WORK WIVES

LAURA A. ROSENBURY*

Traditional notions of male and female roles remain tenacious at home and work even in the face of gender-neutral family laws and robust employment discrimination laws. This Article analyzes the challenge of gender tenacity through the lens of the "work wife." The continued use of the marriage metaphor at work reveals that the dynamics of marriage flow between home and work, creating a feedback loop that inserts gender into both domains in multiple ways. This phenomenon may reinforce gender stereotypes, hindering the potential of law to achieve gender equality. But such gender tenacity need not always lead to subordination. The concept of marriage at work may in fact permit different performances of gender than those found within traditional marriage, providing both women and men with forms of support, connection, and intimacy that escape gender hierarchy without eschewing gender altogether. This Article's analysis of work wives thus provides a vehicle for envisioning more nuanced legal strategies for gender equality, strategies that do not aspire to gender neutrality or gender blindness but rather focus on the ways gender is constructed in and out of law at home, work, and beyond.

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^{*} Sullivan and Cromwell Visiting Professor of Law, Harvard Law School; Professor of Law, Washington University School of Law in St. Louis. For insightful comments and other assistance, I thank Kerry Abrams, Susan Appleton, Caitlin Argyros, Kate Bartlett, Cheryl Block, Fred Bloom, Cynthia Bowman, Devon Carbado, Stephen Casey, Martha Chamallas, Elizabeth Chen, Marion Crain, Adrienne Davis, Barbara Flagg, David Fontana, Brandon Garrett, Kathy Goldwasser, Aya Gruber, Mitu Gulati, Valerie Hans, Clarissa Hayward, Jennifer Hendricks, Rebecca Hollander-Blumoff, Emily Hughes, Michele Jaffe, Laura Kessler, Pauline Kim, David Konig, Nalini Kotamraju, Kim Krawiec, Ethan Leib, Bernie Meyler, Melissa Murray, Jessica Newman, Natalie Pierce, Jed Purdy, Carolyn Ramsey, Russell Robinson, Hillary Sale, Fred Schauer, Peggie Smith, Nelson Tebbe, Rip Verkerke, Rebecca Wanzo, Melissa Waters, Ahmed White, Laura Wolf, Amber Woodward, Noah Zatz, and Emily Zoellner.

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INTRODUCTION

Traditional gender roles continue to infuse many workplaces and families even as women have achieved massive gains in politics, in labor markets, and within the home. Law reform efforts over the past forty years have attempted to counter those roles. States and courts have embraced genderneutral family laws, so that husbands are no longer required to be breadwinners or wives caregivers, as well as expansive interpretations of employment discrimination statutes designed to root out sexualization and other stereotyping at work.¹ These moves toward legal gender neutrality have created opportunities for many individuals to reimagine the roles of both men and women within families and workplaces, but traditional notions of those roles persist even in the face of legal change. Traditional constructs of gender remain remarkably tenacious, maintaining gendered conceptions of work and home life.

This Article analyzes the challenge of gender tenacity, examining one way that traditional gender roles are reinscribed even as they are altered: through the metaphor of the work wife. By analyzing ways that gender flows between home and work through the phenomenon of the work wife, the project fills a void in scholarship concerning family law, employment discrimination, and feminist legal theory. Some such scholarship has previously acknowledged how gender roles are shaped both at home and at work, with expectations and patterns from each realm influencing the other.² But by

¹ See infra text accompanying notes 139–141, 197–204, 224–231.

² See, e.g., Martha Albertson Fineman, The Autonomy Myth: A Theory of Dependency (2004) [hereinafter Fineman, Autonomy Myth]; Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination

focusing solely on relationships subject to explicit legal regulation, specifically the marriage relationship and the employer-employee relationship, past scholarship has generally overlooked the ways that gender roles persist in unregulated relationships of connection and care. This Article, in contrast, analyzes how gender is constructed both in and out of law, through multiple daily interactions that resist easy classification or regulation.

