White, 1996)

Worker and Family Member Identities and the Law

Real people in the real world have multi-faceted, crystallized identities; these identities are not singular or monolithic but rather are made up of multiple, sometimes fragmented, identities that develop from "reflexive social interactions with others" (Tracy & Trethewey, 2005, p. 170). These identity-creating social interactions in contemporary American society include interactions at the workplace, within the family, and the "space" (envisioned as physical, emotional, virtual, rhetorical, or otherwise) that lies between the two. Accordingly, because most families are led by two employed parents or a single working parent (Levin-Epstein, 2006, p. 3), many individuals embody, amongst other identities, the coexisting identities of "worker" and "family member"—two identities that exist, both materially and symbolically, in a seemingly inherent tension.

On one hand, the "ideal" worker identity, as legal scholar Joan Williams notes, is one of an autonomous, individual actor that is able to give as much or as little time to his work as necessary without regard to the competing needs of those who may be dependent on him (Williams, 2000). Conversely, the identity of a "family member" is dominantly defined as the relationship of that person to those who are dependent upon her to meet emotional, if not physical, needs in relationships based on "biological ties, marriage, social custom or adoption"

Edwards & Rothbard, 2002, p. 179). In a typical family, at least some of its members are dependent; others, like caregivers in the family relationship, are often subject to "derivative dependency," which is the condition that exists when those who provide dependent care, such as mothers, ultimately are dependent on yet others for the resources necessary to provide that care (Fineman, 1995; Fineman, 2011). The identity "working mother," for example, represents this merger of conflicting identities (the autonomous and the dependent) within the same body. While a "worker" is autonomous and independent, a "mother" is wrapped tightly with the dependencies that accompany one's caregiver status.

One of the universalities of human experience, Kenneth Burke (1935/1984, p. 298) notes, is the experience of embodiment, or "taking the human body as the 'natural' starting point." At least in human experience, it is not possible for an individual to separate from his or her own body or to create separate "selves" as a way to resolve tension between conflicting or competing identities or to separate out the symbolic and material effects of struggling with identities. Thus, the contemporaneous, intractable condition of a single, material embodiment of conflicting, symbolic identities (Carlson, 2009, p. 162) calls out for rhetoric (either in a productive or destructive way)—for a way of using language to communicatively constitute the relationship between worker and family member identities that frames one's discursive understanding of the tension between them.

This rhetorical framing work must also take into account the material consequences of symbolic identities. Although "the successful management of

work and family is as much an identity issue as it is a time management issue" (Golden, 2001, p. 236), communication plays a significant role in how an individual experiences and interacts with his or her material conditions. In the context of work and family, in particular, this link between the material and symbolic cannot be overlooked. The ability of an individual to meet the material need to produce income while at the same time fulfill the legal and moral obligation to provide care for a dependent child, for example, is directly impacted by the symbolic relationship between competing worker-parent identities.

Accordingly, the symbolic construction of worker and family member identities have material consequences.

As rhetorical constructs, the identities of "worker" and "family member" are shaped by the language chosen to discuss the relationship between the spheres of work and family. That is, how one comes to understand one's self as a worker and family member is not based upon one's internal lifeworld—one's residence in Plato's cave, free from the interpersonal, organizational, and social influences—but rather based upon one's membership in a rhetorical community, a community that is formed, maintained, and transformed through the process of using language to overcome division and create identification (Burke, 1950/1969, p. 22).

Discourses circulating within intimate groups, organizations, and society writ large create subject positions for what it means to have and to craft an identity as a "worker," someone who engages in "instrumental activity to provide goods and services to support life" (Edwards & Rothbard, 2002, p. 179), and "family

member," someone who, by biological connection, choice, or fate, has certain socially defined affiliations in the private sphere.

Discourse plays a central role in "shaping personal identities and in maintaining and transforming institutional structures" (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003, p. 3). One type of those discourses that influences the identities of "worker" and "family member" is the law. The law can be defined in a number of ways, but as a rhetorical, dramatistic concept, Kenneth Burke (1937/1984, p. 291) defined "law" as the "efficient codification of custom" meant to deal with complex social relationships. As a result of its efficiency, law serves as a communicative frame that highlights some aspects of custom and makes invisible others. Accordingly, law functions to shape how terms such as "work" and "family" are understood at any given time by community members including employers, workers, families, and government actors.

As Hasian (1994, 2000) notes, however, the law is not limited to official legal discourses; rather it includes the ways in which everyday individuals in everyday life—in the vernacular—are in a recursive symbolic relationship with official legal discourses as part of a larger rhetorical culture. These official and vernacular discourses intersect; these intersections are locations for both ambiguity in terms of the discourse and translation of those terms between official and vernacular spheres. Because of the presence of ambiguity in terms and the need to translate those terms, the intersect of vernacular and official discourses in the instantiation of the law is a point at which rhetoric is both present and needed. Meaning of terms like "work" and "family," although seemingly positive in their

reference to objective entities in the material world, are, when used as legal terms, "dialectical terms" used to give meaning to concepts that have no "strict location" in materiality (Burke, 1950/1969, p. 184). In accordance with the functioning of dialectical terms, then, rhetoric would be used at these points of ambiguity to create identifications where division has created misunderstanding and conflict. According to Kenneth Burke (1950/1969), this intersection, then, would call for a rhetorical analysis in order to better understand the rhetoric of identity. Similarly, Hasian's (1994, 2000) critical legal rhetoric approach encourages researchers to study not only official discourses of the law but also those vernacular ones to understand action, motivation, and tension in the law.

Because law, when addressed to the questions of work and family, is an official discourse that is intended to, and in fact does intersect, with vernacular discourses, it also raises questions relevant to theorizing the public sphere. That is, in the process of the state communicating to its citizens through the law and, conversely, citizens communicating to the state about the law, a "public," a confluence of individuals who have self-identified as sharing an interest (Dewey, 1927/1954) in the law of work and family, is created, if only for the moment that demands this public's presence.

This intersect between official and vernacular discourses, between state actors and citizens, also implicates the nexus between concepts of the "public," the "private," and the "state," all of which in traditional public sphere theory, are discrete spheres of interaction (Habermas, 1962/1989). At the nexus of these spheres is where the law that deals with complex social relationships is formed by

recursive interaction between discourses of custom (the vernacular) and discourses of the state (official, technical, and authoritative discourse in the form of cases, legislation, and regulation). This rhetorical analysis is situated at that juncture. Using a combination of insights from Burke's dramatistic theory and public sphere theory as well as the critical legal rhetoric perspective, this project applies a Burkean comic perspective that seeks to understand the texts and the ways in which motives are expressed in an effort to extend understanding of how official legal discourses provide vocabulary for everyday understandings of worker and family member identities and how vernacular discourses both inform and draw upon that official discourse. Moreover, this project extends understanding of how discourse emanating from the state or "official" sphere intersects with discourse from the public sphere to communicatively construct worker and family member identities. Finally, the project attempts to extend rhetorical theory by emphasizing the rhetorical aspects of identity construction, by exploring how discourse functions in the uniquely situated public sphere of regulatory rulemaking, and by investigating how official and vernacular discourses intersect to create meaning.

Law and identity: official/vernacular and authority/rhetoricity.

The language of the law has the ability to construct individuals' understanding of the world and define what is taken to be the "'natural' order of things" (Berman, 2002, p. 1171). Law can be considered a "normative framework" that provides common assumptions and identifications in a complex society, particularly where other systems for creating commonalities have

deteriorated (Habermas, 1995, p. 38). Others have likewise recognized that law functions as a rhetoric, using its words to constitute community and identity (White, 1985).

With regard to identity specifically, law has been identified as a site of the discursive construction of identity (Mitnick, 2006). In the context of worker and family member identity, law has been seen as a structure that influences how individuals experience the relationship between work and family (Bornstein, 2000) It provides, in the terminology of Kenneth Burke, a "terministic screen" (1945/1969) that filters individual and collective experience of work and family.

In many ways, the language of the law, as a language that works to incorporate competing perspectives within the same terms, reflects the tensions exhibited by the unified embodiment of worker and family member. It is legal discourse that *itself* has a dual identity; it is simultaneously official and vernacular (Hasian, 2000), discursive and authoritative (Wetlaufer, 1990). Because law, particularly with respect to the relationship between work and family, is addressed to everyday individuals to be implemented in everyday life, law becomes part and parcel of everyday symbolic interaction, used in the communication between neighbors, friends, teachers and students, strangers, and, notably, between employers and employees. Law is a constitutive rhetoric for the relationship between work and family; it is a set of discursive practices that maintain, form, and transform individual understandings of the relationship between work and family identities (White, 1985).

Even though law has both a discursive function and vernacular use, it is often overlooked as a discourse in favor of its own self-imposed identity as "rules," "policies," or "principles," and it is often seen as exclusively an "official" discourse (Wetlaufer, 1990). Law is notorious for denying its own rhetoricity; as a discourse, it sets itself apart from the fray of human interaction and instead represents itself as reflecting universal, foundational principles that are not necessarily defined or shaped by human experience (Wetlaufer, 1990). Moreover, law represents itself as being confined to an official or technical sphere, free from interaction with the vagaries of public discourse (Hasian & Croasmun, 1996).

In part because of law's own view of itself, the constitutive nature of law, particularly how it constitutes individual, socially constructed worker and family member identities, has been underexplored. While the law is often studied for its normative impact on the relationship between work and family life (Arnow-Richman, 2000; Kaminer, 2004), the study of the ways in which law functions as work/family rhetoric and how interactions in the public sphere instantiate that rhetoric is less frequent. Calls have been made for more studies about how social discourses, such as law, function as a discursive structure that influences how we experience work-life conflict (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003). Others have argued that institutional discourses that shape an individual's orientation to work and, consequently, their personal identities in relation to work, should be studied (Kuhn, et al., 2008). Arguably, law is one of those institutional discourses.

Studying the intersect of the legal and the vernacular: The Family and Medical Leave Act and the notice and comment regulatory rulemaking process.

The regulatory rulemaking process for promulgating regulations (also known as the "notice and comment" or "informal" rulemaking process) is a "space" where institutional legal discourses meet vernacular legal discourses to constitute work and family member identities. It is site where the vernacular voices of workers, family members, and other non-legal actors (such as employers) interact with, influence, and are influenced by the "official" language of the law. It is a location where official and vernacular language and agents rhetorically regulate work and family relationships through the administrative law process.

Accordingly, the regulatory rulemaking process, particularly in the context of regulations that govern the relationship between work and family, provides a rich source of artifacts for studying the legal and vernacular discourses that rhetorically constitute worker and family member identities.

The ideal artifacts for exploring the ways in which worker and family member identities are rhetorically constructed in the regulatory rulemaking process are the discursive artifacts of regulatory rulemaking process for regulations that impact the relationship between work and family. The regulatory rulemaking process for the federal Family and Medical Leave Act of 1993 (FMLA) provides these kind of artifacts. Although it is now nearly twenty years old, the FMLA is the only significant piece of federal parental leave legislation to

date, and it provides federal-government-articulated specific language for navigating the terrain of worker and family-member identities. The FMLA gives a subset of workers twelve weeks of unpaid leave when children are born, adopted, or fostered into a family or when a family member suffers from a "serious health condition" (FMLA, 29 U.S.C. § 2611(2))¹. The subset of workers who qualify for FMLA leave are those who have worked at least 1250 hours in the last year for an employer with fifty or more employees in a seventy-five mile radius (FMLA, 29 U.S.C. § 2612). The stated purpose of the FMLA is to permit workers to take "reasonable [medical and family care] leave . . . in a manner that accommodates the legitimate interests of employers" (FMLA, 29 U.S.C. § 2601(b)(2)-(3)) in "high performance organizations" (FMLA Regs., 29 C.F.R. § 825.101(b)).

When the FMLA was enacted, the legislature adopted an enabling statute, which directed the Department of Labor, the federal administrative agency that typically has oversight of employment-related regulations, to promulgate regulations consistent with the language and purposes of the FMLA and provide guidance in the day-to-day administration of the FMLA, on how to interpret the more vague directives in the statute, and deal with issues not expressly covered in the statute (FMLA, 29 U.S.C. § 2654). Whereas the FMLA statute offers more abstract instructions on the policy objectives of the statute and more general

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¹ The FMLA also provides leave from work when an individual worker experiences a serious health condition (FMLA, 29 U.S.C. § 2612). The medical leave for workers themselves it outside the scope of this project. Instead, this project focuses on the leave taken by the worker to act as a caregiver for other family members.

guidance about its implementation, the FMLA regulations provide workers and employers detailed directions on how to meet the requirements of the FMLA. By way of comparison, the FMLA statute is less than 30 pages long while the FMLA regulations exceed 100 pages, which indicates the degree to which the regulations attempt concrete explanation and implementation of work/family policies.

Regulations are a form of administrative law, law that is promulgated by administrative agencies under the authority of the legislature and that carries the same force as statutes the legislature enacts (Murray & DeSanctis, 2009). Unlike legislators, administrative agency rulemakers are not elected representatives. Rather, they are appointed by the President. Thus, according to the Administrative Procedure Act (APA), for a regulatory agency—in the case of the FMLA, the United States Department of Labor—to promulgate regulations, there must be a "notice and comment" period during which the regulatory agency announces proposed regulations to the public through the Federal Register, a daily federal publication. By law, the regulatory agency will set a deadline for comments, and any member of the public, also known as an "interested person" (APA, 5 U.S.C. § 553(c)) can submit written comments to the agency through the Federal eRulemaking Portal or by traditional U.S. mail. After comments are received, the regulatory agency is required by law to respond to the comments, make any necessary changes to the regulations in response to public comments, and issue a final rule that then becomes codified in the Code of Federal Regulations.

After the FMLA was enacted in 1993, the Department of Labor issued the first FMLA regulations. Then, in 2008, the Department engaged in a second round of regulatory rulemaking, this time amending the regulations based on its nearly 15-year experience in administering the FMLA and its collection of information from various stakeholders. As part of that process, the Department of Labor engaged in the rulemaking process and issued a notice of proposed rulemaking that sought written comments from the public. In response, it received over 4,600 public comments. All of these comments are available for review on the official government site, www.regulations.gov.

As a significant piece of legislation with significant regulations and a robust regulatory rulemaking history, the FMLA, its regulations, and the public comments from the rulemaking process are rich rhetorical artifacts for studying the discursive constitution of worker and family member, and, relatedly, employer identities. Moreover, because the process of promulgating regulations occurs at the discursive intersect between official and vernacular spheres and involves both legal and non-legal actors, it is an appropriate place to consider how this intersect functions as a "public" or "public sphere." Thus, while this project will consider the text of the FMLA itself as well as other texts surrounding the FMLA, the primary focus of the project is on the rhetorical artifacts of the 2008 FMLA regulatory rulemaking process, which includes more than 4,600 individual public comments.

Private Lives, Public Comments: The Theoretical Perspective for This Study

This project synthesizes theoretical perspectives from public sphere, dramatism, and critical legal rhetorics as its theoretical foundation. Together, these theories account for the ways in which the process of regulatory rulemaking is a rhetorical process that combines concerns about the public, the private, and the state; the vernacular and the official as interacting "legal" discourses; and language at the intersect of the "legal official" and the "legal vernacular" that constitutes worker and family member identities.

Public sphere theory.

Public sphere theory seeks to understand how publics form, how publics interact with each other, and how publics interact with the state. Accordingly, public sphere studies have focused at least some its attention on the relationship between official discourses, like those emanating from government, and individual discourses, like those emanating from the "public." Public sphere theory has also examined how discourses emanating from official state spheres, like the law, are "culturally specific rhetorical lenses" (Fraser, 1992, p. 126).

John Dewey (1927/1954) theorized that a public forms when a group of individuals has common interests to be addressed. According to Dewey's (1927/1954) view, freedom and democracy turn on the ability of a public to form and to deliberate issues both within and outside of the state. Dewey was predictably concerned with the rise of an "expert" class that could dominate state decision-making and exclude individual citizen input. To remedy this problem,

Dewey called for the integration of the "expert and the community" by means of the "widest possible communication" (Stiernotte, 1947, p. 97).

Public sphere theory is also responsible for developing a theoretical understanding of the ways in which "public" and "private" are rhetorically constructed (Warner, 2002). Habermas (1962/1989) saw the "private sphere" as including both the domestic and the economic, both of which were to be free from public or state intervention. Moreover, he viewed the public sphere as a space of "rational-critical" debate that stood apart from the state (Habermas, 1962/1989). More modern takes on Habermas's theory break down such stark divides, however, creating the opportunity for greater breadth in theorizing participants and locations for "public" participation. For example, Thomas Goodnight's (1982) work on the technical, personal, and public spheres of argument and Gerald Hauser's (1999) careful reconstruction of the public sphere as both vernacular and rhetorical, create more possibilities for exploring discourses previously seen as "private" or "state," as "public."

The regulatory rulemaking process as a site of identity construction implicates the principles of public sphere theory. The regulatory rulemaking process is one that requires participation by both the state, which provides an official, authoritative, or "technical" discourse, and the public, which provides a vernacular, partisan, and pragmatic discourse. All individuals, including individuals that represent organizations, are invited to participate in the rulemaking process. State actors craft the questions of concern for the rulemaking process, individuals share stories, make arguments, and raise issues in the public

sphere regarding those issues, and, at the end of this symbolic struggle, the state codifies some iteration of the discursive interaction into law. Thus, because it represents an intersection where private individuals form a public for the purpose of engaging the state on question of work and family, the regulatory rulemaking process is an ideal place to apply public sphere theory to work and family identity.

The issues of work and family identity also implicate questions of public and private, both of which have been explored in public sphere theory. "Work" and "family" have both been viewed as private, not public spheres. Yet, for a matter to be regulated by the state, the matter must be perceived to be "public" and amenable to regulation and not a matter of exclusively "private" concern. The regulatory rulemaking process makes visible the ways in which individuals assert "privacy" and "publicness" as they relate to work and family identity and the way in which the state defines identities for publically expressing work and family.

Not only does the rhetorical rulemaking process offer a site to study work and family identity construction and concepts of public and private, it also presents an opportunity to consider the operation of the public sphere. First, the regulatory rulemaking process encourages problematization of how public voices function in state facilitated publics. In the regulatory rulemaking process, the state creates a public space that presumes the presence of public voices to influence the state, not resist it. Yet, even in the process of influencing the state, individuals attempt to resist it. Moreover, the state's act to "facilitate" the

development of a public in the rulemaking process implicates how the state discursively controls the rhetorical boundaries for what resources are available for identity construction. These rhetorical interactions between individual and state in a state-created sphere suggests a unique rhetorical dynamic that can benefit from public sphere theory.

Dramatism.

Dramatism theorizes that language is a form of human action in which human motivations reside, and through the "methodological inquiry into cycles or clusters of terms and their functions," human relations and human motivation can be studied (Burke, 1968, p. 445). The terms of dramatism are a way to reveal "strategic spots where ambiguities necessarily arise" (Burke, 1945/1969, p. xiviii (emphasis omitted)) and to make sense of how rhetorical action functions at these spots.

Burke's view of language "holds that our words define us, that our identities are but composites of our symbol systems" (Blakesley, 2002, p. 6). Moreover, official discourses are the kinds of bodies of knowledge that Burke (1937/1984) though rhetorically "coached" attitudes and language. Burke (1950/1969) saw the primary aim of rhetoric as identification, as a means for overcoming division and achieving consubtantiality. Accordingly, Burke's dramatistic theories are well suited to "prob[e] human symbol uses to find spots where . . . grammatical, rhetorical, and symbolic transformations of identity can and do transpire" (Anderson, 2007, p. 33).

Burke (1937/1984; 1945/1969; 1950/1969) also theorized law within his larger dramatistic perspective. He viewed law as an attempt to use symbols to deal with social and technological complexity (1937/1984). Burke viewed law as a rhetorical device that, on one hand, restates existing social standards and, on the other, seeks adherence to those standards from community participants 1935/1984;1937/1984) and as an implement for molding custom (1935/1984). Burke suggested that law is a resource to be "cashed in on" that enables the invention of "new abstractions" that can "take up the slack" between what is and what is desired (1937/1984, p. 292-93). Thus, the law can use symbols to bridge "gaps" between the material conditions that exist and those that are desired. Because ambiguity resides in these abstractions, rhetoric is needed to transform meaning (Burke, 1950/1969).

Thus, because law, from a Burkean perspective, is a set of symbolic, abstract resources that provide a lens through which to understand the human experience, legal discourse is particularly amenable to rhetorical analysis.

Moreover, because dramatism anticipates that law is not static but rather is a product of the recursive relationship between official, "legal" discourses and the vernacular discourses of "custom," it is particularly well-suited for theorizing the intersection of law and the vernacular in the regulatory rulemaking process and for theorizing the relationship between law and worker/family member identities.

Critical legal rhetorics.

Critical legal rhetorics, as a perspective for thinking about and examining the law, views law as not only overly determinate and stabilized by precedent but

also polysemic, hegemonic, and vulnerable to social change (Hasian, Condit, & Lucaites, 1996). It rejects both the foundationalist and antifoundationalist views of the law in favor of a view of law as inextricably tied up with, not apart from, the greater rhetorical community (Hasian, Condit, & Lucaites, 1996). According to this perspective, law is part and parcel of a larger rhetorical culture, and public vocabulary sets the boundaries for legal discourse (Hasian, 2000; Hasian, 1994). Law then, according to this view, is a practice, not just a set of authoritative principles, and the appropriate inquiry is about how legal language comports with and is translated into ordinary experiences of the world and back again.

The critical legal rhetoric perspective is particularly useful here because it allows for "localized studies" to show how rhetorical interactions between the official and vernacular spheres give meaning to law (Hasian, 2000). Because it looks at law from the point of ordinary language, it can shed light on the ways in which the vernacular and the official intersect to use symbols to craft worker and family member identities.

Rhetorical Analysis of Legal Discourse: Comic Perspective and Logologic Methods

Rhetorical analysis and posing research questions.

Although one way to understand law is with regard to its function as a set of rules, institutions, and processes, it can also be understood in its capacity to function as a constituitive rhetoric, a socially circulating discourse about work and family that provides a "common language [that describes] a common past, presence, and future" (White, 1985, p. 38) for navigating the relationship between

work and family. This "common language" is constitutive of community and individual identity—the law makes up, according to Kenneth Burke, a weighted vocabulary or "terministic screen" that "highlight[s] certain aspects [of experience] for focused attention" while making invisible other aspects (Blakesley, 2002, p. 95).

Because law is a constitutive rhetoric, rhetorical theory can "throw[] light" (Burke, 1950/1969, p. xvi) on how law mediates experiences of identity at the intersect of work and family and how law operates to provide discursive resources for identity construction. Rhetorical analysis is particularly appropriate for studying the construction of worker and family member identities in legal language because it can "reveal the undetected presence of identification" (Burke, 1950/1969, p. 26), the discursive resources for dealing with division, and the sites of transformation.

Rhetoric has always been concerned with the public, persuasive, and contextual nature of discourse (Lucaites & Condit, 1999, p. 2). Legal scholars, such as James Boyd White (1985; 1994) as well as rhetorical critics, such as Cheree Carlson (1999; 2009), Marouf Hasian (2000), Todd McDorman (1998), Trevor Parry-Giles (1996), and Clarke Rountree (2001) have successfully deployed rhetorical analyses of legal texts. Rhetorical analysis as applied to law is best suited for examining how facts, precedents, principles form attitudes or induce actions in others (Frug, 1988).

Rhetorical criticism can reveal the rhetoricity of legal discourse, which has often denied its own rhetorical nature and has instead claimed its own

unassailable objectivity, value-neutrality, and universality as well as, ironically, its own separation from the messiness and contingency of human affairs (Whetlaufer, 1990). This is not surprising; law shuns Aristotle and its classical rhetoric roots because during the formalization and institutionalization of the English legal system, law and rhetoric were separated by law's assignment to philosophy and rhetoric's relegation to matters purely of style, memory and delivery (Frost, 1998).

Specifically, rhetorical analysis can reveal insights into how the law enacts or makes invisible certain worker and family member identities within its socially circulating discourse. Work-family discourse in the law provides a vocabulary that filters the experience of work and family for those who participate in legal discourse. Because of the reach of legal discourse, workers and family members, employers, non-employed individuals, workers who have no dependents, and members of the community at large have their experience of the identity of worker and family member impacted by legal discourse. This discourse orients its participants, those who are both passive and active, to particular ways of thinking about the intersectionality or segmented nature of worker and family member identities and the relationship between those physical, mental, and emotional roles.

The language of the law as it intersects with the vernacular in the regulatory rulemaking process creates a unique opportunity to view the ways in which the legal language of identity is shaped and transformed. This opportunity leads to the following research questions:

- Q1: How does discourse of the Family and Medical Leave Act, as contained in the statutes, the regulations, and the regulatory rulemaking process, attempt to give meaning the relationship between work and family and construct worker, employer, and family member identities?
- Q2: What meanings of worker, employer, and family member emerge from the vernacular discourse in the regulatory rulemaking process?
- Q3: What can be theorized about the relationship of official and vernacular discourses regarding the rhetoric of work and family identities in particular and identity more generally?

Engaging the regulatory rulemaking process with a comic perspective.

Much of the law that is generated in official spheres is meant for public sphere "consumption"—everyday people in their everyday lives are meant to implement the mandates of legal authority. Accordingly, law cannot help but exist in everyday talk—in the social, cultural, private, and public discourses of individuals and organizations "outside" the technical legal sphere. When discourse oscillates amongst public, state, and private spheres, that language undergoes both transformation and translation. That is, it becomes open to interpretation, is imbued with additional, sometimes conflicting and competing meanings, and it requires, sometimes, translation—from the official to the vernacular and back again.

The regulatory rulemaking process is unique in that it serves as a site where official and vernacular language can engage in this process of transformation and translation, and research at this site can offer insights into how

individuals in the process "employ[] the possibilities of linguistic transformation" (1945/1969, p. 402). In fact, Kenneth Burke himself called for studies of "particular instances of linguistic transformation" (1945/1969, p. 402).

Because of Burke's emphasis on language as action and motivation, on rhetoric as identification, and on ambiguity as a site of transformation, Burke's comic perspective and logological methodology of rhetorical criticism is appropriate for this study. Comic criticism is a frame of acceptance that is useful for social criticism (Burke, 1937/1984). The comic perspective is charitable to its texts, but is not gullible, and requires the critic maintain maximum awareness of the forensic materials of culture and their meanings (Burke, 1937/1984). In addition, the logological methodology encourages critics to break down the text with a careful analytic approach to reveal what those texts say about human motives (Burke, 1961). It is the job of the critic using a comic perspective to disclose and discuss the interrelationship of terms (Ruekert, 1994).

Accordingly, this project applies the "comic vocabulary" developed by Kenneth Burke's dramatistic theory and draws upon Hasian's (1994; 2000; Hasian & Croasmun, 1996) critical legal rhetorics as a bellwether for staying focused on both the official and vernacular. The analysis uses Burke's cluster method of criticism (1945/1969; 1968), which identifies the key symbols in texts, explores how other symbols "cluster" around those key symbols, and seeks to explain those clusters. As the analysis progresses, it adds to the cluster method by using additional different dramatistic concepts to make sense of the ways in which worker and family members identities develop throughout the regulatory rhetoric.

Accordingly, the study uses Burke's dramatistic terminology as terms to guide analysis. By studying language as a "grammar of motives," (1945/1969) the project reveals how legal language functions as an observable structure for constituting identities and how transformations at points of communication ambiguity are "citable realities" (Burke, 1969, p. 57).

Artifacts For Study

The rhetorical artifacts for this project include the official texts of law, which include the Family and Medical Leave Act (FMLA), the FMLA Code of Federal Regulations, the 2008 Notice of Proposed Rulemaking that proposed amendments to the FMLA Regulations (which includes some pre-notice information gathering and reporting), and the final rule promulgated by the Department of Labor that amended the FMLA Regulations and responded to the public comments; and the vernacular texts, which include over 4,600 comments generated by a call for public participation in the rulemaking process. This regulatory cycle represents the only "general" revision to the FMLA regulations.²

The goal of this project is to take a "snapshot" of the intersecting discourses in the FMLA regulatory rulemaking process at a particular time, focusing primarily on the time from the Notice of Proposed Rulemaking to the promulgation of the Final Rule. Primary legal resources were collected by using commercial legal research databases as well as official government websites. The majority of the public comments (other than the few that were reported as part of

² The 2008 regulatory rulemaking cycle culminated with the final rule effective January 16, 2009. Recently, the Department of Labor issued a new Notice of Proposed Rulemaking in 2012, seeking a less ambitious revision.

the Department of Labor's various reports) were downloaded from www.regulations.gov, which included electronically filed comments as well as comments submitted by United States mail. Comments that were submitted in paper were scanned into the electronic system as images. While some comments could be identified by name and others were anonymous, each submission had a unique identifying number.

A Roadmap for the Rhetorical Journey

The organizational scheme for this project is traditional; it is meant to guide the reader through the theoretical foundations for the project, then to the broader legal context for FMLA and its rulemaking process, and then to a careful rhetorical analysis of the FMLA artifacts as well as an exploration into the implications of the analysis. Accordingly, Chapter 2 discusses the theoretical framework of this piece, reviewing Burke's dramatistic theory and public sphere theory as they apply to law and its communication processes. The chapter also incorporates a discussion of the concept of critical legal rhetorics, a theoretical perspective which allows a researcher to account for the law in vernacular as well as official spheres.

Chapter 3 discusses the concept of identity from a dramatistic perspective. It explains how Burke's notions of "identity" and "identification" are rhetorical constructs, how the attention that work and family scholars within the communication field fits within this dramatistic framework, and how the law functions as an identity discourse. Chapter 4 then gives an overview of the regulatory rulemaking process, discusses the history of the Family and Medical

Leave Act and its regulatory rulemaking history, and gives an overview of the 2008 rulemaking process, including its issues and its results. It concludes by introducing the reader to the concept of eRulemaking, a process that is meant to enhance the participation of the public in the rulemaking process and thus has implications for theorizing the relationship between the public and the official spheres.

Chapter 5 then offers a rhetorical analysis of the legal artifacts, applying a Burkean dramatistic criticism to tease out meaning and suggest theoretical and practical implications. Finally, Chapter 6 offers some thoughts about the trajectory of this project and the conclusions that can be drawn from it, questions about the rhetorical construction of work and family identity yet to be explored, and the implications of studying identity at the intersect of vernacular and official discourses.

Chapter 2

DRAMATISM, PUBLIC SPHERE, AND CRITICAL LEGAL RHETORICS

"We cannot make sense of our collective selves without understanding how deeply discourse shapes us.~ (Hauser, 1999, p. 34)

Dramatism and public sphere theory, as well as the critical legal rhetorics perspective, all focus on how discourse—and thus rhetoric—shape notions of public and private, official and vernacular. They offer ways to imagine how publics rely on rhetoric for their constitutions and how law, as a discourse, does the same. And they offer explanations of how discourse instantiates identities for collective wholes, like publics, for embodied individuals, and for individual roles represented by circulating social texts. Moreover, they describes the spaces (primarily virtual and discursive) and rhetorical processes for identity-constituting discourses. Accordingly, this chapter provides an overview of the bodies of literature in these areas as they apply to this project. The final section synthesizes a view of rhetorically and publicly constructed "legal" identity that is later applied to making sense of the regulatory rulemaking process and the worker and family member identities that develop within it.

Dramatism

Kenneth Burke's theory of dramatism offers a lens for analyzing discourse for its motivated quality and for its rhetorical operations. Dramatism is rich with a vocabulary that provides both a theoretical perspective as well as discrete methods for analyzing rhetorical artifacts. Moreover, it expands the notion of rhetoric to considerations that extend beyond seeing rhetoric as partisanship or

advocacy to considerations of rhetoric as identification in pursuit of consubtantiality. Dramatism is particularly well suited for analyzing texts that create or contribute to orders and hierarchies because dramatism's perspective is that all language is built on motives of hierarchy. Accordingly, this section reviews the dominant themes of dramatism, its specific vocabulary for discerning motives, its relationship to rhetoric and identification, and how it explicitly and implicitly accounts for legal texts or law as a vocabulary of motives.

Motivation, orientation, vocabulary, and representative anecdotes.

Dramatism explains all of human communication through a framework of motives, and the literature of dramatism, particularly Burke's germinal works in *Counter-statement* (1931), *Attitudes Toward History* (1937/1984), *Permanence and Change* (1935/1984), *A Grammar of Motives* (1945/1969), and *A Rhetoric of Motives* (1950/1969), map the terrain of this framework. At its core, dramatism is based on the idea that all language is action. Dramatism's fundamental position is that human language is produced by and is evidence of motivations (Burke, 1935/1984). Burke establishes that the question of motivation is a philosophical one rather than an empirical one and is essentially a question of how humans construct reality via language (Burke, 1945/1969). As Burke noted, "motives are distinctly linguistic products" (1935/1984, p. 35), which is a theoretical premise central to using dramatism as rhetorical theory.

Overall, dramatism seeks to provide a "rounded" account of human action through the parts of the "pentad"—Agent, Agency, Act, Scene and Purpose (Burke, 1945/1969; Conley, 1990). Conley (1990) notes that Burke asserts that

by privileging one of these parts as the "name" for any given situation, humans assign meaning to that situation. Thus, many different meanings are possible. Dramatism gives a way to locate agreements and disagreements among these conflicting ways of naming and therefore is a way to theorize about the nature of agreements and disagreements within and between different terminologies (Conley, 1990).

Motives in dramatism are considered "shorthand" for situations (Burke, 1935/1984). Considered another way, motives are the relationship between the passive and the active and represent a condition of possibility for being human (Biesecker, 1997). From the point of view of dramatism, speech is never neutral; there are always acts and attitudes—i.e., motives—that are present in language. Burke (1935/1984) theorized that motivations are wrapped up in orientations, our sense of how things relates to one another. These orientations create expectations and affect choices; the way in which one exercises judgment is tied up with motives that come from orientations to the world (Burke, 1935/1984).

Human motivation can be understood by looking at how terms are organized to demonstrate "what goes with what" and "what follows what" (Burke, 1937/1984). Key, then, to understanding human action is to identify one's orientations through an examination of language. Orientations can be identified by asking (1) how our language privileges the act, agent, agency, scene, purpose, or attitude (Burke, 1945/1969) or (2) by asking how the terms demonstrate "clusters" of "piety" (Burke, 1937/1984). If orientations can be identified, then

decisions, judgments, and policies can take into account those orientations (Burke, 1935/1984).

Because language is the site of motivation, all vocabularies are "weighted"—intensely moral and loaded with judgment, with meanings that are created cooperatively and socially (Burke, 1935/1984). These vocabularies are "not words alone, but the social textures, local psychoses, the institutional structures, the purposes, and the practices that lie behind these words" (Burke, 1935/1984, p. 182). These words do not have inherent value and meaning; rather, weighted vocabularies are always circumstantial in their meaning (Burke, 1935/1984).

Weighted vocabularies help set the circumference of meaning in any particular discourse and serve to "frame" the communication that takes place within the discourse. Burke calls these frames "terministic screens," which have an epistemological function—that is "our 'observations' are but implications of the particular terminology in terms of which the observations are made" (Burke, 1966, p. 46). If the frame does not account for the by-products in produces, then individuals are alienated from the world because the world seems unreasonable (Burke, 1937/1984). When those by-products overtake the original frame, however, the discourse develops a paradigm shift (Burke, 1937/1984). That shift is never complete because the new "frame of acceptance" still includes all the meanings associated with the old frame (Burke, 1937/1984). This results in "'negativism,' . . . 'disintegration,' 'sectarianism,'" or the "'stealing back and forth'" of authoritative symbols (Burke, 1937/1984, p. 141). With respect to the

law in particular, old frames often become "bureaucratic[ally] embod[ied]" in laws (Burke, 1937/1984, p. 139).

The setting of a circumference of any particular situation is directly related to the human experience of reality. Burke (1945/1969, p. 103) saw interpretation as the haggling over "the particular circumference to be selected for particular instances of interpretation." Interestingly, Burke (1945/1969) rejected the "law of parsimony," a "law" significant to the sciences for explaining the empirically observable world, because he found parsimony too narrow of a circumference for describing human motives. Human motives cannot be simplified, he found—the scenes of human action are too complex (Burke, 1945/1969).

Vocabularies, in dramatistic terms, are reflections, selections, and deflections of reality (Burke, 1945/1969). A vocabulary is a reflection of reality if the terminology is correct in its scope, if it meets the needs of the rhetorical situation (Burke, 1945/1969). Sometimes, however, the vocabulary provides a "selection" of reality, a reduction of the meaning of the situation through a particular use of terms (Burke, 1945/1969). Similarly, a vocabulary can serve as a "deflection" when it is not suited in scope for the subject matter being discussed (Burke, 1945/1969). The way in which weighted vocabularies work to reflect, select, or deflect realities, make these vocabularies rhetorical, or motivated by a desire to create identification through providing a viable frame of reference for a particular audience.

Vocabularies of identification are the "substance" that governs motivations in a particular text. This substance is "dialectical": one that is shaped

by a verbal give and take (Burke, 1945/1969). Motive is not confined to this verbal substance, but language is a good place to look for motivation (Burke, 1945/1969, p. 29). Within this substance, dramatism reveals "strategic spots at which ambiguities arise" (Burke, 1945/1969, p. xviii (emphasis omitted)) and how transformations take place in these spots. Transformation is possible through the use of dialectical terms (Burke, 1945/1969). Dialectical terms are known only in contrasts to their opposites (Burke, 1945/1969). Dialectical terms have no strict location to objects named; they have no positive reference. They are words of action and ideas, naming principles and essences (Burke, 1950/1969).

Key to dramatism is that notion that the study of terms is not just the study of "word play" *about* motivations; rather, terms reflect real paradoxes in the world itself (Burke, 1945/1969, p. 56). In fact, the differences in the ways humans "size up" situations are expressed as differences in the terms used to assign motives (Burke, 1935/1984, p. 35). Terms can be positive—referring to things of experience; dialectical—referring to things with no positive reference; or ultimate—referring to terms that purport to be universal and mask complexity of competing motivations in one umbrella term (Burke, 1950/1969). Accordingly, to guard against the concealment of motives, dramatism encourages the study motives in the terms of language (Burke, 1945/1969).

Kenneth Burke's representative anecdote is a "paradigmatic frame of reference" (Harter & Japp, 2001, p. 412) that both underlies the vocabulary of a discourse (Brummett, 1984) and is developed through the narratives in a discourse. Representative anecdotes are "consistent themes and stories that are

sufficiently broad to encompass the general qualities of [a] discourse including its dialectical tensions and oppositions" (Harter & Japp, 2001, p. 412). They create "parameters, norms, and hierarchies while developing and reinforcing language and other symbol systems" that operate within the anecdote's bounds (Harter & Japp, 2001, p. 413). Representative anecdotes come from deep, often unquestioned, cultural commitments in culture (Brummett, 1984). Many different representative anecdotes underlie discourses (Brummett, 1984) —perhaps at the same time, and may not even be "explicitly uttered in the discourse" (Brummett, 1984, p. 163). Nonetheless, "a representative anecdote reveals the fundamental characteristics of a discourse and fuses its essential values" (Harter & Japp, 2001, p. 412).

Representative anecdotes underlying a discourse discipline the language that can be used to contest propositions of the discourse or the ideologies that underlie the discourse. For example, those who challenge the hierarchies of the representative anecdote "must use the language of and work within the frameworks established by the anecdote" and must present "justifications for their position, again using the language and terms of the anecdote" (Harter & Japp, 2001, p. 413).

Representative anecdotes, by definition, involve narratives or stories that have characters, action, conflict, and resolution. In particular, representative anecdotes incorporate cultural tensions and conflicts (Harter & Japp, 2001). As Burke (1961) describes, one means by which these cultural tensions are expressed is through the dramatic plot of guilt, purification, and redemption. As such, this

plotline can be built into the anecdote itself and then can be played out in the discourse.

Not all anecdotes are representative; some can be "informative" (Crable, 2000, p. 324). Informative anecdotes are characterized by too much reduction or deflection—moving from the "manageable simplicity" of the representative anecdote, to reductionism and simplification (Crable, 2000, p. 324). While representative anecdotes are dialectical, informative anecdotes are not. That is, a representative anecdote moves both toward and away from its subject, allowing a matter to be seen as fully required (Crable, 2000). Conversely, informative anecdotes deflect and reduce, not permitting a view of the matter as fully required, and moving only away from the subject (Crable, 2000).

Embodiment and language as constants in dramatism.

Dramatistic theory is modern to the extent that Burke anticipates some universals of human experience. Burke sees both embodiment and language as those universal aspects (Burke, 1945/1969), the former giving rise to the latter. In his self-described four-word formula, the universality of the human condition is that we are "Bodies That Learn Language" (Burke, 1935/1984, p. 298). For Burke, the self is a consequence of embodiment and social interaction.