The concept of the work wife is particularly instructive because it has moved from the structural to the discursive over time. Understandings of the work wife first evolved at a time when women had access to executive suites only through the secretarial pool. Women in professional workplaces were thus relegated to providing support that frequently looked like the care wives provided to their husbands at home, albeit in a more efficient form. For example, Faith Baldwin, in the foreword to her 1929 novel, *The Office Wife*, asked: "How many business men wish futilely that their homes could be run as well as their offices and their wives comprehend their needs as swiftly and silently as their secretaries?"³ Rosabeth Moss Kanter's sociological study of a large corporation in the early 1970s likewise found that the marriage metaphor was frequently used to describe the relationship between bosses and secretaries, and it was "not just a catchy description"⁴:

The metaphor aptly fit[] many elements of the position: reflected and derived status; greater privileges and lesser work for women attached to higher-status men; . . . fusion of "the couple" in the eyes of others; . . . expectations of personal service, including office "housework"; . . . and an emotional division of labor in which the woman plays the emotional role and the man the providing role.⁵

Moreover, "[o]ver time, a serious emotional bond could develop."6

This marriage metaphor remains even though women in professional workplaces are no longer limited to secretarial roles. The passage of Title VII of the Civil Rights Act of 1964,⁷ which prohibits sex discrimination in the workplace, and the revival of women's movements in the 1970s eliminated many of the impediments to women's workforce participation.⁸ Work wives thus are no longer structural features of most workplaces. Yet portrayals of work wives remain to this day, in relationships defined less by hierarchy but still involving emotional bonds. As one journalist recently wrote, "You have the same boss, the same complaints, the same lousy insurance, the same pay cuts. You start talking about work and move on to home repair,

^{(1979) [}hereinafter MacKINNON, SEXUAL HARASSMENT]; Catherine Albiston, *Institutional Inequality*, 2009 Wis. L. Rev. 1093, 1155.

³ Faith Baldwin, The Office Wife x (1930).

⁴ Rosabeth Moss Kanter, Men and Women of the Corporation 89 (1977). ⁵ Id.

 $^{^{6}}$ Id.

⁷ 42 U.S.C. § 2000e (2006).

⁸ See infra text accompanying notes 183-186.

child care or families. Next thing you know, you are having lunch together and pretty soon . . . you have an office spouse."⁹ An article in the *Wall Street Journal* similarly described work spouses as "a term for . . . co-workers with close relationships."¹⁰

A metaphor that was once used to describe a relationship arising out of coercion and lack of opportunity is now used to describe relationships arising out of choice. This move has created room for multiple, and shifting, conceptions of the work wife. Some portrayals of work wives still hinge on subordination, much like those in the pre-Title VII workplace, whereas others focus on the privileges attaching to both parties in the relationship. Some of the work wives portrayed continue to be women, but some are now men. The metaphor continues to be used to describe male-female relationships, but it is also used to describe same-sex relationships. The term "work wife" remains, but it is often replaced by the gender-neutral term "work spouse" or even "work husband." The unifying feature in all these conceptions, however, is the use of the marriage metaphor at work. These are work wives, or work spouses, not work friends.

The persistence of the marriage metaphor does more than signal a close relationship. The marriage metaphor also keeps gender front and center at work despite legal changes designed to cleanse the workplace of oppressive gender roles. After all, the law of marriage has long been "a codification of a society's attitudes about women."¹¹ Although legal marriage no longer makes distinctions between the roles of wives and husbands, the care provided within many marriages remains gendered, with wives more often than their husbands performing or overseeing child care and housework, as well as engaging in more of the emotional work of family life.¹² Pleas to maintain "traditional marriage" in the face of same-sex marriage also reveal the ways that marriage plays a role in maintaining the gender order to this day. Using the language of marriage to describe close workplace, even if in multiple and shifting ways.

This Article's examination of the work wife phenomenon therefore illustrates one means by which gender remains tenacious even as law attempts to lessen the effects of traditional gender roles. The dynamics of marriage

⁹ Ann Belser, *Some Have Office 'Work Spouses' and Some Don't*, PITTSBURGH POST-GAZETTE, Nov. 14, 2010, at F1.

¹⁰ Sue Shellenbarger, *Does Your Work Wife Get a Valentine?* — *Some Co-Workers Want to Acknowledge a Deep*—Yet Platonic—Bond on the Romantic Holiday, WALL ST. J., Feb. 9, 2011, at D3.