Embodiment is the condition of division—"T' being separate from "you" (Burke, 1945/1969). In order to interact, "T' and "you" need symbolism (Burke, 1945/1969). These shared symbols lead to the social, which itself demands a system of governance that helps symbols attain a shared meaning and to dictate the common ground upon which "you" and "T' relate (Burke, 1945/1969). Thus,

in contrast to postmodern theories which see humans as completely socially constructed, Burke would resist this; "bodies" are not completely constructed by institutions; rather, we are to take the body as the "natural starting point" (Burke, 1935/1984) and to consider how individual choices within that embodied state are taking place within the structure of institutions. For Burke, the basic unit of action for dramatism is "the human body in conscious or purposeful motion" (Burke, 1945/1969, p. 14). Symbolism is essential to the "purposeful motion" that he sees as central to the human condition; without symbolism, purposeful action does not exist (Burke, 1935/1984, p. 296).

Burke's notions of symbolism, purposeful motion, embodiment and individual choice might provide, then, a "first principle" of dramatism; that purposeful action always involves choice within a particular institutional context (in pentadic terms, an "action" within a "scene") (Burke, 1945/1969) that is then symbolically shared with others. Because humans are embodied, attempts to interrelate in a social world are limited by the senses and the intractable condition of being unable to achieve complete consubstantiality. The attempts to create consubtantiality through language point directly to the rhetorical construction of identity because only through attempts to identify with each other do we create a recognizable identity for the self.

Rhetoric and identification.

Humans use "rhetoric," to manipulate symbols and induce cooperation (Burke, 1950/1969). This symbol use is designed to transcend conflict and division and to avoid breakdowns of communication in social, economic, and

political hierarchies (Conley, 1990). Hierarchy is the structural principle in dramatism (Brock, 1990) and implicit in language because, as Burke says, language is what makes the "negative" possible (Burke, 1950/1969). Without hierarchy, there would be no division and no reason to overcome division with identification; without hierarchy, there would be no reason for rhetoric (Conley, 1990). As Biesecker describes, however, identity is wholly relational within this hierarchy: "[T]he self is only given by its structural position within a larger field of discursive forces or symbolic practices, the totality of which is indeterminable yet determining" (1997, p. 75).

Within social life, Burke posits, the key problem of sociality is a rhetorical one, a "problem of appeal" or of identification (Burke, 1950/1969). Identification is a dialectical transformation—it is the way in which one uses rhetoric to move from the estrangement of being embodied to the social possibility of connection (Biesecker, 1997, pp. 47-49). How do we appeal to one another to overcome division? Crable (2006, pp. 14-18) suggests that Burke's concept of identification offers three "tactics" of identification specifically related to identity creation.

First, individuals stress sympathy with the other's "common plight" as a way of crafting identity (Crable, 2006, p. 15). Second, rhetors use antithesis, or using a third party as a threat to identity, as a way to confirm a common identity (Crable, 2006). Finally, rhetors use specific terminology to describe a particular situation as a way to control the experiences of identity within that situation (Crable, 2006).

If these tactics are available, why do rhetors sometimes fail to achieve identification? "Trained incapacities" or "occupational pyschoses," which are the patterns of thought that assist with uninterrupted cultural reproduction, (Burke, 1937/1984) interfere with identification. Burke notes that common occupational psychoses include "capitalism, monetary, individualist, laissez-faire, free market [and] private enterprise" (Burke, 1935/1984, p. 40). Challenges to trained incapacities are often met with resistance in the form of "avoidance," "escape," "rationalization," and "scapegoating" (Burke, 1935/1984, pp. 9-11). To overcome our orientations and trained incapacities, Burke offers "perspective by incongruity." Perspective by incongruity is a tool of transformation; it allows one to merge categories believed to be mutually exclusive, or, conversely, to separate categories believed to be inseparable (Burke, 1937/1984). It allows a change in perspective by dialectic—changing orientation by putting the wrong words (or ideas) together (Burke, 1937/1984).

Dramatism's view of law.

Kenneth Burke applied his dramatistic theory explicitly to the law in an effort to explain how the language of the law operates as a language of motivations. Additionally, other elements of dramatism, even if Burke did not directly apply them to the law, can be profitably extended to legal discourse.

Dramatism sees law in an advanced society as forensic material supplied by the marketplace that codifies custom and "bridge[s] the gap between principle

³ Burke (1935/1969) borrows occupational psychosis from John Dewey, who, interestingly, was central to the development of public sphere theory.

and reality" (Burke, 1937/1984, p. 291). In dramatistic terms, law is the "efficient codification of custom" as opposed to a system of ecological balance through its chosen terminology; law rationally isolates particular perspectives and makes other perspectives invisible (Burke, 1937/1984, p. 291). Law is an "order of authority" that stimulates "the imagination to think of motives in terms of the law" itself (Burke, 1945/1969, p. 123).

Burke further described law as a form of "secular prayer" (1937/1984, p. 291): a way of coaching attitudes by the use of imitation and verbal language. (1937/1984, p. 324). Law "takes up the slack" between secular prayers and the inconsistencies of reality, providing a means for individuals to cope with those tensions (1937/1984, p. 325).

Not only does law codify custom, it also is resource for creating custom (Burke, 1935/1984, pp. 186-87). Law is at first the codification of custom coming from outside of the law itself. Then, as new situations arise, law becomes an educative device, an "implement for the molding of custom" (Burke, 1937/1984). A danger of this implementation function, Burke notes, is that as law moves away from traditional custom, "[1]aw becomes incongruous, except insofar as people can alter their customs to fit the liquid, constantly shifting alterations of the law" (Burke, 1935/1984, p. 187). That is, when law "molds" custom, it becomes "rational," creating a "secular attitude" towards the "formulation of law" (Burke, 1935/1984, p. 187). When this happens, law moves from custom to "traffic regulation" (Burke, 1935/1984, p. 187). Burke was concerned about this problem of law's ability to shift and, implicitly, about law's impact on identity; if the

authoritative language of the "state" is constantly shifting, then the law provides no reference point by which a citizen can "give himself definition as a character. In learning to shift seasonally into new schemes of ought and ought-not, the citizen suffers the disintegration of his entire moral framework" (1935/1984, p. 187).

Consistent with his view of weighted vocabularies and terminologies, Burke also characterized law as a "terminology of motives" that reduces the "vast complexity of life" (1945/1969, p. 96). Consistent with law's shifting nature, however, it is difficult know at any given time what motives the law has (Burke, 1945/1969). For example, law can codify custom and thus be "conservative," or it can transform custom and thus be "innovative" (Burke, 1945/1969, p. 342). Burke also noted the paradox that exists in the law with respect to its conserving and innovating dialectic: "Revolutionary changes in the living conditions of America since the adoption of the Constitution were mostly the work of men who hired expensive legal talent to get their innovations sanctioned in the name of tradition" (1945/1969, p. 342 (emphasis omitted)).

Burke (1950/1969) saw the American Constitution itself as representative of the way in which "constitutions" are embodiments of dialectical interactions. He envisioned the Constitution as a "motivational ground," the purpose of which was to serve as an instrument to shape human relations (Burke, 1950/1969, p. 341). Constitutions, like law more generally speaking, are legal "substances designed to serve as motives for shaping or transforming behavior" (Burke, 1950/1969, p. 342). These "legal substances" represent an ideal, a balance or

equilibrium, where competing concepts are symbolically merged into a unifying whole. Sometimes, however, this unity is challenged by the practical in the form of "cases." Burke (1950/1969, pg. 349) noted that "[w]hen, in the realm of the practical, a given case comes before the courts, you promptly find that this merger or balance or equilibrium among the [different legal provisions] becomes transformed into a conflict among [them]."

In addition to the way Burke expressly defined the law, his theory of dramatism can be extended in other ways to help explain the law in a way that furthers its rhetorical and dramatistic understanding. First, law can be characterized as a "representative anecdote" that stands in to represent a larger "system" of governance that Burke (1945/1969) recognized as demanded by the social to provide a terminology of shared meaning and to create common ground for interrelations. That is, law functions to give "official" definitions to terms and concepts that provide stability of meaning in those symbols and to give individuals a common language for talking about everyday problems. It further provides citizens with what would Burke would call a "frame of acceptance," or a system of meaning by which individuals assess a situation and adopt a role within it (1937/1959, pg. 5).

Considering Burke's commitment to the embodied condition of humans, law might be seen then, as a means by which humans engage in an attempt to create an external "substance" to account for the embodied condition. Because "you" and "I" are always separately embodied, complete consubstantiality is impossible and some ambiguity in experience remains in the realm of the

symbolic and the social. Because law is a product of language, law then would always be the product of the embodied human condition. In addition, the sociality of the human condition demands law as a means for keeping order in a civil society (as opposed to keeping order through sheer brute force or fear). Law functions, then, as a (1) vocabulary for use in that social, symbolic realm and (2) site for transformative identification experiences because of the division inherent in individuals separately embodied and engaging in social interactions.

As a jurisprudential matter, Klinger (1994) has suggested that Burke's theoretical views can provide a rhetorical and "holistic view of the law, one which deconstructs the apparent tension between jurisprudential philosophies." In Burkean terms, he asserts, "absolute foundations [for] the law are little more than trained incapacities," and he asserts that a "communicative praxis" should be the goal for understanding law at a philosophical level (Klinger, 1994). With Klinger as a starting point for the theorizing of law as dramatism, law has a "positive" character—law does not exist in nature, in ethics, or in the metaphysical; rather, law exists as it is communicated, as the shared symbols between those intractably embodied individuals who are separate from each other and need law to keep order between them in the social.

Nonetheless, law's positive character and its origins in the moltenness of shifting motivations gives law not only a positive character but also a formal and transformative one. Maintaining order and predictability in the social setting require some tracing back of the law to its common sub-stance from which it is derived (Burke, 1945/1969, p. xix). That is, as legal distinctions are made or

occur, the law "branches" from a common "trunk" of substance, recreating the distinctions of history that lie in its "roots." The moltenness of law's common substance makes it subject to power struggles over how the law will be shaped from its common origins, but, unlike the view asserted by Critical Legal Studies scholars, power alone does not define law. Instead, law is a type of representative anecdote, made up of terms that seek to resolve tensions between competing meanings within those terms (such as" work" and "family," for example). As a representative anecdote, law then is subject to a critique of whether it is an anecdote of appropriate scope and circumference and whether is it an accurate reflection of lived conditions.

This, of course, leads to law as rhetoric—as a "mode of appeal." As rhetoric, the law is an attempt to create identification to overcome social divisions. Because identification seeks to create consubstantiality between individuals who are otherwise divided, individuals seeking identification look to share a common "substance." Dramatistically, law can be seen as a substance, both intrinsically, within its own culture and organization, and extrinsically, serving as a context for something else. Thus, law is simultaneously contextualizing and subject to a broader context; that is, law provides a "substance" for identification within legal discourse, narrowly defined, and also provides a basis for crafting identities within the larger rhetorical culture. Accordingly, law can serve as an "official" and "vernacular" substance simultaneously.

A dramatistic view is consistent with how Amsterdam and Bruner (2000), scholars writing within the legal field, view the law. Much of their rhetorical view of the law consists of understanding how law has a categorizing function that, in turn, frames the way in which social issues and ideas are discussed in public discourse. This view is consistent with dramatism's view of the law as a "terministic screen."

Categorizing, Amsterdam and Bruner (2000) note, is a human activity that creates the world rather than derives from it. Categories derive from "general theories of the world and template narratives about life" that are in the "storehouse of any culture's ways of construing the world" (Amsterdam & Bruner, 2000, p. 28). All category systems, they assert, have a motivated quality (Amsterdam & Bruner, 2000, p. 40). They note that the human imagination can generate "contrast categories," such as god/devil, government/anarchy, freedom/slavery (Amsterdam & Bruner, 2000, p. 39). This view is consistent with the Burkean idea of language as motivation and the character and operation of dialectical terms. Burke himself recognized that classification was a partisan activity of rhetoric (1950/1969, p. 22), and that the law's dialectical terms were just another name for Jeremy Bentham's "fictitious entities" in the law (1950/1969, p. 184). Biesecker further notes that classification and the related acts of abstraction and comparison are the things that allow and individual to "imaginatively identify" with another (1997, p. 47).

Amsterdam and Bruner (2000, p. 51) note that categories are rhetorically "suffocating." That is, when categories are well-established, it is difficult for

individuals to become aware of the "value-loaded narrative and conceptual frameworks from which particular categories are being derived" (Amsterdam & Bruner, 2000, p. 51). Because categories have this rhetorical character, they serve to frame what is open for debate or consideration, in what locations those debates can legitimately take place, and the language by which the debate participants will engage (Amsterdam & Bruner, 2000). This is consistent with the way in which Burke views occupational psychosis or trained incapacity; once a rhetoric of meaning becomes dominant and we are trained to view it as "normal," it becomes difficult to wrench that rhetoric loose from its moorings to challenge its unquestionable meanings. Law's efficiencies, in Burkean terms, make invisible the motivational nature of the categories Amsterdam and Bruner describe as essential to the law.

Public Sphere Theory: Discursive "Spaces," and Rhetorical Activity

"Rhetorical processes institute individuals as a public."~ (Hauser, 1999, p. 34 (emphasis omitted))

Public sphere theory provides a theoretical grounding for this project because is privileges questions about what counts as a "public," how publics operate to define themselves and the identities of those who participate in them, what conditions are required for public deliberation, and how those publics interact with other "spheres," such as the private sphere and the state. Concepts of the public sphere problematize the regulatory rulemaking process as a site of rhetorical activity and public deliberation and reveals that the regulatory rulemaking process itself can challenge both normative and descriptive ideas

about the interaction between the public and the state and what it means to enact the identity of a "counterpublic." Moreover, the concepts of public and private that emanate from public sphere theory relate to the tensions between worker and family member identities. Finally, public sphere theory can help theorize how law, and individual interactions within state created discursive spaces through legal discourse, can shape identities.

Origins and definitions of "the public" and public participation.

"The" rationally deliberating public.

Although Habermas (1962/1989) recognized the public as the location for transmission and renewal of cultural knowledge, coordination of action, social interaction, and, importantly, identity formation, originally, he took a fairly narrow normative and descriptive view of the "the public" and defined it as one which was a "single comprehensive entity for deliberating the common good" (Hauser, 1999, p. 45). The purpose of the public was to discuss issues of common concern in a disinterested manner and to stand in opposition to the state, conveying to the state the public's position on the matters of common concern (Habermas, 1962/1989). Later, Habermas (1995, p. 360) explicitly made a communicative turn in his view of the public sphere, specifically acknowledging that the public sphere was not an "institution" or an "organization," but rather is "a network for communicating information and points of view."

Early views of the public sphere saw participation in the public sphere as based on an individual's possession of political identity or "citizenship," "on [his or her] active participation in and a sense of belonging to a particular political

system" (Kulynych, 2001, p. 240). Habermas determined that those who were permitted to participate in the public sphere are deemed to be "citizens," defined as those who were members in a "'common political culture'" (Kulynych, 2001, p. 241). In particular, traditional notions of citizenship in the public sphere required participants to be autonomous and independent (Kulynych, 2001, p. 235), and Habermas required autonomy as a precondition to public participation (Kulynych, 2001, p. 255).

Habermas's (1962/1989) original work observed that those persons who could participate in the political public sphere were educated, property-owning male members of the bourgeois class. As a prerequisite to participation, members of the public sphere had to have the "power of control" over their property (1962/1989, p. 28). Habermas even expressly noted the difference between the independence of the property owner, who could participate in the political public sphere, and his family, his "wife and children," who could not: "[T]he independence of the property owner in the market and his own business was complemented by the dependence of his wife and children on the male head of the family; private autonomy in the [conjugal, private] realm was transformed into authority in the [marketplace or civil society]" (1962/1989 p. 47). Thus, the embodied identity of the public sphere participant was male, landed, and educated.

Habermas's (1962/1989) normative position on participation in the public sphere was that the ability to engage in critical-rational debate was a prerequisite to public engagement. Personal experiences and emotional appeals were confined

to private life and thus not appropriate for public discourse (Fraser, 1992). With respect to the source of rationality, Habermas's (1984) view rejected both Kantian metaphysical views of rationality residing in the cosmos and Cartesian views of rationality as residing in the person and instead placed rationality in the concrete context of communication. In contrast to more recent rhetorical views of the public sphere that anticipate pluralism, fragmentation, and lack of universality in communication means (Hauser, 1999), Habermas (1984, pp. 307-308) set out universal standards in "communicative action," and proposed three validity claims for communication that is otherwise comprehensible: the propositions must be truthful; the intent of the speaker must be truthful; and the statements must be "right" with respect to existing norms and values. Habermas (1984) saw deliberative discourse amongst free, equal citizens as a benchmark for emancipation; communication should be rational and have the goal of achieving and sustaining consensus.

For Habermas, critical-rational deliberation was central to achieving a legitimate result in the public sphere, and he excluded other forms of deliberation or communication from his perspective. "Processes of deliberation take place in argumentative form, that is, through the regulated exchange of information and reasons among parties who introduce and critically test proposals" (1995, p. 305). This type of exchange is built upon the "rational world paradigm" which requires that participant be competent in argument (Fisher, 1984, p. 268).

Habermas's notion of deliberative discourse still favors orderly rationality, discourse that is "'formal and general," "'dispassionate and disembodied"

(Kulynych, 2001, p. 258). Types of speech that "introduce emotion and passion into the deliberation[] are seen as introducing disorder into the public" (Kulynych, 2001, p. 258), and "in the eyes of many deliberative theorists, not a public where genuine deliberation can take place" (Kulynych, 2001, pp. 258-259). Even acknowledging diverse styles of communication, including the passionate expression of logical arguments, this notion of "orderly rationality" is a presupposition of the quality of the communication that underlies Habermas's view of public participation.

As discussed in more detail below, theorists (Asen & Brouwer, 2001; Fraser, 1992; Hauser, 1999) have challenged the limits of rationality and participation that Habermas placed upon participation in the public sphere. They have opened the space for diversity of who can participate in the public sphere and discursive strategies for participation. These approaches have also created spaces for greater recognition of publics, a concern of John Dewey's that is addressed in the next section.

Unrecognizable "publics."

John Dewey (1927/1954) asserted that communication is the means by which publics "recognize" themselves and that "the public" comes into being based upon the indirect consequences felt by one group of individuals based upon the actions by another. Unlike Habermas who saw the state and the public as separate, Dewey (1927/1954) offered that the basis of the state was the public. Importantly, the state to Dewey (1927/1954, p. 19) was the highest realization of human capacities; the state was the "official and representative character" that

could protect members of the public from the indirect consequences of private action through regulatory activity. Unlike Burke who, in the context of dramatistic theory and the law, expressed concerns about the fluidity of the relationship between the public and the state, Dewey (1927/1954) felt positive about the relationship between the public and state as a fluid one; because the public is ever-changing, the state must be ever-changing as well.

Dewey (1927/1954) expressed concern that advances in technology created conditions that kept the public from recognizing its shared interests and its ability to respond productively to state interaction. In an era of "technological innovation, mobility, and mass communication" (Hauser, 1999, p. 25), the public was beginning to be unable to recognize itself, or, in other words, to lose its collective identity. The public was "eclipsed" by too much available information and too little social cohesion to permit it to engage in informed and active participation in public debate (Dewey, 1927/1954).

Goodnight (1982) shared Dewey's concern about the rise of technology and its negative impact on the ability of publics to "appear" and deliberate. But Goodnight highlighted "technocracy" over "technology" in his concerns about the constraints of the modern condition on public deliberation. Goodnight (1982, p. 259) thought that in a technically focused society, "audiences seem to disappear into socially fragmented groups," and that issues of public concern were disappearing into "government technocracy or private hands." Ultimately, he concluded that "questions of public significance themselves become increasingly difficult to recognize, much less address, because of the intricate rules,

procedures, and terminologies of the specialized forums" (Goodnight, 1982, p. 259).

Dewey (1927/1954) was likewise concerned with Walter Lippman's (1927) idea deliberation should be confined spheres of expertise rather than the public. Even in this climate of increasing information and advancing technology, Dewey (1927/1954) continued to have faith in a deliberating public that could inform policymaking, and he challenged Lippmann's (1927) assertion that it was impossible for informed public opinion to guide public policy making.

Dewey (1927/1954) thought that the answer to the deteriorating public was the (re)constitution of a "Great Community," a community in which "the ever-expanding and intricately ramifying consequences of associated activity shall be known . . . so that an organized, articulate Public comes into being" (1927/1954, p. 184). In other words, Dewey (1927/1954) thought that the public, "delocalized" by mass media and technology, needed to be "relocalized" so that individuals could have a role in forming and directing the goals, values, and activities of the groups and institutions of society. Dewey thought that this kind of relocalization of the public would create a situation where individuals could debate without distraction.

Democracy for Dewey resided in the notion of community itself. Dewey did not discount, however, the need for publics to take advantage of technology to fully engage in democracy. He recognized that technology would continue to be transformative of the ways in which public deliberation would take place and be mediated. Thus, he encouraged the public to "breathe life" into the "physical

machinery of transmission and circulation" (1927/1954, p. 184). "Democracy will comes into its own," Dewey noted, "when free social inquiry is indissoluably wedded to the art of full and moving communication" (1927/1954, p. 184).

A rhetorical response: discursively constituted publics and identities.⁴

Approaches in public sphere scholarship since the original writings of Habermas and Dewey have expanded the notion of what counts as a public, the ways in which publics recognize themselves, and what counts as public deliberation. Public sphere theorists now advocate a pluralistic view of the "public sphere," emphasizing the rhetorically constituted nature of multiple publics (Hauser, 1999, p. 33). Publics are pluralistic, rhetorical, and affected by imbalances of power, and, as Warner (2002) notes, are created by attention and discourse rather than by places or persons. In this view of "public," public spheres are not defined by their constituents or their locations, for example, but are defined by their rhetorical activity; publics "emerge as those who are actively creating and attending to these *discursive processes* for publicizing opinions, for

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⁴ Without the rhetorical turn in public sphere theory, it would be much harder to synthesize approaches from public sphere and dramatism. Barbara Biesecker (1997) describes this theoretical disjunction. Habermas (1984) claims that the only "truthful" communication is "communicative action." Communicative action does not include rhetoric, which Habermas (1984) would define as "strategic communication," and therefore unavailable for transformative possibilities. Burke (1950/1969), on the other hand, makes rhetoric central to his concept of transformative speech. For Habermas (1984), understanding and consensus were the goals, but for Burke (1950/1969), perpetual reconstitution of the social and the individual through language is the ideal. The good news is that, in contemporary public sphere theory, "consensus need not be viewed as the end of discourse in the public sphere" (Asen & Brouwer, 2001, p. 12), and rhetorical public spheres have been embraced rather than rejected as spaces for legitimate public communication (Hauser, 1999).

making them felt by others" (Hauser, 1999, p. 33). Publics do not "exist" in this view, and they are not "found." Accordingly, the notion of a monolithic public is outdated; "we should expect a developed society to be populated by a montage of publics" (Hauser, 1999, p. 35 (emphasis omitted)). This montage of publics is not just based in face-to-face conversations between individuals, however. Publics can be created virtually and technologically, without or without direct engagement between the individual actors. Asen (2009, p. 269) notes that "[p]ublics manifest . . . through texts circulating in mass media and new media." Accordingly, publics are not confined to actual dialogue but can also exist in the circulations of texts (Asen, 2009).

In tandem with recognizing the pluralism and rhetorical composition of publics, contemporary public sphere theory recognizes the inequitable limitations Habermas's original theory placed upon those who could participate in the public sphere. The concept of "counterpublics" now theorizes the unequal distribution of the power to participate in public discourse and establishes "counterpublic spheres" where voices excluded from dominant public spheres can "invent and circulate counterdiscourses to formulate oppositional interpretations of their identities, interests and needs" (Fraser, 1992, p. 123). Asen and Brouwer (2001, p. 8) further demonstrate that the public sphere exists not in its singularity but in multiplicity and that counterpublics may be recognized not by their desire to seek isolation or separation but by their identity as "persons who articulate oppositional discourse." That is, a counterpublic does not need to be a particular group or a particular location; rather, a counterpublic can be a particular type of

invocation of marginality, socioeconomic standing, or exclusion from power.

Asen (2009, p. 283 (emphasis omitted)) notes that counterpublics "should tell us something beyond summarizing an advocates' claims[; it should tell us] how invocations of counterpublics serve various interests and agendas."

Moreover, counterpublic theory challenges the "bounded" nature of Habermas's original "public," which was necessarily separate from the state. Fraser (1992) offers that publics can exist within both the state and civil society. Likewise, Asen and Brouwer (2001) and Schudson (1994) rejoin the public sphere and the state from their original theoretical separation and recognize that "democratic governments offer multiple forums and various points of access for citizens" (Asen & Brouwer, 2001, p. 15). Some of these "counterpublics," no matter where they are located, will be "strong" and have the ability to both form opinion and make decisions, while others will be "weak," having only the ability of opinion formation (Fraser, 1992).

Retheorizing the public sphere as a multiplicity requires that we take account of the conditions of the discursive practices within these discursive spheres (Asen & Brouwer, 2001). Gerald Hauser's work on public spheres takes Habermas' position that a "public" is "the interdependent members of society who hold different opinions about a mutual problem and who seek to influence its resolution through discours." (Hauser, 1999, p. 32 (emphasis omitted)). However, Hauser extends the theory to argue that publics exist because of their "rhetorical character" (1999, p. 33) and are characterized by "the character of their rhetorical exchanges shared among their members" (1999, p. 35).

Accordingly, publics have an explicit connection with rhetoric, which Hauser defines, consistent with the dramatistic view, as "the symbolic inducement of social cooperation" (1999, p. 14 (emphasis omitted)). He notes that a public can form by manifesting attention to issues by "correspondence with public officials" (Hauser, 1999, p. 33). Publics do not preexist their discursive purposes; rather, they are made up of those who are actively attending to discourse, which means that publics construct reality by "establishing and synthesizing values, forming opinions, acceding to positions, and cooperating through symbolic actions, especially discursive ones" (Hauser, 1999, p. 33). Hauser (1999, p. 35) argues that researchers must "account for the ways in which society is awash with [these] rhetorical exchanges."

Regarding deliberation, contemporary public sphere theory has moved beyond Habermas's view that public debate is confined to critical-rational discourse alone. Hauser (1999) and others (Fraser, 1992) redefine what is needed for participation in public deliberation, moving from the traditional requirements of rationality to include other forms of appropriate participation in the public sphere. Fraser (1992, p. 120) suggests that different "cultural styles" of deliberation be recognized as legitimate for participation. Hauser (1999, p. 33) legitimizes participants in the public sphere based on "rhetorical competence," "a capacity to participate in rhetorical experiences" and an ability to exercise judgment that expresses "the collective understanding among those who have witnessed a public matter from their respective points of view and have taken the views of others in to account while forming an opinion" (1999, p. 100). That is,

constituting a public requires no more than "collective participation in rhetorical processes" (Hauser, 1999, p. 34).

Hauser also presents a challenge to Habermas's view that deliberation and judgments in the public sphere should be dispassionate. Hauser (1999) asserts that dispassion is counterintuitive to being engaged, and engagement is what is necessary for thinking through the consequences of public policy decisions.

Passionate judgments about policy in the public sphere that do not follow critical-rational patterns are not irrational; rather, Hauser (1999) argues that a public participant needs to engage emotion and reason together for sound public judgment. For the public sphere to function well, then, it must not expect disinterest of its participants but rather seek to accommodate a multiplicity of expression of those conflicting interests (Hauser, 1999).

Hauser also challenges Habermas' (1984) idea that the strategic communication, i.e., partisan, rhetorical communication, distorts deliberation in the public sphere and causes a failure of consensus. Hauser (1999) posits that disagreement can occur without distortion, and that the goal of consensus from public deliberation is a goal that the postmodern condition will not allow. Instead, Hauser (1999, pg. 55 (emphasis omitted)) asserts, in contemporary society, "common understanding supplants warranted assent as the communication norm for achieving reasonable mutual cooperation and toleration." Having personal interests, in the rhetorical model of the public sphere, is "essential for the exercise of prudent judgment on public concerns" (Hauser, 1999, p. 55).

Replacing Habermas' critical rationality model for public deliberation,
Hauser (1999, p. 61) suggests the "rhetorical norm of 'reasonableness."

Arguments can be judged based on their ability to create "identifications" and their reasonableness across multiple perspectives (Hauser, 1999, p. 61). Whether an argument is successful can be determined by looking at how well it addresses "relevant needs and commitments" (Hauser, 1999, p. 61). Importantly, Hauser (1999) recognizes that they ways in which publics discuss issues of concerns forms a "vocabulary of motives" (Burke, 1945/1969) that can become rhetorically salient and operates to define the subject and the community. All of this leads Hauser to define the public sphere as a "discursive space in which individuals and groups associate to discuss matters of mutual interest and, where possible, to reach a common judgment about them. It is the locus of emergence for rhetorically salient meanings" (1999, p. 61 (emphasis omitted)).

Contemporary counterpublic theory also challenges the traditional criticalrational debate model of the public sphere by inserting into the model of public
deliberation personal experience, self-interest, and contingency. It suggests that
bracketing of personal experience and personal characteristics is inappropriate
and that the solution to the bracketing of inequality in the public sphere is to
eliminate actual "systemic social inequalities" (Fraser, 1992, p. 121). By having
"rough equality" among peers (1992, p. 121), Fraser argues, we can foster
"participatory parity" in deliberative discourse (1992, p. 119). Fraser notes that
"equality" of status is not a necessary condition of participation in the public
sphere (1992, p. 117). Rather, counterpublic theory has extended public sphere

citizenship to those who experience marginalization (Squires, 2002, p. 446), making it no longer true that education, property ownership, autonomy and independence and are prerequisites to participation. Reworking public sphere theory to deal with the "problems of access and identity" (Squires, 2002, p. 449), counterpublic theorists expanded the scope of public participation to both those who speak from their experiences of actual exclusion from the dominant public as well as those who acknowledge this experience of exclusion (Asen, 2001, p. 427).

The problem of competing "spheres" and the question of deliberation.

The question of the nature of public spheres, beyond the question of whether they are singular or plural, public or counterpublic, was addressed by Thomas Goodnight who recognized that the "increasing variety of forums, formats, styles, and institutional practices [of public deliberation] . . . demands careful attention" (1982, p. 252). Goodnight (1982) identified the existence of three spheres of argument; the personal, the technical, and the public. The personal sphere is a site of informal argument based on private experience; in this realm, arguments are based upon consubstantiality (Goodnight, 1982). The technical is the site of specialized forms of argument; here, the arguments are occupation specific (Goodnight, 1982). Finally, the public is the site of issues of public interest and public responsibility; in this context, arguments are grounded in partisanship (Goodnight, 1982). Consistent with John Dewey's (1927/1954) view, Goodnight (1982) recognized that public argument requires that the consequences of the dispute extend beyond the personal and technical spheres.

Goodnight (1982) expressed his concern about the development of a technical sphere that excluded participation from everyday individuals in the policy-making process. Specifically, he recognized that, similar to Walter Lippmann's (1927) idea that policy decisions should be left experts, when the technical dimensions of public problems are emphasized, technical (and sometimes mathematical) language, as opposed to "commonsense" language, becomes a constraint for decision-making (Goodnight, 1982). He argued that the need for specialized knowledge and language in the public sphere limited "common citizens" ability to participate (Goodnight, 1982). Hauser (1999, p. 26) agreed that the "technical character of public policy issues exclude those people lacking technical, institutional, or financial resources." This relegation of policy issues to technical spheres renders the everyday individual "a mute and befuddled observer" and severs public deliberation from policy making (Hauser, 1999, p. 27).

Although Goodnight (1982) recognized the existence of separate spheres, his work reinforced the traditional requirements of "deliberative rhetoric" in the public sphere. Goodnight (1999, p. 251), categorized "deliberative rhetoric" as "argumentation through which citizens test and create social knowledge in order to uncover, assess and resolve shared problems," and he suggested that "argument practices arising from the personal and technical" are improper substitutes for deliberative discourse (1999, p. 252). While Goodnight did not directly address what modes deliberative argument should take, his work suggested that in the public sphere, "proofs" must be "more formal," participation must be limited to

"representative spokespersons," and speakers must "employ common language, values, and reasoning so that the disagreement [can] be settled to the satisfaction of all concerned" (1999, p. 255). Although Goodnight conceded that "the ways of making arguments are various" and that some arguments require only the "most informal demands for evidence, proof sequences, claim establishment, and language use" (1999, p. 255), he asserted that that these modes of deliberation are best left to the private sphere. For Goodnight, then, traditional forms of deliberation require that participants bracket inequality or difference and engage in a rational debate "as equals," conforming to acceptable modes of deliberation, a view that Fraser (1992) would oppose.

Hauser, however, rehabilitates the notion of multiple "spheres" for public deliberation focusing more on how those "spheres" are constituted rhetorically than upon how they pre-exist publics and their discourses. Hauser argues that "rhetorical forums" are needed to "provide 'a symbolic environment [where] issues . . are advanced, admired, and provisionally judged'" (1999, p. 34 (emphasis omitted)). Hauser uses a term of Burke's (1945/1969) pentad to make his point: a "public" is not a "act" or particular "agents" or even a particular "scene": rather, a public is a "constituting agency," visible through society's "actual discursive engagements" (Hauser, 1999, p. 35). Because of the communicative engagement that must be available to a public, Hauser harkens back to Habermas's idealized model of deliberation and notes that rhetorical public spheres must be "accessible to all citizens; there must be access to

information; and the specific means for transmitting information must be accessible to those who can be influenced by it" (1999, p. 63).

Consistent with his view of multiple spheres, Hauser (1999) elaborates upon Habermas's (1962/1989) "political public sphere." In the political public sphere, Hauser (1999, p. 57) recognizes that individuals participate in political discourse for the purpose of "critical publicity" that can serve as a "template for public knowledge." A political public is not defined by its shared political interests, however; it is defined by its function of providing "critical evaluation and direction" (Hauser, 1999, p. 60 (emphasis omitted)). However, Hauser's political public sphere is effective only if "legislative and administrative bodies subordinate their exercise of political control to . . . participation in decision-making processes" (1999, p. 57).

Hauser (1999, p. 58) recognizes in Burkean terms, that institutional settings are often "scenes for public discourse" and accordingly asserts that "[i]institutional features undeniably are essential components of the public sphere." Although publics certainly can form without institutions to "contain" them, institutions can often define the norms of communication within publics. In addition, the constraints of institutions "regulate the kinds of content and presentation permitted and excluded from a public's realm of discussion" (Hauser, 1999, p. 58). Hauser (1999) expresses some concern, however, about the way in which bureaucratic institutions that are charged with managing collective welfare control political discourse in the institutional realm. He suggests that discourse is organized around the maintenance of wealth and status by those who

have control of the discourse and the articulation of "need" by those who are "economically, politically, or socially disenfranchised" (Hauser, 1999, p. 58). He argues, then, that in a bureaucratic environment, the claims to privilege and status are not exercised via "an enactment of citizenship" but through "privileged access to the decision-making process" (Hauser, 1999, p. 58).

In sum, Goodnight and Hauser craft a notion of public spheres as having different qualities based on the kinds of discourse that circulate within them. While Goodnight bemoans the rhetorical differences of different types of spheres of communication and asserts that some forms of influence are not appropriate for the public sphere, Hauser embraces the rhetoricity of the public spheres that can make room for different kinds of deliberative strategies. Moreover, instead of excluding the technical and the personal from public sphere participation, Hauser encourages awareness of how the rhetorical conditions of institutions can expand or constrain the conditions of the communicative environment, or the "communicative ecology," and can dictate how individuals experience themselves among strangers (1999, p. 60). These conditions, which include institutional constraints for discourse, shape the emergence of publics and how individuals act within them.

Vernacular publics.

Publics exist, uniquely, according to Hauser (1999), in the vernacular.

That is, "a public's members converse through the everyday dialogue of symbolic interactions . . . expressed in the language and style that members of a society must share . . ." (1999, p. 36). Hauser's view of vernacular expression as a

legitimate mode of deliberation allows the "[t]he discourses by which public opinions are expressed, experienced, and inferred [to] include the broad range of symbolic exchanges whereby social actors seek to induce cooperation, from the formal speech to the symbolically significant nonverbal exchange and from practical arguments to esthetic expression" (1999, p. 90-91 (emphasis omitted)). Howard (2010, p. 243, 248) adds that vernacular rhetorics are "non-institutional," and that when individuals "claim[] the non-institutional as a source of authority," they are speaking "in a vernacular mode."

Hauser proceeds to identify a particular mode of the vernacular, the political. "[V]ernacular [political] discourses . . . remind us that publics do not exercise their political competenence only through the orderly debate of parliamentary bodies. Their deliberations take a variety of forms suited to their time and place and within the cultural understanding of their audiences . . ." (Hauser, 1999, p. 100). Hauser notes that the public sphere is not "tidy"; rather, because it is rhetorical, it is messy and flawed (Hauser, 1999, p. 273). Although this messiness is inconsistent with critical-rational models of the public sphere, Hauser (1999) does not find this to be delegitimating; rather, the public sphere's untidiness is inherently expressive of its rhetorical character.

In addition to the legitimacy of vernacular discourse as public discourse, vernacular discourse is also relevant because it also interacts with official discourses. Hauser (1999) uses the O.J. Simpson murder trial from the mid 1990's as an example of this type of interaction. He notes that "participants included attorneys and expert commentators, but average citizens also were

actively engaged" (Hauser, 1999, p. 65). He describes all of this as a "conversation" that can be "mutually constitutive of each other's identity" (1999, p. 67). This mutual constitution of identity leads to community. To participate in a community, we must be able to acquire its vernacular language, a language that both "lack[s] and transcend[s] the force of official authority" (Hauser, 1999, p. 67).

Walter Fisher's view of "narrative" argument fits within Hauser's broad view of "vernacular deliberation." Fisher (1984, p. 266) argues that the "narrative paradigm" of human communication, which privileges storytelling as a form of argument, "challenges the notions that human communication-if it is to be considered rhetorical—must be an argumentative form . . . and must be rational [in terms of informal or formal logic." As Fisher notes, "[t]he narrative paradigm does not deny reason and rationality; it reconstitutes them, making them amenable to all forms of human communication" (1984, p. 266). Consistent with Hauser's view of "vernacular discourse," Fisher (1984, p. 272) asserts that rationality in the narrative paradigm takes two forms: (1) narrative probability, or the coherence of a story and (2) narrative fidelity, or the "truthfulness" of a story as it relates to what the audience knows to be true in their lives. As such, narrative rationality does not require specialized training or knowledge; it depends upon one's ability to identify with stories. Fisher (1984, p. 272) argues that the narrative use of language is "a universal function" that eliminates the hierarchy required by traditional rational discourse.

Finally, Michael Warner joins Hauser and Fisher's position that legitimate modes of debate can be found in vernacular and narrative forms and highlights that participation in the public sphere has been wrongly "ideologized as rational-critical dialogue" (2002, p. 115). Warner (2002, pp. 114-15) asserts that there is a "poetic function of public discourse" that is generally unrecognized but results in "poetic world-making." As such, when publics engage in activities that are not deliberative but rather are poetic, these publics are "more overtly oriented in their self-understandings to the poetic-expressive dimensions of language [and can] includ[e] artistic publics and counterpublics" (Warner, 2002, p. 116).

In sum, the concept of a "vernacular" public opens the field of deliberation to citizens of all types using a variety of communicative techniques. In addition, it suggests that those forms of discourse that may have been deemed "private," such as narrative or poetic expression, are arguably appropriately "public." Consequently, if forms of expression from the vernacular are appropriately public then issues coming from the vernacular can be deemed appropriately public as well.

Public and private.

In Habermas' original work (1962/1989), he aligned himself with John Stuart Mill (and others in political philosophy), asserting that there should be a sphere of private activity that is free from intervention by the state. For Habermas (1962/1989), these spheres included the domestic and economic. Accordingly, the topics of private property in the market economy and privacy in personal and family life were traditionally excluded from discussions in the public sphere

(Fraser, 1992). Moreover, Hauser (1999) notes that Habermas's requirements for rational-critical arguments excluded arguments that were deemed "private" by the dominant interests. Warner (2002) concurs; the notion of what is "publicly relevant" is shaped to require disinterestedness, and the separation of public and private issues has the effect of keeping some issues out of reach of public deliberation. Fraser (1992) has critiqued Habermas's requirement for disinterested debate, arguing that the bracketing of personal interests in public is neither possible nor desireable.

Asen and Brouwer (2001, p. 10) suggest, however, that even though "line drawing" occurs between the realms of public and private, they are not fixed concepts and what is public and private "emerge in social action and dialogue." What is "public" and what is "private" are not fixed concepts but rather require "perpetual performances enacted through public discourse" (Asen & Brouwer, 2001, p. 10) to define and redefine what will count as public or private in the public sphere. The important question then becomes how participants in public discourses draw these lines between public and private in an effort to either create or avoid publicity (Asen & Brouwer, 2001). Warner (2002) further notes that public sphere theory can reopen the connection between the personal and the political that was cut off with earlier notions that the "public" was common and disinterested (as opposed to the "interested" public sphere).

With regard to public and private, work and family issues have classically been treated as private concerns, lacking the significant range of indirect effects that Dewey (1927/1954) would have required in order to move a private interest

to a public one. For example, in Habermas's (1962/1989) view, the family was the source of subjectivity and privacy. Over time, however, various aspects of the employment and domestic spheres have become subject to public debate and state regulation (Fraser, 1992). For example, limiting the ability of children to work or making spousal abuse a crime are examples of private concerns turned public.

Often, this transformation of private concerns into public ones takes place in the policymaking process where legal language takes a central role. The idea of statemandated leave from work to attend a child's school function is an example of a private issues, child rearing and educational choices, becoming public ones through the passage of legislation (Davis, 2010).

Views of what is appropriately public are deep-seeded cultural concepts and arguably impact the ways in which certain topics can be discussed. The concept of "work family balance," for example, which represents a merger of two private spheres (one, private economy, the other, private domesticity), is particularly susceptible to the problem of cultural circumscriptions of its discussion because of its "private-private" nature. To move discussions about work and family from public to private is an effort at swimming upstream. Thus, public sphere theory can offer some guidance on understanding about how these traditionally private relationships are approached and transformed into public issues in the process of public deliberation. As Asen and Brouwer note, "public sphere scholars should pay attention to struggles of demarcation [of public and private] as valuable sites of study" (2001, p. 11).

A public sphere view of the law.

Habermas' (1995) view of the law is focused on how law orders social action and life. He characterizes law as a "normative framework" that provides common assumptions and identifications in a complex society where our lifeworlds have become too pluralistic to provide a means of social integration (Habermas, 1995). Law is a strategic communication that functions to ease the burden of social integration where other means of creating shared identity, such as established and accepted hierarchies, have broken down (Habermas, 1995, pp. 25-27). This is consistent with Hauser's (1999) view of the public as rhetorical and based on conversation and with Amsterdam and Bruner's (2000) view that when one speaks in the language of the law, one is establishing an identity for oneself, for one's community, and for the conversation itself.

In Habermas's (1995) view, law is necessary when features of modern society, including pluralization, fragmentation, profit-seeking, and organizational structures, have weakened the stable background and assumptions of the lifeworld, which have been the source of shared identities. In this context, law provides a stable social environment for forming identity as members of different subgroups can pursue their own interests (Habermas, 1995). Moreover, law is can adapt to new situations by developing new "programs," by creating new norms (Habermas, 1995, p. xxiii (trans. intro.)).

Amsterdam and Bruner (2000, p. 173) note that "legal discourse . . . is dressed in the garb of ordinary discourse." Likewise, Habermas (1995) recognizes that because law is built on ordinary language, it has a mediating

function between systems and the lifeworld. This mediating function requires Habermas to view law as an attempt to bridge the realm of "fact," on one hand, with realm of "norm" on the other. He treats law as a set of public norms and institutions embedded in society (Habermas, 1995).

At this intersect of fact and norm, Habermas's theorizes the foundations for legitimate law-making. In his view (1995), law in complex pluralistic societies cannot be legitimated by morals or ethics. Rather, law is legitimated by the "discourse principle" (Habermas, 1995, p. 107). Specifically, law must result from a "discursive process" that makes it "rationally acceptable for persons oriented toward reaching an understanding on the basis of validity claims" (Habermas, 1995, p. xix (trans. intro.)). Law is not the product of the social contract, of natural law, or of rational decision-making; rather, according to Habermas, "the legal community constitutes itself not by way of social contract but on the basis of a discursively achieved agreement" (1995, p. 449).

The state, as the political system standing in opposition to the lifeworld, has the decision-making power to act through law (Habermas, 1995). But, to engage in legitimate legal actions, the formal decision-making procedures within the constitutional state must be democratically legitimate: citizens must be able to understand themselves "as authors of the law to which they are subject as addressees" (Habermas, 1995, p. 449). Formally institutionalized deliberation must have input from what Habermas (1995) called the informal public sphere. Guaranteeing "equal opportunities for the public use of communicative liberties" is key to legitimizing a legal code. (Habermas, 1995, p. 458). That is, for the law

to be legitimate, citizens must have the equal opportunity to participate in democratic deliberation (Zurn, 2011).

Moreover, the law must be responsive to citizen concerns, but it cannot be too subservient to particular interests that can access administrative power illegitimately (Habermas, 1995, p. 386). Public fora, informal associations, and social movements must give all individuals channels of communication between the public sphere and civil society (Habermas, 1995). Habermas notes that this "democratic procedure makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character for political will formation" (1995, p. 448).

In Habermas's view, law has a "dual" character. On one hand, it has the power to be emancipatory; through democratic processes, it can regulate as a functional social power (Zurn, 2011). On the other hand, major powers can pressure law into their own service, creating unjustified power relationships within the law (Zurn, 2011). Thus, embedded in the law is a tension between validity (i.e., valid social norms) and facticity (i.e. the unjust power relations) (Zurn, 2011). Because of this tension, law is normatively ambiguous (Zurn, 2011), and the focus of the public sphere is the struggle over influence over the law within it (Habermas, 1995, p. 363).

Consistent with Habermas's view that law is one of a number of existing discourses, contemporary public sphere theory offers a way to position law against other discourses. Public sphere theory would suggest that law is a "strong," (Fraser, 1992) "dominant" (Squires, 2002) discourse that interacts with

other discourses to shape meaning. Thinking about "strong" and "weak" discourses or publics can allow focus on the intersecting nature of discourses and see to how identities are constructed at those intersects. Moreover, considering law as an identity-shaping discourse focuses on law's "translation" function (White, 1985), its role in translating the experience of ordinary life into legal language. Thinking of law as a kind of "public" allows examination of how law functions as both a technical or official sphere and a public sphere; how law brings together multiple publics; and how law gives voice to or takes voice from various publics. Public sphere theory imagines law in a recursive relationship with vernacular discourses and part of a larger rhetorical culture (Hasian 1994, 2000).

Regulatory rulemaking and the public sphere.

Public sphere theory provides a way to theorize regulatory rulemaking as a rhetorically constituted public. This public is first rhetorically constituted by individuals who have contemporaneously recognized their shared concern over the indirect consequences of state action and who, via technological and virtual means, engage in deliberation about public policy concerns that are contained within the law. Subsequent to their initial participation, the regulatory rulemaking public continues to be constituted by the continually circulating fragments and remnants of public participation as well as the legal texts that result from their input.

Through the lens of public sphere theory, the notice and comment period in the regulatory rulemaking process is a discursively created location for the

deliberation of matters of public interest, through which any individual can participate. The rulemaking process challenges Habermas's concerns that the public was becoming "commodified"; in this process, the direct public participation in government that Dewey and Hauser require is still available.

Using public sphere theory opens up the ways in which deliberation can take place allows the public comments to be considered as public deliberation.

Hauser's (1999) view that "rhetorical competence" is all that is needed to participate in public deliberation—as opposed to the ability to engage in critical-rational debate—allows individuals to participate in the rulemaking process in a variety of ways and have it count as participation. This view treats narrative, emotional, and passionate contributions to the public sphere as legitimate.

Applying public sphere theory in this way gives the discursive fragments in the regulatory rulemaking process an opportunity to be legitimized, meaningful discourse. For example, since Hauser theorizes that the vernacular is a process by which people participate, the mere act of sharing stories may count as sufficient for meaningful public deliberation.

Public sphere theory's recognition of interested positions on matters of "private" concern allows the regulatory rulemaking process to be theorized as a site for arguing about more than abstract issues. Rather, it permits the rulemaking process to be seen as a public sphere that also allows for deliberation about the material experiences of life (through narration for example), not only to debate certain points but to aesthetically express a view of the possibilities of a greater good. Public sphere theory allows the recognition of law as a terminology with

nodes of normative and even empirical ambiguity; accordingly, it provides room for dramatism to explore the motivations that exist in tension at these points of ambiguity.

Allowing for more modes of expression in the public sphere as legitimate, however, places more responsibility on the audience, particularly an audience like the state that controls access to the rulemaking sphere, to be receptive to those modes of expression. This shift in responsibility from rhetor to audience, from citizen to state actor, in the case of regulatory rulemaking, requires examining and considering how and why those shifts might occur.

Public sphere theory also allows one to theorize how the rules of regulatory rulemaking control the ways in which deliberation can take place. The regulatory rulemaking process is primary textual and technological—it occurs in virtual space and in chronological time. It involves an intersect with state actors, legal discourse, and vernacular discourses. It comes into existence by official acts and disintegrates again through the use of administrative rhetoric, which codifies into law some of the perspectives articulated in the deliberations while silencing others.

The ways in which the state creates sites for deliberation—not for itself but for others who wish to rhetorically engage the law—suggests the broadening of the concepts public sphere, counterpublic, and the political public sphere to account for a "facilitated public sphere." The "facilitated public" sphere is one where those who possess the power of "administrative rhetoric" (Burke, 1950/1969) create a discursive space for others to participate in the decision-

making processes and engage in deliberations with an eye toward influencing state decisionmaking. In essence, the state seeks to create a space for a public to emerge that can at least influence policymaking even if it cannot ultimately exercise decision-making power.

Facilitated publics implicate concepts in public sphere theory as well as concepts about law as a rhetorical construct. Habermas (1995, p. 447), in fact, asserted that the law must be established through systems that "guarantee the autonomy of all legal persons equally." Thus, when a state facilitates a public, it sets the rules for participation that may or may not guarantee open participation by all citizens. In addition, these rules may cause some participants in the discourse have more power and access to the space than others, and those participants, like public interest organizations, may have roles of their own to facilitate discourse participation by the less powerful. As Habermas (1995, pp. 366-67) offered, organizations of society "anchor the communication structures of the public sphere" and "distill and transmit such reactions in amplified form to the public sphere." This involvement of organizations in shaping discourse with the state raises questions about the ways in which individuals participate in a facilitated public.

Facilitated public spheres also raise questions about how counterpublics, in a facilitated space, operate. On one hand, the goal of the participant in the regulatory rulemaking process may not be to "resist" the state; rather, the goal of the participant may be to influence the state to adopt the views of the participant. In that respect, a participant can be both "oppositional," like a member of a

counterpublic, but also "dominant," like a member of the traditional public, seeking to engage the state in its own language and for its own purposes. At the same time, however, a goal of a participant may also be to resist the dominant interpretations of laws and regulations and to attempt to set out new laws and rules for participation. In this way, an individual may challenge the discursive norms of the state. In that case, the individual may function more like someone who is traditionally considered "counterpublic." These conflicting characteristics of participation emerge in the regulatory rulemaking sphere.

Finally, public sphere theory imagines the regulatory rulemaking "public" as one that is rhetorically constituted by the intersect of competing, complementing, and contrasting state, private, and civil discourse communities. Theorizing this deliberative process as rhetorical reveals that rulemaking is a recursive, multivocal process where, as Kenneth Burke suggested, law codifies custom and then reflexively informs it. In this process, the language of the law and the language of culture dance to construct new norms for attitudes and behaviors. Public sphere theory offers a way to imagine how those various discourse communities intertwine in the regulatory rulemaking process. This intertwining of the official and the vernacular, the state and the public, the public and the private, points to the final perspective informing this project, critical legal rhetorics.

Critical Legal Rhetorics

Critical legal rhetoric is a critical stance that uses law's rhetorical nature as a basis for its own critique. To better understand critical legal rhetorics, it is

useful to begin with the basic idea of how law can be understood not only as a rhetoric, but as a constitutive one.

Law as a constitutive rhetoric.

As a general matter, law does not view itself as rhetorical (Whetlaufer, 1990). Traditionally, law, and those who practice it, view the written words of the law as a language that provides transparent access to the meaning of "law" as intended by the author; the language chosen does not play a role in the meaning itself (Whetlaufer, 2000). From this point of view, law does not see itself as based on contingencies and probabilities; rather, it sees itself as an exercise of power and authority, a system of rules, a method of imposing social order that is objective, modern, formalistic, and acontextual (Whetlaufer, 2000). Law views itself as a discourse whose meaning is certain and ascertainable (Whetlaufer, 2000). For legal texts, there are no contingencies; there is "one right answer."

Whetlaufer (2000) explains that there are serious problems with denying law's rhetorical nature. First, imposing order through the law is not value free; legal decision making is complex, and it should not be oversimplified or ignore underlying value structures (Whetlaufer, 2000). Second, reading the law for a single meaning causes certainties of outcome to be overstated when there may be more than one right outcome possible (Whetlaufer, 2000). Third, looking at law as singular in meaning eliminates reading for possibilities and looking at texts for more than one meaning (Whetlaufer, 2000). Fourth, reading law for certainty marginalizes voices of challenge by overstating legitimacy of the existing system (Whetlaufer, 2000). Finally, and perhaps most importantly, reading law in a non-

rhetorical fashion avoids evaluating law as a language or discourse, as a means of persuasion or as a form of communication (Whetlaufer, 2000).

Another view of the law, however, sees law as communicative and rhetorical, embracing the contingency and constitutiveness of law's language as a potential site of positive social change. James Boyd White (1985, p. 28), a law and literature scholar, defines law as "a branch of rhetoric . . . by which community and culture are established, maintained, and transformed [and which] has justice as it's ultimate aim." White's definition involves three overlapping concepts that further illuminate why law can be considered a rhetoric and why, if law is not read for its rhetorical qualities, aspects of law's textual richness and importance are left unexplored.

First, law operates by persuasion and not scientific reasoning; White (1985) calls this law's "culture of argument." In a culture of argument, truth lies not in any set of propositions, but in the tensions that exist among competing views of the world (White, 1985). Thus, law creates a world not by articulating a set of rules, but by imagining what can be seen on the other side—to test one construction of reality against another (White, 1985). As such, law's meaning is uncertain; we cannot ever be sure about the meaning of legal language as it is perceived and used by others.

In considering law as a culture of argument, law as an expression of power and authority cannot be ignored. It is, however, power and authority expressed through language. As such, it involves articulating justifications that are designed to persuade us that the exercise of power is correct. This process of articulating

justifications through language results in law being perpetually made and remade by participants and demands that law be seen as a set of resources for claiming, resisting, and declaring significance thought and argument (White, 1985).

Second, law is both constitutive and discursive. Law is a situated communication—located in a contingent social world— that is based on language (White, 1985). Law is a discourse by which we constitute ourselves and our community, it is not merely a linguistic representation of that community (White, 1985). Law's language is influenced by the language and practices of the community in which it operates (White, 1985). Law has a recursive relationship with that community; at the same time it maintains and transforms the broader culture, the broader culture is maintaining and transforming the law (White, 1985).

Finally, law is communal. While law is a technical sphere, it cannot be separated from its relationship with the community it seeks to govern; it is situated within and is defined by that community. Law interacts with the broader culture and draws upon cultural resources in its language, while at the same time remaking those resources. As such, law creates community by providing a common language through which participants can describe and give shared meaning to the past, present, and future (White 1985).

Critical legal rhetorics; building on the concept of law as rhetoric.

Critical Legal Rhetorics (CLR) is a perspective that frames the law "between" formalist or foundationalist jurisprudential approaches and antifoundationalist, critical legal studies approaches. It advances a rhetorical view

of the nature of law (Hasian & Croasman, 1996) and asserts that the rule of law is neither a fixed set of universal principles nor the site of pure relativism, polyvalence, or indeterminacy (Hasian, 1994). Rather, both the "rationalistic legal paradigm," which relies on foundationalism, and the Critical Legal Studies view of law, which relies on perpetual relativism, "trivialize the realm of rhetoric" in the law (Hasian & Croasman, 1996, p. 390).

CLR looks at law from the point of "ordinary language" and asks whether the language of the law comports with our communal experience of it. It asserts, consistent with both dramatism and public sphere theory, that, first, the rule of law is a pragmatic symbolic construct (Hasian & Croasman, 1996). Second, it sees law as overly determinate rather than indeterminate (Hasian & Croasman, 1996). Specifically, "[b]ecause laws come from public deliberation and argumentation, there are always more choices available than are selected" for expression within the law (Hasian & Croasman, 1996, p. 393). Third, it holds that the "deconstructionist" approaches of Critical Legal Studies are only part of the relevant work to be done with critical assessments of the law (Hasian & Croasman, 1996); rather, the goal of deconstructing the law should lead to rhetorically reconstructing it as well. Finally, CLR sees law is practical, not just theoretical, and considers it a "language directed toward coping with practical goals" (Hasian & Croasman, 1996, p. 393), a discourse that is both constitutive and dependent upon "audiences, prior texts, and real-world contexts that create identities and relationships" (Hasian & Croasman, 1996, p. 394).

CLR looks at law as a "performance" that uses symbolic constructs to meet rhetorical exigencies, and can be examined to determine if our "communal experience" of the law comports with law's language. Absent the characterizations, ideographs, and narratives of the surrounding public discourse, law has no meaning (Hasian, Condit, & Lucaites, 1996). The "cultural resources" of law come from the public discourse to inform legal discourse; law cannot exist apart from the public vocabulary and the larger rhetorical culture (Hasian, Condit, & Lucaites, 1996). Hasian (2000) notes that "rules of law" are co-produced by the interaction of participants in both the legal and public sphere.

To view law from a CLR perspective means to view law as a rhetorical process, one of creation and constitutiveness. This perspective requires that scholars do more than "trace" the official discourses of law; rather, critical legal rhetorics exposes not only the dominant discourse but also makes room for "vernacular" voices that provide alternative views (Hasian, 2000). It encourages scholars to "look at law as a process or a performance rather than as a finished product waiting to be discovered" (Hasian & Croasman, 1996, p. 396). Scholars can critique law using a wide variety of rhetorical methods in the CLR perspective—"characterizations, narrative, myths, and other discursive units" are all available for analysis (Hasian, 1994, p. 55). CLR promotes informed interpretation of the law, giving voice to marginalized communities. According to Marouf Hasian, Jr., the leading scholar of CLR, the theory allows for "localized studies" of law to show how it is "produced and instantiated through particular power relationships" (1994, p. 54).

Shaping a Theoretical Synthesis

The perspectives of dramatism, public sphere, and critical legal rhetoric offer a robust theoretical position for thinking about the rhetoric of work and family in the regulatory rulemaking process. Together, they permit a view of law as a discourse provides a public, weighted vocabulary for talking about the experiences of everyday life. As Burke (1976/1984, pp. 341-342) suggests, law provides a "public grammar" that is part of a "complex technique of 'checking' one's assertions by public reference." This vocabulary, however, does not exist in or emanate from the legal sphere alone; it is always contingent upon the larger public discourse, which provides the prevailing values and social realities as well as an interpretive context for determining what the law "means."

Moreover, dramatism and public sphere theory share common concerns about the law as a discourse; in both views, law is a "bridge" built of language that socially orients individuals to particular values and norms when other cultural languages have failed to do so. In Burkean terms, the public sphere is in many ways the "Human Barnyard" (1950/1969), a publicly accessible site where issues of common concern arise. Accordingly, both dramatism and public sphere theory share an orientation toward exploring rhetoric required to navigate the settings where individuals engage one another.

Second, both theories "lean against" the "efficiencies" (Burke, 1931) of the law in an effort to expose its inner workings to ensure the survival of democracy. To accomplish this, Burke (1931, p. 115) would look for the "modes of appeal" in the law to "throw into confusion the code which underlies the

commercial enterprise, industrial competition, and heroism of economic warfare." Contemporary views of public sphere theory, similarly, are concerned with the ways in which the "dominant public sphere" has the ability to oppress other publics and "set out the spoken and unspoken rules for public speech" (Squires, 2002, p. 450). Thus, although the accessibility of individuals to debate in the public sphere would be the primary concern for public sphere theorists, they join Burke in his concern that discourses must be challenged for their limiting nature to avoid the problem of "cultural consumption," a concern that John Dewey (1927/1954) raised when he wrote about the "public" in "eclipse."

Third, all three perspectives are concerned with the ways in which legal language is connected to the construction of identity or to establish identifications. Public sphere theory would offer that law is both normatively and factually ambiguous and provides a strategic resource for identity through speech that is motivated by a desire to induce cooperation (Habermas, 1995). Burke (1950/1969), similarly, sees language as often full of ambiguities calling for rhetoric that is motivated by a strategic desire to create identification in areas where division exists. Perhaps the statements in the public sphere (such as those in the notice and comment period of regulatory rulemaking) are ones that are an attempt to develop a shared motivation for work and family. And, even if the regulatory rulemaking process is not directly deliberative in that individuals do less to address each other in debate but focus their efforts on influencing state actors, the rulemaking process is still a site, in Burkean terms, where individuals attempt to influence how identities will be built into the law through particular

terms and representative anecdotes. Moreover, Asen offers that public spheres for policymaking do not need to be deliberative; circulating texts that provide "'speaking positions' that various advocates could adopt" (2010, p. 133) are enough to establish legitimacy of rulemaking processes.

The view of the public sphere as rhetorical is consistent with Burkean views regarding the primacy of language in shaping thought. Hauser (1999) notes that public spheres require that individuals share enough of a lifeworld to be able to have sufficient understanding of contextualized language. "Controlling language in which issues are discussed determines how they are expressed, relevance of experience, and expertise in adjudicating the issues they raise" (Hauser, 1999, p. 78). So, where the official and the vernacular languages intersect, there will be a struggle between languages to determine which one will dominate the discursive sphere, and both dramatistic theory and public sphere theory will be interested in that intersect.

Moreover, as Burke suggests and Hauser agrees, the dominant language will serve as a vocabulary of motives, an "index to the symbolic resources that contain the norms and values of groups and classes" (Hauser, 1999, p. 78). "Rhetorical considerations," Hauser (1999, p. 35) notes, "provide conceptual and critical purchase to better explore the ways in which the conversations within and between publics shape society." Amsterdam and Bruner reflect this synthesis regarding how legal language functions in a public sphere. With respect to the law in particular, they note that "commonplace legal rhetorics function to narrow the range of discursive space and interpretive possibility" (Amsterdam & Bruner,

2000, p. 193 (emphasis omitted)). Stated in dramatistic terms, law provides a terministic screen for the reflection, selection, and deflection of realities. And when law is seen as terminology, or in other words, as communication, it becomes more accessible—instead of being a mystery to most individuals, it becomes "accessible to the people over whom it reigns" (Klinger, 1994, p. 8). Thus a view of law as a public terminology allows for greater agency of the individual for "solving problems that continue to adhere in the human condition" (Klinger, 1994, p. 8).

Ultimately, identification and division between individuals interacting in a society are an invitation to rhetoric to bridge the chasm between separately embodied beings using language. Those divisions commonly take place in "public," where matters of concern are addressed by those who directly, indirectly, publicly, or privately experience the consequences of, among others, the state's policymaking activities. And, when these divisions are addressed rhetorically, they ultimately involve the intersect of official legal discourses with vernacular ones. In sum, this is the theoretical position that underlies this project.

Chapter 3

THEORIZING WORK AND FAMILY IDENTITY AND THE LAW

Social constructivist luminaries Berger and Luckmann (1966) characterize identity as the "subjectification of reality." That is, the "self" is socially constituted identity; constituted from the ways in which individuals mutually identify with one another and participate in each other's beings (Berger & Luckmann, 1966). From their view, then, identity emerges from the public dialectic between individuals and society. Kenneth Burke (1950/1969) also concluded that all of human interaction was based upon "mutual identification," which he determined was the attempt to overcome division and to create identification with others. If we can identify with one another, Burke (1950/1969) thought, we can overcome division. And, when individuals identify with one another, they shape identities both dependent upon and to some degree consubstantial with those others. In Burke's view, then, identification is the process of rhetorical exchanges, and identity is thus the product of rhetoric.

In the context of communication studies in work and family, communication scholars (Buzzannell & Lui, 2005; Golden, 2000; Kirby & Krone, 2002) adopt the social constructivist and dramatistic view that that identity is discursively constructed and is a product of the mutuality of human communication processes. They overtly recognize that work and family identities come not only from interpersonal interactions but from interactions with socially and officially circulating texts (i.e., macrodiscourses) in the public sphere (Kirby, Wieland, & McBride, 2006), which also has been recognized by public sphere

theorists as a site of identity enactment and development (Fraser, 1992). Through this lens, law can be regarded as an official macrodiscourse that is a discursive resource for work and family identity construction.

This chapter addresses the theoretical underpinnings for rhetorical construction of "legal" work and family identities by demonstrating the connection between concepts of identity as discussed in dramatistic theory, in communication work/family scholarship, in public sphere theory, and in the construction of legal discourse. Ultimately, this chapter concludes that work and family identities in legal discourse are fluid and multiple, that socially circulating institutional discourses like law are public resources for constructing work and family identities, that identity has a distinctly dialectical character, and that the law is a "scene" for the construction and enactment of legally informed identities. In sum, it asserts that identity as expressed in the law and in regulatory discourse is a rhetorical vocabulary of motives that operates to define the subject's identities as worker, employer, or family member, and the community, such as the workplace and homespace. ⁵

⁵ Critiques have been lodged against identity theories as being reductionist, simplistic, essentializing, and overly deterministic; increasing conflict among groups and individuals,' as an enemy to rational thinking; as interfering with political coalition building or with "rational deliberative democratic procedures"; and as overemphasizing difference (Martin-Alcoff, 2006).

Although this project's focus is not to address criticisms of identity per se, a few responses are worth mentioning here. First, this project seeks to complicate the concept of identity rather than to simplify or reduce it by considering how identity is rhetorical—how it is a situated communicative performance. Moreover, the project seeks to understand how identity operates in the deliberative, "rational" realm of the public sphere. Consistent with Hauser's (1990) view of rhetoric as definitive of the public sphere, this project sees the

Identity is Fluid and Multiple

"[D]ramatism holds that our words define us, that our identities are but composites of our symbol systems." ~ (Blakesley, 2002, p. 6)

In *A Rhetoric of Motives*, Kenneth Burke (1950/1969) adds "identification" to Aristotle's "persuasion" to enlarge the definition of rhetoric. Although identity and cooperation were not always considered to be goals of rhetoric, Burke (1950/1969, p. 43) saw it differently; he defined rhetoric as "the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols." In other words, identification was an effort to overcome division in the "scramble" of the "Human Barnyard" (Burke, 1950/1969, p. 23). This identification takes place in areas of ambiguity between individuals who seek consubstantiation. Accordingly, in situations where individuals cannot know for certain where identifications begin and division ends, there is an invitation to rhetoric (Burke, 1945/1969, p. 20). Some scholars have asserted that engaging in identity discourse is such a concern in the modern world that identity can be a greater motivator for individuals than money (Cheney, 1983).

communication of identity as essential to understanding how identity relates to the complexities of public discourse and deliberative procedures in a pluralistic world. And finally, this project views identity as the product of the interaction between sameness and difference; between identification and division, seeking to understand the relationships between the two. Conversely, one might argue that identity is the key to sameness, not difference. Ultimately, rhetorically constructed identities are relevant to the arguments we make, because in making those arguments, individuals work toward sameness, toward what is common and consubstantial, rather than what is different.

Identity, in dramatistic terms, is not biologically fixed even though biology (i.e., embodiment) may be considered the prelinguistic condition of identity (Anderson, 2007, pp. 30-31). Instead, identity is a "rhetorical self: lived through "communicative practices of speaking, listening, narrating, acting, working, playing" (Anderson, 2007, pp. 167-168). "[I]dentity is not an 'essence' that one has, but 'a process, a social, symbolic, linguistic process'" (Anderson, 2007, p. 27). Identity is found in an individual's "complex of attitudes . . . that constitute the individual's orientation (sense of 'reality,' with corresponding sense of relationships)" (Burke, 1935/1984, pp. 309-10). Communication scholars addressing how our "talk" shapes our experiences as workers and family members view work/family discourse as consistent with this concept of the fluidity of identity (Farley-Lucas, 2000; Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003), and they agree that identity is a symbolic product of communication processes (Scott, Corman, & Cheney, 1998, p. 305).

Identities are produced through identifications that are not fixed or final (Anderson, 2007, p. 28). Identity is "not lived as a discrete and stable set of interests, but as a site from which one must engage in the process of meaning-making and thus from which one is open to the world" (Martin-Alcoff, 2006, p. 46). Identity "exists in interpretation and in constant motion" (Martin-Alcoff, 2006). Public sphere theorists also recognize the fluidity of identity in public discourse: "Through discursive engagement, individuals and groups construct identities, shape needs and interests, and build forums and networks, among other activities" (Asen, 2009, p. 283).

Because of this lack of fixity, individuals can have a shifting sense of self as well as a shifting perspective or orientation to the world. In a sense, these shifting perspectives are the "perspectives by incongruity" that Burke describes when he discusses process of "weighting and counter-weighting" in language (1937/1984, p. 311). "Perspectives by incongruity . . . are obtained by 'seeing from two angles at once' . . ." (Burke, 1937/1984, p. 269); similarly, a shifting sense of self can position individuals to view situations from multiple viewpoints at once. The multiple viewpoints might be likened to Tracy and Trethewey's (2005) notion of a crystallized identity, where in multiple identities are experienced simultaneously.

Identity can be thought of not only as fluid instead of fixed but also as multiple instead of singular. Burke regarded "identity" as a unique combination of conflicting "corporate 'we's" (1937/1984, p. 264), and work/family scholars recognize this as well, speaking of "identities" instead of "identity"—multiple rather than singular (Tracy & Trethewey, 2005, p. 168). Individuals are capable of holding multiple, yet integrated, identities (Kuhn & Nelson, 2002), an amalgam of these "corporate 'we's" which are are subject to shifts when societal norms create conflicts between those "corporate 'we's" (Burke, 1937/1984, pp. 268-269). That is, in some contexts, certain identities will emerge as primary or preferred, while other become secondary or marginal (Kuhn & Nelson, 2002). When faced with conflicts between identities, individuals will "choose among valued identities" in order to alleviate the conflict (Kuhn & Nelson, 2002, p. 11).

Law as a discourse has been characterized with the fluidity to encompass the idea of shifting identities. Law is not a "static inventory of norms and traditions"; rather, it is a "dynamic social phenomenon, continuously forming and being formed by human thought and social behavior" (Mitnick, 2006, p. 825). Although law can be seen as an identity discourse that has the characteristics of fluidity necessary for the discursive construction of identity, legal terms themselves have a difficult time simultaneously reflecting multiple identities in a single term. Cheree Carlson (2009), in her work on the construction of gender in the courtroom, makes note of the difficulty law has with multiple identities in one body. She notes that the postmodern condition requires that multiple identities occupy one body, but that a person must go to court with one legal identity (Carlson, 2009). Law's inability to accommodate multiple identities in single terms is consistent with Burke's (1937/1984) recognition of the essentializing function of legal language—law, in order to be effective as an authoritative discourse and to be efficient, to meet its own anti-rhetorical goals of being subject to only one meaning (Wetlaufer, 1990), requires it to disayow the possibility of persistent multiple meanings in single terms.

This reflection of one identity at a time in legal terminology is consistent with Carlson's statement that language in general is a site of teleology or "symbolic" perfection (2009, p. 166). That is, legal identity terms are likely to be "god terms" or "ultimate terms" in the Burkean (1950/1969) sense because they respond to the human need for perfection, hierarchy, and order. In the regulatory process related to work-family regulation, for example, one might see terms that,

at least on their face, construct a "perfect," singular identity for workers and family members. Below the surface, however, these god terms likely reflect a merger of oppositional identities masked by hierarchy.

In summary, rhetorically constructed identities, both in Burkean terms and in the terms of work/family communication scholars, are fluid and multiple.

While law is a discourse that is capable of accommodating shifting meanings over time, it has trouble with its terms encompassing more than one meaning at a time. Accordingly, those terms, if examined closely, will reveal tensions beneath the surface about work and family identities, since, by its very nature, the singularly embodied experience of work and family is a contested one.

Institutional Discourses and Resources for Identity Construction

Burke's view was that there can be no participation in the social collective without making efforts at identification. "Identification," Burke noted, "is hardly other than a name for the function of sociality" (1937/1984, pp. 266-67). Identity, then, according to Burke, becomes a function of public interactions in a broader context, and identity is "discourse aimed at gaining another's cooperation in the creation or defense of the rhetor's desired identity" (Crable, 2006, p. 3). Identity is not just who I am but "who I am through a definition of where I am speaking from, and to whom" (Anderson, 2007, p. 168).

This socially positioned identity "marks on an advocate's discourse" in a partisan way (Asen, 2009, p. 271). That is, circulating discourses position individuals as speaking members of publics and serve as constraints on identity, advantaging and disadvantaging individuals in public discourse (Asen, 2009).

"[N]o speaking position is neutral[;] all speaking positions reveal interests experiences and worldviews. . . . [A]n individual's experience of discourse and materiality imposes constraints on one's textual persona. Identity may emerge socially as a fluid contingent construction, but we do not create self-representations from a *tabula rasa*" (Asen, 2009, p. 270).

Communication scholars studying work/family have likewise recognized the "publicness" and intersectionality of identity; identity "emerges out of reflexive social interactions with others" within organizational and institutional discourses that provide subject "positions" for experience (Tracy & Trethewey, 2005, p. 179; Weedon, 1997). Thought of slightly differently, in order to create a self, individuals engage in the process of identification, drawing upon available institutional and language resources that can be reproduced as their own identity (Kuhn & Nelson, 2002, p. 11). Even scholars in the area of economics now recognize identity as "interactionist," emerging from "social interactions and power relations" (Akerlof & Kranton, 2010, p. 25).

In contemporary society, articulated norms, policies, and practices along with social interactions with others provide "discursive resources" or "institutional scripts" (Gioia & Poole, 1984) for creating particular identities. These discursive resources are "socially constructed frame[s] drawn from a culture or subculture that enables members to assign meaning to . . . activity," (Kuhn & Nelson, 2002, p. 12) and they invite those organizational members to enact particular identities (Tracy & Trethewey, 2005, p. 172).

With respect to work and family identities, resources for constructing identity generally are consistent with the public/private divide between work and family and with a masculine norm of what it means to be an "employee" (Williams, 2000). The "dominant organizational logic" offers employees an identity consistent with the "ideal worker standard": employees should be "a male worker whose life centers on his full-time, life-long job, while his wife or another woman takes care of his personal needs or children," or they should "act" like that male worker (Acker, 1990, p. 149). Conversely, the "private" characteristics of identity such as nurturing or focus on relationships (Trethewey, 2006, p. 206), such as those of dependency, are generally less visible in the workplace.

Like other organizations, the language of legal institutions "constitute aspects of . . . human social identity" (Mitnick, 2006, p. 823). As a "constitutive rhetoric" (White, 1985), law provides a set of identifiable cultural resources upon which participants can draw to creatively remake the law through rhetorical exchanges. The cultural resources of law are ordinary language, which the law borrows from (and consquently contributes back to) the larger rhetorical culture; law cannot exist apart from everyday language (Hasian, Condit, & Lucaites, 1996). Burke implicitly recognizes this relationship between law, a kind of specialized, expert activity, and the broader culture when he notes that "[a]ny specialized activity participates in a larger unit of action" (1950/1969, p. 27).

From a rhetorical perspective, then, law discursively frames the way everyday identities are viewed. Because legal rules create categories based on "socially salient characteristics" (Mitnick, 2006, p. 828), social relations are

"permeated with law" (Mitnick, 2006, p. 824). Law defines roles and gives them meaning (Mitnick, 2006). For example "'[c]onstructions of maternity, biology, identity, and love are influenced by many factors, including laws and institutional policies" (Ayres, 2009, p. 284, quoting O'Donovan, 2002, p. 369). In dramatistic terms, law provides particular motives for enacting identity; it coaches attitudes, and it privileges some realities over others.

Law not only frames social relations and crafts social identities, law orders those relations and identities into hierarchies as well (Kuhn, et al., 2008). In Burkean terms, law might be deemed an extrinsic "order of motivation" (1950/1969, p. 27), one of the broader discourses that constructs and constitutes individual identities. Law's messages, then, can be seen as "symbolic . . . enactments of identity" (Scott, Corman, & Cheney, 1998, p. 305).

The notion of law being an order of motivation implicates Burke's (1950/1969) concerns about the ordering effect of discourse—mystification and hierarchy. First, he notes that society is built upon the concept of "mystification." Mystification is the act of the ruling class to make ruling ideas separate from ruling class (Burke, 1950/1969, p. 111). These expressions of past ruling classes survive in fragments without specific reference to the situations where they arose. Accordingly, mystification is a byproduct of written word and establishes the groundwork for interactions with strangers in the social setting (Burke, 1950/1969, pp. 111, 115). Mystery calls for rhetoric, for identification, to overcome the divisions that mystery establishes (Burke, 1950/1969, p. 115).

Hierarchy is related to mystification. For mystification to operate, it must have a sufficient merger of opposites in singular ideas to cloak distinctions between groups. Accordingly, hierarchy allows one idea, one identity, in a system to become the culmination of a hierarchy, an image that is deemed to best represent an idea (Burke, 1950/1969, p. 141).

Mystification and hierarchy are part of larger institutions and cultural systems, like, for example, law. The written words of the law are fragments of authority that, even though originating in response to specific historical conditions, are separated from those conditions by time and abstraction. As a result, law, simply by virtue of its separation from historical conditions of its creation, calls for the processes of identification to overcome its mystery. Moreover, law can be seen as an institution or social system that sets up a hierarchy of terms, a culminating language to best represent particular ideas or identities associated with a dominant doctrine, like the doctrine of work and family. Within this doctrine, conflicting ideas merge into singular concepts that invite rhetorical responses.

In summary, identity is a product of sociality and publicness. Public discourses, like the law, offer discursive resources for individuals to use and to interact with when constructing identity. Law, as a discourse of authority that is committed to abstract categorizations and hierarchies of terms can be expected to create order in those terms. That ordering is also a process of mystification that separates the original scene of the legal enactment from its later application. As a

result, legal terms expressing work and family identities can be expected to the be locations for the merger of opposites.

Identity's Dialectical Character

Burke (1945/1969; 1950/1969) viewed identity as arising from a dialectical process that resulted in transcended conflicts or merged opposites. Burke's concept of identity as a "terrain of dialectical transformations" (Anderson, 2007, p. 32) is consistent with Tracy and Trethewey's (2005) view that identity is one's notion of self within a particular context, produced by competing, fragmentary, and contradictory discourses. Crable (2006) further suggests that a dramatistic view of identity is consistent with identity as a struggle between opposing forces.

Consistent with contemporary identity theory in work/family, Burke (1937/1984, p. 266) described this identity dialectic with an example of the conflict between love and duty. "Duty" is a shorthand for "identification with some larger corporate unit," whereas love is an identification with a "partnership of two" (1937/1984, p. 267). Moreover, he noted that it is natural for individuals to identify with the business corporations they serve as well as with the "corporate identity of family" (1937/1984, p. 267). This recognition of the conflict between identification one's work obligations and the identification with one's family members might be seen as an example of the conflicting motivations that lie within work and family identities similar to the conflicting motivations between love and duty. This conflict is one that certainly would arise in discourse about those concepts.

Another expression of the dialectical nature of identity is in the role of Burke's (1945/1969) "scapegoat." Burke's (1945/1969) view was that in the original state of order, a scapegoat shares the identity and inequities of the larger group. But when disorder occurs, the inequities of the whole are ritualistically divided out and placed into the scapegoat (Burke, 1945/1969). Those who seek to distance themselves from the scapegoat then merge in dialectical opposition to the scapegoat in a "purified identity" (Burke, 1945/1969, p. 406). The purified identity, which will possess characteristics unique from the scapegoat, will then be defined by its own terms; this is an example of Burke's observations that identities are localized in terms which then have "potentialities" for meaning of their own (Burke, 1945/1969, p. 414).

Burke's dialectical view of identity is analogous to the public sphere dialectics of engagement/withdrawal and public/private. Mansbridge (1992) asserts that individuals have the ability to "oscillate" between identities that either engage the public or withdraw from it. Moreover, discourses of the public sphere are the result of what is defined as public, as topics appropriate for public discussion, rather than private (Fraser, 1992). Consistent with this public/private divide, Burke (1945/1969, p. 106) saw identity as a product of the shared reality that is created when one allows a "private point of view to be replaced by a public point of view." For example, Asen and Brouwer (2001) note that to make a private issue public, to make an issue part of Burke's "shared reality," one can make the private issue an issue of justice, so that the issue presented has larger cultural implications and becomes part of the shared reality. This connection

between a shared reality and the public sphere supports identities expressed in legal texts as public issues because they implicate how individuals socially determine and instantiate their shared realities.

In summary, work and family identity in the law is a product of public dialectic. Work requires that an individual identify with a business unit while family requires identification with "love," or in other words, intimate connections to fulfill needs other than economic ones. To resolve this dialectical tension, symbolic mergers that combine conflicting identities into a single identity might be expected, or the dialectic might result in a scapegoat followed by a symbolic merger of the remaining identities into a "purified" and unifying whole. Moreover, taking a cue from public sphere theory, terms that encompass identities might be expected to oscillate between engagement of work and withdrawal from it and to craft family identities in a similar way. Finally, similar oscillation might be expected in terms of the ways in which issues are made public and private, recognizing that terms will only reflect those identities that can be publicly represented in legal terminology, and identities that remain private may be invisible in legal discourse—subject, of course, to shifting, as the bounds between public and private are drawn and redrawn.