¹¹ Herma Hill Kay, "Making Marriage and Divorce Safe for Women" Revisited, 32 HOFSTRA L. REV. 71, 90 (2003); see also NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 7–8 (2000) [hereinafter COTT, PUBLIC VOWS].

¹² See, e.g., Suzanne M. Bianchi, John P. Robinson & Melissa A. Milkie, Changing Rhythms of American Family Life 90 fig.5.1, 93 tbl.5.1 (2006); Arlie Russell Hochschild with Anne MacHung, The Second Shift (2d ed. 2003) [hereinafter Hochschild, Second Shift].

flow between the public and private divides of work and home, creating a feedback loop that inserts gender into both domains in multiple ways. The concept of marriage at work may therefore influence assessments of job performance and workplace roles in ways that reinforce gendered expectations rather than challenge them. At the same time, however, the concept of marriage at work may also permit both women and men to experience intimacy and support in new forms that escape traditionally gendered dynamics of care without eschewing gender altogether. New performances of gender might result—performances that lie between gender hierarchy and the aspirations of gender neutrality that pervade both family law and employment discrimination law today.

At bottom, then, laws aspiring to gender neutrality and gender blindness at home and work have not, and likely cannot, eliminate the relevance of gender in either domain. Such laws have eliminated egregious instances of gender hierarchy, thereby enabling more diverse gender performances, but gender remains relevant in ways that both reinforce and challenge traditional gender roles. Those seeking to promote gender equality at home, work, and beyond must therefore develop a deeper understanding of the dynamics that contribute to gender performance and, ultimately, to the construct of gender itself. Analyzing work wives provides a new way to engage in that project.

Part I chronicles past and current treatments of work wives in popular culture and law, examining ways that law, or lack thereof, shapes understandings of the concept. Portrayals of work wives exist against the backdrop of both marriage law and employment discrimination law. Obviously, work wives are neither wives for purposes of family law, nor are they a recognized class of workers for purposes of employment discrimination law. Yet popular understandings of work wives incorporate aspects of those parallel relationships explicitly regulated by law. In turn, the work wife metaphor sheds light on the potential and limits of explicit forms of legal regulation, at times frustrating the goals of that regulation and at other times furthering them.

Part II specifically analyzes the "wife" of the work wife metaphor, considering the relationship between work wives and wives explicitly recognized by law. Legal marriage is the norm against which work marriages are portrayed. Yet the use of the marriage metaphor at work also sheds light on the roles legal marriage, and husbands and wives, have come to perform in various aspects of society. In particular, work wife portrayals reveal ways that the roles of wives have been preserved as distinct from those of husbands, or spouses more generally, despite legal change. Gender-neutral marriage law has not de-gendered all conceptions of spousal roles. Instead, the turn toward gender neutrality has primarily worked as a one-way ratchet: wives now increasingly engage in the wage-work traditionally assigned to husbands, but husbands have been much slower to engage in the carework traditionally assigned to wives.¹³ The term wife thus preserves its traditionally distinctive meaning, as the common plea, "I need a wife," illustrates.¹⁴ Marital roles remain gendered even as states gradually recognize same-sex marriage and as the parties to all marriages embody their roles in new and different ways.

Part III then analyzes the "work" of work wives, theorizing how the persistent metaphor of the work wife complicates efforts by feminist legal theorists and others to eradicate gender discrimination in the workplace. Most of these efforts have attempted to make gender irrelevant to employment decisions. The work wife metaphor, in contrast, illustrates the myriad ways that gender continues to be present in the workplace. Portrayals of work wives therefore resist the notion that conceptions of workplace merit can ever be separated from other gendered social dynamics, highlighting the need for new ways of analyzing the promise and limitations of employment discrimination law. The Article concludes by offering suggestions for new ways of conceptualizing gender equality projects.