Law as a Scene of Identity Construction

In addition to providing a way to understand institutions and systems as part of the rhetorical creation of identity, Burke provides a way to envision the law as a scene in which work and family identity discourses circulate. Anderson (2007) sees Burke's concept of "constitutions" as creating a scene for enacting

identity. Burke defined constitution, in legal terms, as "an act or body of acts (or enactments), done by agents (such as rulers . . .) and designed (purpose) to serve as a motivational ground (scene) of subsequent actions, it being an instrument (agency) for the shaping of human relations" (1945/1969, p. 341). The constitution is a scene for judgment, and that constitution is also available to substantiate judgment (Anderson, 2007, p. 42). Even in this scenic sense, constitutional principles have the potential to be dialectical, however, which means that when discussing the concept of identity, even the scenic elements of identity are open to rhetorical reconstruction (Burke, 1945/1969).

Constitutions operate as a circumference for identities (Anderson, 2007, p. 48). This circumference sets limits on a constitution's potentialities with respect to the identities that can emerge from the constitution (Anderson, 2007, p. 48). Any identity that appears within that circumference is an act of interpretation that makes the choice of circumference apparent. For example, the Family and Medical Leave Act provides a constitution of terms that, subsequently, sets a circumference on how the FMLA can be reasonably understood. In the FMLA, a term like "family" becomes a "god term"—a term that seeks to sum up an entire situation. Stepping down from that god term (Anderson, 2007, p. 44) to a term like "mother," another term that appears in the FMLA, is an interpretation of identity that reduces the circumference of possibilities for that identity. Identity, then, is a strategy: "Like all symbolic action, the expression of identity is a strategy, a way of addressing a situation in order to transform it" (Anderson, 2007, p. 56).

Similarly, public sphere scholars have recognized that "[public spheres] are arenas for the formation and enactment of social identities" (Fraser, 1992, p. 125). Thus, the enactment and construction of identity in public spaces has the "potential to create new political realities within the open-ended possibilities of a democracy" (Hauser, 1999, p. 17). The possibilities for political transformations only go so far, however; public spheres have been characterized as "culturally specific rhetorical lenses" that can accommodate only so many identities within that frame (Fraser, 1992, p. 126).

This recognition of the limiting effect that public spheres have on identity harkens back to the issues of identity that John Dewey (1927/1954) implicitly raised when he complained about the question of community and the complexity of modern society. As Dewey (1927/1954) recognized, technology, communication advances, and media—the scene of the discursive public sphere—have made it more difficult for publics to have self-awareness, for individuals to recognize themselves as members of a group with particular concerns. Similarly, these scenic elements can constrain the ways in which identity can be understood by the discourse participants even if they were able to recognize themselves as a public in the first place.

This same rationale applies to the law as a constraining scene on the construction of identity. If Dewey were confronted with the question of work and family in the context of regulatory discourse, he might offer that the communicative interactions of workers, family members, and others are limited by the rhetorical boundaries of the language of the law.

Communication scholars considering work/family in terms of "scene" have recognized how the discursive constraints have been rhetorically constructed to constrict the work and family identities. Some scholars have criticized the characterization of work and family as competing spheres, segmented roles, and separate times (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003). These characterizations "perpetuate an ideology of separate worlds, which holds that work and home are bounded in space and time, carrying out autonomous functions according to distinctive rhythms" (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003, p. 6).

Kirby and her co-authors (2003) attempt to recharacterize the scene of work and family relationships as a scene of empowerment consistent with Burke's recognition that the scene of identity—as well as identity itself—is open to dialectical transformation. In that scholarship, work and family are placed in a scene of "social structures and material conditions" that provide discursive resources for and limitations on the symbolic management of identity (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003, p. 14). Because of its relationship to symbolism, identity is not just an effort to avoid conflict but to gain a "positive accomplishment of personhood" (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003, p. 14). In the empowerment view, the scene of structures and material foundations is directly linked to the act of accomplishing personhood, and the enactment of personhood as well as the scene in which it occurs, share, as do all good Burkean ratios (1945/1969), a commitment to symbolic constructions.

Building on this concept of situating work and family issues within an empowerment "scene," I theorized in previous work (Davis, 2010) an "empowerment identity" approach to understanding the construction of work and family identities in legal discourse. That approach calls for recognition of workplace regulations as sites where individual identities are communicatively and socially constructed and reconstructed. Laws are discursive resources that enable individuals to construct identities that give them, in Burkean terms, "equipment for living" as workers and family members. Viewing regulations from this perspective reveals (1) how they act as modes of appeal and sites for identification and division and (2) how they constrain or empower individuals to enact particular work and family identities.

In summary, law acts as both a resource and a scene for the construction of work and family identities. As a scene, it is also amenable to rhetorical construction and reconstruction; thus, the ways in which the law is constructed impacts the identities that can emerge from it. This construction can be bounding or empowering to identity.

Approaching the Study of Identity in Regulatory Rulemaking

Because identity is so basic to being social and being human, it is often taken for granted. This taken-for-granted status gives identity a "rhetorical status with a powerful rhetorical warrant" (Anderson, 2007, p. 162), a warrant that is often uninterrogated. The literature about identity provides a means to interrogate the warrants of work and family identities at the intersect of vernacular and official discourses.

Law provides a motivated vocabulary *from* which to draw identities and *within* which engage in the process of identification. These "legal" terms represent mergers that conceal within them the conflicting "corporate 'we's"—the unique components of identity—that constitute them. These terms also provide a scene—a constitution—that provides a circumference from which to draw identities, a circumference that is limited by the range of motivations for work and family that can be found within legal terms. Even though they are limiting, they are also ambiguous, capable of concealing conflicting meanings. This ambiguity in these terms of identity, then, is a resource for rhetoric—a resource for creating and recreating new identifications within and for legal texts. As such, because it is the task of the critic to "study and clarify the resources of ambiguity" (Burke, 1945/1969, p. xix), it is also the job of the critic to study and clarify the resources of identity and to understand how these points are also points of transformation.

Applying the concepts discussed in this section to the regulatory rulemaking setting requires a synthesis of ideas about rhetoric, identity, work and family, and law. First, identity as worker or family member can be seen as the process of *identifying as* a worker or family member, of using rhetoric to overcome conflict in those roles and seek consubstantiality with others on the meanings of those identities. As a result, these identities are always a product of the "public"—of interactions with others in discursive domains. The regulatory rulemaking process, where individuals interact with each other and the state to debate administrative law, is one of those public domains.

Moreover, identities as family members and workers are always in progress, in rhetorical transformation. Thus, static notions of identity of worker or family member—even as those identities are defined in the law, for example—cannot fully explain the discursive transactions that continually redefine the terms. Looking at the processes in the regulatory rulemaking process can shed light on the "in progress" nature of identity.

In addition, law is a site where the hierarchal arrangement of conflicting "corporate 'we's" is subject to debate and then, finally, to merger into terms that subsume them in strategic ambiguity. As a result of that ambiguity, the individuals, in everyday experience, may struggle to translate those legal identities into lived experience, often with mixed results. Nevertheless, the law provides a discursive resource, a constitution of sorts, a vocabulary of motives, for ordering and reordering identities. Looking at the intersect of the vernacular and the official texts in the regulatory rulemaking scene can reveal the nature of the struggles in translation and in the resources of ambiguity available to individuals in the law.

Law's tendency to merge opposites in ultimate terms can be explained in part by Burke's concept of "purified identity" and Carlson's references to law's inability to entertain multiple identities. Conflicting commitments regarding work and family become lodged in legal terms and experience a certain amount of calcification and lack of fluidity. This is because of law's tendency toward certainty and overdeterminancy. Moreover, they are likely to reflect common understandings of the relationship between work and family rather than novel

ones. Yet, those terms still carry the rhetorical residue of their previous struggles of meaning and are open to struggles over meaning. The terms of the regulations in the regulatory rulemaking process can be examined for their purified identity as well as their rhetorical residue.

Ultimately, law can be seen as one "constitution" or "scene" for the performance of identity; it is an institutionalized vocabulary that employers, workers, and family members draw upon to define themselves, their relationship to one another, and their community. This "constitution," like others, is a site of tensions; of tensions between expert rationalities and vernacular "reason," between powerlessness and empowerment. Kirby and co-authors (2003) as well as Tracy and Trethewey (2005) suggest that the successful navigation of work and family turns on what identities are available for constructing roles and moving between or integrating them. Therefore, investigating the regulatory rulemaking process can reveal the tensions defined in the work-family literature and explain how they discursively and rhetorically operate.

Ultimately, identity is a horizon from which an individual "takes in" experiences; it is a way of knowing who and where we are (Martin-Alcoff, 2006). Identity is linked to law because different experiences and perspectives are necessary to a fully representative government; thus, it is necessary to take "identity into account in formulating decision-making bodies or knowledge producing institutions" (Martin-Alcoff, 2006, p. 44). As such, Martin-Alcoff says that "we don't need to overcome identity as much as to more deeply understand

it" (2006, p. 46). The deeper understanding of identity and the ways in which it is discursively constructed is the goal of this project.

Chapter 4

CONSTITUTIVE RHETORIC: THE REGULATORY RULEMAKING PROCESS AND THE FAMILY AND MEDICAL LEAVE ACT

When Congress passed the legislation known as the Family and Medical Leave Act of 1993 (FMLA), it included in the legislation what is known as an "enabling" statute that allows a regulatory agency, here, the Department of Labor, to "prescribe such regulations as are necessary to carry out [the provisions of the FMLA] not later than 120 days after the date of the [FMLA's] enactment" (FMLA, 29 U.S.C. § 2654). With this language, Congress empowered a federal administrative agency, the Department of Labor, to promulgate regulations to "carry out" the FMLA's mandates. Since that time, the Department of Labor promulgated extensive FMLA regulations in 1995, amended those regulations in 2008, and in 2012, began the process of amending them once again.

The process of promulgating FMLA regulations involves a process known as "notice and comment" rulemaking, the procedures for which are described in a federal statute, the Administrative Procedure Act (APA). Key to the notice and comment rulemaking process is "giv[ing] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" (APA, 5 U.S.C. § 553). The persons contemplated by the APA include "an individual, partnership, corporation, association, or public or private organization other than an agency" (APA, 5 U.S.C. § 551).

This process of offering data, views, and arguments on the content of regulatory rules is the kind of process Rob Asen describes as "policymaking"

(2010). According to Asen, policymaking "occurs as debate participants attempt to persuade others to support particular programs and outcomes" (2010, p. 129). These participants can number in the hundreds and thousands, and as such, the themes of policymaking are diverse and the texts fragmented (Asen, 2010). The resulting policies, however, maintain and enforce the meanings that emerge victorious from the process (Asen, 2010). Asen (2010) notes that policymaking, like the kind contemplated by the APA, represents a discourse of power that mediates between rhetorical and material (i.e., money, goods, and services) forces.

The FMLA regulatory rulemaking process takes place in a state-created discursive space where state actors and members of the public (i.e., the "public" here being a discursive construct made up of individuals who have identified themselves as sharing common concerns) engage in partisanship, identification, dissent, and meaning-making. State actors inform the public of the proposed content of regulations via a source called the Federal Register and invite the public to comment. By proposing content, the state "select[s] problems from an already established agenda" (Asen, 2010, p. 139). And in return, the public responds with messages about the propriety of that content. Because the regulations will ultimately create abstract categories for the purposes of ordering legal terms and identities, this process of the public interacting with the state about the content of regulations necessarily implicates questions of identification and division, central to dramatism's view of rhetoric (Burke, 1950/1969).

Moreover, since the process takes place where the state intersects with multiple

publics, public sphere theory offers language for considering the relationship between vernacular and official discourses in rhetorical public spheres.

Accordingly, this chapter first discusses the history of the FMLA and its regulatory processes. Then, it turns to a discussion about the regulatory rulemaking process more generally, including the advent of eRulemaking.

Finally, based on this background discussion and in anticipation of the rhetorical analysis of the code, regulations, and comments that follows in Chapter 5, it theorizes the regulatory rulemaking process as a state-facilitated public sphere where vernacular and official discourses shape understandings of work and family identities.

The Family and Medical Leave Act: A Background

The FMLA is a federal statute with accompanying administrative law provisions that expresses a public policy position on the relationship between work and family. As Asen (2010, p. 126) suggests, statutes and administrative provisions like the FMLA have both material and rhetorical consequences. That is, not only does the FMLA provide certain material benefits for workers and employers, it also "create[s], sustain[s], negotiate[s], and redefine[s] the meanings" of those material benefits and the recipients of those benefits (Asen, 2010, p. 126). As the end result of the process of enacting the statute and promulgating the regulatory provision, the FMLA "enact[s] and enforce[s] symbolic hierarchies that unite and divide people, and synthesize[s] and oppose[s] values" (Asen, 2010, pp. 127-128). Asen's description of the FMLA as policy is consistent with Burke's (1937/1984) view of law as a symbolic hierarchy.

This section describes the process of enacting the FMLA and the symbolic interpretations surrounding its enactment; the provisions of the FMLA and their thematic representations of work and famil; and the themes of accommodation, crisis, and gender that researchers have used to give symbolic meaning to the FMLA.

Identities in tension: Enacting the FMLA.

In the late 1980's, the first widespread public policy discussions about the needs of working parents, particularly working mothers, to manage the demands of work with the demands of family life (Dowd, 1989) culminated in the passage of the Family and Medical Leave Act of 1993. After Congress passed the Act, President William Jefferson Clinton signed that bill into law. As part of that process, he issued a statement (1993) in which he spoke of the intended impact of the FMLA—to bridge the divide between work and family: As a result of the FMLA, he stated, "American workers will no longer have to choose between the job they need and the family they love" (Clinton, Family and Medical Leave Act Statement by the President, 1993). He went on to describe the inherent tension in identifying as both a "worker" and a "family member":

As a rising number of American workers must deal with the dual pressures of family and job, the failure to accommodate these workers with adequate family and medical leave policies has forced too many Americans to choose between their job security and family emergencies. . . . It is neither fair nor necessary to ask working Americans to choose . . .

(Clinton, Family and Medical Leave Act Statement by the President, 1993).

Dealing with relationships of dependency within families and the impact of work responsibilities upon them was a significant emphasis for the FMLA. In the text of the FMLA, Congress recognized these dependency relationships, noting that the number of single-parent and two-parent working households had increased, and that both parents needed to be able to "participate in early childrearing" and to take care of "family members who have serious health conditions" (FMLA, 29 U.S.C. § 2601(a)(2)). Likewise, President Clinton acknowledged that the number of working parents, particularly working mothers, had grown and that those mothers needed to be available for "family emergencies" involving their children (Clinton, Family and Medical Leave Act Statement by the President, 1993). Moreover, he pointed out that, in households where both parents worked or in working-single-parent households, parents needed time off work to be able to care for "vital needs at home" (Clinton, Family and Medical Leave Act Statement by the President, 1993). Congress also recognized the unique plight of motherhood in the context of working; it noted that women tended to have the "primary responsibility for family caretaking" and that this caretaking responsibility had the potential to have discriminatory effects on women in the workplace in the absence of statutory protections (FMLA, 29 U.S.C. § 2601(a)(5)).

In addition to recognizing the caretaking and dependency relationships between working parents and children living in the home, Clinton also explicitly acknowledged another type of "dependency" relationship: "[W]ith America's population aging," he noted, "more working Americans have had to take time off from work to attend to the medical needs of elderly parents" (Clinton, Family and Medical Leave Act Statement by the President, 1993). Clinton's remark would prove to be prescient; the care of elderly parents by working adult children would become a issue in the FMLA regulatory discussions in the future and be significant in the constructions of "workers" and "family members" in the new millennium.

In the text of the FMLA, Congress not only recognized the tension between work and family for workers who were family members, it also recognized that this dual identity of "worker" and "family member" placed employees in potential conflict with their employers. Although the FMLA states that it is intended to fulfill, among other purposes, the purposes of "balanc[ing] the demands of the workplace with the needs of families," and to ensuring that "leave is available . . . for compelling family reasons on a gender-neutral basis" (FMLA, 29 U.S.C. § 2601(b)(4)), the FMLA further states that these purposes must be accomplished "in a manner that accommodates the legitimate interests of employers" (FMLA, 29 U.S.C. § 2601). As discussed below, the FMLA regulations further develop the meaning of the "legitimate interests of employers," interests which, over the years of crafting FMLA regulations, have received significant attention.

In sum, the FMLA expressly constructs dualities in identities and interests.

It first establishes that it is addressed to individuals embodying the intersecting

and potentially divisive identities of worker and family member. Moreover, it provides that these singularly embodied dual identities also create tension with the interests of an employer, thereby establishing an additional tension between of "worker" and "employer." After establishing these identities in tension, Congress then proceeded to craft language in the FMLA to reconcile the divisions and relieve tensions.

What the FMLA does.

The FMLA provides an "eligible employee" with unpaid leave of up to 12 weeks during any 12-month period for the for the birth and care for a child under one year of age, for the placement of an adopted or foster child, to care for an employee's spouse, son, daughter, or parent if that individual has a serious health condition (FMLA, 29 U.S.C. §2611 & 2612)⁶. This leave may be taken all at once or "intermittently or on a reduced leave schedule," but the employer may temporarily transfer the employee to another equivalent position that "better accommodates recurring periods of leave" (FMLA, 29 U.S.C. §2612(b)). An employer or employee may elect to substitute paid vacation leave, personal leave, family leave or medical leave (if it applies) for any part of the 12 weeks afforded by the FMLA. When a husband and wife work for the same employer, they are

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⁶ The FMLA also covers leave for one's own "serious health condition" or for a "qualifying exigency" related to a military member's active duty (FMLA, 29 U.S.C. § 2612). This dissertation focuses on the "caregiving" leave entitlements that relate to the situations of dependency between parent, spouse, and child and does not address specifically the provisions for one's own health conditions (unless they overlap with caring for a family member's health conditions) or for the specific provisions to address the needs of military families.

limited to a total of 12 weeks of leave to care for a newly born, adopted, or fostered child or to care for a "sick parent" (FMLA, 29 U.S.C. § 2612(d)).

The FMLA describes an employee who is eligible for FMLA leave as one with a longer term, regularized, and loyal relationship with an employer who has sufficient resources to "cover" an employee's FMLA leave. An employee is eligible for FMLA leave when he or she has been employed for at least 12 months with the employer, having worked at least 1,250 hours in the last 12 months (FMLA, 29 U.S.C. § 2611(2)(A)). In addition, for an employee to be eligible, an employer must have employed at least 50 employees at a worksite or at multiple worksites within a 75-mile radius (FMLA, 29 U.S.C. § 2611(4)).

The FMLA defines carefully the subjects of its provisions. In other words, the FMLA details the characteristics of the workers and family members to which the provisions of the FMLA apply. First, a person who suffers a "serious health condition" must be someone for whom a condition requires inpatient care or "continuing treatment by a health care provider" (FMLA, 29 U.S.C. § 2611(11)). A "parent" under the Act is defined as the biological parent or someone who was "in loco parentis" when the employee was a child (FMLA, 29 U.S.C. § 2611(7)). A "son or daughter" is broadly defined and includes biological, adopted, foster, or step children, legal wards who are under 18 years of age or who cannot engage in self-care due to a disability (FMLA, 29 U.S.C. § 2611(12)).

The theme of monitoring also plays a prominent role in the FMLA through its emphasis on notices and certifications. First, employers must give notice of workers' FMLA rights: employers are required to post notices at "conspicuous

places" at the worksite that describe the "pertinent provisions" of the FMLA ((FMLA, 29 U.S.C. § 2619(a)). Second, employees are required to give notice of the intent to take FMLA leave, the goal of which is to avoid "unduly" disrupting employer operations (FMLA, 29 U.S.C. § 2612(e)(2)(A)). If an employee can foresee the need for leave, that employee must provide the employer with 30 days' advance notice or, if the leave begins in less than 30 days, then the notice must be given as soon as practicable (FMLA, 29 U.S.C. § 2612(e)). If the leave is for foreseeable "planned medical treatment" of the employee or a qualified relative, then the employee has a duty to "make a reasonable effort [to not] disrupt unduly the operations of the employer" (FMLA, 29 U.S.C. § 2612(e)(2)(A).

Notably, the FMLA statute does not contemplate "unforeseeable" FMLA leave; this gap is later filled in by the FMLA regulations.

With respect to certifications, an employer can require an employee to provide certification of a "serious health condition" from a health care provider that describes the date the condition commenced, the "probable duration of the condition," the underlying medical facts, and, if the leave is required for the care of another, a statement that the employee is needed for caregiving and for how long (FMLA, 29 U.S.C. § 2613(a)). If the certification is for intermittent leave to care for another with a serious health condition, the certification must include information about the necessity of care provided by the employee and the expected duration and schedule of the intermittent leave (FMLA, 29 U.S.C. § 2613(7)). Conflicts about the validity of a certification are resolved by gathering additional health care provider opinions. If the employer doubts the validity of

the information in the certification, the employer is entitled at its own expense to get the "opinion of a second health care provider" (FMLA, 29 U.S.C. § 2613(c)(1)). If the original opinion and the second opinion conflict, the employer may obtain, again at its own expense, the opinion of a third health care provider, agreed to by the employee, who will render a final decision on the matter (FMLA, 29 U.S.C. § 2613(d)). The employer may require "subsequent recertifications on a reasonable basis" (FMLA, 29 U.S.C. § 2613(e)).

The FMLA also establishes the protections related to that leave to which a employee is entitled. First, when an employee returns from FMLA leave, she is entitled to be restored to her former position or to an "equivalent" position (FMLA, 29 U.S.C. § 2614(a)(1)). The employee is entitled to the maintenance of any health benefits during the leave and is entitled to all employment benefits that had accrued before the leave (FMLA, 29 U.S.C. § 2614(a)(2)). Moreover, an employer is prohibited from interfering with an employee's FMLA rights and from discriminating against an employee on this basis (FMLA, 29 U.S.C. § 2615(a)). If an employer violates these requirements, the worker can recover lost wages and benefits as well as attorneys fees and equitable relief such as reinstatement and promotion (FMLA, 29 U.S.C. §2617(a)(1)).

Does the FMLA really have the reach that Clinton hoped it would have in 1993? In 2005, the Department of Labor stated that roughly 76.1 million workers were covered by the FMLA, and between eight and 17 percent of them took FMLA leave (Report, 2007, p. 35551). Cahn and Carbone (2010, P. 204), however, put this data into context, a context which demonstrates a more

disappointing reach for FMLA protections for workers in the United States: They note that "almost 40% of employees are not at worksites subject to the FMLA," and "only 54% of the workforce is eligible to take FMLA leave." "Even among those workers who are covered," they state, "many . . . cannot make use of the opportunity because they cannot afford to take unpaid leave" (Cahn & Carbone, 2010, p. 204).

Accommodated families; episodic disruptions; gender discrimination.

Not only are there identities in tension in the FMLA, family member, employee (or worker), and employer, three dominant themes underlying the relationship between family and work have been recognized as circulating in the FMLA. First, the FMLA embodies a theme that family has an episodic, intermittent, and crisis-driven character. Second, the FMLA reflects a tension between the types of accommodations the FMLA supports: accommodations for workers who are family members to tend to family matters or accommodations for employers to meet legitimate business-related goals in the workplace. And, third, the FMLA itself as well as the United States Supreme Court, looking at the legislative history of the FMLA, has characterized the FMLA as an antidiscrimination statute, designed to remedy discrimination that arises from the stereotypes of women as primary caregivers. The characteristics of family needs as "intermittent," the conflict between the kinds of "accommodations" the FMLA should support, and the question of whether the FMLA is anti-discriminatory in its purpose are relevant to considering how individual comments in the regulatory process thematize the protections in the FMLA.

First, the FMLA has been characterized as treating family demands as intermittent, episodic disruptions to an individual worker's commitment to the workplace. The stated purpose of the FMLA 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" (FMLA) Regs. 29 C.F.R. § 825.101(b)). These "emergencies" are limited to "serious health conditions" of a family member that require "inpatient care in a [medical facility]" or "continuing treatment by a health care provider" (FMLA, 29 U.S.C. § 2611(11)). The Department of Labor defines "continuing treatment" as one 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" (FMLA Regs., 29 C.F.R. § 825.115). Ironically, however, the FMLA does not cover the most "intermittent" or "episodic" health conditions 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 to care, for example, for a sick child (FMLA Regs., 29 C.F.R. § 825.113(d)). Similarly, the "bonding time" one has with a new child is also described as episodic: although FMLA leave is permitted for the birth or adoption of a child, those twelve weeks of leave must be taken within the first twelve months following birth or adoption (FMLA, 29) U.S.C. §2612(a)(2)).

These textual limitations in the FMLA that suggest that the critical demands upon a worker for caregiving are time-limited, intermitted, and "emergent," and the leave provisions are in tension with the routine demands

imposed upon a family member by caregiving. The FMLA has been identified as an "emergency" approach to family caregiving needs (Silbaugh, 2004), that does "little to address the everyday leave needs" of caregivers (Kessler, 2001, p. 422), and that "provides leave only in crisis situations" (Bornstein, 2000). Moreover, Peggy Smith (2002, p. 583) recognized that the FMLA provides "no protection for the many routine parental obligations and exigencies that most commonly clash with work demands." Similarly, others have also interpreted the FMLA as 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 (Eichner, 1998).

With respect to the question of accommodation, Davis (2007) found that as a rhetorical matter, the FMLA expressly positions the "accommodation" needs of employers and workers against each other. The "Findings" section of the Act explains that the FMLA 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" (FMLA, 29 U.S.C. § 2601(a)(3)).

Conversely, the Purposes section of the Act recognizes that permitting employees to take reasonable unpaid medical and child care leave must be done "in a manner that accommodates the legitimate interests of employers" (FMLA, 29 U.S.C. § 2601(b)(3)) which, according to the Code of Federal Regulations, is in "high-performance organizations" (FMLA Regs., 29 C.F.R. § 825.101(b)). 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. This "dual accommodation" of workers under the FMLA has rhetorical consequences. Cahn (2000, p. 193) noted that "accommodation of . . . [caregiving] often leads to perceptions that [caregivers] are not 'real' workers"—those workers who can meet the "high-performance" demands of the workplace.

With respect to anti-discrimination, the FMLA characterizes itself as an anti-discrimination statute in its purposes—it states caregiving responsibility falls upon women and that one of its goals is to "promote . . . equal employment opportunity for women and men" (FMLA, 29 U.S.C. § 2601(b)). In that regard, the FMLA allows both men and women to take time off work for the birth, adoption, or foster placement of a child and for the purpose of giving care to a relative with a "serious health condition" (FMLA, 29 U.S.C. § 2612(1)).

The United States Supreme Court in *Hibbs v. Nevada Department of Human Resources* (2003) reaffirmed this view. It described the purpose of the FMLA as to "protect the right to be free from gender-based discrimination in the workplace" (2003, p. 728). It further described an unfairness in the workplace for women—that they were seen as the primary caregivers, and that this "allocation of family duties remained firmly rooted" in the employment sector, causing employers to create discriminatory family leave policies as a result (2003, p. 730). It noted that in the legislative process, Congress had recognized that parental leave policy was rare for men, and even when available, men were discriminated against in its use.

The Court neatly summed up:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.

Because employers continued to regard the family as woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually fulfilling stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees (2003, p. 736).

Accordingly, the Court found that the FMLA was enacted to ensure that "family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men" (2003, p. 737). Notably, the court recognized that the FMLA was positioned as a significant intersect of identities—at the "faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest and affects only one aspect of the employment relationship [that being the relationship between caregiving and working]" (2003, p. 738). This concept of the "faultline" is one that permeates work and family discourse and is notable in its characterization of the intersect as a danger zone, subject to instability.

The FMLA, the Rulemaking Process, and the Regulations

The FMLA's regulatory rulemaking history.

Within the legislative framework of the FMLA, the Department of Labor was empowered to promulgate regulations that "fleshed out" the requirements of the FMLA as they would be applied day-to-day in the workplace. This process of promulgating and amending FMLA regulations and gathering information from the public for that purpose has nearly a twenty-year history. After the FMLA was passed in 1993, the Department of Labor had 120 days to issue regulations. During that period, it collected a small number of public comments and subsequently issued interim regulations. With the interim regulations, the Department of Labor asked for comments from the public. It received about 1,000 additional comments and then issued its final regulations in 1995.

The Department of Labor continued to collect data and monitor the workings of the FMLA and its regulations within the workplace. In 1995, it issued a reported entitled "A Workable Balance: Report to Congress on Family and Medical Leave Policies by Commission on Family and Medical Leave," which reported survey data gathered about the FMLA. Roughly five years later, the Department of Labor issued a subsequent report which provided even more data about the effects of the FMLA.

After President George H.W. Bush took office in January 2001, the Department of Labor began the process that would it lead it to revise the FMLA regulations for the first time. In 2002 and 2003, the Department of Labor held stakeholder meetings with a number of constituencies and evaluated how

decisions made by courts about the FMLA impacted the regulatory scheme. Then, in 2006, the Department of Labor issued a Request for Information (RFI), seeking input from the public on its planned regulatory changes for the FMLA. Specifically, the Department invited "interested parties having knowledge of, or experience with, the FMLA to submit comments [and] any pertinent information [to determine] the effectiveness of [the regulations]" (U.S. Dept. of Labor, RFI, 2006, p. 69505). This process yielded more than 15,000 public comments, provided to the Department via e-mail and regular mail.

In response to this input, the Department of Labor issued a report outlining the information it had received from its Request for Information. In the report, the Department (2007, p. 35550) noted that it had received comments from "workers, family members, employers, academics, and other interested parties." It noted (2007, p. 35550) that this "input ranged from personal accounts, legal reviews, industry and academic studies, surveys, and recommendations for regulatory and statutory changes." The comments, the Department said, were often "brief emails with very personal, and, in some cases, very moving accounts from employees who had used family or medical leave" (Report, 2007, p. 35551).

In that report, the Department of Labor (Report, 2007, p. 35550) said that "[n]o employment law matters more to America's caregiving workforce than the [FMLA]." It said (Report, 2007, p. 35550) that the FMLA "opened a new era for American workers, providing employees with better opportunities to balance work and family needs." It recognized that the FMLA gave workers "who are

primary caregivers to ill family members" the ability to "deal with these serious challenges while holding on to jobs" (Report, 2007, p. 35550).

In February 2008, between the time that the Department of Labor collected comments for its Request for Information and its issuance of a Notice of Proposed Rulemaking, Congress passed new legislation, the National Defense Authorization Act, which set up special leave provisions for military families under the FMLA. Thus, as part of its Notice of Proposed Rulemaking issued in 2008 (Proposed Rule, 2008), the Department of Labor requested that the public comment not only on its proposed revisions to the FMLA that arose from its Request for Information but on the issues related to the military family leave statute recently passed by Congress. This process yielded more than 4,600 additional comments, provided via U.S. Mail, fax, and the government's relatively new portal for commenting, www.regulations.gov. ⁷ The Department of Labor described the comments it received from as being from "a wide variety of individuals, employees, employers, trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others" (Final Rule, 2008, p. 67937). In November 2008 and with an effective date of January 16, 2009, the Department of Labor issued its Final Rules on the FMLA, the first amendments to the FMLA regulations since their promulgation in the early 90s (Final Rule, 2008).

⁷ All of the comments analyzed in this project are available for review on www.regulations.gov or in the Federal Register as cited herein.

Four days after the new rules became effective in 2009, Barack Obama became President, and by the end of the year, Congress had once again amended the FMLA provisions related to military family leave and had acted to create special rules in the FMLA related to flight crews. In the Fall of 2009, the Department of Labor indicated its intent to review the implementation of the new military leave regulations and to implement new flight crew regulations (U.S. Dept. of Labor, 2009). The Department also stated it would look at "other revisions of the current regulations implemented in January 2009" (2009, p. 56).

Dialogue between the Department of Labor and the public regarding the content of the FMLA regulations continues. In April 2011, the Department announced that it would conduct additional surveys to "collect new information on the use and need of FMLA leave in order to update DOL's understanding of leave-taking behavior and to close current data gaps remaining from the previous surveys" (U.S. Dept. of Labor, 2011, p. 18254). Moreover, on February 15, 2012, the Department issued a new Notice of Proposed Rulemaking wherein it stated that it was "propos[ing] regulatory changes to implement [the new statutory requirements for military leave and flight crews]" and "review[ing] the impact of regulatory revisions published in the [Final Rule in 2008]" (U.S. Dept. of Labor, 2012, p. 8960). Ultimately, the Department of Labor concluded that, other than making changes for the new military and flight crew statutory provisions, it proposes little if any changes to the existing regulations but for removing "optional-use forms and notices" from the text of the Code of Federal Regulations (2012, p. 8963).

All of the subsequent changes to the regulations, however, are contingent upon the expectation that public deliberation and dialogue will occur about these proposals, requiring the Department of Labor to receive comments on its proposed rules and then respond to them. In that spirit, the next section outlines the content of the FMLA regulations with an eye toward the completed 2008 regulatory rulemaking cycle, drawing attention to the regulatory provisions and rulemaking dialogue that are related to worker and family member identity.

The content of the FMLA regulations.

This section provides an overview of some of the FMLA regulations before turning, in the next chapter, to a careful rhetorical analysis of the FMLA statute, regulations, and public comments. Although the FMLA regulations and proposed changes are quite detailed and lengthy and would be deserving of booklength explication in and of themselves, this section does not seek to explore all of the details of the regulations; rather, this overview of the regulations is meant to address those regulations that provide background, were important to the 2008 regulatory rulemaking process for the purposes of this project, or provide terminology related to work and family identity.

The FMLA regulations, both in the original and amended versions, begin with a description of the purposes of the FMLA. This description is consistent with that found in the FMLA statute, and it, too, highlights the tension between work and family, the need to resolve that tension, and the need for the FMLA to

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⁸ When the original (pre-2008) version and the current (post 2008) version are consistent, the citation reference is to the current regulations. The pre-2008 version is designated with a citation that includes the year 2007.

be that resolution. The regulations note two fundamental FMLA concerns: "the needs of the American workforce, and the development of high-performance organizations" (FMLA Regs. 29 C.F.R. § 825.101(a)). The section goes on to note:

American's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously ill children or parents . . . workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home (FMLA Regs,. 29 C.F.R. § 825.101(b)).

In addressing these concerns, the purposes suggest a reconciliation of the tension between work and family life and worker and employer, a reconciliation based upon stability and connectedness. "A direct correlation exists between stability in the family and productivity in the workplace. . . . When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs" (FMLA Regs., 29 C.F.R. § 825.101(c)). The regulations note that the costs are "small" to ensure that "stable workplace relationships" "will not be dissolved while workers attend to pressing family health obligations . . ." (FMLA Regs., 29 C.F.R. § 825.101(c)).

The specifics of the FMLA regulatory scheme are required by law to be consistent with the statute's terms and intent (U.S Supreme Court, 2002, Ragsdale v. Worlverine World Wide, Inc.). Thus, the FMLA regulations elaborate upon

and clarify the meaning of the rights and obligations set out by Congress in the FMLA statute. For example, although the statute states that the regulations apply to "employers," the regulations detail how to determine who counts as an "employer," particularly where there are joint employers or successors in interest (FMLA Regs., 29 C.F.R.§§ 825.106 & 825.107). They describe the conditions under which public and federal agencies are subject to the FMLA (FMLA Regs., 29 C.F.R. §§ 825.108 & 825.109). The regulations assist in determining whether 50 employees are within 75 miles, a requirement of FMLA coverage; for example, they specify how the 75 miles will be measured ("by surface miles, using surface transporation over public streets, roads . . . by the shortest route from the facility where the employee needing leave is employed") (FMLA Regs., 29 C.F.R.§ 825.111).

Regarding employees who are eligible for leave, a controversial point in the 2008 regulatory rulemaking process was with regard to whether time spent working for an employer before a break in service will count towards the 12 months needed for an employee to be eligible for FMLA leave. The original FMLA provisions were not clear on this point. Through comments made in the rulemaking process, employers argued that counting employment before a break in service to determine FMLA leave eligibility is too difficult with respect to record keeping. Others, however, argued that counting breaks in service toward FMLA represented fairness to women who have taken time off for childbearing or other caregiving activities. In the final regulations, the Department of Labor took the position that breaks in service of less than seven years represented a fair

resolution of these opposing views and would be counted toward determining eligibility for FMLA leave (FMLA Regs., 29 C.F.R.§ 825.110).

Another of the most controversial and complex aspects of the FMLA was the concept of a "serious health condition," which is defined as a "condition that involves inpatient care care . . . on continuing treatment by a health care provider" (FMLA Regs., 29 C.F.R. § 825.113(a)), and for which FMLA leave is available.⁹ Specifically, in the process of amending the regulations in 2008, the Department of Labor recognized that there was signficant dispute over whether and to what degree "minor" illnesses should be included or excluded from the definition of serious medical condition. Ultimately, the Department decided to stick with the original list of illustrations of common ailments that, but for unusal circumstances, would not be serious medical conditions, rather than amend the regulations continue to create an exclusionary category for minor illnesses; the regulations state that "[o]rdinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine . . . are examples of conditions that do not meet the definition . . . " (FMLA Regs., 29 C.F.R. § 825.113(d)).

Moreover, much controversy arose over what the amount of treatment necessary for a condition to qualify as "serious." After the 2008 process for amending the regulations, the regulations required that to qualify for FMLA leave, an individual must visit, in person, a health care provider at least two times

⁹ In the original version, the definition was the same but was expressed in a different section of the regulations.

in 30 days or once with a "regimen of continuing treatment under the supervision of the health care provider" (FMLA Regs., 29 C.F.R. § 825.115(a)(2)). The first visit must take place within seven days of the incapacity (FMLA Regs., 29 C.F.R. § 825.115(a)(3)). A distinction was made, however, for pregnancy and prenatal care; any period of incapacity is sufficient to qualify for FMLA leave, and even severe morning sickness will qualify as a "serious medical condition" (FMLA Regs., 29 C.F.R. § 825.115(b)).

For the birth of a child, the regulations provide that both mother and father are eligible for leave to experience "bonding time"—time to be spent during the first twelve months of a healthy infant's life (FMLA Regs., 29 C.F.R. § 825.120(a)(2)). The regulations provide that sometimes leave may be taken before the birth, adoption, or foster placement of a child (such as for proceedings and appointments related to the adoption) and that a "husband" (but not a "father") may care for a "pregnant spouse" who is incapacitated or in need of prenatal care (FMLA Regs., 29 C.F.R. § 825.120(4)&(5) & 825.121). Unlike intermittent leave for serious health conditions, intermittent leave is available for child birth, adoption, or foster placement only if the employer agrees (FMLA Regs., 29 C.F.R. § 825.120(b) & 825.121(b)).

The regulations further address what it means to be a particular kind of family member in terms of the FMLA. First, for the birth, adoption, or fostering of a child, a "father," as well as a "mother," can take family leave" (FMLA Regs., 29 C.F.R. § 825.112(b)). Second, a "parent" is defined someone who, in relation to the employee, is a "biological, adoptive, step or foster father or mother,

or any individual" who had daily responsibility to care for and financially support of the employee when that employee was a child without regard to biology or legality of relationship (FMLA Regs., 29 C.F.R. § 825.122(c)). Similarly, a "son or daughter" is defined, in relation to the employee, as a "biological, adopted, or foster child, a stepchild, a legal ward" or someone who is cared for "in loco parentis" by the employee and who is 18 years old or younder or who lacks the ability of self care (FMLA Regs., 29 C.F.R. § 825.122(c)). A "parent-in-law" is not a qualifed family member for the purposes of caring for a parent with a serious health condition (FMLA Regs., 29 C.F.R. § 825.201(a)). Grandparents, aunts, uncles, cousins, and other individuals in nontraditional family relationships or less "mature" relationships, such as "boyfriend" or "fiance," are not expressly included in the regulations.

In the 2008 regulatory rulemaking cycle, the question of how individuals prove the existence of these family relationships was a point of controversy. The Department of Labor had proposed that in addition to being able to ask for a birth certificate, an employer could ask for a notarized statement or tax returns as proof of an FMLA-qualified dependency relationship (2008, Proposed Rules, p. 7890). After a vigorous debate about the value of employee privacy versus the value of employer supervision and monitoring, ultimately, the Department rejected the notarized statement and tax returns as forms of proof, and informal statements regarding family relationships were permitted to be enough (FMLA Regs., 29 C.F.R. § 825.122(j)).

Another controversial point with respect to the 2008 regulatory rulemaking cycle was defining when a worker is "needed to care for" a family member under the FMLA. The regulations state that to be "needed" includes being needed for transportation to the doctor, for "psychological comfort and reassurance" of a family member with a serious health condition (FMLA Regs., 29 C.F.R. § 825.124(a)), or to serve as a substitute caregiver (FMLA Regs., 29 C.F.R. § 825.124(b)). The controversy surrounded whether a worker can qualify for FMLA if others are available to provide the needed care. Ultimately, the Department concluded that the employee seeking leave need not be the only family member who is available to provide care, and that need for care can be intermittent and still be covered (FMLA Regs., 29 C.F.R. § 825.124(b)).