I. THE WORK WIFE IN POPULAR CULTURE AND LAW: THEN AND NOW

Work wives have moved from the monolithic to the multiple. Earlier understandings of the work wife described a female secretary serving as the second wife to a high-powered male executive in a relationship that appeared almost completely one-sided.¹⁵ The lower-ranking woman served a caregiving, sexualized role in support of her male boss. This was the relationship portrayed in Faith Baldwin's 1929 novel *The Office Wife*,¹⁶ as well as the relationship currently portrayed in the popular television show *Mad Men* as it chronicles office life in the early 1960s.

As women gradually moved out of secretarial pools into management tracks and received some legal protection against gendered expectations, portrayals of the work wife changed but did not disappear. Most notably, relationships between men and their work wives came to be portrayed as less overtly hierarchal beginning in the 1980s.¹⁷ This evolution likely tracked changing workplace demographics as well as changing understandings of what marriage meant outside of work, particularly the new legal understanding of marriage as an economic partnership in which both parties contribute and benefit.¹⁸ Now, some portrayals of work wives posit women having their

¹³ See infra text accompanying notes 168–169.

¹⁴ See infra text accompanying notes 172–175.

¹⁵ See infra text accompanying notes 21-63.

¹⁶ For background on Baldwin, a popular writer in the 1920s and 1930s, and her other novels portraying office romances, see Julie Berebitsky, Sex and the Office: A History of Gender, Power, and Desire 128–35 (2012).

¹⁷ See infra text accompanying notes 74–76.

¹⁸ For an overview of the development of the partnership theory of marriage, see Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1234–43.

own work wives, male or female, and some men becoming the work wives of other men, calling into question the very meaning of the term "work wife." Surveys report that anywhere between a tenth and two-thirds of workers report that they have a work spouse, without asking those workers to define what they mean.¹⁹

Elements of hierarchy and partnership continue to mix, however, in current understandings of work wives in both popular culture and law. Gendered hierarchy may remain in some situations, but that hierarchy may also play out in much different ways than in the past—for instance Ari and Lloyd on the popular television show *Entourage.*²⁰ Or hierarchy may give way to other interactions based on shared experiences and goals. Examining diverse portrayals of work wives illuminates some of the consistent, constitutive elements of the work wife concept, permitting an analysis of how the concept has remained distinct from descriptions of other relationships at work and how that distinctiveness affects constructions of gender and gender equality at work, at home, and in other aspects of society.

A. Early Understandings

Faith Baldwin's *The Office Wife* recounted the sad tale of forty-year-old and single Janet Andrews, the "best secretary" Lawrence Fellowes "had ever had,"²¹ who resigns against her will after being overcome by unrequited love for her married boss. Mr. Fellowes is initially out of sorts—"It's hell the way a man gets to depend on his secretary, isn't it?"²²—but soon Miss Andrews is replaced by the younger Anne Murdock, "whose crossed legs and short skirt revealed silken delightful knees" and whose "round small breasts rose perceptibly with an increased pace in her breathing" when offered the job.²³ Miss Murdock herself is focused only on succeeding in the business world until the attention she provides Mr. Fellowes blossoms into admiration and love, not just for the "job, but for a man."²⁴ She too resigns

¹⁹ See Shellenbarger, *supra* note 10, at D3 ("Nearly two-thirds of workers have or have had a work spouse, according to a survey in July [2010] of 640 white-collar workers by Captivate Network, a Chelmsford, Mass., digital-programming and advertising company."); Eve Tahmincioglu, *Does your "work spouse" get a Valentine?*, MSNBC. COM (Feb. 14, 2011), http://www.msnbc.msn.com/id/41531479/ns/business-careers/ ("An OfficeMax survey released this month found that 50 percent of those polled who have a "significant other" also 'share a relationship with a 'work wife' or 'work husband.''"); Viviana A. Zelizer, *Intimacy in Economic Organizations, in* ECONOMIC SOCIOLOGY OF Work 23, 35 (Nina Bandelj ed., 2009) (citing a 2007 survey by Vault.com finding that twenty-three percent of all white-collar workers report they have a work spouse).

²⁰ See infra text accompanying note 105. For more information about *Entourage*, see the show's official website at http://www.hbo.com/entourage/index.html (last visited Apr. 8, 2013).

²¹ BALDWIN, *supra* note 3, at 4–5.