The question of intermittent or reduced leave has likewise been controversial under the FMLA. Intermittent or reduced leave—leave in short blocks of time to care for someone with a serious health condition—is available only if that leave is for a medical necessity (FMLA Regs., 29 C.F.R. § 825.202(b)). Intermittent or reduced leave is available to provide for, among other things, "psychological comfort," transportation to a medical appointment, and prenatal examinations (FMLA Regs., 29 C.F.R. § 825.202(b)(1)). Intermittent leave for the birth, adoption or foster placement of a child is only available, however, with the employer's agreement (FMLA Regs., 29 C.F.R. § 825.202(c)). If intermittent leave is for "planned medical treatment" the employee must "make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations" (FMLA Regs., 29 C.F.R. § 825.203).

The amount of time an employer can count towards FMLA leave when the leave is intermittent has been the focus of debate. An employer can charge intermittent leave in an increment "no greater than the shortest period of time that the employer uses to account for use of other forms of leave" so long as that increment is no greater than one hour and the leave charged against the employee is no longer than the leave actually taken (FMLA Regs., 29 C.F.R. § 825.205(a)). For the purposes of family leave under the FMLA, the regulations provide that the employer may require any paid leave available to the employee run concurrently with the FMLA leave (FMLA Regs., 29 C.F.R. § 825.207(a)).

Although as a general matter employees have the right to be restored to the same or equivalent position after FMLA leave, "key employees," or those employees who are salaried employees in the top ten percent of earners, can be refused restoration of employment after FMLA leave if the restoration will cause "substantial and grievous economic injury" (FMLA Regs., 29 C.F.R. § 825.217(b)). Although the regulations do not define what constitutes an injury, if restoring a key employee "threatens the economic viability of the firm," presumably because the company has had to hire a replacement or make costly changes to accommodate the employee's leave, then the "injury" requirement is met; "[m]inor inconveniences and costs" in the normal course of business, however, do not qualify (FMLA Regs., 29 C.F.R. § 825.217(c)).

Additional areas of controversy under the regulations were the degree to which employees must give notice of "unforseeable" FMLA leave, the content of that notice, and who the employer can assign to seek clarification and

authentication of a medical certification for FMLA leave. First, the FMLA statute does not describe the notice that is required when FMLA leave is unforseeable. But the original regulations provided that for FMLA leave that is unforseeable, the employee must give notice "as soon as practicable . . . within no more than one or two working days" (FMLA Regs., 2007, 29 C.F.R. § 825.303(a)). This timing was a controversial point. The proposed regulations suggested replacing the one to two day requirement with notice to be provided "promptly" (U.S. Dept. of Labor, 2008, Proposed Rule, p. 7891). In the final regulations, the "promptly" language was replaced with "the time prescribed by the employer's usual and customary notice requirements" (FMLA Regs., 29 C.F.R. § 825.303(a)), and employees were expected to provide notice according to their employer's usual and customary procedures for giving notice (FMLA Regs., 29 C.F.R. § 825.304(c)).

Second, under the original FMLA reulations, the content of the notice an employee must give in the case of unforeseeable leave was to "state that the leave [was] needed" (FMLA Regs., 2007, 29 C.F.R. § 825.303)(b)). This was controversial because it was vague. The Department of Labor adopted a final regulation that stated that:

An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request.

... [S]uch information may include that the condition renders the family member unable to perform daily activities; ... the anticipated duration of the absence, if known [;] and whether ... the family member is under the

continuing care of a health care provider Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations udner the Act. (FMLA Regs. 29 C.F.R. §825.303(b)).

Finally, regarding an insufficient medical certification, employers complained that they could not sufficiently inquire about medical information and believed it was too onerous for employers to be required to use health care providers to inquire with employees' health care providers. In the final regulations, the Deparatment of Labor decided that if an employer finds a certification of a medical condition insufficient, has given the employee the opportunity to "cure" the deficiency, and the deficiency has not been cured, the employer may have "a health care provider, a human resources professional, a leave administrator, or a management official" contact the health care provider (FMLA Regs., 29 C.F.R. § 825.307(a)). The employee's direct supervisor, however, cannot make the contact or review the medical information (FMLA Regs., 29 C.F.R. § 825.307(a)).

In sum, the FMLA regulations fill in the gaps where the statute is silent and provide detail and elaboration on points that are either statutorily vague or ambiguous. These vaguenesses, ambiguities, and silences are in part revealed by notice and comment process. In many cases, public comments challenge the legitimacy of the Department's interpretation of the statute; highlight the disconnect between symbolic representations within the FMLA regulations and lived experiences of workers, families and employers; and call attention to

tensions in the legal identities created for workers, family members, and employers in the FMLA. The next section addresses the process by which the notice and comment rulemaking process proceeds.

The Regulatory Rulemaking Process

"Interested persons" and regulated processes of debate.

Under governments purely republican, where every citizen has a deep interest in the affairs of the nation, and in some form of public assembly or other, has the means and opportunity for delivering his opinion, . . . the voice of eloquence will not be heard in vain." (Adams, 1810/1962)

Administrative regulations, which are the product of regulatory rulemaking, are, in dramatistic terms, "administrative rhetoric" (Burke, 1950/1969, pp. 158-66). That is, they are actions that are both material and symbolic in their operation. In other words, administrative regulations combine language that shapes attitudes and ideas with language that creates material, empirical consequences in the world. Asen (2010, p. 125), in his work on policymaking, agrees that policies, "even though they exist only as fictions in a rhetorically constituted universe of discourse," have material power over not only the social relations in which people participate but also upon "specific material forces like institutional arrangements and money."

Administrative or regulatory lawmaking lies within the executive branch of government. Administrative agencies are neither legislatures nor courts; their role is to deal with the "day-to-day details of governing" (Fox, 2008, p. 1). One way that administrative agencies carry out their day-to-day governance activities is to promulgate and enforce regulations. Subject to a grant of power by the

legislature, a regulatory body is expected to "flesh out" the legislature's enactments through administrative regulations and to develop expertise in the area in which they are charged with regulatory decision-making (Fox, 2008).

In the early 1970s, Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit noted that fairness to the public was a critical feature of administrative rule making. Specifically, he noted that rulemakers must be transparent in their decision-making processes and must "give good faith attention to all the information and contending views relevant to the issues" (1974, p. 379). Wright noted that "the administrator owes a duty to the public to give serious consideration to all reasonable contentions and evidence pertinent to the rules he is considering." (1974, p. 380). This duty of fairness is "owed to the public generally, not to particular individuals" (Wright, 1974, p. 386). Relatedly, Fox (2008, p. 10) notes that Justice Stephen Breyer has described number of justifications for regulatory decision-making; they include, among others, two that are relevant to this project: "to compensate for externalities [and] to compensate for unequal bargaining power."

The process of promulgating administrative regulations is governed primarily by the Administrative Procedure Act and the agency's procedural rules (Fox, 2008). The type of rulemaking relevant to this project is "notice and comment rulemaking" (Fox, 2008, p. 15). Notice and comment rule making requires that, before an agency can promulgate a regulation, it must give notice to the general public in the Federal Register that a rule is being contemplated, and it must invite "interested persons" to submit "written data, views, or arguments"

about the rule (APA, 5 U.S.C.§ 553(c)). This process of soliciting comments is a "hallmark" of the informal rule-making process (Fox, 2008, p. 160). After the agency receives comments, it is required to consider all of the comments and then it issues a rule (APA, 5 U.S.C. § 553(c)). Because of the Supreme Court's deference to the technical expertise of administrative agencies in rule-making, very few regulations will be struck down due to errors in the rulemaking procedure. Accordingly, the best place for interested parties to challenge the rulemaking of an agency is during the rulemaking process (Fox, 2008, p. 154).

Before the agency can promulgate the final rule, it is obligated to take into "consideration . . . the relevant matter presented" (APA, 5 U.S.C. § 533(c)), and, in turn, it must include, in its preamble to the regulations, "a concise general statement of [the] basis and purpose" of the final regulation (APA, 5 U.S.C. § 553(c)) that accounts for the comments it received. One court has noted that "'the basis and purpose statement is inextricably intertwined with the receipt of comments" (Action on Smoking and Health v. Civil Aeronautics Board, 1983, p. 216).

Although the Act does not define "consider," courts have attempted to define and describe the term. The courts have concluded that "consider" imposes upon the agency a good faith requirement to log in all comments and review those carefully from those "major entities affected by the rule" (Fox, 2008, p. 160). One court, for example, concluded that the basis and purpose statement must reflect the "major policy" issues that came up in the rulemaking and how the agency responded with "conscientious attention" and "reasoned disposition"

(Automotive Parts and Accessories Association. v. Boyd, 1968, p. 341). Stated another way, the agency's basis and purpose statement must "refer to relevant submissions by interested parties and should rebut or accept these submissions in an orderly fashion" (Wright, 1974, p. 381). Although an agency is not bound to follow the comments it receives, "[a] reviewing court will be exceptionally suspicious of an agency rule that disregards all of the commentary" (Fox, 2008, p. 160).

The rulemaking process must be a "genuine dialogue" between agency experts and the public (Wright, 1974, p. 381). Courts have noted that "there must be an exchange of views, information, and criticism between interested persons and the agency. . . . [D]ialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public" (Home Box Office, Inc. v. Fed. Commn. Commission, 1977, pp 35-36). Although the agency must consider comments with "a mind that is open to persuasion" (Advocates for Highway and Auto Safety v Federal Highway Administration, 1994, p. 409), the agency must reasonably respond only to "significant" comments that raise "substantial issues" or contain "meaningful analysis or data" (Thompson v. Clark, 1984). The agency has a duty to respond to particulars in the record that, when coupled with the agency's expertise, support its rule-making (National Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission, 1976). The responses must be more than "vague and conclusory" (Cat Run Coal v. Babbitt, 1996, p. 779). However, "the detail required in a statement of the basis and purpose depends upon the subject of the regulation and

the nature of the comments received" (Action on Smoking and Health v. Civil Aeronautics Board, 1983, p 1216).

The purpose of soliciting comments is, in part, to "provide fair treatment for persons affected by the rule" (Home Box Office, Inc. v. Federal Communications Commission, 1977, p. 35). For example, agencies must at least mention comments that oppose its final rule-making position and address important criticisms of the rule (Lloyd Noland Hospital & Clinic v. Heckler, 1984). And, sometimes, regulations are modified based on the criticisms or suggestions found in comments (National Association of Pharmaceutical Manufacturers v. Department of Health and Human Services, 1984).

Public comments are not free of suspicion, however, in the rulemaking process. The courts have recognized that comments are also "pieces of advocacy" (Fox, 2008, p. 160) and that the comments of "interested" parties need not be accepted at "face value" (National Tire Dealers & Retreaders Association v. Brinegar, 39-40, 1974). Indeed the United States Supreme Court has said that public commenters are instructed not to enage in "unjustified obstructionism" by making comments that are "cryptic and obscure" (Vermont Yankee Nuclear Power Corporation. v. National Resources Defense Council, 1978, pp. 553-554), because the agency must respond only to those concerns that are mentioned in more than "general" terms. Commenters, therefore, have a duty to explain in their letters the "whys" and "hows" of their objections before the agency must respond in the basis and purpose (Reyblatt v. U.S. Nuclear Regulatory Commission, 1997). The burden is on commenters is to "structure their participation so that it

is meaningful, so that it alerts the agency to the [commenter's] position and contentions" (Vermont Yankee Nuclear Power Corporation v. National Resources Defense Council, 1978, p. 553).

Meaningful participation, although construed by the courts as a burden to be carried by the public, has been a focus of the federal government as well in using technology to improve the notice and comment process. The advent of technology as a means to facilitate public participation is discussed below.

The advent of eRulemaking.

"The American people deserve a regulatory system that works for them. . . . We do not have such a regulatory system today." (Clinton, Executive Order 12866, 1993)

"Reading through *Federal Register* announcements, travelling to agency reading rooms' to review comments, and sending submissions through the mail has been supplanted by the click of a mouse on the Internet." ~ (eRulemaking Program, 2010, p. D-1)

The 4600+ comments to the FMLA notice of proposed rulemaking that are the focus of this project were primarily submitted through an online process called eRulemaking. eRulemaking and its site, Regulations.gov, are discussed below.

In 1993, the executive branch of the federal government embarked upon a mission to make the regulatory process "more accessible and open to the public" (Clinton, Executive Order 12866, 1993). A decade later, the federal government had established Regulations.gov, its eRulemaking Program, to "enable the public to easily access and participate in a high quality, efficient and open rulemaking process" (eRulemaking Program, 2010, p. 3). By placing the agency rulemaking functions on the internet and allowing the public to comment via the internet, the

government took "a difficult, even arcane paper-based process and transformed it into a readily accessible process for public consumption" (eRulemaking Program, 2010, p. D-1). By January 2008, 90% of the federal agencies were using the portal (eRulemaking Program, 2010). As of November 2010, there were "nearly 4,000 active agency users and nearly 300 agencies whose rules and regulations are posted to *Regulations.gov*" (eRulemaking Program, 2010, p. 3).

Prior to the advent of eRulemaking, "issues existed regarding the public's knowledge of proposed rulemaking and the public's ability to make an informed comment" (eRulemaking Program, 2010, p. D-1). Accordingly, the goal of Regulations.gov, as an interactive public website, is to give the public access to regulatory information and the opportunity to make comments on regulatory rulemaking. In particular, the eRulemaking process is touted for its ability to allow for "more informed comment" by the public since the public can use the portal to "see other public submissions posted to the website" (eRulemaking Program, 2010, p. D-1)

Specifically, the goals of the program include "increas[ing] public access, [and] increas[ing] participation in and understanding of the rulemaking process" (eRulemaking Program, 2010, p. D-1). Relatedly, the way the regulatory agency communicates to the public on Regulations.gov has been identified as significant. In a 2010 "Best Practices" guide, the eRulemaking Program recognized that in the context of federal regulations, "writing used to describe agency initiatives and proposed actions is sometimes unclear or incomprehensible unduly specialized, and even unreadable" and that this can result in confusion for the public

(eRulemaking Program, 2010, p. 7). Accordingly, the Best Practices guide suggested that agencies "should use plain writing . . . to ensure that all stakeholders have a clear understanding" (eRulemaking Program, 2010, p. 9).

The current version of the Regulations.gov website invites users to "Let Your Voice Be Heard." It gives instructions on how to find a rule, how to submit a comment, and how to find a comment made by someone else. There are links on the site to RSS, Facebook, Twitter, and YouTube feeds, all purportedly able to increase access to the rulemaking process.

When a user on Regulations.gov clicks on the question "Do My

Comments Make a Difference?" the user is directed to a fact sheet with the same

name. In that document, the "principles"—democratic, legal, and management—

that justify public participation in regulatory rulemaking are discussed (Public

Comments Make A Difference, n.d.). The document notes that public

participation is key an "essential function of good governance" (Public Comments

Make A Difference, n.d.). It discusses that because of public participation, a

regulatory agency can respond to individuals and evaluate the degree to which

regulatory changes will be accepted in the public (Public Comments Make A

Difference, n.d.). Moreover, allows the agency to reduce conflict and litigation

over regulations and to determine the public's priorities in rulemaking (Public

Comments Make A Difference, n.d., p. 1).

Significantly, the fact sheet notes that the regulatory rulemaking process allows the agency to draw upon "distributed expertise"—"the more comments,

the greater likelihood of collecting the most accurate, useful, and current information for the development of the rules" (Public Comments Make A Difference, n.d., p.1). Finally, the fact sheet states that "[a]gencies respect the views and questions of others without biased judgment or unfair criticism," and the process gives "democratic legitimacy" to regulations (Public Comments Make A Difference, n.d., p.2).

Regulatory Rulemaking as Rhetorical Intersection

"[R]hetorical scholars may contribute importantly to studies of public policy by illuminating the constitutive and consequential qualities of this complex communicative practice [of policymaking]."~ (Asen, 2010, p. 139)

The regulatory rulemaking process is a discursive space for the shaping of identities. In many ways, it meets the requirements for public participation set by contemporary public sphere theory; it is open to all and it allows voices of all different types to enter the conversation. Moreover, with the advent of eRulemaking, the public in the process cannot only address comments to the state; it can address other members of the public in the rulemaking process. It is a space wherein individuals constitute themselves as a public for the purposes of deliberation of issues of policy, an act of which John Dewey would be proud. The regulatory rulemaking "public" recognizes itself and speaks to both the state and each other. In the best ways that James Boyd White hoped, the regulatory rulemaking process represents a culture of argument with legitimacy and justice as its aims.

This process of regulatory rulemaking, as discussed below, is rhetorical and tied to the symbols of authority. It is a site of facilitated debate as well as translation of ideas from the legal to the vernacular and back again. Finally, it is a site of identity construction: construction through law's interaction with the public and the public's interaction with the law. Each is discussed below.

Rulemaking as rhetorically constituted symbols of authority.

As Kenneth Burke would suggest, the regulatory rulemaking process is a rhetorical one; it attempts to make the actors in the process, the state and the public participants, consubstantial. It is a site and a process where vernacular and official actors give meaning to a symbol of authority, the law. The meanings of "worker," "family member," "intermittent leave," "family leave," "son," "daughter" and the like are those "legal" symbols of authority that Burke would suggest belong to the public, and as such, members of the public have a stake in their ownership. This ownership of the words' authority in the rulemaking process cannot be delegated; rather, because the words are acts, the products of purposeful action, their meaning, inextricably and always, belongs to the discourse participants (Burke, 1959, p. 334). In other words, the meaning of the FMLA in the regulatory process is created cooperatively through the sharing of public comment with the regulatory agency. As such, actions within the process, from the creation of regulations, notice to the public, comments from the public, and responses to those comments, all constitute rhetorical acts designed to overcome division, create identifications, and establish a common "sub-stance" that will lend legitimacy to the final rules.

The recursive interactions between state and public in rhetorically constituting the rulemaking process is significant. Rulemaking, as a form of policymaking, is "a multidirectional process, whereby policymakers may select problems from an already established agenda or introduce problems onto public agendas" (Asen, 2010, p. 139). Moreover, given the electronic means by which individuals can participate, regulatory rulemaking represents a site of "increase[ed] . . . opportunity for engagement in the processes of discursive citizenship" (Howard, 2010, p. 242). In the case of regulatory rulemaking for the FMLA, the terms of the statute, the existing regulations, and the ways in which the Department of Labor frames its request for comments all provide a circumference in which work and family can be discussed. The FMLA text is not static, however, and the rulemaking process demonstrates how the meanings of the terms are rhetorically constituted by the discourses circulating in the regulatory rulemaking process.

Burdens of translation and facilitation.

The regulatory rulemaking process is set up in such a way that both the state and the public have burdens of translation in the process, and the state has the burden of facilitating public participation. First, the regulatory rulemaking process appears to create a burden on a commenter to sufficiently "translate" his or her vernacular into "official" language that an agency official might recognize as raising an objection to the regulation or providing analysis or data. It places upon the commenter the duty of creating understanding in the receiver; the duty is on the sender to structure comments in a written form (typically not oral) for the

understanding of another. On the other hand, the state, through its creation of a "space" to receive comments from the public about its plans for regulation, has some responsibility in the process for ensuring active participation and deliberation by the public; that is, it facilitates the public's ability to comment on the regulations. Moreover, the agency has the burden of translating its "expertspeak" into language that can be "plainly" understood by the public.

As discussed elsewhere in this project, legal discourse, in its traditional form, seeks to extinguish contingencies, to be objective and acontextual, and to adhere closely to authority and hierarchy (Wetlaufer, 1990). Moreover, law has a tendency to oversimply problems and solutions, overstate its own legitimacy, and marginalize certain voices (Wetlaufer, 1990). This is consistent with Asen's (2010) view that the policies give meaning and value to particular aspects of society rather than reflect the values that somehow society instantiates in the policies. The regulatory rulemaking process can be seen as a foil to the traditional rhetoric of the law and the corresponding rhetoric of policy. The regulatory rulemaking process opens up a space where the vernacular intersects with official regulatory language to shape the ways in which that language creates meaning and value. It also provides a space to examine how individuals in the vernacular use the meanings and values supplied to them by the official text to either inform their deliberations or to use that official text as a point of resistance.

In particular, the regulatory rulemaking process is exactly the kind of rhetorically constituted "public" that Hauser contemplates when he discusses how a public comes to be. The official discourses define matters of concern and

individuals discursively form a public that share the concerns and actively deliberates about them.

Finally, the regulatory rulemaking process is an example of a public that can (and is meant to) exert influence on policies but cannot ultimately decide what those policies will be. Arguably, this is the kind of public that might fall somewhere between Nancy Fraser's (1992) categories of "strong" and "weak" publics. That is, the public in the regulatory rulemaking process is a public that has the ability to influence policy but not necessarily to make the ultimate decisions about that policy. The influence comes from participants making "mundane statements" (Asen, 2010, p. 133) and crafting "meaning through their engagement with each other [and their] hope to circulate their preferred meanings more widely" (Asen, 2010, p. 132). But the inability to engage in decision-making comes from the fact that the state is the ultimate decision-maker. In this way, the regulatory rulemaking process challenges the binary of strong and weak publics and encourages more reflection on the characteristics of publics when they form at the behest of and in response to state action.

Regulations as sites for identity creation.

The process of engaging in regulatory decision-making is a process of audience—and identity—creation and identification. Chaim Perleman and Lucie Olbrects-Tyeca (1960) argued that speakers imagine the "universal audience," which is the audience that should agree with the argument being made and is the audience that *should* be. In other words, speakers *project* audiences as much as reflect them (Perelman & Olbrects-Tyeca, 1960). Thus, when speakers, both state

actors and members of the public, in regulatory decision-making speak, they project an audience that can identify with them, and that reflects back their own identities. Once this reflection occurs, then those same identities can take on a life of their own, acting "as a force that operates relatively independently of individual participants" (Asen, 2010, p. 133). Upon breaking free of their individual proponents, they become "'speaking positions' that various advocates could adopt" (Asen, 2010, p. 133). As such, statements of identity in the regulatory rulemaking process "propogate and enforce social norms with material consequences" (Asen, 2010, p. 134).

In addition, participation in the regulatory rule-making process is not only a process of assigning meaning to legally designated identities, it is individual enactment of identity in the public sphere for the purposes of influencing the state. In other words, when the "official" identities of workers and family members are in question, the public communicates to the state what those identities should be by enacting, through their comments, specific subject positions for commenting. Notably, a public discussion about the privately managed intersect between work and family, particularly where individuals can have direct interaction with state actors on the regulatory process, is not all that common and thus provides a unique setting for identity creation.

Finally, in facilitating the space in which those communication can be made, the state offers discursive boundaries—in the form of proposed regulations, requests for information, and the like—to control how those identities can reasonably be shaped. That act raises a number of issues. First, as seen in the

discussion above, who will "count" as a "family member" is at issue. The nature of the family experience—intermittent, episodic, emergent, routine—is at issue. The degree to which a worker must not have "breaks in service" in order to prove loyalty to an employer for the purposes of FMLA leave is an issue. The identity of a family member who is "needed," the degree to which those persons can be trusted, and the degree of monitoring needed is at issue. Each of these articulated issues, along with others described by the Department of Labor, represent stasis points in the classical sense and provide a circumference for the ways in which work and family can be constituted in the terms of the FMLA. These circumferences provide sites, both limiting and empowering, for constructing identities because they provide the questions that can be answered in the rulemaking process.

In sum, Asen (2010, p. 134) suggests that the study of policymaking "implicate[s] circulating bodies of rhetoric that serve as publicly articulated ways of collectively understanding and evaluating our world." Considering the comments that arise in this regulatory rulemaking process as a body of rhetoric made up of discursive, deliberative fragments that are constitutive of identity, this raises questions of how the comments create meaning, how they persuade, and how the identities of work and family are constructed through the textual transactions between comment and regulation. The next chapter turns to a careful analysis of that rulemaking process.

Chapter 5

ANALYSIS

This chapter seeks to engage the reader on multiples levels of knowledge construction. First, it examines a body of social knowledge—the cooperative interactions of discourse participants in the public sphere. Second, it examines a codified version of that social knowledge—in the regulations themselves. Third, by engaging in rhetorical criticism, it creates a form of social knowledge by offering readers a deeper understanding of the way the text of the law interacts with official and vernacular actors to construct work and family identities.

The specific goals of this chapter are to (1) understand terms used in the regulatory rulemaking process as clusters of motivations about the nature of work and family, (2) understand rhetorical strategies used by public participants in the regulatory rulemaking process, and (3) explore what those clusters and strategies reveal about the rhetorical construction of work and family identity. This analysis section will account for the major claims about worker and family member identities using dramatistic terminology and method. Particularly, the section will use various methodological terms from the dramatistic method including "cluster," "perspective by incongruity," "dialectical term," "merger," and "bridging device," among others. The section will also make observations about how the interchanges related to the regulatory rulemaking process reveal something about the operation of the public sphere, facilitated publics, and the law itself.

This chapter begins with a short discussion of what rhetorical criticism epistemically offers. Then it discusses the concept of social knowledge and its rhetorical construction. Third, the comic perspective and the dramatistic methods applied in this section are briefly discussed. Finally, the chapter turns to a dramatistic analysis of the regulatory rulemaking process using cluster analysis and other Burkean concepts to reveal the meanings of worker, employer, and family member identities that lie within the regulatory rulemaking process.

The Epistemic Function of Rhetorical Criticism

Rhetorical criticism does not propose universal truths; rather, rhetorical criticism allows a researcher to situate herself at the point of "praxis"—at the point of the practical and the active to look at policies "relevant to the great issues of our time" (Wander, 1999, p. 359). The goal of rhetorical criticism is not to identify what things are but, rather, what things mean. Rhetorical criticism can reveal the meaning of not only what is said in the text but also in its "silences"—what is negated through the choices made by a speaker in addressing his or her intended audience; through rhetorical criticism, what is unacceptable, insignificant, and negated in the text can be seen (Wander, 1999, p. 369).

Rhetoric has the power to be epistemic, to be a way of knowing. (Scott, 1999). At the very least, rhetoric is a "central tool" for gaining access to social knowledge (Lucaites & Condit, 1999, p. 128). By engaging in rhetorical criticism, understanding through studying the symbolic transactions between individuals can be gained. Even more boldly, it might be asserted that "rhetoric is

the master practice responsible for the construction of all human truths" (Lucaites & Condit, 1999, p. 129).

The analysis of the 2008 FMLA regulatory rulemaking process is not designed to result in scientific knowledge; rather, it generates rhetorical knowledge of the practical and the social in an effort to gain greater understanding of the way language works to mediate human relations, and to interpret, evaluate, envision new possibilities for the law, work and family identities, and regulatory rulemaking (Lucaites & Condit, 1999, p. 5). As meaning is always an incomplete project, interpretation always plays a role in how we come to know through discourse (Peters, 1999).

Rhetorical criticism is important because it reveals the importance of legal discourse to the community and society as a whole; it can expose how legal discourse has a socially constitutive function (Scallen, 1994) and how law is also constituted in by discourse and interaction in the public sphere. This rhetorical challenge to law's professionalized discourse opens law to greater understanding.

Rhetoric and Social Knowledge

Rhetoric is constitutive of public life; it is the means by which we engage each other through discourse in public to render judgment and produce action (Lucaites & Condit, 1999, p. 13). Farrell (1976) ties rhetoric to knowledge by arguing that rhetoric generates social knowledge, a form of "common" or "collective knowledge." Social knowledge is not individual, objective, or detached, but rather it depends upon having a "personal relationship" with others in a larger community (Farrell, 1976). Social knowledge also gives "foundation

and direction to the art of rhetoric" (Farrell, 1976, p. 12). That is, rhetoric is the art applied to social knowledge to use it for change and action.

Social knowledge is probable knowledge; it is in a "potential" or indeterminate state and it is both transitional and generative, meaning that when a point of social knowledge is settled it becomes "social precedent for future controversy" (Farrell, 1976, p. 10). It relies upon assumed consensus for placing issues in argument. Finally, possessing social knowledge requires that decisions be made because communities are repeatedly confronted with problems that require collective deliberation and action. "Knowledge which relates problems to persons, interests, and action often implies, then, a covert imperative for choice and action" (Farrell, 1976, pp. 10-11). Importantly, social knowledge is tied to individual identity: "Social knowledge is merely the surface tracing of a deeper identity, between the self and its conscious extension—the human community" (Farrell, 1976, p. 13).

The regulatory notice and comment process is a form of cooperative and collaborative knowing that takes advantage of and leads to social knowledge. The existence of the work-family debate, the large audience of public participants, and the desire to regulate the relationship between work and family create a situation for the formation of social knowledge. Moreover, when the Department of Labor issues a notice of proposed rulemaking, it is attributing consensus, for the sake of argument, that something must be done to transform the regulations as an authoritative discourse. Third, when the Department finally makes a decision about what regulations are appropriate for the FMLA, it is creating precedent for

future controversies. The knowledge generated in the rulemaking process defines the conflict between the concepts of work and family and requires that the Department make decisions about which conceptions of work and family will be transmitted in the law. Thus, because regulatory rulemaking is a site of social knowledge, it is amenable to rhetorical analysis.

A Comic Perspective and the Dramatistic Method

A comic perspective.

This project takes the comic perspective to rhetorical analysis as developed by Ruekert (1994), based upon Burke's discussion of comic criticism. Ruekert draws upon Burke's work in Attitudes Toward History (1937/1984), in which Burke describes the "comedic" frame as the best "frame of acceptance" for orienting ourselves to the world. Ruekert (1994) posits that all of Burke's work is the development of a method that allows the critic to apply the comic perspective. A comic approach assumes that people are not evil, but mistaken, and need correctives not punishment (Ruekert, 1994). A comic perspective serves as that kind of corrective by (1) being charitable to a text but not gullible, (2) maintaining a "maximum awareness" of the "forensic" materials of culture as the source of meaning, (3) seeing everything as related to everything else to look for the ecological balance between things rather than accepting the efficient and rational isolation of some ideas over others, (4) using metaphor as a perspective to posit how symbols seemingly unrelated are or could be related, (5) assuming that all human action has symbolic content, (6) taking an analytical approach to the text to break it down, (7) rejecting absolute logics or truths, and (8) using "perspective

by incongruity" to transcend categories or other barriers to merger (Ruekert 1994).

This project takes a comic perspective when analyzing the FMLA regulatory rulemaking process. Rather than assuming that some views of the work-family relationship are right and others are wrong, the project approaches the discourse openly, looking to explain rather than to blame. The comic perspective is particularly important in a discourse that emphasizes a hierarchy of terms and relationships that are created by categorization, because it emphasizes resisting hierarchy and looking for ways to better understand the motivations behind that hierarchy. By virtue of the overdeterminate nature of law (Hasian 1994), law is one of those hierarchical and categorizing discourses amenable to review from a comic perspective.

The project maintains a keen awareness of the texts—the statute, the regulations, the Department of Labor's analysis of the law, and the over 4,600 comments—as materials that are sources of meaning. The law and the comments are treated as rhetorical actions with symbolic content and the goal of the project is to ferret out the meanings in those symbols. By using a variety of dramatistic approaches, the project seeks to determine how symbols are related or unrelated and how the various texts can relate and interact.

The dramatistic method.

"Dramatism is a method of analysis and a corresponding critique of terminology designed to show that the most direct route to the study of human relations and human motives is via methodical inquiry into cycles or clusters of terms and their functions" (Burke, 1968, p. 455). Stated another way, dramatism provides a way to understand human relations by identifying the motives in language. These motivations are revealed in the ways in which the speakers highlight act, agent, scene, agency, purpose, and the incipient action, attitude, in their speech. For this project, attitude is particularly important because identities, arguably, are composites of our attitudes, and attitudes are found in language. As shown below, comments on the meaning of the FMLA regulations reflect various attitudes about what it means to be a worker, employer, and family member and what it means to move between those various and contested identities.

Dramatism encourages a researcher to look carefully at the terms in a text to get at its meaning and to reveal the underlying system of motives. It provides a method of analysis that can describe humans as they react symbolically to their environment (Brock, 1990). A number of "sub-methods" give the researcher the tools to take this careful look. First, one can seek out "clusters" of terms by charting what symbols go with other symbols and then asking what "substance" they share (Burke, 1937/1984). Cluster analysis also allows the researcher to take terms from the substantive area itself, such as "worker" or "family member," and as use those terms as constructs for analysis, allowing the researcher to use the term as a particular "sub-stance." So, in the law, we might be able to see how some words cluster around particular ideas or concepts that form those words' "sub-stance" (Burke, 1937/1984). Using cluster analysis, meaning in a symbol can be found by examining the internal organization of a text, noting what follows what, and discovering the symbol's function (Burke, 1937/1984). A cluster

analysis allows examination for "authority in symbols, acceptance and rejection, rituals of purification and rebirth, transcendence, bureaucratization of the imaginative, alienation and identification" (Burke, 1937/1984, p. 203).

Moreover, by applying a "perspective by incongruity," a critic can carefully consider the symbolic mergers and divisions in a text and get at the "sub-stance" that governs the motivations in a particular text (Burke, 1937/1984). This process involves a "wrench[ing] . . . loose a word and metaphorically apply[ing] it to a different category" (Burke, 1937/1984, p. 308). As part of this "wrenching loose" activity, a number of other Burkean constructs can be operationalized to interrogate the text. For example, one might look for "bridging devices" that transcend conflict by merging opposites into single terms (Burke, 1937/1984).

Cluster analysis and perspective by incongruity allow the critic to reveal the ways terms are positive (having a single, identifiable meaning), dialectical (having no positive reference), or ultimate (being a term to order all other terms) (Burke, 1950/1969). Moreover, the critic can examine how legal texts "casuistically stretch" terms to introduce new principles while remaining faithful to old ones (Burke, 1937/1984). The method permits inquiry into which legal abstractions "transcend" opposites through symbolic mergers that integrate more meanings into a term more than is evidence on its face (Burke, 1937/1984).

Another possible means of analyzing how public texts construct social knowledge and provide symbolic patterns is to search for the representative anecdote (Burke, 1945/1969). A representative anecdote is a dramatic theme or

story that undergirds a discourse; when it is revealed it can show the "essence of a culture's values, concerns and interests" (Brummett, 1984, p. 164) with respect to real life problems. Burke (1945/1969) himself recognized the representative anecdote as a particular kind of selection, reflection, or deflection of reality based upon the vocabulary (or "terministic screen") chosen for expressing and framing a particular discourse. Representative anecdotes provide a filter through which critics can look at legal discourse to identify the ways in which it represents particular realities. Burke (1945/1969) suggests that representative anecdotes must have sufficient scope to be fair representations of a particular situation and yet sufficiently simplistic to provide a useful reduction of the subject matter.

By identifying and analyzing the representative anecdote, the critic can study and reconstruct discourse and can tap into what societies most deeply fear and hope and how these societies confront fears symbolically (Brummett, 1984). By identifying the representative anecdote underlying a discourse, a culture's strategy for living a situation is revealed; the representative anecdote can be seen as the "symbolic remedy" for a cultural problem. (Brummett, 1984).

Looking for the representative anecdote underlying a legal text is particularly valuable for rhetorical analysis of the implicit assumptions and values held by a culture as represented in and perpetuated by that text. To get at the representative anecdote in legal discourse, one can ask "'If this [legal] discourse were based upon a story, an anecdote what would the form, outline, or bare bones of that story be?'" (Brummett, 1984, p. 103).

Anthony Amsterdam and Jerome Bruner, writing within the legal academy, have implicitly recognized the importance of Burke's dramatistic techniques to evaluate the law as rhetoric. First, they note that the law is heavily based upon categorization through language. Moreover, they recognize that this type of categorization is a "familiarity [that] insulates habitual ways of thinking from inspections that might [make] them senseless, needless, and unserviceable" (Amsterdam & Bruner, 2000, p. 2). Accordingly, a goal of analyzing legal texts should be to not only reveal the categorizations in the law (i.e., the "clusters" of terms) but to also "mak[e] the already familiar strange again" (Amsterdam & Bruner 2000, p. 1) (i.e., take a perspective by incongruity).

Applying the methods of dramatistic criticism to the regulatory rulemaking process means first understanding how the Department of Labor, in its procedures for rulemaking, set the terms of the debate by offering terminology that limited the potential meanings of statements that the public utters. Then, within the structures established by the "official" discourse, it can be observed how individuals (including organizational representatives) use or resist that language to create particular worker, family member, and, as a contrast, employer identities. Because the FMLA regulations function to set conditions for performances as employees within the workplace, employer identities must also be considered in conjunction with worker and family member identities. The employer, and, in fact, the workplace, is inextricably tied to the determination of the identity of the worker without the bounds of the FMLA. Accordingly, this

analysis will also take into account the way in which employer identities are constructed.

Within the dramatistic frame, this project uses terms from work and family-focused communication research and public sphere theory to assist in discovering how particular identity concepts "cluster" around particular terms. For example, concepts of public and private, both of which are discussed in public sphere theory and work/family communication literature, are used to examine the discourse. In addition, the texts are reviewed to determine how ideas about worker and family member identities merge and divide, and to determine how ideas could be related to each other in ways that the text does not make apparent on its face. The "intensity" and "frequency" of terms, as Foss (2004) suggests, are studied to reveal the major features of the text, working to generate connections and disconnections, continuities and discontinuities that shed light on how the texts work to craft identity. By combining concepts from the theoretical perspectives applied here, categories and concepts continued to emerge throughout the analysis, which avoided the "cookie cutter" problem with rhetorical criticism where the method ends up over-dictating the result of the analysis.

Analysis

This section first discusses the limits on the analysis. Then, it describes the ways in which the regulatory rulemaking process affects the nature of the public that forms and the ways in which the deliberations develop within that process. It then examines how meaning clusters around particular terms expressing worker and family member identities. Then, it examines the kinds of

circumferences that are drawn around the identities expressed. It concludes with a brief summary of the terrain covered in the analysis.

Limits

First, although the FMLA covers both "family care" and "self care" in its provisions, this analysis is focused more on family care and the relationships of dependency related to that family care than on self-care for one's own health conditions. Thus, the project focuses more on "family leave" than it does "medical leave," although it does examine medical issues when "family leave" involves leave to care for a family member who has a serious medical condition. Second, this project does not give attention to the recent amendments that provide family and medical leave under the FMLA for military members. The leave provided to military families and the resulting identity implications for those families is a discrete and unique area that, while worthy of study, is outside the scope of this analysis.

Third, this study is limited by the self-selecting nature of the participants in the regulatory rulemaking process. The participants in the regulatory rulemaking process include, for the most part, official government actors; individuals who have been encouraged to participate via their membership in special interest organizations; individuals who are participating as representatives of organization, often times an employer; and individuals who are not affiliated with any particular employer or organization. On the employer "side" of this equation, many comments were facilitated by language provided by the Society of Human Resource Managers. In addition, a number of other employer

representatives identified themselves as affiliated with these employer-focused special interest organizations. On the "employee" side, a number of unions, including the Teamsters, the American Federation of Teachers, and the American Postal Workers Union, all encouraged comments from their members. Other interest groups that encouraged comments include the National Organization of Women and Women Employed. In addition to encouraging comments, these groups often submitted one "official" comment on behalf of their membership.

Because of the self-selecting nature of the participants, these comments cannot be viewed as statistically representative of a cross-section of "the public," even if such an entity could be defined. Rather, as John Dewey (1927/1954) recognized, this self-selection and self-identification are hallmarks of the ways publics form—a public creates itself via the recognition of common interests. In the case of the FMLA regulatory rulemaking, however, the formation of the "regulatory rulemaking public" is facilitated by the actions of other "publics"—i.e., special interest groups—that have encouraged participation of individuals. As discussed below, this kind of facilitated participation complicates the rhetorical operation and the identity function of the regulatory rulemaking process. While self-selection of participants does not impact the validity of a rhetorical analysis like this one, however, it is important for readers to be aware of the nature of the origins of the comments.

Facilitating and limiting the public debate.

The FMLA regulatory rulemaking process offers a unique setting for considering the ways in which public debate operates where the state has created

a venue for public participation from any and all members of the public without limitation. This unique setting shows how the state plays a role in bureaucratizing the imaginative of work and family identity, it demonstrates the ways in which the rules for participation in that deliberative setting can both mute individual voices as well as provide spaces for voices of resistance, it shows how appropriated language has the ability to lose its effectiveness with the audience (the state) that has the ability to effect the change desired by the public participants, and it demonstrates that by facilitating a space for public deliberation, the result is a paradox that may do as much to deter effective participation as encourage it. This section addresses those points.

"Bureaucratizing" the imaginative of work and family.

In 2008, one week after the Notice of Proposed Rulemaking was issued to amend the FMLA regulations, Assistant Secretary of the Employment Standards Administration of the Department of Labor, Victoria Lipnic, was called before the United States Senate's Subcommittee on Children and Families, Committee on Health, Education, Labor, and Pensions, to describe the Department of Labor's proposed rules. Lipnic described the state of affairs surrounding the FMLA this way:

The FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child, and in allowing employees to be absent for blocks of time while they . . . care for family members recovering from serious health conditions. The FMLA also seems to be

working fairly well when employees are absent for scheduled treatments related to a family member.

However, the Department has learned that the FMLA, like any new law, has had some unexpected consequences. . . . [E]mployers often expressed frustration about difficulties in maintaining necessary staffing levels and managing attendance in their workplaces, particularly when employees take leave on an unscheduled basis with no advance notice. [Moreover] the current medical certification process is not working as smoothly as all involved would like. . . . Without action to bring clarity and predictability for FMLA leave-takers and their employers, the Department foresees employers and employees taking more adversarial approaches to leave . . ." (Lipnic, 2008, pp. 4-6).

Lipnic further stated that the proposed rulemaking reflected the Department of Labor's commitment to "[t]he peace of mind that the FMLA brings to workers and their families as they face important and often stressful situations" (Lipnic, 2008).

With these comments, Lipnic set the stage for how worker and family member identities, already embedded in the existing regulatory language and structure, had undergone a transformation in vernacular as well as the legal discourses—how the meaning of the regulations had transformed, without necessarily any "official" intervention—and how "official" processes were underway to determine how those transforming meanings would merge into the terms of the regulations—or would be rejected. Lipnic's announcement

amounted to, in Burkean terms, an invitation to rhetoric—an invitation to the public to participate in the messiness of deliberation and democracy, to engage in building systems of order by commenting on the regulatory proposals, and to overcome division about the meanings of the regulations by seeking consubstantiality. In her comments on the need for "clarity" and "predictability," Lipnic implicitly stressed how the points of ambiguity in the language of the regulation offered opportunities for "official" transformations. These official transformations would be the product of the inventiveness of a public that formed in its recognition of shared concern over the regulations; in response to the notice of proposed rulemaking, more than 4,600 different comments would seek to influence the future of the FMLA's application.

Also present in Lipnic's comments was a revelation about how official discourses operate to "bureaucratize the imaginative." "Bureaucratization of the imaginative" describes how imaginative possibilities that circulate in a culture, like the possibilities of what it means to be a worker or a family member, are ritualized into specific structures and rules that then become reinforced by that same structure and those same rules (Burke, 1937/1984, p. 225). Although Burke (1937/1984, p. 225) describes "bureaucratization of the imaginative" as a "process of dying" and of turning of ideas into commodities, bureaucratization might also been seen, at least in an authoritative discourse like the law, as a systematized process of *becoming*. Ideas circulating in culture 'become' more than ideas when bureaucratized; they become authoritative terms that create material relations, their "materiality" established by their presence in official,

authoritiative texts. As a commodity with the weight of authority behind them, "bureaucratized" terms become an "official currency"—a means of trading ideas and framing lived experiences in a common and influential public language.

When coupling the authoritative nature of language with the bureaucratization of imagination, one can rethink the valence of "bureaucratization of the imaginative." On one hand, bureaucratized terms can be seen as discourse that oppresses, but, on the other, authoritative language can be empowering, legitimizing points of view that might otherwise have remained suppressed.

The notice of the proposed rulemaking of which Lipnic speaks is the process by which this "official currency," this "bureaucratizing of the imaginative," both comes into being as well as reinvents itself. The existing structure of the FMLA regulations provided a currency of identity terms, a common language for capturing the imaginative possibilities of worker and family member identities that existed in culture prior to the enactment of the FMLA and again when the regulations were first promulgated in 1995. Over time, custom began to challenge those regulatory commodifications, testing the coherence of the identities contained within those terms, finding areas of ambiguity, tension, and conflict between the terms themselves and the lived experiences they motivated. As a result, Lipnic's notice of proposed rulemaking is a "second act" of identity commodification or bureaucratization, a way of transforming meanings, that been codified and authoritative but had become uncertain over time, into new "bureaucratized" terms that would provide new certain and clear legal identities for those functioning within the bounds of the FMLA.

Moreover, this characterization of the FMLA's transformation since its passage establishes a representative anecdote for the rulemaking process. In this "story" to Congress about the functioning of the FMLA and its regulatory scheme, Lipnic reveals the reductive theme that undergirds the "reality" of the FMLA; the FMLA functions well for workers but employers are frustrated with unexpected leaves of absence. Without the "symbolic remedy" of government action to clarify the regulations, employers and workers will become "adversarial," a fear that already undergirds the tension between worker and employer in the statement of purposes in the FMLA. Moreover, the anecdote reveals an underlying concern about ways in which control can be exerted to avoid the unexpected. Thus, in the representative anecdote delivered by Lipnic, the imaginative possibilities of work and family are bureaucratized into a frame that focuses on eliminating the unexpected, exerting control and predictability over the FMLA process, and avoiding adversarial interactions.

Beyond the representative anecdote, this bureaucratizing function of the regulatory rulemaking process that Lipnic identifies has additional implications. First, the existing regulatory scheme allows the state, here, the Department of Labor, not only to bureaucratize ideas about work and family that come from culture, but to also control the set of questions that can be asked about the existing bureaucracy and thus to shape the ways in which the "answers" to those questions are effective or ineffective as responses in the rulemaking process. In other words, the questions that are asked the regulatory rulemaking process are defined by the existing language and the official actors' understanding of that language

and its ambiguities. As described in more detail below in the section "answering the wrong questions," the existing bureaucratic scheme has significant implications for the ways in which the public is facilitated in participating in the regulatory sphere and whether that public is able to be heard in the official realm. That is, the bureaucratization of the meanings of work and family are pre-made starting points for the consideration of the meaning of work and family,

An additional implication regards the power to rhetorically appropriate the language of the existing regulations and terms of the debate in the regulatory rulemaking process. Here, the state is not the only actor that has the power to bureaucratize the imaginative possibilities of the regulations in a way that controls the nature of the public debate; rather, large, special interest organizations have significant power to shape the ways in which their members comment on the regulations and enact particular identities within the regulatory rulemaking process. And, in this process, a number of organizations used this power, including the Society for Human Resource Management, the National Organization of Women, and the American Postal Workers Union. These organizations, among others, sought to give voice to their members in the rulemaking process by suggesting to their members that their comments include or reproduce the organization's "suggested comments" as their individual comments. Hundreds, if not thousands, of uni-"form" comments appeared in the FMLA regulatory rulemaking process.

The rhetorical strategy of suggesting that individuals use the organizations' "suggested comments" implicates questions of "form," which, in

Burkean terms (1931), is the creating a satisfying of an appetite in the auditor, a rhetorical technique meant to enhance the power of the appeal of a document. The power of the organization to create a form of response, draw its members' attention to that form and the issues it raises, and empower individual members to submit that form as a comment suggests that the organizations believe that numerous messages in the same form are persuasive in the regulatory rulemaking forum. The section "form' letters: appropriating identities" discusses this concept in more depth.

The final implication of the way in which the regulatory rulemaking process "bureaucratizes of the imaginative" is that it creates a paradox regarding the nature of public participation in regulatory rulemaking. That is, although the public is invited and encouraged to participate in the process (and in the modern era, technology has helped provide even greater opportunity and ease in that participation), the questions that the Department of Labor asks, the existing meanings of the terms of the debate, and the power of organizations to shape the discourse in the process operate to mute the voices of some individuals who have been invited as members of the public to participate. As such, while facilitating public participation in the rulemaking process privileges the imaginative by inviting individuals to share their views of what the FMLA regulations should be, at the same time, the process is "bureaucratized" by the existing terms and rules of debate set within the state-sponsored venue. The section "the paradox of a facilitated public" addresses the complexities surrounding this question.

Answering the wrong questions.

In 2006, the Department of Labor issued a Request for Information (RFI) (2006, p. 69505) to the public inviting "interested parties having knowledge of, or experience with, the FMLA to submit comments and welcome[ing] pertinent information that will provide a basis for ascertaining the effectiveness of the current implementing regulations and the Department's administration of the act. The questions posed are not meant to be an exclusive list of issues for which the Department seeks commentary and information." The Department (2006, p. 69508) specifically noted that it sought "comments and information from the public on all issues related the FMLA regulations." In response to that RFI, the Department of Labor received more than 15,000 comments, which the

In that report, the Department noted that it had received three categories of comments: comments that requested expansion of the FMLA coverage, comments that demonstrated "frustration by employers about difficulties in maintaining necessary staffing levels and controlling attendance problems in their workplaces," and "powerful testimonials" that expressed "gratitude" from employees who had successfully used the FMLA to "balance their work and family care responsibilities" (Report, 2007, p. 35551). Regarding the "powerful testimonials," the Department of Labor devoted an entire chapter (of an elevenchapter report) to discussing those employee experiences, including reproducing verbatim anecdotal comments of gratitude like this one:

My mother was diagnosed with cancer and she had a stroke that left her paralyzed and wheelchair bound. With the help of the FMLA, I was able to take her to her appointments and tell doctors what was going on with her since I was her primary caregiver. I was able to be with her when she took her last breath and was grateful for the time I was able to [spend] with her until her death (U.S. Dept. of Labor, Report, 2007, p. 35558 (alteration in original)).

After its report on the RFI, the Department of Labor then issued its notice of proposed rulemaking in February 2008. In the notice of proposed rulemaking, the Department offered specific revisions to the FMLA regulations and included those proposed changes in an over-100-page rulemaking announcement (Proposed Rule, 2008). At this point, the Department framed its request for comments in a much narrower way, seeking comments specifically on its "proposed changes" to the FMLA regulations (Proposed Rule, 2008, p. 7876). Specifically, although the proposed rulemaking announced a large number of changes that would impact the ways in which individual workers could use FMLA leave to handle family matters and how employers would be able to implement those changes, the Department asked for specific input on more technical questions such as:

- Whether specific tests in the FMLA regulations should be amended to conform with other statutes;
- Whether the proposed definition of "periodic" as used in conjunction with visits to a health care provider for a serious medical condition was appropriate;

- "Whether, in situations in which a physical impossibility prevents an employee from using intermittent leave or working a reduced leave schedule from commencing work mid-way through a shift, an exception should be made to allow the entire shift to be designated FMLA leave" (p. 7874);
- Whether combining certain notice provisions into one regulation would result in more effective communication of FMLA rights to employees;
- Whether the time frame the rules proposed was sufficient to allow for giving an employee notice of FMLA eligibility was sufficient;
 and
- Whether an individual who has given prior notice of a serious medical condition should give a particular kind of notice when needing additional leave (Proposed Rule, 2008).

All of these questions, amongst the others posed, were, of course, important questions for implementing the FMLA regulations. And these questions, along with the call for comments more generally, generated over 4,600 comments.

After receiving these comments, some of which had hundreds of additional comments from other individuals attached, the Department of Labor summarized them in the notice of the promulgation of the final rule that appeared in the Federal Register (Final Rule, 2008). Notably, the tone the Department of Labor had expressed with regard to the 15,000 comments in the notice of

proposed rulemaking had changed with respect to its perception of the second set of comments offered in response to its notice of proposed rulemaking. The Department characterized the comments it had received this way:

Nearly 90 percent of the comments received in response to the [notice of proposed rulemaking] were either (1) [v]ery general statements; (2) personal anecdotes that do not address any particular aspect of the proposed regulatory changes; (3) comments addressing issues that are beyond the scope or authority of the proposed regulations, ranging from repeal of the act to expanding its coverage and benefits; or (4) identical or nearly identical 'form letters' sent in response to comment initiatives sponsored by various constituent groups (U.S. Dept. of Labor, Final Rule, 2008, p. 67935).

The Department then characterized "remaining comments" as those that "reflect[ed] a wide variety of views on the merits of particular sections of the proposed regulations" and proceeded to carefully respond to those comments in generating the final rules (Final Rule, 2008, p. 67935).

By way of comparison to the Department of Labor's treatment of anecdotal experiences with the FMLA in its Request for Information Report, consider the following anecdote that the Department of Labor likely considered to be within the "90 percent" of comments that were not particularly relevant to its mission in the proposed rulemaking process:

I have used FMLA for both of my parents. I was out for a month with my father and his doctor told me that the care I gave him during that time

prolong[ed] his life for years. My mother had eye surgery and I was able to be with her until the doctor stated it was O.K. for her to be without supervision. I say this to say that without the FMLA I would have had to risk my job to care for my parents. Several years later my father was sick again and I was harassed by management about my attendance while my father was in the hospital where he died. I lost two parents within [a] six month time period (Anonymous #14, 2008).

This shift in response to public comments is notable in that it informs how vernacular discourse can be inconsistently received in an "official sphere" and how certain identities in the regulatory rulemaking process are either visible or invisible. Unlike in the 2007 Request for Information where anecdotal experiences were welcomed, in the second instance, the proposed rulemaking, the Department's language implied that anecdotal experiences with the FMLA answered the "wrong questions" at this stage of deliberation. Because the official actors sought more technical answers in this second phase of rulemaking, many "lived experiences" of workers were no longer relevant to the rulemaking process. Accordingly, where expressions that revealed concrete, individualized identities of workers and family members, in particular, were welcomed in the first process, in the second, those anecdotal comments expressing identities were largely dismissed as irrelevant. That is, when individuals decided to address a question with narratives of individual experiences of the FMLA—narratives and experiences for which the Department of Labor did not ask—the Department did not respond receptively to those communications.

This question of the way in which the official actors define the topics for discussion, or, in other words, defines identity positions from which one can speak, directly implicates Goodnight's (1982) concerns about the operations of the technical, public, and private spheres; Hauser's (1999) vernacular publics; and of the idea of what it means to "facilitate" a public sphere. First, the language of the Department of Labor as the official rulemaker seems to intend to facilitate only those comments consistent with its "official motives" in the rulemaking process. The language of these official motives set the conditions and rules for exchange in the FMLA regulatory rulemaking process. Here, the Department invites commenters to follow its "technical" lead, answering specific questions that are distilled from the information it gathered from its Request for Information. And, as a legal matter, individuals have some obligation, as discussed in Chapter 4, to conform their responses in this manner.

Implicit in these "official questions" are conditions and that make some kinds of discourse count and others not. The public, however, does not necessarily follow these conditions, either through a lack of understanding of the rules of discourse (recall that the notice of proposed rulemaking is over 100 pages long and includes specific questions dispersed throughout the text) or as a result of intentional resistance. As the Department's response makes clear, if its conditions for participation are not followed, the voices of the public, so important to the state in its announced policies on eRulemaking, may not be heard in the process. That is, the failure to adapt vernacular "talk" in a way that can be translated within the discursive structure results in a muting of voice, at least as

that voice can be heard by the officials within the state who have the administrative power to implement changes. Accordingly, the conditions of discourse set by the official structure can have the impact of limiting the messages that are received about work and family, what parts of those messages become codified into law, and accordingly, the ways in which worker and family member identity can be reconceptualized in the law as a result of regulatory rulemaking.

Even though the state may not "hear" all of the expressions of identity that emanate from public comments, that deafness does not preclude individuals from expressing work and family member identities outside of the specific call of the questions. Within the structure of submitting individual comments to the Department of Labor via the internet, there is still room for resistance, particularly a resistance that rejects technological interpretations for everyday experience. In the FMLA regulatory rulemaking, hundreds of comments fit this pattern consistent with Hauser's notion that critical-rational debate is not the only worthy means of expression in the public sphere. Many comments were written in a way that addressed not the technical aspects of administering the FMLA but expressed individual anecdotes or narratives that conveyed the ways in which an individual commenter understood his relationship to the FMLA, to the workplace, and to family. So, while the comments that did not address the specific technical questions were not necessarily heard by the official, the public still carved out a space within that technical sphere for its own varied expressions of identity. Even though perhaps moot with respect to the effect upon its intended audiences, to the extent that others read the comments, the comments would have had effect.

Moreover, to the extent that identity is affirmed and reaffirmed through one's own expression of it, simply offering the comments had an identity-shaping impact, even if upon no one other than the commenters themselves.

"Form" letters: appropriating identity.

In dramatistic terms, "form," is "creation of an appetite in the mind of the auditor, and the adequate satisfying of that appetite" (Burke, 1931, p. 31).

Because they function as an appeal, forms can be used to help a speaker persuade an audience. As an act of persuasion, a form is part of the attempt at identification between the speaker and the audience (Burke, 1931).

A form, in its material sense, like the embodiment of the concept of "form" in a "form letter," is not only a mode of appeal; it is also, like the law, an "efficient codification" (Burke, 1937/1984) of a particular interpretation of an experience (Davis, 2011). Because of its efficiency, a form isolates and stresses certain patterns for experiencing a particular environment, and leads the reader to anticipate certain qualities in the document, to anticipate how those patterns will repeat, and to be gratified by that sequence (Burke, 1931). Moreover, because form calls attention to selective features of a particular situation and creates a structure that dictates how readers will experience the situation structured by the form, a form can be a "formula" for creating and guiding the next experience (Davis, 2011).

A number of organizations offered their members specific language to use to comment on the proposed changes to the FMLA regulations. For example, the Teamsters for a Democratic Union offered their members a "sample comment"

that could be offered as a comment to the Department of Labor. ¹⁰ This four paragraph comment was repeated dozens of times, verbatim, in comments submitted in the rulemaking process.

Similarly, the American Postal Workers Union, AFL-CIO encouraged their members, via the Union website, to "use portions or all of the samples below—or to write their own remarks—explaining why they oppose the new regulations" (American Postal Workers Union, AFL-CIO, 2008). The APWU went further than the Teamsters, however, and encouraged their members to "add examples from your own experience if they are relevant" (American Postal Workers Union, AFL-CIO, 2008). The APWU form language was replicated hundreds of times in the comments and sometimes, as called for by the Union,

I am writing to comment on the new FMLA proposals that are currently under consideration as final regulations. I am a covered employee under the FMLA, and I am concerned that the new regulations will make it more difficult for me to take qualified leave.

Two new proposed regulations would make it harder for employees to exercise their right to leave under the FMLA.

The new regulations under sections 29 CFR Sections 825.302(b) and 303(b) are too technical and detailed, and could give employers an opportunity to make an excuse to deny leave to workers that qualify for the leave, by requiring employees to say the "magic words" to properly notify employers of their leave.

The proposed Section 310(g) would also make it harder for workers to use the leave to which they are entitled. By requiring a fitness report for even one day off work, this new rule would make it harder for workers who suffer from chronic ailments to take intermittent leave.

I urge you to re-consider these regulations (Teamsters for a Democratic Union, 2008).

¹⁰ The teamsters offered this language:

was augmented by personalized anecdotes of individual members' experiences with the FMLA.

The National Organization for Women (NOW) (2008) also proposed to its members "suggested comments." NOW (2008) offered that individuals could "cut and paste from our suggested comments, add your own personal story or thoughts, and/or you can add a document such as a personal letter from you!" Dozens of letters in the NOW form appeared in the comments.

On the employer "side" of the equation, the Society for Human Resource Management also initiated grassroots letter-writing efforts (SHRM Recommends Improvements to FMLA Implementation, 2007), where members submitted letters in language supplied in large part by the Society, but then added personalized name and address information (see, e.g., Lisa Bridgeman, 2008).

As noted above, the Department of Labor appeared to look with disfavor on the form letters submitted by organization members, even when additional

I am writing to oppose your proposed regulations (RIN 1215-AB35), which will undermine the Family and Medical Leave Act (FMLA) and hurt workers and their families. The Department of Labor should be working on expanding FMLA, not restricting it. I am concerned that the proposed changes will make it more difficult for workers to take advantage of the unpaid leave afforded them by the FMLA and will add unnecessary restrictions to a law that has been working well for both employers and employees for 15 years.

I do support the provisions dealing with "light duty" and military family leave, and ask that you preserve them and drop the proposals that make it easier for employers to deny leave and harder for employees to fulfill and balance their work and family obligations (National Organization for Women, 2008).

¹¹ The NOW "suggested comments" stated:

"personalizing" language was added, noting that the form letters received were in the 90 percent of comments that were not relevant to its considerations (2008, p. 67935). An individual commenter, in fact, further noted his concern with the validity of the form letters submitted by the Society of Human Resource Managers: "[the] DOL has no way of knowing which [comments] are genuine and which are of a "cookie-cutter" variety, the latter of which are clearly intended to "taint" the rule for selfish HR business interests. A series of formal proceedings, at a variety of strategic locations throughout the United States, can provide the DOL with real and true comments, from the public, on this proceeding" (Lineweber, 2008). The comment further complained "that the flood of identical, and probably un-researched, comments from . . . interest groups, if left unchallenged could serve to artificially cause the DOL to make ill-conceived and devastating changes . . . " (Lineweber, 2008).

It is not surprising that individuals would comment using language provided by the organizations in which they are members since that is the way in which many would discover the opportunity to participate in the rulemaking process, and it would give them a way to engage the state in language that was tailored to the specific technical questions raised by the Department. A question arises, however, about the effectiveness of using form letters in this way and what it means for legitimate subject positions in the regulatory rulemaking sphere for raising and discussing issues of public concern. The language used by the organizations who offered the form letters showed that they believed that the same or similar language offered by many comments would have the effect of

persuading the Department of Labor to make changes consistent with those repeated comments. Yet, the Department of Labor's response reveals that the "form" of the letter, even with the supplemental personalizing information, transmitted a uniform identity of the commenters, one that it seemed to treat as less influential and lacking credibility—an ethos that allowed the Department of Labor to state that it intended to ignore the comments as surplusage in the process.

Even though the call to add "personalized" comments as part of the "form" comment might be a way to diversify this uniform identity and allow individual commenters to share their individual experiences, the appropriated organizational language created difficulties for influential subject positions. That is, even though the organizational forms allowed an individual to continue to maintain a connection and convey an affiliation with that particular public interest group, the language failed to create identification with the "official" audience. Given the Department's highly technical characterization of the regulatory rulemaking process, arguably appropriating language from a more "expert" speaker—the organization's leadership that is engaged in the details of the debate and has resources to craft carefully constructed critical-rational responses—is an effective way that individuals can authentically engage the state for the purpose of exerting influence. But, given the Department of Labor's apparent rejection of the "form letters" as a rhetorically appropriate way to comment on the regulatory rulemaking, it seems that the form letter may have created an appetite in the Department of Labor that the letters ultimately did not satisfy. Perhaps from the

organizations' perspective, the letters created a means of participating in the process that satisfied the appetites of their members; the members identified with the language provided by the organizations. This, however, did not result in actual identification between individuals in the official sphere and individuals in the public; rather, arguably it created a false sense of the potentiality for identification in the commenter using a form letter while at the same time alienating the potential audience of state actors. Moreover, using the form language resulted in individuals lacking an identity or subject position from which to comment. Identity, whether worker or employer, was subsumed by the comments themselves.

The paradox of a "facilitated" public.

According to the law on regulatory rulemaking, the rulemaking process is to be open to the public for participation in the deliberations that yield regulations. These spaces for deliberation come into being only when the regulatory agency calls them into being and sets the rules for debate. In this way, the regulatory rulemaking notice and comment process results in a public that is facilitated, that is, it does not spontaneously or organically develop, but it is called into being and enabled by the state.

Official announcements of notice and comment rulemaking are available typically through the Federal Register and now through Regulations.gov, both of which are rather obscure sources for laypersons. As a result of the way in which regulatory rulemaking is announced, an individual is expected to either have the knowledge of the rulemaking process herself or be a member of an organization

that sees as one of its purposes maintaining awareness of regulatory rulemaking in its interest area. As a result, participation in the regulatory rulemaking process will likely be skewed toward organizations and its members, as the participation in the FMLA regulatory rulemaking process demonstrates through the number of organization-sponsored comments submitted in the process. As a result, some "interested persons," as they are described in the language of the Administrative Procedure Act, identify themselves not as a public of individuals responding to the announcement of regulatory rulemaking but by their affiliation with a member of a particular organization. Thus, while arguably every worker/family member would have a position, and perhaps a comment, on how the FMLA regulations should function to impact work and family life, the voices that were more likely heard in this regulatory rulemaking process were those that are "affiliated," however loosely, with an organization. That affiliation provides the member with another social identity, an identity of one that trusts in the knowledge and expertise of an organization's leaders and their language for speaking about issues.

The consequence of this, then, is that, at least in this regulatory rulemaking process, authenticity of identity becomes hard to determine from the use of the organization-supplied form letter. Stated another way, the identity of the speaker becomes hard to determine from the official's perspective, thereby raising questions about the credibility (or, for that matter, the identity) of the speaker. Moreover, in the context of the FMLA regulations, offering personal anecdotes, as suggested by the organizations as a way to convey "authentic"

identity, does not cure the problem because, at least for this rulemaking process, most narratives are deemed outside the parameters of the rules for participation and off limits for debate. Thus, sharing their individual experiences in the rulemaking process or using the language their organizations provide them places commenters in a Catch-22 if they feel uncertain about how to respond to the technical regulations.

All of this, then, leads to a paradox. Individual participation in the regulatory rulemaking process is "facilitated" by both official actors and organizational ones, both of which appear to have the intent to create a space where members of the public can participate fully and completely in the rulemaking process and can have a voice that is heard in that process. This facilitated space, however, is circumscribed, by the language constraints placed upon the debate by the state, through the topics it sets for debate, and by organizations, through form language that is meant to allow individuals without expertise to participate in the technical environment of regulatory rulemaking. Thus, while both the state and organizations sought to create conditions to facilitate public participation, they both paradoxically create rhetorical constraints that may proved, even unintentionally, to deny some participants a unique voice in the process or caused them to express their comments in a way their voices could not ultimately be heard by the individuals they sought to influence.

Plenty of comments resisted the discursive constraints, however. Many comments used unique narratives and vernacular language that addressed the function of the FMLA. Others ignored the questions that were asked by the

Department of Labor and described their experiences with and opinions about the FMLA. These comments, which resisted the rules of discourse set by the facilitated public were particularly useful in understanding the ways in which individuals constructed themselves as workers and family members. And, even though some comments used form-based language to express their views, this appropriated language is still relevant to worker and family member identity formation because, as Asen (2010) states, in policymaking discourses, circulating discursive fragments as well as authentic dialogues, are sources of meaning and motivation. The remaining sections take up the substance of all of the comments, appropriated, compliant, and resistant, applying a Burkean lens, to examine how all of those comments create meaning and motivation.

Clustering terms and tensions of identity.

Terms of identity are, as Burke (1950/1969) suggests, strategies for encompassing and dealing with situations; in the regulatory rulemaking context, the terms used in the process are strategies for coping with the material and symbolic consequences of work and family intersections, two spheres of experience generally considered separate and distinct (Kirby, Wieland, & McBride, 2006). In other words, the comments about work and family reveal how discourse constructs identities for workers and family members, how the law either accepts or rejects those constructs, and how the law itself provides a resource or a point of resistance for constructing identity.

Terms for work and family identities were present in hundreds of comments—even though the Department of Labor chose not to consider them in

its efforts to amend the regulations because they did not address the questions posed in the process. They provided "key symbols" around which particular concepts of worker, employer, and family member identities clustered. These terms were provided in the text of the FMLA and its regulations, in discussions by the Department of Labor in proposing new rules, and in the language used in public comments.

The terms that emerged as key symbols—privacy, abuse, accountability, sacrifice, and struggle, and the minor terms that clustered around these key terms, provide a terministic screen for interpreting work and family experiences and for shaping work and family identities. Many of these terms were dialectical terms, open to merger, division, and transformation as a vocabulary reflecting the motives of discourse participants. As dialectical terms, they lacked a material, positive referent to ground their meanings; accordingly, the terms were prime locations for ambiguity and for rhetorical transformation and legal classification. As some dialectical terms ultimately become "positive" legal terms with official, static meanings, looking at the "push and pull" of the comments about those terms can reveal the legal boundaries drawn around work and family identities in legal language and how, within those boundaries, those identities are contested and adoopted.

Burke (1937/1984) reminds us that symbols contain much more meaning than what is evident on their face; instead, symbols are "mergers" that integrate multiple meanings. Looking carefully at the clusters of words used in the rulemaking process also reveals how identities are codified within the law and

how those same identities play a role in the crystallized identities expressed in the language of the comments.

The sections below explore a number of dialectical terms and the contested meanings that cluster around and merge within each. For public comments, there are two sources. The first source is the Federal Register, in which the Department of Labor sometimes reproduces public comments. When the Department of Labor reports are the source of a comment, the comment will be designated as a comment and will be cited to the "Dept. of Labor" as the author. Second, most individual comments appeared on the federal regulatory site, regulations.gov. In that context, comments are attributed to individual authors. When those comments are cited, they are identified as a comment and are assigned to a specific author (e.g., "Manning") or to "anonymous" when an author identity is unavailable.

Privacy (and publicity).

"We have spent the last 200 plus years building . . . the Right of Privacy." \sim (Land, 2008)

"This is just [a] back door to put their nose in your personal life and to put your business on the workfloor." (Manning, 2008)

Privacy is a key symbol around which themes of publicity, expertise, and distrust circulated in the regulatory rulemaking texts. Under the original FMLA regulations promulgated in the mid 1990s, an employee who was claiming a serious medical condition for himself or for a qualified family member need only provide a certification that contained the "medical facts" that established a serious medical condition (U.S. Dept. of Labor, Proposed Rule, 2008, p. 7914).

Moreover, if the employer wanted to question a certification's "authenticity," only an employer's "medical provider" representative could contact the health care provider to obtain more information (U.S. Department of Labor, Proposed Rule, 2008, p. 7916). Under the proposed rules, however, healthcare providers would also be able to provide information to an employer about the prognosis or diagnosis of the employee (U.S. Dept. of Labor, Proposed Rule, 2008, p. 7915). Under the new regulations, information about the employee's family member's diagnosis or prognosis could be included on the certification and, even more importantly, the new regulations would allow any employer who was concerned about the authenticity of a medical certification (i.e., that the document was fraudulent or misrepresentative) to contact a medical provider about that certification; an employee who did not consent to this contact between employer and employee would risk the loss of FMLA coverage (U.S. Dept. of Labor, Proposed Rule, 2008, p. 7917). The Department viewed the changes as not "significantly impact[ing] employee privacy" (Proposed Rule, 2008, p. 7918).

Many comments provided during the rulemaking process, however, disagreed with this assessment and offered comments that connected three distinct themes to the idea of privacy as it related to the relationship between work and family: lack of expertise, stonewalling by employers, and "shop talk." First, comments objected to the access of "nonexperts" to employee medical information. The American Postal Workers' Union (2008) in their sample comments, which were included in a number of individual comments, pointed out that the change to the regulations meant that "disputes over the certification of a

medical condition would no longer be settled among health care professionals. Health care providers would have to justify their conclusions to employer representatives who have no medical training." Another comment juxtaposed employer representatives with "management . . . [who] are not pastors, priests, or any form of clergy. They are not trained counselors. Why would anyone want to hand over private information to a boss?" (Headrick, 2008). Another commenter more forcefully described the character of the "non-expert" that would access information and the connection of that non-expert invasion of privacy to other historically invasive governmental acts:

The furthest thing from my mind should be a non-medical bureaucrat deciding if this is covered by FMLA. FMLA was enacted precisely to lift this weight from a working mans' shoulders. Changes, if made, that would usurp a physician's certification is not only reprehensible, BUT UNACCEPTABLE. . . .

Is there fraud or misrepresentation? Yes, of course there will always be some fraud or misrepresentation. Do you have the right to investigate that possibility? Of course you do. But when you apply a broad solution to punish the few, then you bring back memories of McCarthyism and guilt by association. HIPPA laws were enacted by the government in conference with the people precisely to PREVENT such abuses of privacy, especially relating to medical records. You must have CONSENT in order to prevent such abuses (Rice, 2008).

Another comment expressed concern that the lack of expertise would result in a "pigeonhole effect" of a nonexpert trying to make sense of medical information provided by an expert care provider: "[y]ou now have coordinators trying to figure out what a doctor means when he writes a 'description of serious health condition'. The coordinator has a sheet they go by, when a doctor puts a description they try to match it to their sheet to see if they think it[']s a serious condition or not" (Bellard, 2008). Finally, one comment by the Director of Equal Opportunity Policy for Women Employed, focused the problem of the lack of expertise and the problems associated with the intimate but hierarchal relationship individuals have with others in the workplace:

[I]t could be the employee's supervisor or even co-worker who calls the healthcare provider. . . . [A] non-health care provider calling on behalf of the employer could request and obtain extensive personal information about the employee, and not being under a licensed obligation to keep the information confidential, could share it freely. This could clearly have a chilling effect on workers requesting and taking FMLA leave (Josephs, 2008).

Second, comments suggested that allowing supervisors to contact healthcare providers without the individual employee's knowledge would result in coercion of medical providers to give more private medical information. One union organization wrote that allowing a direct supervisor to contact a health care provider for information "would deter valid requests for leave from employees who resent this invasion of . . . their family member's privacy" (U.S. Dept. of

Labor, Final Rule, 2008, p. 68018). Another comment noted that "if workers submit medical certification, they are protected from invasive requests for further medical certification. I believe many employers . . . would routinely declare certifications "insufficient," and would deny workers leave under the FMLA" (Hilton, 2008). In a more Darwinian tone, another commenter noted that "[t]he proposed changes allowing direct contact with an employee's healthcare provider will in fact lessen privacy rights and create new tools for abusive supervisors and managers to weed out those who might not be the youngest, fastest, or healthiest from their workforce" (Gonnello, 2008).

A third line of comments clustered around the question of privacy in relation to its foil, "publicity." These comments expressed concern that allowing direct contact between any employer representative and the medical provider would result in the private information being shared with others in the workplace through illicit communication about their personal affairs. The National Partnership for Women and Families (2008, p. 17) argued that "[t]here are many serious health conditions that carry strong social stigma—a worker with any of these stands in danger of having her supervisors or coworkers know about her condition."

Stated differently, workers resisted sharing their medical information due to the risk of workplace gossip—they did not want their private family identities shared in the workplace, and the new regulations would "breed[] the chance of possible ridicule" (Anonymous #1, 2008). Some comments focused on the untrustworthiness of supervisors in keeping information private:

- "Allowing any manag[e]ment personnel access to a person[']s medical records is a very bad idea for the simple fact too many members of manag[e]ment have a [tendency] to 'talk too much' about private information. This would give them more 'conversation' topics about employees" (Williams, 2008).
- "I oppose any changes in the privacy policy that is now in force with the Family Medical Leave Act. Our medical history is information that should be kept between ourselves and OUR doctors. Everyone knows that Postal supervisors are some of the biggest gossip sources we have" (Hurley, 2008).
- "If the employee brings in more information it will just [be] more information passed around on the floor for all management to know and pass around (and play like they have a medical degree)" (Bellard, 2008).
- "By changing the FMLA regs, the employee's medical history, family history, etc is open for public view. . . . Can the employee review the Managers medical history to determine if he needs to contact their medical provider to determine if he is fit for duty or if he is of sound mind to supervise the employee? If so, then what is available for one, should be available for all" (Land, 2008).
- "I am concerned that the proposed regulation changes hurt the privacy of medical information by allowing employers to talking to employees' doctors directly. If my parents can't, why should my boss, who has less right to know?" (Skinner, 2008).

Another employee used a specific anecdote to describe the dangers of information sharing in the workplace. In a situation where an individual had been in a car accident the "immediate supervisor, without regard to the employee's feelings and/or privacy, showed the pictures of the automobile accident to employees on the work room floor. In reality the supervisor left the pictures on a worktable for all to see" (Watson, 2008). Others focused on their resistance to being forced to share information more generally in the workplace: "I also strongly believe that people's medical records and information should remain under strict confidentiality and that employers should not have access to that information. I have had some very private information during my pregnancy that I would never choose to share with anyone but family, and especially not my place of employment" (Blackman, 2008).

Ultimately, the Department of Labor concluded that employers would be permitted to directly contact an employee's health provider when there was a question about the authenticity of the provider's certification (Final Rule, 2008). However, in its final rule, the Department of Labor indicated that it took seriously workers' calls for greater respect for worker privacy and specified that although an employer's representative contacting the health care provider could be a "human resource professional, a leave administrator, or a management official [; that individual cannot] be the employee's direct supervisor" (Final Rule, 2008, p. 68062).

With respect to identity in the workplace, the comments demonstrate that "privacy" works as an identity term, one that crafts a "worker" identity primarily by drawing attention to the a set of conflicting characteristics that reside within an employer and his or her representatives. First, comments gave attention to both "expert rationalities" and "practical rationalities," drawing attention to the knowledge of medical experts in understanding medical conditions and the lack of knowledge a non-expert has interpreting the meaning of a health care provider's assessments. At the same time, however, other comments about privacy suggested more sophisticated employers who would be able to cleverly ask questions of medical providers that might be so invasive as to deter employees from taking leave. These views of the need for privacy are somewhat incongruous; one argument is that employers are unsophisticated and unable to understand medical information; conversely, privacy is needed because employers are too sophisticated and can manipulate providers for medical information beyond that to which they are entitled.

Finally, the comments shape the identity of supervisors in the workplace as lacking not only sufficient intellect to review medical information but also lacking discretion and trustworthiness. These characteristics demonstrate how the concept of "publicity" is merged into the term "privacy" for the purposes of workfamily identities. Comments expressed concern that as a result of the proposed regulations, workers would be the subject of unwanted "publicity," of being known in the workplace by a particular type of non-work identity—by the nature of their own illness or that of a family member. The need for privacy of medical information stems from more than just a sense that medical information is private; it stems from a need to protect oneself against unwanted publicity in the

workplace, from being identified, perhaps even stigmatized, as an individual with a medical condition and having that private identity shared at work. The danger of revealing this private side at work suggests that the divide between public and private in the work/family context continues to be a contested concept. Some comments recognized the priority of family life over work and shared detailed stories, in a public forum, of their intimate experiences using FMLA; at the same time, comments showed a resistance by workers to being known at work by their non-work identities, particularly where they perceived the integrity of their work identities could be compromised by their "family" ones. In this way, while workers want to be able to "talk" to their workplaces about their families and "talk" in a public forum about the FMLA, they did not want that same information to be "talked about" at work.

While there is likely nothing extraordinarily illuminating about an employee's desire for privacy in the workplace, dramatistic analysis reveals that a "private" identity in relation to work is a complex merger that involves trust in and discretion of others and one's understanding of the identity of others in the workplace. In theorizing work and family, communication researchers have suggested that the idea of family life and work life has, to some degree, been characterized as confined by static boundaries and that fully understanding the relationship between work and family means problematizing those "exclusionary boundaries" by looking at boundary work as "symbolic management" (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003, pp. 7-8). The comments in the regulatory rulemaking process that express the desire for "privacy" represent, to

some degree, a desire for a static boundary between worker and family member that serves as an essential symbolic representation for maintaining functional and manageable identities. This suggests that work-family theorizing should not be too quick to dismiss more fixed conceptions of boundaries as useful representations for understanding work and family. Perhaps ideas of flexibility and permeability of boundaries deemed more serviceable in work-family research (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003) might be reevaluated to ask how the symbolic representations of static boundaries serve to empower individuals in negotiating work and family life.

Abuse and accountability.

In the comments to the proposed regulations, the identities of workers, family members, and employers clustered significantly around the terms "abuse" and "accountability." First, some comments identified workers as abused by employers in their efforts to "threaten, intimidate, [and] harass" (Anonymous #22, 2008) employees in their attempts to use the FMLA, particularly through the proposed regulations that would allow employers to directly contact health care providers. "Please do not give undue power to managers who will use it to intimidate employees into not using the [FMLA]" (Westerhold, 2008). Another noted that "measures that make exercising FMLA rights more onerous and burdensome should be stricken Employees don't need . . . the feeling of being harassed when they or a family member are ill. It gives employers a way to strong-arm workers who are in a vulnerable position" (Masley, 2008). Another claimed that family members were also "victims" of the employer's abusive

strategies: "Many if not most of the victims [of the proposed regulations] will be children and spouses of the wage-earners. Management's ruthless pursuit, abuse, and elimination of honest, hardworking, but medically disadvantaged employees will become unfettered" (Long, 2008). Another specifically characterized the proposed regulations as giving employers a "right to abuse and stonewall employees" (Anonymous #2, 2008).

Metaphors of violence, unsurprisingly, developed around the term "abuse." One comment asserted that in medical certifications situations, "management hatchet men" would use the new regulations to "harass and intimidate doctors" to get information (Rabinowitz, 2008). An additional comment called the proposed regulations "weapons" for employers to use in the "war against employees" (Anonymous #3, 2008). Still another vehemently described the proposed regulations an "ADDITIONAL WEAPON TO DEHUMANIZE LOYAL HARD WORKING EMPLOYEES" (Anonymous #4, 2008). Another characterized the FMLA as "hard earned, hard fought" rights (Anonymous #5, 2008), and another noted the "attack" on "working people in this country" by "more managerial manipulations and deliberate attempts to frustrate the [FMLA] procedure" (Anonymous #6, 2008). Conversely, when describing the employer's difficulties in deterring worker misuse of FMLA leave, another comment stated: "Daily we battle the effects to the operation the sick calls create" (Anonymous #7, 2008).

In this language, comments created an identity of an employer that was adversarial, attacking, greedy, and lacking compassion. The employers who

abused the FMLA were employers who appeared to care little for their employees, who sought to dehumanize them, and who cared little for the employee's family issues and who had declared war on their employees. One comment implicitly recognized the conflict between the abusive nature of employers in their pursuit to "abuse" employees and the concept of a compassionate and humane workplace: "I firmly believe that a more compassionate workplace is GOOD for business, not an economic liability," this comment noted (Wall, 2008).