²² *Id.* at 10.

²³ *Id.* at 20.

²⁴ Id. at 155.

and enters a doomed engagement to someone of her "own class,"²⁵ until Mr. Fellowes, rejected by his wife and jealous about Miss Murdock's engagement, finally proposes.²⁶ Miss Murdock accepts but is "wounded with a sense of loss"²⁷ when Mr. Fellowes says she cannot also return to his office. "No longer—the Office Wife. Just—Wife."²⁸

Despite massive social and legal change, relationships like the one between Mr. Fellowes and Miss Murdock still loom large in our cultural imagination. The popular television show *Mad Men* currently portrays several secretaries serving as work wives to their bosses in the early 1960s, providing not just administrative support but also emotional support and even sex.²⁹ From the first season in 2007, Joan Holloway, the head of the secretarial pool, is engaged in a sexual affair with executive Roger Sterling.³⁰ Another executive, Don Draper, brought his secretary Allison from his old firm to his newly created one, only to sleep with her and then reject her while going through the pain of his divorce. Although some audience members reacted with outrage, the actress who plays Allison saw it as a natural part of both of their characters: "He's very alone when we see him at the beginning of the season, and you don't see everything he went through. But you assume she was there for it, through the divorce, missing his kids, and I think she really steps in as his work wife, essentially."³¹

If considered in the abstract, portrayals of work wives in *The Office Wife* and *Mad Men* might be read as involving only the trials and tribulations commonly found along the path to love. That quest for love took place in a particular historical context, however, of women's tenuous position in the white-collar workplace from the 1890s to the 1960s.³² Although many wo-

I think when she goes over there, she really has every intention of getting him in the apartment, and making sure he's okay, and then continuing on with her night—you get the impression that she's done it before. And then I think it really all changes when he grabs her hand. . . . [I]t's probable that when she first started working there, she probably had a little crush on him, and that physical contact kind of brings up all those thoughts and that regret. She definitely makes that conscious decision to kiss him back, and I think it's really understandable how it would happen.

Id.

³² See ANGEL KWOLEK-FOLLAND, ENGENDERING BUSINESS: MEN AND WOMEN IN THE CORPORATE OFFICE, 1870–1930 4 tbl.I (1994) (showing that women made up an increasing percentage of clerical workers, from a negligible number in 1870, to almost twenty

²⁵ *Id.* at 211.

²⁶ Id. at 274–75.

²⁷ *Id.* at 277.

²⁸ Id.

²⁹ For more information about *Mad Men*, see the show's official website at http:// www.amctv.com/shows/mad-men (last visited Apr. 8, 2013).

³⁰ The affair subsequently ends but later reignites even after Joan has married and Roger has left his wife and married another secretary in the interim.

³¹ Emma Rosenblum, Mad Men's Alexa Alemanni on Being Don Draper's Secretary, VULTURE (Aug. 6, 2010), http://www.vulture.com/2010/08/alexa_alemanni_don_drapers_ sec.html. Alemanni adds:

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men (particularly unmarried women, lower-class women, immigrant women, and women of color) worked for wages outside of the home prior to that time,³³ most of these wages came from low-status menial jobs; access to the professions was largely restricted.³⁴ Just before the turn of the century, single white women gradually gained entry to the business world, but generally only through the secretarial pool;³⁵ other women were almost entirely excluded.³⁶ And once these young, white women married, most (male) employers assumed they would want to leave the workplace in favor of their proper role in the home.³⁷

Employers therefore generally did not view secretaries as workers before the 1970s; instead, they were temporary guests and helpmates from the domestic realm.³⁸ This conception of the role of women in the workplace likely made it easy for both male executives and female secretaries to fall into patterns in which the woman preformed something more than the dictation, typing, and calendaring that the position entailed. If an executive wanted to avoid this blurring between work and the domestic realm, he could hire a male secretary.³⁹ In *The Office Wife*, Mr. Fellowes briefly considered such an option when Miss Andrews left, but he ultimately decided against it because male secretaries had too much ambition and lacked a personal touch: male secretaries are "all right for travelling but the work is just

³⁴ See id. at 298–99.