As Burke (1945/1969) suggests, dialectical terms like "abuse" are the sites of struggle over meaning, and 'abuse" revealed itself to be of this class. In contrast to arguments that employers "abused" their power under the FMLA, another line of reasoning emerged in the comments that pointed to worker "abuse" of FMLA leave by taking it dishonestly and not for its intended purposes, and that employers were unable to hold workers accountable for honesty in leave taking. This abuse arose particularly in the setting of the employee who used FMLA leave intermittently rather than in a single large block of time.

In its report on the Request for Information in 2007, the Department of Labor said that "many employer[s] . . . used the words 'abuse' or 'misuse' to describe employees use of unscheduled intermittent leave" (Report, 2007, p. 35552). Another comment stated that "the law and its generous benefits are subject to widespread abuse (and is being abused) and is used by too many to simply be able to take/use restricted Sick Leave . . . without any questions asked and at any time they desire without any recourse . . ." (Mitchell, 2008). Still

another noted that "employees have used FMLA excuses to come in late, to cover for child care problems, and just not wanting to come in because it rained" (Anonymous # 20, 2008). Another comment stated that "[t]here are copies of successful FMLA paperwork circulating so the employees can fill out the paperwork and the doctor just signs it I for one am tired of going to work wondering how many employees will show up today" (Anonymous #7, 2008).

In this representation of worker identity, workers now are the "abusers" of the FMLA and of their employer. They, as a whole, are dishonest, deceptive, untrustworthy, and, because they do not like to come to work for something as simple as foul weather, they are lazy. Moreover, the comments suggest they collaborate in their deception, sharing dishonestly drafted paperwork to "dupe" their employers. Because of the unsavory and untrustworthy nature of the worker, more monitoring and control is needed to ensure their accountability.

Some comments showed deep concern that workers were characterized as untrustworthy in taking FMLA leave and challenged those notions directly. One individual noted that the new rules were "based upon a . . . fundamentally flawed premise that employees are dishonest or otherwise devoid of integrity" (Clark, J.R., 2008). Others rhetorically questioned: "Are we being overwhelmed by people taking family leave and lying about their reasons?" (McGrath, 2008). "Who is going to 'abuse" the opportunity to take UNPAID leave to hold on to their health care insurance while they are dealing with the severe illness or injury of . . . their family members?" (Ludi, 2008).

Others attempted to find a middle ground, recognizing that each individual worker did not stand as a representative for the whole, and acknowledging that one could not speak to a uniform sense of goodwill amongst workers and acknowledging that some would abuse the FMLA leave but arguing that changing the rules for all was not the appropriate answer. One comment stated that "no law is perfect or immune from abuse . . . The fact of the matter is [however,] that the vast majority of people cannot afford to miss work and will not abuse it" (Anonymous #8, 2008). Another offered that the proposed regulations made him feel like he "was treated like a criminal. That I would do anything to lie and cheat the system There is no reason for the employees[to] be treated like they are out to abuse the system. Yes, there are always a few that do, but they are a small percentage" (Danek, 2008).

Another group of comments attempted to take the focus off the fact of abuse and to place the remedy for that abuse within the system of enforcement rather than to create an essentializing identity of employees as abusive. One comment asserted "they want to treat us all like abusers and scare us into behaving right, when all it would take is to follow proper procedures, carry them out and document those who abuse" (Lawson, 2008). Similarly, another noted that if someone is suspected of abusing the FMLA, "[employers] should take the appropriate steps to correct the fault" (Carbonel, 2008), rather than having in place a system that denies all workers FMLA leave based upon the abuse of the system by only a portion of those workers.

The struggle over the identity of the worker as "abused" or "abusive," demonstrates the struggle associated with the "paradox of purity" (Burke, 1945/1969). The phrase means that no individual actor of a particular class can behave inconsistently or with different motives than the motives generally attributed to members of that class (Burke, 1945/1969). The differing lines of reasoning about the role of the employer and the worker regarding abuse of the FMLA shows a struggle over the definition to be attributed to the general members of the class; once that class is given its attributes, no individual behavior can be inconsistent with it. This means that, in pure terms, either all workers are abused by employers or all employees abuse the FMLA. Either all employers should be legally limited to avoid their abusive behavior or all employees should be subject to careful monitoring and control. This, then, results in legal language that reflects this pure identity.

Consistent with the "pure" identity of the "untrustworthy worker," comments focused on the amount of control an employer should and can exercise to monitor employees and hold them "accountable" for their family commitments that interfere with their work demands. Many of the accountability comments gravitated around employer concerns that they were unable to get sufficient information to verify the need for intermittent leave or to authenticate a medical certification for FMLA leave suspected to be fraudulent. One comment asked with respect to FMLA, "As I have nothing to hold her accountable, how do I make sure she is truly at home? Intermittent leave needs to have more controls associated with it" (Anonymous #11, 2008). Another noted that "most of our

abuse of the FMLA regulations occurs with the long term intermittent conditions . . .[s]ix months [without recertification] leaves too much time without accountability" (Beickelman, 2008). Another comment noted that "[e]mployers need some rights to be able to determine if a leave request qualifies as covered under the FMLA and be able to monitor it to eliminate abuse" (Anonymous #12, 2008). Finally, another comment noted that workers should not be able to hide "behind this law to protect the fact that they want to come to work late and/or don't show up at all and the employer cannot hold them accountable for doing so" (Anonymous #9, 2008).

In response, other comments recognized this untrustworthy characterization but resisted it, focusing instead on the "abusiveness" of monitoring and the inherent trustworthiness of workers. One comment asked, "[a]re U.S. Workers to be treated as enemy combatants, or foreign terrorists? Are we now to be secretly spied on?" (Dailey, 2008). "The use of it as you want to do is nothing but total control" (Bergeson, 2008). Another said "I feel that this extra monitoring of the FMLA is a disgrace. We as [A]merican citizens have worked hard all our lives. We have put in 40 plus hours per week for the employer and they have yet to be thankful for our dedication and commitment We are forced at every turn be harassed and beat down This is yet another attack on the over burdened middle class who has to the carry the country" (Anonymous #10, 2008).

The question of accountability extended into a proposed regulation that would allow employers to request that an employee provide additional

documentation in order to get leave for the birth, adoption, or foster placement of a child. While the original regulations required employee, as a prerequisite to getting FMLA leave, to submit a birth certificate and a signed statement describing the new caregiving relationship, the proposed rules allowed employers to require that employee submit sworn or notarized statements of relationship or tax returns showing that the worker was claiming the child as a deduction.

The Teamsters characterized this as "open[ing] new loopholes for employers to deny leave to workers who need to . . . take care of a family member" (Teamsters for a Democratic Union, 2008). The American Postal Workers' Union (2008) called attention to the relationship between accountability and employee trustworthiness and characterized the rule change to providing documentation of a birth or adoption as an "insulting and offensive rule change." Another comment agreed and said, "I am dismayed by the proposed change to require a sworn, notarized statement of family relations in addition to the birth certificate when requesting post-natal FMLA. I see this as a further impediment to obtaining leave protection, and as additional, unnecessary paperwork hassle required at a time when my focus is best directed toward my newborn and family" (O'Dell, 2008).

The Department of Labor announced that one of its goals in its proposed rulemaking was to make changes that would "foster better communication between workers who need FMLA leave and employers who have legitimate staffing concerns and business needs" (Lipnic, 2008, p. 12). Accordingly, another of the proposed changes offered in the regulations was the change in the

ways in which employees must give notice (i.e. be "accountable") to their employers regarding their intent to take FMLA leave. In the original regulations, employees giving notice of the unforeseeable need for FMLA leave were not required to expressly request FMLA leave but were expected to give "sufficient" notice. In the proposed regulations, the Department of Labor noted that what constituted "sufficient" notice for purposes of making employers aware that an employee sought FMLA-protected leave was not defined (Proposed Rule, 2008). Accordingly, the proposed regulation stated that "sufficient information" for a notice of FMLA leave must include statements that addressed whether "a covered family member is unable to participate in regular daily activities[], the anticipated duration of the absence, and whether the [family member] intends to visit a health care provider or is receiving continuing treatment" (U.S. Dept. of Labor, Proposed Rule, 2008, p. 7908).

This proposed change was precipitated by comments to the Request for Information, some of which the Department of Labor noted in its report. One comment summed it up this way: "Employers are not 'mind readers' and they often refrain from asking employees why they are absent for fear that they may invade an employee's medical privacy" (U.S. Dept. of Labor, Proposed Rule, 2008, p. 7908). Conversely, the Teamsters Union characterized these proposed as "excessive new notifications requirements for employees" that required the employee to use "magic words" to get FMLA coverage (Teamsters for a Democratic Union, n.d.). In reaching out to its membership through a poster

campaign that solicited comments for the rulemaking process, the Teamsters' described the proposed regulatory changes with this logic:

- The new rule would require employees to tell their employer 1) that they cannot perform their job functions or that a family member cannot perform his or her daily activities and 2) whether or not they intend to visit a healthcare provider.
- The current rules only require an employee to tell the employer why they are taking leave and how long they expect to be out.
- If an employer forgets any one of these magic words, they employer could deny their leave (Teamsters for a Democratic Union, n.d.).

Another comment echoed the "magic words" theme and noted that the proposed "regulations . . . are too technical and detailed, and could give employers an opportunity to make an excuse to deny leave to workers that qualify for the leave, by requiring employers to say the 'magic words'" (Anonymous #13, 2008). Another comment in the sample grassroots campaign letter from the Society of Human Resource Management (2007) saw this language not as magical but as a "trigger," noting that it was good to clarify "what constitutes sufficient information to trigger an employer's obligations under the FMLA" (see e.g. Miles, 2008).

Ultimately, the proposed regulations included the requirements for notice that had been deemed "magic words," but noted that what information must be given would "vary depending on the circumstances" (U.S. Dept. of Labor, Final Rule, 2008, p. 68005). Although the regulations retained its rule that a worker did

not need to "mention the FMLA to put the employer on notice of the need for FMLA leave," an employee must provide "sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include . . . whether . . . the employee's family member is under the continuing care of a health care provider. .. [or] if the leave is for a family member[,] that the condition renders the family member unable to perform daily activities . . .; and the anticipated duration of the absence, if know." (Code of Federal Regulations, 29 C.F.R. § 825.303(b)). In follow-up, the Department of Labor (2010) published in February 2010 a Fact Sheet that gives information to individuals about the FMLA. In that Fact Sheet, the Department advised that employees "must provide sufficient information for an employer reasonably to determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that the . . . employee's qualifying family member is under the continuing care of a health care provider" (U.S. Dept. of Labor, Fact Sheet, 2010).

The tension in the comments over "accountability" is an example of the operationalizing of conflicting identities. Monitoring employees and providing notice and information about one's whereabouts and obligations are ways of "enacting" the rhetorically shaped identity of the untrustworthy, disloyal worker and the duped, powerless employer and is dependent upon the nature of the actor. Thus, the struggle over the kinds of information an employee must provide and the degree to which an employer can monitor the behavior of an employee is a struggle over the fundamental identities of those actors and the ways in which

they will perform their identities in the workplace. Workers and employers, then, will be sites of "rhetorical enactment" of legal terms; they will embody the meanings legally assigned to their identities and perform accordingly.

The recognition of "magic words" is a testament to ways in which language both shapes identity and help individuals to enact it. Burke notes that the "magical" aspects of language are not confined to the "mythic." Every new distinction is in effect a "let there be" added to some universe of discourse (Burke, 1985, p. 93). What Burke recognizes explicitly and the comments recognize implicitly is that the employee's rehearsal of the "magic words" of FMLA leave are a ritualization and enactment of identity. In other words, in that time and place of requesting leave, an individual worker is the request for leave; he is those "magic words." By incantation, he evokes an identity, ritualized even further by the express design of the language he must use, of a particular kind of worker, in a particular situation, making a particular request. And while these words may make for administrative efficiency, as a matter of identity, arguably, they are, as some comments point out, a process of dehumanization of the individual. Even if that is too strong a perspective, at the very least it represents a deindividuation, a "purity" of sorts that fits neatly with the ways in which the law effectively operates to efficiently codify and bureaucratize that which originates as customary. Thus, when the "magic words" become codified into the regulations—and they do—the real "magic" is lost; custom is efficiently commodified, the imagination is bureaucratized, and legal identity becomes, at least temporarily, fixed.

Sacrifice and struggle.

In addition to abuse and accountability, sacrifice and struggle emerged as key symbols in the comments surrounding the proposed regulations. With respect to workers, three themes of sacrifice emerged.

In the preamble to both the original and the current FMLA regulations, the Department of Labor advised that "workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home" (FMLA Regs., 29 C.F.R. § 825.101(b)). Although this basic premise of the law was unchallenged in the regulatory rulemaking process, comments address this question of the "choice between" as a question of sacrifice and struggle. One comment noted that "workers should not sacrifice time with family in emergencies or crisis situations as a result of the 'undue burdens' placed upon them by new FMLA regulations. Employees should not have to sacrifice their jobs in order to care for their families" (Anonymous #15, 2008). Another comment specified that "[n]o new parent should have to sacrifice their job in order to raise a child or leave a sick parent unaided . . ." (Brusky, 2008). Another comment associated guilt with the potential of sacrifice faced by workers: "[w]e are getting more fractured-more families are suffering. Parents/caregivers should not have to feel guilty about loving their family member" (Keane, 2008).

Some comments asserted that the suffering and sacrifice were caused by "burdens" that the new FMLA regulations would place upon workers. The National Organization for Women (2008) characterized the proposals as an

"unjust burden [on] the already difficult lives of those dealing with . . . caring for family members with illnesses and/or chronic health conditions," and a number of commenters included this language in the comments to the Department of Labor. Another commenter noted that the regulations "may put unnecessary roadblocks in the way of workers seeking the leave No one should be forced in a time of crisis to make the impossible choice between work and family" (Snellings, M., 2008).

Related to the term of "sacrifice" were references to the "struggle" of workers to manage the competing demands of work and family. One comment noted that "[i]t's great that we are finally recognizing the struggle between personal and professional lives and allowing employees to focus on their family when their family needs it most" (Anonymous #16, 2008). This struggle was seen as connected to a worker's position of powerlessness: "[w]orking individuals should not have to gr[o]vel and be[g] in order to have time to take care of ... family members" (Anonymous #17, 2008). Another comment noted the powerlessness family members feel when dealing with a dying relative: "As a social worker for a hospice, I watch people struggle with their multiple responsibilities. They desperately try to find time to be there for their dying family member who needs care at home and an employer who does not always understand. . . . Do not tear families apart when they need one another most" (Sinicropi, 2008).

Sacrifice and struggle were informed by metaphors that described taking FMLA leave to care for family members as a series of involuntary performances

from a position of powerlessness. Metaphors of "hurdles" and "hoops" were significant here in conveying the idea of the ways in which workers feel powerless to resist the kinds obligations imposed upon them to meet family needs The new regulations, asserted one comment, imposed "extra hurdles . . . on workers [and] make[s] their lives harder" (Krall, 2008). Another asked "Why create additional hurdles and hardships for Americans with health and family concerns?" (Chau, 2008). Another comment gave a narrative account of what it is like to "jump through hoops" to take FMLA leave:

My co-worker's cancer had not responded to treatment. He was terminal. He needed to continue to work his last days, for benefits to stay in effect for his loved ones. He did not want to risk losing his life insurance. But he was in pain alot and needed to use FMLA occasionally. So he re-certified, like our employer asked. It was noted that it was terminal. The FMLA dept. said his certification wasn't completed enough to qualify, because there was no end date on his condition . . . He asked them, did they want him to predict the day of his death, because it is terminal, that means it ends when I die. . . . My co-worker jumped through all our employers hoops... several times!!! (Ward, 2008).

The metaphor of "jumping through hoops" was used repeatedly: "employees go through undue stress by making them 'jump through hoops' to comply with company requirements" (Anonymous #18, 2008); "an employee should not . . . be punished if they miss a hoop" (Anonymous #21, 2008); and "[g]ood workers

should not be further . . . made to jump through hoops when dealing with a serious illness of a family member" (Maloof, 2008).

The comments also attributed sacrifice and struggle to employers who faced reduced productivity and employees who had to cover for other absent workers as a result of FMLA leave. One comment mentioned the demand of an employer to "struggle through the disruptiveness of an unworkable schedule that wreaks chaos on its operations" (Berens & Tate, 2008). Another noted that "[i]t is very difficult to maintain business standards when it is extremely easy for employees to be away from work [on FMLA leave]" (Thomas, 2008). With respect to intermittent leave, one comment provided that the current regulations "unfairly penalize[d] other employees who must work overtime or cover for an absent employee. They lead to operational challenges for businesses [when the business gets] little or no notice of the employee absence" (Donohoe, 2008). An additional comment noted that due to FMLA leave the employer struggled to keep up employee morale, noting that sometimes "the employer simply operates understaffed and the remaining employees must increase their workload or customer service suffers. This can be tremendously demoralizing to a workforce that is required to perform extra duties on an on-going, indefinite basis" (Berens & Tate, 2008).

The question of "perfect attendance" was also raised with respect to the unfair treatment of employees who are "left behind" at work when other employees are out on FMLA leave. Under the existing regulations, an employer would be required to ignore FMLA leave when calculating perfect attendance

awards. The Department of Labor said, in its report that accompanied the proposed rules, that "both employees and employers gain from [a perfect attendance] bonus" because they "motivate workers not to be absent" (Proposed Rule, 2008, p. 7947). The Department said that comments indicated that the original FMLA regulations "interfere[d] with the effectiveness of perfect attendance bonuses" because giving perfect attendance awards to individuals out on FMLA leave did not deter absenteeism and, as a result, employer would be more likely to give up perfect attendance awards policies; this, in turn, would hurt employees (U.S. Dept. of Labor, Proposed Rule, 2008, p. 7947).

These discussions of sacrifice and struggle directly implicate the motives of order, guilt, scapegoating, and redemption and also illustrate the existence of two competing hierarchies that conflict with each other. In one hierarchy, "order" is when an individual can, without assistance from the FMLA, balance work and family demands. Conversely, in the other hierarchy, order is when employers can efficiently maintain productivity, schedules, and operations and others are treated fairly in reliance upon those schedules and operations. Disorder arises when the two orders come into conflict with each other; employees with family concerns come into conflict employers' interests in regularity and control and other workers' interests in fairness. Unsurprisingly, guilt arises because the worker seeking FMLA leave cannot be "perfect" and cannot perform as the "ideal worker" and likewise cannot perform as the ideal family member. Secondarily, guilt might also arise from employers imposing too many "hoops" and "hurdles"

for taking FMLA leave, forcing workers into an "impossible choice" between work and family.

Finding a scapegoat and engaging in "victimage" is essential to redemption and restoring order. And, while there might be competing hierarchies at work here, the identity of the scapegoat in both is clear: the worker. In one hierarchy, the worker is a "blameless" scapegoat—a victim of the scene and of circumstances. In the other, the worker is a "blameworthy" scapegoat—a scapegoat whose actions—not circumstances—have caused the disorder. In either circumstance, workers maintain the role of victim.

In the "blameless" narrative, as the scapegoat or "victim," the comments reveal an identity of powerlessness associated with being a worker. A worker is powerless to control the family crisis. The worker is powerless to control the "hurdles" that must be cleared in order to take FMLA. As a victim, the worker is subject to "punishment" for needing to make the "impossible choice" between work and family. Perhaps the scapegoating of the worker lies in the mere requirement that he make an "impossible choice"; perhaps it lies more in complying with the technical requirements of the FMLA. Either way, in struggling with taking leave to deal with a family crisis, the worker either engages in self-mortification—blaming himself or herself for either being not fully present as a "worker" or, conversely, not fully present as a "family member"—or is "punished" by an outside force for making the same decision. The "outside" here can arguably be cast as the FMLA regulations themselves, which allow an employer to deny FMLA leave unless an employee "jumps through the hoops"

imposed by the technical and detailed FMLA regulations. Either way, the redemption lies in victimizing the worker, powerless to do anything about the circumstances.

In the "blameworthy" narrative, the proposed regulations attempt redemption by creating a different scapegoat, a symbolic "substitute" for the powerless worker that creates new path to redemption. Instead of scapegoating the worker, the proposed regulations scapegoat either the direct supervisor or the employer. By excluding the direct supervisor from the process of certifying medical leaves or from the process of communication with health care providers, as discussed in the previous section, the FMLA scapegoats the direct supervisor as the source of disorder. In effect, the direct supervisor is "punished" under the regulations—she is kept in the dark, so to speak, about worker's medical information, and as a result she is unable to expose workers to ridicule by sharing information about them in the workplace or using that same information to manipulate them. By making the behaviors—and identity—of the direct supervisor the focus of the FMLA, the FMLA regulations attempt to resolve the tension between the sacrifice of the employee in making the "impossible choice" between work and family and the sacrifice of the employer in experiencing reduced commitment from the worker by making the direct supervisor sacrifice her role in supervising.

By victimizing the direct supervisor's identity, by implicitly asserting that it is the supervisor—not the employer or the worker—that has created some disorder in administering the FMLA, the regulations are able to use the direct

supervisor as a bridging device between the worker and the employer in a way that is somewhat unique. The direct supervisor is both "worker" and "employer." By placing the negative characteristics of workers and employers in the direct supervisor, workers and employers can rally around their dislike of a common "enemy"—and without disrupting any of the processes or identities that the FMLA ultimately imposes.

In an alternative "blameworthy" narrative, the worker seeking FMLA leave is seen as a "bad actor," imposing costs upon the employer and employees who have been "left behind" to take up the slack at work. In this narrative, a way to redeem those who are suffering, here, the employer and the workers who are "perfect," who engage in behaviors like "perfect attendance" at work, is to exclude the FMLA-seeking worker from the benefits of that perfection. Accordingly, the proposed regulations and, ultimately, the final regulations, allowed employers to exclude workers from perfect attendance awards if the employee has an FMLA absence. This move unified the interests of the employer and the "perfect" employee left behind at work. A comment from an individual affiliated with the Society of Human Resource Management recognized the redeeming qualities of this regulatory language: "[n]ot only is this [new rule on perfect attendance] a better and fairer interpretation of the FMLA, it will help employee morale, since employees on FMLA leave will not be treated more favorably than other employees" (Mohr, 2008). In the promulgated regulations, the ultimate redemption was in the form of prioritizing

the needs of the worker left behind, merging within the employee taking FMLA leave the "non-perfect" characteristics that would not be rewarded.

Codifying and crystalizing identity.

FMLA "stands for Family Matters and Love is for Always " \sim (Sinicropi, 2008)

Terms like "work" and "family" ought to be positive terms—terms that have a material referent; one can point to a group of individuals and call them "family"; another can point to a group of activities and call them "work." Yet, "family" and "work" in the law are quintessentially dialectical terms. While many loving family relationships are considered "family" and many types of productive labor considered "work" in the vernacular, law gives visibility to only certain "family" and "work" identities while suppressing others. For example, in the statutory language of the FMLA, "work" has a specific, but dialectically determined meaning; "work" is confined to the activities "affecting commerce" for any employer who "employs 50 or more employees for each working day of during 20 or more calendar workweeks in the current or preceding calendar year" (FMLA, 29 U.S.C. § 2611 (4)(A)). While "work" could mean any number of things—from unpaid domestic labor to work for an employer who employs five workers for five weeks a year—the FMLA provides a particular "identity" of those who will "count" as doing work. In other words, the law sets out the terms of visibility for recognizable worker identities and makes invisible other identities. Terms in legal texts themselves and in the regulatory rulemaking process both express and repress identities. By attempting to set out specific

definitions for family members within the FMLA, the regulations "take up the slack," in Burkean (1937/1984) terms, between what identities are experienced in the material world and how those identities function in their "pure" legal form.

This section explores how individual "family" identities are codified in the FMLA regulations and how those same roles were extended, contracted, or otherwise addressed in the FMLA proposed rulemaking process. The section first looks at the "codified" terms used to describe family in the FMLA and then looks at the ways comments intersect with those codifications to further complicate the identities of family members, both within and without FMLA coverage.

Ultimately, both the legal definitions in the FMLA and the anecdotes described by individuals struggle to encompass complex, contradictory, crystallized identities that are often excluded when attempting to frame an identity as one of "pure" motive. The anecdotal comments, however, attempt to provide an antidote to legal definitions that obscure difference and complexity.

The terms of identity that are codified in the FMLA text demonstrate an effort to create "pure" identities of workers and family members that are consistent with the announced purpose: "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers" (FMLA Regs., 29 C.F.R. § 825.101(a)).

First, an "employee" for the purposes of the FMLA coverage is a person who has been employed with an employer for at least 12 months "for at least 1,250 hours of service with such employer during the previous 12 month period (FMLA, 29 U.S.C. § 2611). This definition reveals a specific worker "identity."

First, this worker has a reasonably steady, at least part-time, job. The worker is loyal, having remained with this employer for at least 12 months. Moreover, this employee has proven himself or herself worthy; since the employee has not been terminated in the last 12 months, the employee has performed sufficiently well to be deserving of FMLA leave. As mentioned in the prior section, comments related to the treatment of workers in the workplace disputed the honesty of employees. The terms "loyal" and "hardworking" were repeatedly used the comments to describe the qualities of workers deserving of FMLA leave; these characteristics are implicitly embedded in the FMLA definition of a worker entitled to leave. Thus, although the specific definition of worker was not a consideration for the proposed rulemaking, the definitions existing in the statute and regulations provided a resource for individuals, even implicitly, in understanding the "worthy" worker identity.

With regard to family actors that are visible within the FMLA, the regulations provide specific definitions of family members that thematize or provide a representative anecdote for what counts as family. At the time of the proposed changes, the regulations defined a number of family roles:

- Spouse: "Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides" (FMLA Regs., 29 C.F.R.§ 825.122(a)). "Husband" and "wife" are not specifically defined in the regulations.
- Parent: "Parent means a biological parent or an individual who stood in loco parentis to an employee when the employer was a son or

daughter" This term does not include parents "in law" (FMLA Regs., 2007, 29 C.F.R. § 825.113(b). For a person standing in loco parentis, all that is required is "day-to-day responsibilities to care for and financially support a child A biological or legal relationship is not necessary" (FMLA Regs., 2007, 29 C.F.R. § 825.122(c)(3)). 12

• Son/Daughter: Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and 'incapable of self-care because of a mental or physical disability'" (FMLA Regs., 29 C.F.R. § 825.122(c)).

In addition, the regulations use the terms "mother" and "father" but do not expressly define them. These terms are used to refer to the individuals who can take leave to care for a newly born "child" on one newly placed for adoption or foster care (FMLA Regs., 2007, 29 C.F.R. §§ 825.120 & 825.121). "Child," although used in the regulations, is undefined.

In the proposed regulations, the Department of Labor made what it considered only minor changes to the definitions of parent, clarifying that a parent includes step, adoptive, and foster parents (FMLA Regs., 29 C.F.R. § 825.125). Moreover, it did not address these definitions as open for redefinition, but instead explored the complexities of the relationship between the terms "mother,"

¹² In an interpretation of the "in loco parentis" provision, the Department of Labor concluded that anyone "with day to day responsibilities to care for and financially support a child" fell within the definition of parent (U.S. Dept. of Labor, Administrative Interpretation, 2010).

"father," "husband," and "wife" for the purposes of pregnancy and taking leave for a new child. In the preamble to the proposed regulations, the Department of Labor noted that "where a male employee is needed to care for . . . a pregnant spouse who is incapacitated or requires prenatal care, the male employee will be entitled to FMLA leave . . . [A] male employee may be entitled to FMLA leave to accompany his pregnant spouse to a doctor's appointment for prenatal care [even where only] psychological care may be involved" (Proposed Rule, 2008, p. 7888). In the final regulations, the Department of Labor changed the wording of its proposed regulations to cover "husbands" and not "fathers" so as to clarify "that FMLA leave to care for a pregnant woman is available to a spouse and not, for example, to a boyfriend or fiancé' who is the father of the unborn child" (Final Rule, 2008, p. 68050).

The Department also addressed how the provisions would apply to unmarried couples. In the preamble to the final regulations, the Department noted that "husbands and wives who work for the same employer may be limited to a combined 12 weeks of FMLA leave for the birth or placement for adoption or foster care of a healthy child" (Final Rule, 2008, p. 67949). Although the Department had received requests to extend this limitation to "unmarried parents" working for the same employer, the Department did not do so because the purpose of the FMLA statute in including this provision was to "eliminate employer incentives to refuse to hire married couples and applies only to' a husband and wife" (Final Rule, 2008, p. 67950).

In its notice of proposed rulemaking, the Department sought to clarify what it means to be "needed to care for" a family member; in this way, it addressed the general definition of "caregiver" for the purposes of the FMLA. In its final regulation, the Department decided that a caregiver must not be limited to "the only individual, or even the only family member available to provide care to the family member with a serious health condition" (Final Rule, 2008, p. 67953). Rather, the Department determined that "[a]n employee is entitled to use FMLA leave to care for a spouse or covered family member . . . no matter how many other family members, friends, or caregivers may be available to provide this care" (Final Rule, 2008, p. 67964). The Department clarified that "to care for" did not mean, however, "us[ing] FMLA leave to work in a family business" (Final Rule, 2008, p. 67964).

Other comments recognized that the identity of caregiver is not necessarily singular but is made up of a web of individuals who provide care for others. One comment noted "I am alone in my time zone with my elderly mother. She was becoming increasingly forgetful after several small strokes and is currently in a nursing home after fracturing her hip in January, but I hope she can return to her house My two brothers might be able to come from California for a few days each, but they aren't sure when, especially the one who has to move with his family to Washington state" (Ramirez, 2008). Another comment noted that he was assisting in the care of "the mother of a friend of mine" (Stone, 2008).

Beyond those identities overtly defined in the regulations, the public comments revealed other identities subsumed within the construct of loving

family relationships that are excluded from the regulations, both implicitly and explicitly. First, the regulations expressly provide that "parents-in-law" do not count as "parents" under the FMLA (FMLA Regs., 29 C.F.R. § 825.201(a)). By implication, the regulations also exclude children who are over 18 and not disabled. The regulations do not apply to a grandparenting role. And the FMLA does not explicitly recognize same-sex unions.

Even though the regulations frame the debate in ways that exclude these family members, comments in the regulatory process recognized these family relationships as legitimate, important, and existing. One commented noted that issues surrounding the FMLA are "very important issue[s] to me as I have an elderly mother-in-law" (Anonymous #19, 2008). Other comments encouraged the FMLA to recognize caregiving for children who are over 18 (and not disabled) and "who do not have anyone else to take care of them If for some reason they were to become seriously ill, I cannot use FMLA for the mere fact they are over the age of 18; However, I can use it for my parent who is also over the age of 18" (Johnson, A., 2008). The WorldatWork, an association for human resource professionals, argued that children over the age of 18 should be recognized as a "son" or "daughter" (WorldatWork, 2008). Others talked about the FMLA in their capacity as grandparents, even though they cannot use the FMLA for grandparenting. "As a 75-year-old grandmother, I write on behalf of my daughter's family and all those younger who would be affected" (Ellgar, 2008).

In addition, one commenter called attention to the express absence of same-sex couples in the regulation: "Two years ago, it was determined that my

Life Partner of 28 years needed to have radical back surgery Since she and I were not "MARRIED", [t]here was no obligation for the FMLA to be given so I could take care of her during her recovery One would think that after almost 30 years of loving commitment there would be protection for the simple things in life like taking care of each other" (Martin, 2008).

Although not overtly included in the language of the FMLA statute or regulations, the discourse surrounding the FMLA recognized an emerging family identity; the identity of a person as a member of the "sandwich generation." In its report on the Request for Information, the Department of Labor acknowledged the existence of the "sandwich generation": "The FMLA appears to be particularly valued by employees caring for both children and parents with serious health conditions" (Report, 2007, p. 35558). Commenters also noted the prevalence of this "pinched" identity: "[M]ore people find themselves caring for aging parents in addition to children" (Snellings, V., 2008). Another stated "I lost both of my parents within 6 months of each other. I had a full time job and two small children and was left the job of executor of my parents' estate. Had the family leave law not been in place I would have lost my job in a heartbeat" (Riley, 2008). Another provided an anecdote, representative of that "sandwich" identity:

More often than not our 40 somethings including myself are part of the sandwich generation[, i]n which we juggle full time employment and taking care of the family and elderly parents. If it was not for FMLA my husband would not have the ability to take care of his elderly mother after his father passed away last year. He needed time to get her affairs in order

and make sure she has what she needs, to get her to the lawyer, doctor, etc. Most of these tasks cannot be performed after 5:00pm. Almost all need to be done during normal working hours. Not to mention the time he was given to care for his elderly father who was dying in the hospital. All the while I was working a full time job and still am. Taking care of our children and the household. We would have never been able to get through this life crisis if we didn't have flexible access to FMLA. (Kube, 2008).

Other comments discussed the relationship of work and family in an effort to create a more complex identity of worker/family member that reflected an attempt to balance the not just the relationship between work and family but also to make sense of their relative values. For example, one comment expressed that "worker" and "family member" can be valued not as separate identities but as a single one and pointed to the potentiality of this crystallized identity: "[At my company, i]f an employee needs time off ...[t]o provide assistance to a 'loved one' (and their definition of loved one is VERY broad), all we have to do is call our manager People shouldn't have to choose between being a loving, caring human being and being a responsible worker. The two are not mutually exclusive" (Heinen, 2008). Another noted that this integrated identity could be recognized valuable: "[M]y professional experience has seen both sides of the coin. I have had the fortune to work for employers whom, in fact, recognized and appreciated my talents and professionalism and refused to let my daughters' medical issues cause them to lose a valuable employee" (Baptista, 2008).

Another pointed to the complexity of worker/family member identities directly related to human dignity: "So many of us, including myself, are so used to being able to enjoy a work schedule which allows us, more fortunate ones, to come and go much more easily than so many wage earners who have to punch a time clock. Why do we think we have the right to deny these workers the dignity to just be able to have this flexibility in some of these very important times in their lives without jeopardizing their ways to continue to make a living and just pay their bills?" (Pfab, 2008).

Other comments sought to discuss the relative value of caregiving and of paid work: Some privileged caregiving: "The United States' workforce is made up of people who also provide high quality and free caregiving to children [and the elderly Caregiving is equally important to the maintenance of a stable society as is paid work in the economy" (Mederer, 2008). Others saw caregiving and work and interrelated: "[B]illions of corporate dollars are lost due to lower productivity when employed caregivers have trouble balancing their work and family responsibilities" (Woldt, 2008). "Without flexible leave FAMILY LIFE which we place a high value on in our country, AND our 'HIGH PRODUCTIVITY,' which we place an even higher value on, cannot be maintained. With so many families working, struggling, and so little health care, we are actually facing a crisis" (Stoeltje, 2008). "Workers are more productive when they know they can spend time with their families and not have to choose between earning a dollar or losing valuable quality time with a loved one" (Hawkins, 2008). Another commented that "[i]t is apparent that American

businesses, large and small, wish to be penny-wise and pound-foolish, in the extreme. Yes, a business makes profits but large-scale investment in their employees guarantees a workforce that buys into the fortunes of the company it works for. A company gets a satisfied, well-treated, committed workforce and, in return, the company gets continued profits" (Sanchez, 2008).

What might be said about the term "family" is that it is a "god term"—a simplifying term that hides within it the complexities of family. Its title alone, the Family and Medical Leave Act seeks to invoke that god term, which has the effect of operating as the primary motivation for the act, for subsuming all other motivations that might be relevant to the concept of family. Unpacking "family" within the FMLA by analyzing the specific terms of "family" used within its purview reveals the ways in which a "family" identity is constructed. First, the traditional family structure is reified in the language of the FMLA. Spouse, mother, father, child, husband, wife, son, and daughter are all representative of the traditional nuclear family; the only changes to this family are the changes that have been imposed upon it by the change of scene—the need to have a two incomes for a family, to account for the demands placed upon it as a result, and to recognize that different individuals can be in loco parentis to a child. Yet, in the vernacular, other identities are raised—grandparents, same-sex couples, unmarried parents, adult children who need care, workers who are both acting as caregivers to their own parents and their own children at the same time; all of these are identities either not contemplated at all by the FMLA or contemplated in ways that "divide" the identities rather than recognize the mergers. For example,

when it comes to the "sandwich generation," the FMLA does not make any special arrangements for an individual who is welcoming a new baby *and* is also caring for a dying parent. The same amount of leave—12 weeks a year—is available even if the worker is confronting both at the same time.

The failure of the FMLA to continue to recognize the nature of the extended family or emerging family identities, such as same sex "spouses," unmarried "parents" or the relationship between unmarried mothers and fathers for caregiving, illustrates that the definitions' attempt to "take up the slack" between the symbolic and the material have fallen short. The FMLA does, however, recognize that the scene of caregiving goes beyond the individual because the regulations clarify that the individual is entitled to FMLA leave even if there are others who can care for an ailing family member. Likewise, the comments sought to create more complexity in worker identity by integrating family identities into worker roles and pointing to the value of family caregiving both for the family and for workforce productivity. Both of these rhetorical moves are attempts to resist simplifying characterizations of work and family and to account for more complexity in those identities.

Broadening identity: Increasing the circumference of the human barnyard.

The Department of Labor stated that their proposed rules reflected "recommendations made by stakeholders who have day-to-day experience with the FMLA. This experience is from the perspective of both leave takers and employers who must manage the leave" (Lipnic, 2008, p. 6). Different speakers

identified within their letter their own identities, implicitly, and sometimes explicitly, suggesting how that identity—and their perspective on the issues—gave their comments extra credence. For example, comments revealed whether individuals were mothers, fathers, human resource professionals, and the like. But key to this self-referencing were the ways in which comments created consubstantiality with a larger group as an effort to define identity. Specifically, various commenters crafted their comments to enlarge the scene in which the agency of the FMLA operates. These expansions included creating scenes of class (and, relatedly, class warfare), tying class concepts to the identity of America as a nation in its own right, and then focusing on the division of the United States from its international peers.

Burke might have expected these comments to alter the circumference of identity. He recognized that "national motives can be placed into a hierarchy of motives, graded from personal to familial, to regional, to national, to international and universal. . . .Once a national identity is built up, it can be treated as an individual" (Burke, 1950/1969, p. 165). In addition, these comments demonstrate how public interchanges shape a larger collective identity (Gross, 2010). Each of the moves described below establishes a hierarchy that worked to place work and family identities with larger circumferences, each time reshaping, even if subtly, identities within those contexts.

Working class and the national identity.

"Why the assault by this Admin[istration] on the working class? We need FMLA to support families "~ (Patterson, 2008)

"If families are truly the foundation of our democracy and national value system, FMLA is the cornerstone." ~ (Zaydel, 2008)

Comments in the regulatory rulemaking process created identifications between workers and the national interest by focusing on the importance of the plight of the working class and the group's importance to American interests.

One comment recognized that the proposals would "severely hinder the working class who can ill afford to [lose] their jobs in these uncertain times" (Logie, 2008).

Another noted the reason to protect the working class: "This is one instance in which our government can exert its collective power to protect the workers who contribute so much to our society and our economy" (Smith, M., 2008). Another comment reinforced this need for protection: "If anything, now is the time for government to watch for middle class interests as many depart[m]ents of the gover[n]ment have become pawns for the wealthy and elite" (Anzivino, 2008).

Another said:

[We need to] protect the best interests of American citizens. The everyday workers are those who keep our economy strong by doing the hard physical and mental labor that keep our industries, governmental agencies, and small businesses running. In the wealthiest country in the world, the well-being of all workers should be guaranteed, and the FMLA provides economic and emotional security for workers and the families who depend upon them. Especially in an age in which senior executives receive

enormous sums (often regardless of how successfully they lead an organization) I urge you to reject any further restrictions on this law (Marafiote, 2008).

This identification of the classic division between business and workers was furthered in other comments: "Corporate America seems to get whatever it wants and the working class is left to deal with the mess that is left behind. This is just a small protection for the working class who make the money for the corporate world" (Burton, 2008). Another comment sarcastically postured "[T]hat's right—America wasn't built for freedom of the people [;] it's only about business" (LaPointe, 2008). "[W]hy are [there] billions for corporate welfare . . . and nothing for employees whose blood, sweat, and tears make employer[s] rich?" (McCannon, 2008). Another comment focused on the difference in sacrifice between rich and poor: "[changes to the FMLA] would be, in the long run, detrimental to the Nation as a whole and do nothing more than to further show the American public that while they are being expected to sacrifice more and more of their benefits, big business is being allowed to profit even more from their efforts" (Johnson, R., 2008). Still another applied the class comparison to individuals: "Perhaps, a wealthy person, or the boss of the company does not need to worry about [losing a job to care for a sick relative]. Truth is, someone like me, and millions that are like me do" (Juarez, 2008).

Other comments drew upon the metaphor of the physical body, likening the American working class workforce to the "backbone" of the country. "Workers in this country have fought too long and hard to get these rights granted

to them. . . . I strongly oppose the attempt to 'rape' the backbone of this country's working class by diluting the FMLA law" (Bell, 2008). Another noted that "This country was built on the backs of the working-class people" (Lavalliere, 2008). A third comment offered that "[e]very day the average citizen goes about his/her day working hard, obeying the laws and trying to maintain a footing in an ever increasing atmosphere of economic disaster. . . . It is we who are the real backbone of this great country" (Berney, 2008). "I think that most of America is slowly being worked to the bone, ground to nothing in the name of profits and sales . . ." (Holdridge, 2008).

One commenter summed up neatly the relationship between the FMLA and class identity: "God help the working class if these proposed changes are accepted. I believe in my heart that America will see the largest class divide ever in the history of mankind" (Gonnello, 2008).

In these comments, the scene of work is shifted from the specific "workplace" to a larger scene, a scene of class distinctions and national identity. The individual workers in the workplace possess the characteristics of the working class—loyal, hardworking, sacrificing for American business, in jeopardy, and deserving of protection from the government. This linkage is followed by a move to linking class to the success of America—the working class serves as backbone for American success, productivity and pride.

The concept of "working class," with its enthymatic character, also serves as a bridging device. Because it shares the characteristics of workers who deserve FMLA protection and characteristics of the American "identity," it links the

protection of workers under the FMLA to the protection of America. With this move, workers are able to recast their lot; receiving a benefit under the FMLA is about giving a privileged status to American values.

But creating a shared identity between workers, the working class, and America is not the only move that is made to craft identity. The importance of family to the national identity is also used as a bridge. First, the FMLA identified as one of its purposes as "promot[ing] the national interests in preserving family integrity" (FMLA, 29 U.S.C. § 2601(b)(1)). Thus, any argument about family being an important national value is already reflected in the text of the statute. And comments drew upon this link between family values and the FMLA, pointing toward salvation of the state through protection of families. "Let's save this nation for our grandchildren and great-grandchildren," one comment offered (Newbury, 2008). "Our government is constantly stressing family values, and rightly so as family is important in passing along the traits of good citizenship to each new generation" (Smith, M., 2008). Another noted that "[o]ur country needs to model sound family structure for future generations and that means our laws should reflect that" (Brusky, 2008). Another said:

Our society needs more protection for the family structure not less. We are in danger of becoming a less democratic country if we further weaken the bond with family and children because it is the family where our children first experience the freedoms of our democracy. They can resist the trouble of gangs and drugs if they have a stronger family bond. Leave the family leave and care act alone. Let our future families know that they

are valuable enough to invest time in the bonding and care of families (Young, 2008).

"Sure we all want to be successful in our jobs and we all need finances to survive. But, we also need and love our families. Please don't make the employee choose between their job and their family. . . .Come on people wake up and most of [all] have a heart and give respect to the true core of America—THE FAMILY" (Clark D. , 2008).

Other comments linked family satisfaction as a bridge to workplace productivity. These comments reflected what the Department of Labor said about the FMLA and their findings of its operation over the years: that the FMLA benefits both family integrity and workplace productivity (Report, 2007). A number of comments focused on the link between a "happy" and "healthy" worker and an improved society. One comment noted: "We are such workaholics in our society and the families suffer when they are torn apart due to working just to pay the bills. . . . A happy, well rested, and fulfilled society is a hard working and profitable society!" (Haroldson, 2008). "We need to realize that healthy and happy workers are more productive. A society cannot progress if it does not address the basic needs of its work force" (Mills, 2008). Another pointed to the FMLA as "a step toward making family and health as important as productivity in the workplace As my children move into the workplace, I want them to be able to truly have a good work/life balance" (McIntee, 2008). Another employer noted:

We employ people who need to juggle their work and family responsibilities. It is critical that we maintain the ability to be flexible and understand the importance of family and medical leave for employees and to care for loved ones. By honoring this reality of people's lives and finding balance in the work place we have found that our employees are happier in their jobs, are dedicated to their work and are able to go about their lives with much less stress. This provides a greater job satisfaction for employees and maintains their loyalty and longevity saving the organization staffing changes and costs. It seems to me that this Act is good for business as well as families (Smith N., 2008).

These comments show the family as a central component of American identity. Workers, then, through their membership in the family merit as much protection as the family does. Moreover, the link between the family and national productivity demonstrates how "family" becomes a bridge between what seem to be disparate ideas—the family as a domestic, economically nonproductive sphere and the workplace as an economically productive business setting. Beyond the setting of the FMLA and its comments, this type of bridging device is found in the idioms "working parents," "working caregivers," or "working families," phrases that, on their face represent a merger of opposites. The joining of these words creates an identity that merges the dominant cultural strains of identity: productivity (in other words, "work") and family.

"Worker" and "family member" represent two of those conflicting "corporate 'we's" that Burke discusses with respect to identity. Being American

and being a member of the working class represent two additional "corporate 'we's" that impact identity. The comments that draw upon class and American identities represent a shift in the coordinates for gauging identity, a shift in emphasizing one aspect of the "corporate 'we's" over others. This represents a move to see the FMLA from a different perspective or a different angle; by wrenching "worker" loose from the confines of the workplace relationship, the comments that draw attention to the worker's link to "America" via their contemporaneous links to class and family represent a "perspective by incongruity" that reveals the rhetorical underpinnings of identity while simultaneously creating those same underpinnings.

Identity amongst international peers.

"We are supposed to be the great country in the world and yet we have the worst benefits of any developed country in the world! You should be ashamed." (Gray, 2008)

The move toward discussing the relationship of the FMLA to the United States and its place on the world stage represents another move of "dialectical transformation" (Burke, 1945/1969) and a shift to focusing on America's division from the international community as a motivating term. Whether that motivation is one of consubstantiation, that the United States should share substance with other nations on the issues of work and family, or an appeal to an identity of pride, of establishing a place higher in the hierarchy of nations, the comments act to create a new relationship between work and family identities that privileges family over work.

Some comments focused on the link between the FMLA and the United States' international standing. One comment noted that "[s]upporting and increasing the [FMLA] is necessary if we are the country we claim to be. As it is, the United States is behind every other industrialized nation in supporting women, children, and families . . ." (Barkman, 2008). Another commented that "[i]t is long past time for my nation, the United States of America, to join the ranks of family-friendly advanced nations instead of constantly punishing them for being a family with children, persons who may become sick, who may have the typical problem of family that other, more advanced civilized nations support families with in their times of need" (Backman, 2008).

Another comment focused on specific comparisons:

You might consider that the United States is the worst nation in the industrialized world in terms of family medical leave and in terms of family friendliness period. France gives women off work for 6 months with pay from the government, provides free health care, and provides the new mother with a "nanny" part-time a day or so a week. Brit[ai]n allows the woman to take off 6 months paid partially by the government, partially by the employers. In Norway and Sweden, the mother gets a year off with pay. The US 6 weeks looks meager next to the rest of the world. And Europe is doing quite nicely economically; look at the dollar against the Euro (Marshall, 2008).

Some comments focused on the shame and embarrassment the United States must feel about falling behind on the national scene: "How sad we must

look to the rest of the developed world with our anti-worker/citizen/taxpayer programs. Every other civili[z]ed country allows their workers to have a break when a family member becomes ill" (Holmes, 2008). Another noted "The U.S[.] is the most advanced country in the world, the super power of all nations, yet we have one of the worst maternity/paternity leave systems in place. It is quite disapp[oi]nting and, as a young college student, it discourages me from staying in this country when I start a family" (Smith J., 2008). "As you must be aware, the United States is one of the few industrialized nations that limit Family and Medical Leave to an UNPAID version. . . . Please do not adopt regulations that will further embarrass Americans in the world's economic market!" (Russell, 2008).

With respect to international identity, the motivation for change comes from division, not identification. In these comments, the United States has fallen out of "order," and protecting the FMLA is the way to restore it. The argument over the relationship between work and family no longer is one that is about the tensions between worker and family member or worker and employer but about the United States and the rest of the world. By enlarging the circumference of the question of work and family to the international scene, the terms of the debate again change to questions about collective identities rather than individual ones.

Although the circumference drawn here is geographic, a circumference around work and family identities can be drawn through stressing various aspects of time. This last section is focused on the time boundaries of work and family identities as developed in the FMLA rulemaking process.

Time identity: Efficiency, ecology and kairos.

The nature of the FMLA as a legal scheme that focuses on the intersect between work and family made it susceptible to issues of time in three ways. First, some of the main issues that came up in the proposed regulations included the question of what should "count" as a "normal" workweek for the purposes of calculating FMLA time off; that is, should overtime be included in that calculation? A second question that arose was what should count as a "normal" work pattern for the purposes of counting eligibility for leave. These questions were questions of the "chronology" of work and family. A third perspective questioned the nature of time spent with family, a question that dealt with "right time" rather than chronological time. Questioning how much overtime a worker can be expect to count toward FMLA leave addresses questions of how the identity of the worker is shaped by one's perspective regarding to how time is spent. Moreover, the issues of the look-back period for counting FMLA entitlements addresses questions regarding the commitment of time it takes to be a "normal" worker. In addition, in discussing the FMLA, comments regarding the "time" spent with family were based more on conceptions of kairos or "right" timing."

With respect to chronological time, the original language of the FMLA regulations provided that an employee could be charged no more than 40 hours of overtime a week toward FMLA leave. The Department of Labor proposed to change the rule to allow an employer to charge more than 40 hours of FMLA

leave if the employee taking the leave was scheduled for overtime work during that week (Proposed Rule, 2008).

The American Postal Workers' Union (2008), in its sample comment, repeated by others in the rulemaking process, argued that "[t]his change would force employees to use up their FMLA protection at a faster rate. The normal work week for a full-time worker is 40 hours; any rule that would change more than the standard work-week is wrong." Another comment stated that "[o]vertime should not count as part of the employee's FMLA. If an employee goes on vacation, he gets only 40 hours and receives no pay for overtime worked whil[e] he was off....FMLA should be no different" (Gunder, 2008). In the final rule, however, the Department of Labor promulgated a regulation that requires the overtime hours to count toward FMLA leave when the employee would have been required to work them (Final Rule, 2008, p. 67979).

An additional ambiguity regarding chronological time that the Department of Labor noted in the regulations was in the statement that the twelve months that an employee had to be employed in order to be FMLA-eligible need not be "consecutive' (Proposed Rule, 2008, p. 7881). The Department said that due to this ambiguity, one court had stated that even a five-year break-in-service did not disrupt continuity, and the Department asked commenters to speak to this question (Proposed Rule, 2008, p. 7881). The Department also noted that neither the text of the FMLA statute or its legislative history spoke to the question of discontinuity (Proposed Rule, 2008, p. 7881). The Department of Labor proposed

that the regulations be amended so that "a continuous break in service of five years or more need not be counted" (Proposed Rule, 2008, p. 7882).

This proposal generated much controversy in the commenting process. In the preamble to the final rules, the Department of Labor noted that the AFL-CIO suggested that there was no legal requirement to limit the breaks-in-service to five years, and that if there was a limit, that limit should be consistent with the typical recordkeeping timespan of seven years (Final Rule, 2008, p. 67940. The Department noted that the National Partnership for Women and Families, among others, said that said that limiting the look-back to five years would impose hardships for women who had taken time off to care for children or family members and suggested that a six or seven-year look-back would be less harmful (Final Rule 2008, p. 67940). One commenter, a law student, also described this view:

Essentially, those employees who have worked for the employer within the past five years (for a total of twelve months) are more worthy of FMLA rights than employees that have not worked for the employee within five years, regardless of their length of previous time with the employer. . . . Employees that worked for an employer for years, quit to raise a family, and returned to that employer after their children started grade school, [should not] be barred from receiving FMLA. . . . Assuming a full time position, these few months between accumulation of 1,250 hours and twelve months may be a crucial time period for anyone juggling work and family. . . . [Without this protection,] [t]he parent would have to

decide whether to care for their child or return to work so that his/her FMLA security would not expire (Parry, 2008).

Commenters relying on the Society of Human Resource Managers form letter suggested, that the "five-year period is unrealistic and [would] create an undue burden and cause administrative headaches for employers, especially since FMLA . . . regulations only require that an employer keep certain employment records for three years" (Miles, 2008). Other comments pointed out that because expectations of employees change over time, an employee who has been away from the workplace for more than five years is effectively a new employee and thus should not be entitled to FMLA credit (U.S. Dept. of Labor, Final Rule, 2008, p. 67940). Another comment noted that it would be "unfair" for an employee returning after a break in five years to be eligible for FMLA before a person who had recently given 12 months of service to the company (U.S. Dept. of Labor, Final Rule, 2008, p. 67940).

Ultimately, the Department of Labor modified its proposed rule to allow a continuity of service to extend back seven years but required that beyond a three year period the employee had the responsibility of submitting "sufficient proof" of past employment, which includes "W-2 forms; pay stubs; a statement identifying the dates of prior employment, the position the employee held, the name of the employee's supervisor, and the names of co-workers; or any similar information that would allow the employer to verify the dates of the employee's prior service" (Final Rule, 2008, p. 67942). In making this final rule, the

believes that a seven-year gap draws an appropriate balance between the interests of employers and employees [and limits] the burden on employers in attempting to verify an employee's claims regarding prior employment in the distant past. . . . By allowing a gap of up to seven years, the rule takes account of the comments noting that employees sometimes take extended leaves from the workforce to raise children or to care for ill family members and emphasizing that women are particularly likely to fill this role' (Final Rule, p. 67942).

These comments, in conjunction with the Department of Labor's decision to allow a look back period of seven years reveals how the idea of the "normal" work pattern was challenged and that challenge was effective to change the meaning of the term.

The emphasis on time with respect to the "normal' workweek and the "normal" career pattern demonstrate Burke's emphasis on efficiency. Efficiency, Burke (1937/1984) notes, stresses one ingredient of a particular whole to the exclusion of its other parts. Here, "time" is the efficiency that identifies the worker. Workers are measured in time—by the amount of time spent at work, the amount of time spent with a particular employer, and, conversely, the amount of time spent away from work. These identities are efficient; they measure identity by a single aspect—time. Moreover, measuring worker identity in this way accomplishes the goal of symbolic substitution. The time measures, at least in

part, the value of loyalty; the time measurements substitute a uniform, objective measurement of loyalty for a subjective one.¹³

But, chronological time was not the only way in which discourse surrounding the FMLA measured time. Time was also measured in terms of ecological balance—matching the right behaviors to the right time. Specifically, these comments came up in the context of providing "nurturing" to new children and providing "comfort" and emotional care at the end of life.

With respect to the need to "nurture" new children, comments addressed the importance of that time to bond with a child and to nurture it—to maintain that "ecological balance" between parent and child at to recognize that "right timing" for caregiving. One comment noted that "I believe there is something to be said for the nurturing that needs to take place at home, both for the baby and its mother" (Cupples, 2008). Another noted that "[e]ach infant needs security and nurturance to maximize her/his potential We must provide that time to care" (Shanklin, 2008). Another mentioned, with respect to an adopted child, "[d]evelopmentally this time is exceedingly important to promote a health well attached child. Children who do not get this time with their adoptive parents tend

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This emphasis on chronological time was also seen other FMLA regulations as discussed in Chapter Four. For example, the change requiring two visits to a doctor within 30 days to establish a serious medical condition emphasizes the chronological aspects of having a serious medical condition. The requirement that "bonding time" with a child take place in the first-year of life also emphasizes chronological time. Additionally, the focus on quantifying the time "practicable" for giving notice of unforeseeable leave as one or two working days emphasizes chronological time. And, debating the minutiae of how much time an employer can deduct for time away from work for intermittent leave also reveals this emphasis.

to have significant development, emotional, and cognitive delays. The FML allowed me to spend crucial time with my son" (Paulsey, 2008). Another noted that "[t]here is nothing more profound in a person's life than the birth of their children. . . . [I]t is clear that people, both parents and children, need every opportunity and advantage to make childbirth a positive and warm experience" (Wright, 2008).

Another comment extended the concept of nurturing children by requesting that other types of nurturing in other contexts be made available under the FMLA:

I believe the Family Medical Leave Act should also include some type of clause covering employees who need to attend to children of school age (generally below 18) who are in need of care due to mental, emotional, sexual abuse situations affecting their education/schooling. Parents should be entitled to address these situations (such as meetings with the school, expulsions, etc) without having to worry about losing their job. The children are our future and their schooling is important to all of us (Steflin, 2008).

Others comments focused on caregivers being able to give care at the right time at the end of life. "There are no words to express what it meant to be able to care for my Mom every single day until she died in July. The time we were able to spend talking, crying, and sometimes laughing is not measureable in any shape or form" (Haselrud, 2008). Another comment noted that "[to care for my parents] was a special time for my family that would have cause[d] untold

hardships for my mother and allowed my father to pass away in a dignified manner and in comfort" (Maloof, 2008). Another noted that "[m]y mother used FMLA to take care of my grandmother when she was very ill. This prolonged my grandmother's life, kept her out of a long-term care facility (therefore decreasing the burden on taxpayers), and increased my grandmother's comfort. My grandmother lived 5 more years after mom helped her. She was able to stay at her home until she passed" (Hunt, 2008).

The discussion of time regarding the FMLA regulations represents a discussion of family at the intersect of a different order of motivation. The FMLA states this motivation in its purpose—to make "enduring" connections with both family and work through time spent with both. In addition, by emphasizing the "right time" over chronological time, the comments demonstrate this emphasis on "enduring" connections, stressing an ecological view of time, emphasizing the whole of time rather than its fragments.

Comments that focused on nurturing and end of life comfort focused on being present at the "right time"—at the time during which a family member was in his or her first or last moments. This aspect of family identity evokes kairos, placing an emphasis on "right timing" or "right opportunity" (Sipiora, 2002, p. 1), calling attention to "the crisis points of human experience . . . when junctures of opportunity arise, calling for ingenuity in apprehending when the time is 'right'" (Sipiora, 2002, p. 15). *Kairos* "points to . . . the special position an event or action occupies in a series, to a season when something appropriately happens

that cannot happen at just 'any time,' but only at *that* time, to a time that marks an opportunity which may not recur' (Smith J. E., 2002, p. 47).

Here, the opportunities for family in birth and death represent how the "right time" intersects with identity of a family member. While much of work is evaluated by chronological time, family, at least as represented in these comments, is evaluated in units that represent the "right time." The problem with this characterization, however, is the difficulty in translating this aspect of human experience—right timing—into the legal terms for replicating the experience. Accordingly, a danger of the law, as others have recognized, is that the law is never a fully authentic translation of experience.

In comparison to chronological time as embodied in FMLA regulations, where the perspective on time starts with the workplace and then "carves out" family, the characterizations of family as "kairos" does not privilege work or family over the other; time is not "carved out" of a separate whole, but is reallocated within the whole. This reallocation, however, still presents identity issues. Identity scholars complain that identity discussions focus on the concept of "time management" (Kirby, Golden, Medved, Jorgenson, & Buzzanell, 2003). But perhaps time management is a function of our embodied, temporal condition. In other words, even when individuals view their time as "right timing," and allocate time between work and family, they still do not characterize those times as "interlocking" or "concurrent." Rather, life, and consequently, the enactment of identity, is characterized as time bounded.

On the other hand, a "time bounded" identity could be a product of how the law codifies identity and provides a terministic screen that makes it impossible to see life as anything other than separate, time-bounded spheres. Perhaps this is a side effect of how legal discourse, as a macrodiscourse, operates—it forces boundedness due to the ways in which it creates singular, unit-driven definitions, written from privileging the chronological bias of the workplace over other concepts of time and value.

Regardless, as a consequence of time bounded lives—with time between work and family being materially separate—the role of rhetoric is not to symbolically integrate time or to consequently integrate identities. Arguably the role of rhetoric is to manage the intersect between those conflicting identities, assigning time, either chronologically, or kairically, to each.

A bird's eye view of the identity barnyard.

The regulatory rulemaking process takes the imaginative possibilities of work and family and demonstrates a process of bureaucratization, a process that leads to an authoritative statement of work and family identity. This process involves the intersection of official and vernacular discourses in a uniquely constituted setting. In this setting, the state calls the public into being and sets the methods, terms, and rules for exerting influence in the process while at the same time maintaining an opening in the process for any individual to participate in any written form desired. In addition, as Tracy and Trethewey (2005) recognize in their work, organizations offer rhetorical resources for constructing identity, and, here, organizations invited their member to attempt to assert influence by using

those resources. Further, in the process, individuals either complied with or resisted the discursive constraints and resources to convey information about their views on and identifications with work and family.

The key symbol of privacy represented a transcending term that merged conflicting concepts of expertise, non-expertise, and unwanted publicity as a consequence of communication between medical care providers and employers. In this setting, workers enacted private identities in an effort to make that privacy an issue of concern sufficiently public to be regulated. "Abuse" as an identity presented itself as a term that was used to define the nature of workers or employers; either workers or employers were subject to abuse by the other. This division was enhanced further by metaphors of violence between worker and employer, which perpetuated adversarial identities. Other comments attempted to reconcile those tensions by assigning motives to individuals and instead merging the universal cure for abusive employers and employers into a system that functioned to discipline workers who deserved it.

The term "accountability" demonstrated the tension in identities and how the invocation of particular words, "magic words," ritualized particular worker identities. Sacrifice and struggle were also words that represented dialectics of identity—oscillating between employers' sacrifices and those of workers and their family members who would not benefit from time with family but for protections of the FMLA. Discussions of sacrifice also implicated the scapegoat identity and revealed that the discourse attempted to place the blame for disorder in the

workplace on account of family responsibility primarily in the worker; worker as victim; worker/supervisor as victimizer; and worker as victimizing other workers.

Regarding the specific identities of workers and family members, the FMLA regulations and the comments revealed a tension between codified versions of "family" within the text of the FMLA and the struggle for control over the details of that term within the comments.

Finally, the comments attempted to define work and family within different circumferences of meaning. By placing work and family within a national and class context, work and family were able to share positive identifications with the "working class" and with the "American" identity. Comparing America to the international community, the discussion of identity then shifts from individual identities to larger collective ones. Finally, the regulations and the comments reflected competing views of time that looked at the identities of workers as a function of efficiently allocated chronological time or ecologically allocated right-timing.

Chapter 6

CONCLUSIONS, IMPLICATIONS, AND FURTHER DIRECTIONS

Burke defines his logology, his method for examining language for human motives, as "rooted in the range and quality of knowledge that we acquire when our bodies . . . come to profit by their peculiar aptitude for learning [language]" (1985, pp. 89-90). How work and family identities are constructed in the regulatory rulemaking process implicates this rhetorically constituted knowledge. As embodied beings, humans perform intimacy and productivity; through language, they imbue those performances with meanings of "work" and "family" and develop identities based upon those rhetorical constructions.

As an authoritative discourse, legal texts and the processes that create them are sites that give birth and rebirth to socially constructed identities. The law, as Burke notes (1937/1984, p. 326), involves "'character building' in that one shapes his attitudes, 'the logic of his life,'" at least in part via the "secular prayer," or the language provided to him by law. The unique nature of the regulatory rulemaking process, with its facilitated intersect between vernacular constructions of identity and competing official ones, demonstrates how law acts as a character, or identity, building device. The regulatory rulemaking process illustrates that identities are fluid, contested, and rhetorical concepts. This study of the FMLA regulatory rulemaking process gives insight into how those identities are constructed at the regulatory juncture and the limitations and problematics of that process. Specifically, the study provides insight into law's role in constructing

work and family identities and the operation of publics at the intersection of the vernacular and the official.

Work and Family Identities in Legal Discourse

The regulatory rulemaking process demonstrates that law functions as part of a larger rhetorical milieu. The process is evidence of the assertion that Hasian (2000) makes about relationship between legal texts and vernacular ones, that they are continuously in circulation with one another, and the law could not exist but for a broader rhetorical culture. In the case of work and family law in the FMLA, the ordinary language of the larger public is rhetorically made and remade in a recursive interaction between official and vernacular texts. These interactions guide the state in shaping how the law will define worker and family member identities. Yet, in the end, the text of the law and the regulations "bureaucratize" identities, shaping individual identities into official ones that reach beyond the individual experiences of those who helped inform the law to new situations not yet contemplated by the legal text.

In the regulatory rulemaking process, the legal texts and comments tend to perpetuate the traditional identities of employer and employees and between work and family. This is not surprising since the law itself acts as a circumference within which work and family can be imagined, and, as the "efficient codification of custom" (Burke, 1945/1969, p. 291), law will tend toward reifying existing norms. Yet, the strategies for challenging those conventions and carving out spaces for alternative or ambiguous identities are noteworthy and problematize understandings of work and family identities. This rhetorical move is particularly

notable in the comments that seek to limit employer access to worker medical information. Although Goodnight (1982) suggests a distrust of expert/technical discourses as exclusionary to public discourse; in the FMLA regulatory rulemaking process, comments looked to medical expertise to create a private identity for workers and apart from their workplace identity. This redoubling of exclusion, that is, using the language of exclusion ("expertise") to craft a private (exclusionary) identity free from the employer's gaze is an efficient rhetorical move by members of the public who may not have access to the full panoply of technical or official understandings of the law but can use understandings of the privacy of medical information to craft an identity that separates family life from work life.

Moreover, the use of "private" identity to make a separate sphere for home life challenges the ways in which communication scholars have critiqued workfamily scholarship in communication. Their view has been that conceptualizing work and family as separate, bounded spheres limits the ways in which the relationship between work and family can be envisioned. While this may be a legitimate critique for framing research, the regulatory rulemaking process demonstrates "boundedness" as a strategy for discursive empowerment.

Not surprisingly, the comments revealed a struggle over the relative power individual workers have to balance their family and workplace lives in relation to the power individual employers have to run their businesses. This intractable identity dilemma begins in the language of the FMLA itself through its attempt to recognize and reconcile the competing interests of workers, family members, and

employers. The drive, however, for hierarchy results in struggles over claims to power. Yet ironically, in the regulatory rulemaking process, the identities that are often claimed are not ones of powerfulness but of powerlessness and victimage. Comments written from a worker perspective characterized employers as having too much power and control resulting in abuse and sacrifice of the worker. Comments written from an employer perspective characterized employees as having the power to "abuse the system" as well as their co-workers, resulting in sacrifice (in the form of administrative burdens and lost profits) on the part of employers and the employees left behind. This struggle to claim victimization suggests a problematic with work-family identity, at least as it becomes expressed in the law. Both workers and employers seek protection from each other via the state rather than seeing the law as a means to empower both to improve working relationships. This means that the debate over the relationship between work and family, and the identities that correspond to that relationship, are locked in a tragic, rather than a comic frame that could result in an orientation towards blame rather than problem-solving.

The artifacts in the rulemaking process also demonstrate how identity, as Crable (2006) suggests, is a product of strategies to gain sympathy with or from others and also create antithesis with others. Sympathy is sought through narratives that tell of the common plight of workers in balancing work and family. Providing non-technical, practical accounts of experiences through narrative is an example of resisting the technologizing language of the official discourse to frame the experience of work and family. These "mundane" (Asen, 2010) narratives

serve as argument about public policy and compete for status as representative anecdotes, as stand-ins for all experiences of work and family. Yet, this competition for primacy may be in vain. Although these individual stories are acknowledged in the discourse, what becomes codified in the law is separate from these "common" stories; legal rules that develop from these stories become highly abstracted, "disembodied," somewhat technical categorizations. Although the legal categories can be seen as representative anecdotes in and of themselves, they lack the concrete detail of the material experience and thus act to reflect a "pure" identity, one that may fall short of sufficiently translating lived experience. Accordingly, while the comments that offered narratives of the work and family experience breathed life into the law, the concrete identities of workers and family members were subordinated in the law to more abstract, sterile ones.

A second strategy for crafting identity is to draw upon antithesis (Crable, 2006) or to define a common enemy. Identities in conflict can transcend division by identifying a scapegoat in which to place that conflict. In the regulatory rulemaking process, the undisciplined, "gossipy" supervisor is the identity that is constructed to bear the conflict that is created when the Department of Labor decides to implement a policy that allows employers (and not their health care provider-representatives) to see more medical information and to engage in conversation with medical care providers. By making this move in the discourse, the supervisor becomes the scapegoat upon which all sins can be placed; sacrificing his access to information is the price for restoring order between worker and employer.

Yet, this move presents a problem; it reduces the supervisor to a "flatness" of character. Supervisors in particular are complex in their identities; they are not only employers, they are also workers and they likely also have family members. Moreover, attributing an evil motive to them, that is, suggesting a desire to give employees unwelcomed publicity about their family's medical conditions, for example, results in the codification of the identity of the supervisor that is not necessarily empirically accurate. Further, the regulations now include this supervisor identity, an identity which, consistent with other identities in the law, has the capacity to define the material conditions of interaction. As Carlson (1999) suggested, legal argument can either challenge the structures or work within them. By drawing upon the classic hierarchy of "supervisor-subordinate," the comments failed to challenge existing workplace identities and instead shifted aspects of blameworthiness so as to craft new identifications between "employer" (not "supervisor") and worker.

The regulatory rulemaking process also reveals how the law creates static identities that can be resisted by vernacular texts. Comparing the text of the FMLA statute and regulations to the comments about the roles of individuals as family members demonstrates that multiple identities crystallize in single bodies, but attempts at legal categorizations fall short of capturing these crystallized identities. Singularly expressed identities such as "son," "daughter," "spouse," "mother," or "father," fall short of "taking up the slack" between categorical definitions and lived experience. To experience multiple identities is a vernacular reality that struggles to be expressed in a legal one.

The regulatory rulemaking process also shows that identity as a worker or family member is not necessarily limited to the contextual circumference of the workplace the family or the intersect between the two; instead, that identity can be understood in relation to class standing, national affiliations, global relevance, and time. Dramatism (Burke, 1950/1969) recognizes that identities are the product of hierarchy and the human desire for order. In the regulatory rulemaking process, however, identities of worker and family member are embedded in conflicting yet contemporaneous hierarchies that involve decisions about how to relatively position business interests, family needs, national priorities, and global membership. The rulemaking process demonstrates that these hierarchies are not fixed and instead are in flux, ready to be repositioned by rhetoric. Moreover, the study shows that identity oscillates between these orders of hierarchy both within legal texts and in vernacular expressions of identity.

For example, what it means to be a "citizen" of the United States is casuistically stretched in some comments to include a "family first" identity. The FMLA itself mentions "family integrity" as a key component of the national identity. In other contexts, the same national identity is stretched to encompass business and economic interests as consistent with the national identity. This use of national identity as a "god term" is an effort to reconcile the contested hierarchy; by placing national identity at the top of the hierarchy, the competition for position between work and family merges into an identity that puts "nation" first.

Unlike Dewey (1927/1954), who valued the public's constant interaction with the state to reshape its policies, Burke expressed concern about law's shifting nature; he worried that laws constantly in flux denied individuals the ability to stably self-define. The regulatory rulemaking process demonstrates the power of dramatism to reveal the kinds of concern that Burke expressed. It shows how authoritative discourses fix rhetorical boundaries of identity but are also open to challenge from vernacular discourses. It reveals the efficiencies in the law and calls attention to the lack of ecological balance in legal categories. It reveals tensions in competing motivations. It shows how work and family identities attempt stabilization in the law but do not necessary achieve that stability. And, it reveals itself useful for examining how identity and identification operate in relation to authoritative texts.

Publics at the Intersection of the Official and the Vernacular

The FMLA regulatory rulemaking process is a useful illustration of Hauser's (1999) theorizing about rhetorically constituted publics. The regulations and the comments call into being a public that formed primarily in the realm of technology and thus exists only virtually. As a result, the subject positions for speaking—the identities from which individuals speak—are constructed almost exclusively textually and rhetorically. In this context, "[t]he identity of the advocate often matter[s] less than the tenet articulated. . . . Discourse appears as the rhetor" (Asen, 2010, pp. 133-34). When discussing public policy making discourse to explore identity, the idea that the identity of the advocate is subsumed into the overall identity of the discourse is important and suggests some

significant conclusions about the nature of the public and the identities of that public in the FMLA regulatory rulemaking discourse. First, it encourages consideration of the "facilitated" public and what that means to public policymaking. Second, it calls into question identities expressed in appropriated language. Finally, it requires further thought about individuals and counterpublicity.

When the state creates a virtual space, as it does in the regulatory rulemaking process, for public participation, it acts to call a public into existence and to define the parameters of this public participation. In other words, official, or as Howard (2010) calls them, institutional, actors create a space for vernacular rhetoric. Without the role of the state to create this space and the law to define how the state must respond to public participation, there would not necessarily be a means for the public to provide input into the "technical sphere" regulatory rulemaking process. In this way, the regulatory rulemaking setting acts as a "facilitated" public, creating the location from which vernacular voices can speak (Howard, 2010).

The state's facilitation of the regulatory rulemaking process complicates access and power in the public sphere. While individuals without official access and technical knowledge are empowered to speak by virtue of having a space created for them in which to do so, the rules of participation and the selection of which voices will have influence is left to the official state actors. In other words, the state sets rules of recognition—rules that determine what voices will influence policymaking. Howard (2010, p. 248), asserts a similar point when he says "the

institutional nature of participatory media . . . shapes the possibilities of the discourse enacted in those media." Thus, the public's participation in this process risks marginalization.

Moreover, within this sphere, special interest organizations are also empowered to speak. They also provide scripted language for individual members of the public to provide as input into the regulatory rulemaking process. Thus, although the language provided by the organizations gives individuals a way to participate, it may dilute participation because first, the organization selects the language in which an individual's ideas will be expressed, and second, the same form of language used by many different participants suggests an inauthentic identity of the individual participants. In other words, when form is overused, the form loses its appeal.

As Crable (2006) points out, a rhetorical strategy of identity formation is control over the terms of the debate. To some degree, then, individual input into the formation of work and family identities in is eclipsed by the ways in which the state and special interest organizations control the terms of the debate, both in the call for participation and in the response. When these controls combine with the rhetorical fragmentation that occurs from the multitude of speakers speaking in a technologically mediated, virtual public setting, the ability of the public to identify itself and to influence public policy is limited. Yet, what this study proved was that even within this heavily controlled setting, individuals still managed to use the language of the law and the language of public interest groups to challenge official identities, offer narratives expressing concrete experience of

work and family, and take advantage of legal terms to craft new ways of imagining worker and family member identities. Even if individual comments were not "heard" by the state or by others in the vernacular, speaking into and as a "public" reflexively influences one's own view of one's own identity, consistent with or in contradiction to the larger public. Arguably, the process of identification occurs by the act of "speaking in public"; identification with the projected audience may be enough for individuals to view themselves as a member of a public.

Finally, the facilitated regulatory rulemaking process problematizes, even if only slightly, the concept of a counterpublic. Brouwer (2006) suggests that counterpublics are known by the marginality of their participants and their oppositional positioning. Opposition means "resistance, rejection, or dissent" (Brouwer, 2006, p. 197). And, marginality is located in individual perceptions of exclusion from dominant publics (Brouwer, 2006). In the context of regulatory rulemaking, comments voice opposition against state policy proposals or, conversely, give support to those same proposals. Yet, even though there is resistance and opposition in the regulatory rulemaking process, there is no "dominant" public against which a counterpublic can form. Rather, in the context of the regulatory rulemaking process, no "dominant" public forces the exclusion of voices; in fact, the exact purpose of the regulatory rulemaking process is to create a virtual space for the expression of all points of view. In that regard, imagining the regulatory rulemaking process as a site for counterpublic formation is strained.

But, on the other hand, it also seems inappropriate not to consider opposing voices in the regulatory rulemaking process as potential counterpublics. The opposition to the state's dominance in constructing authoritative, official identities creates a "dominant" codified discourse against which oppositional, marginalized identities could form. And, even though this regulatory rulemaking public is transitory, lasting only as long as the notice and comment window, Brouwer (2006, p. 197) recognizes that counterpublics can form even in "dispersed, asynchronous communication" settings and allow individuals to form counterpublics, even if virtually constituted and arranged. Perhaps one way of thinking about this dispersal in the "virtual" domain is that individuals seek a "counterpublic-ness," a projected identity of opposition and marginality, rather than the desire to form a counterpublic, a consubstantiality with others who share a similar identity.

Many of the comments—if not all of the comments—tell the story of work and family by assuming a particular perspective—that of a worker, employer, or family member. In this way, the comments claim a public "self" that can have an opinion in opposition to the state from a point at which that individual perceives marginal, or as Howard (2010) suggests, as "altern." Even if the case of employers who typically would be considered part of the dominant discourse of capitalism and policy formation, a marginalized identity can be claimed in the regulatory rulemaking process by that employer for the purposes of the FMLA. In this way, the claim of marginalization with the accompanying oppositional stance suggests the formation of a an attitude of counterpublic-ness; in terms of

the Burkean pentad (1945/1969), counterpublic motives might be seen as an orientation or attitude rather than a place, an act, or even a discursive construct that seeks to assert "non-institutional authority" (Howard, 2010, p. 249).

Moreover, many of the comments in the rulemaking process claim marginalization, yet the primary claim of the state in its facilitation of the debate is that no voice is marginalized in the process at all. This is ironic since the purpose of the process is to empower and give voice. These tensions present in the regulatory rulemaking process problematizes counterpublic theory at the point where official and vernacular discourses intersect in a space facilitated by the state.

Practical Implications

The most significant practical implication for this project is that it directly links the rhetoric of identity formation with the authoritative discourses of the law and the material experiences of work and family. It attempts to take into account the diversity of identity as expressed in the rulemaking process and to consider how those plural identities intersect with material conditions.

Asen (2010) notes that there is a connection between the polysemy of the symbols of public policy debates and material consequences of those debates. "The different meanings circulating in policy debates portend different outcomes for target populations" (Asen, 2010, p. 138). Cahn and Carbone (2010) identify the plurality of the FMLA's target populations; "families are living different lives with different symbolic and practical needs." That is, families are not monolithic in their nature, structure, or purpose: this means that the symbolic construction of

workers, employers, and family members in legal texts will have material ramifications for those who are subject to those laws and those impacts will affect families differently based on their differences.

Moreover, Cahn and Carbone (2010, p. 9) comment that "family dynamics have responded to workplace needs more readily than the workplace has changed to accommodate family responsibilities." More family friendly workplaces would help both "men and women feel comfortable that they can combine work and family" (Cahn & Carbone, 2010, p. 9). They state that "the challenge is to more effectively integrate the worlds of work and family," and to "remake the social contract between employers and workers" (Cahn & Carbone, 2010).

Addressing identity at the intersect of the family and the workplace is important because understanding how identity is constructed from the discourses that are circulating in society can help remake the social contract and provide different symbolic resources for shaping work and family identities. It demonstrates that dealing with work and family issues means more than just allocating time, space, or people to the task; it means rethinking how individuals come to know themselves as workers and family members. Rethinking the symbolic construction of identity, particularly in authoritative texts, is part of the remedy for problems confronting workers who are also family members. A study like this one can encourage policymakers to be sensitive to the discourses of identity and how identity is shaped by and shaping of legal language and to consider the implications of process and voice in the regulatory rulemaking process.

Moreover, giving attention to the regulatory rulemaking process itself is a practical consequence of this project. By calling attention to the way in which the state facilitates participation and the consequences of that facilitation, the project offers state actors some insight into the operation of regulatory rulemaking process. Given the recent attention to eRulemaking as the means by which the public can most fully participate in rulemaking, studies that reveal how the process operates can contribute toward improving that process.

Future Research Possibilities

Further explorations into the construction of legal identities in general, work and family identities, and the regulatory rulemaking process can be imagined as a result of this project. First, the project's results opens questions of how publics are facilitated by the state and the impact that facilitation has on the nature of public deliberation. The intersect of the state and public deliberation summons descriptive and normative investigations into the spots where the state calls publics into being. Moreover, other identities besides work and family identities can be explored in publics facilitated by the state. Work and family are not the only legally defined identities. Identities as "victims," "criminals," "attorneys," and "jurors," for example, are all identities that are legally defined. Exploring how they are crafted in legal texts would reveal more about how law creates identities.

With respect to work and family, other discourses, including state statutory law, case law, and the United States Constitution, all provide locations for the exploration of work and family identity construction. With respect to the

regulatory rulemaking process, the process provides fertile ground for considering how regulatory rulemaking works. Questions of public participation that have been raised in this project would be worth exploring in other highly regulated contexts including, for example, environmental law and immigration. By examining those regulatory rulemaking processes, researchers could interrogate how identities are constructed, how publics are facilitated, and how terms are motivated. All of these investigations could yield greater knowledge about the ways in which individuals interact with legal texts and how law acts not only as a discourse of authority but also as a discourse of identity.

Finally, this project's work could be extended to macrodiscourses, discourses like the law that have wide-ranging reach and impact, where vernacular and official discourses intersect. For example, the intersect of the official and vernacular in pop culture, mass media, and religious discourses would be locations for further study of how macrodiscourses shape work and family identities.

In Conclusion

A comic perspective rejects the tragic binary of "either/or" and instead looks at the symbolic world through a comic "both/and" lens. This project works to reveal the binaries of work and family identities as well the transformations that can occur when those binaries are subjected to critique. In the FMLA regulatory rulemaking discourse, some binaries are perpetuated and others are challenged with perspectives by incongruity and transformative mergers. These rhetorical revelations suggest that our attention should not only be addressed to

the material conditions of navigating work and family but to the symbolic expressions of identity that define the meaning of those conditions. Asen (2010) reminds us that with respect to public policymaking, rhetoric has material as well as symbolic consequences. Thus, it is important, if researchers want to change the material conditions of work and family, to take seriously the symbolic construction of identity in those texts that inform public policy and those that express it.

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