³⁵ See generally Margery W. Davies, Woman's Place is at the Typewriter: Office Work and Office Workers, 1870–1930 (1982).

³⁶ African-American women, for example, did not enter clerical jobs in white-owned businesses with any frequency until the 1940s. BEREBITSKY, *supra* note 16, at 18.

³⁷ See *id.* at 101 (quoting a 1935 article in *Fortune* magazine to conclude that "[w]omen's difference from men—'their conscious or subconscious intention some day to marry, and their conscious or subconscious willingness to be directed by men'—rendered them 'amenable and obedient' and without ambition, making them perfect secretaries and subordinates."). Many women may have wanted to assume marital roles as well, although such preferences grew out of a culture, both in the workplace and in general, that assumed they would want to do so. *See id.* at 1–3 (recounting the story told by a former female "typewriter" in 1891, which detailed the sexual advances she experienced in the office before she left her job to marry a man she met at work).

³⁸ Cf. Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1668 (1991) ("Sexist men do not, as a general rule, try to avoid all contact with women. On the contrary, they desire contact in certain subordinating forms, such as having women as secretaries and dependent wives.").

³⁹ Men historically served as secretaries, with women gradually, and steadily, entering the profession in the decades surrounding the turn of the twentieth century. *See* KWOLEK-FOLLAND, *supra* note 32, at 4; Sharon Hartman Strom, "*Light Manufacturing*": *The Feminization of American Office Work, 1900–1930*, 43 INDUS. & LAB. REL. REV. 53, 63 (1989).

percent in 1890, to just under fifty percent in 1920); BEREBITSKY, *supra* note 16, at 141–76 (describing office life for women from World War II to the early 1960s).

³³ See Teresa Amott & Julie Matthaei, Race, Gender, and Work: A Multicultural Economic History of Women in the United States 297–301, 300 tbl.9-2 (1991).

a stepping stone to them—means to an end. They don't take the personal interest in it that a woman does." 40

Felice Batlan's historical analysis of legal secretaries reveals that the personal touch provided by a female secretary to her male boss was generally thought to include fidelity and an "ability to intuit his needs. Much like a wife, she acted as an attorney's buffer from the world, saving him from having to deal with the minutia of daily life."⁴¹ Indeed, a secretary might be even better than a wife. In *The Office Wife*, a contemporary of Mr. Fellowes describes the ideal executive secretary as:

[A] pretty and intelligent young woman; a young woman who understands his business—and incidentally himself—one thousand per cent better than his wife does.... His wife sees him in mental undress. Sees him tired, irritable, crabbing about something, too busy to take part in whatever little schemes and interests she has. His secretary, however, may see him bad tempered, impatient, or as a slave driver; but she sees also what he accomplishes and how he accomplishes it and why."⁴²

And Mr. Fellowes seemed to agree:

Men . . . choose their wives through a combination of emotional motivation, propinquity and chance, but their secretaries are selected by the intellect and with a knowledge of certain definite needs—needs which do not alter with the years. . . . Anne now attended to his personal bills, kept track of his club dues, of life insurance premiums. She was in communication with his brokers, she kept a separate engagement pad for his social activities and never failed to remind him of them.⁴³

Miss Murdock gradually provided intimacy and trust beyond friendship as well. As Mr. Fellowes eventually tells her, "You know things about me that are a sealed book to my closest men friends. I've not had to camouflage with you."⁴⁴

Women, in turn, likely took on such caregiving roles for a variety of reasons. Some women may have felt they had no choice or that such caregiving was the best choice among their limited options. Some women in fact received better treatment at work if they engaged in relationships with

⁴⁰ BALDWIN, *supra* note 3, at 11; *see also* BEREBITSKY, *supra* note 16, at 101 (describing a 1935 article in *Fortune* magazine which argued that the "modern office necessitated a 'daily, intimate, and continuing relation,' which was much easier between a man and a number of women than between a man and a number of men").

⁴¹ Felice Batlan, "If You Become His Second Wife, You Are a Fool": Shifting Paradigms of the Roles, Perceptions, and Working Conditions of Legal Secretaries in Large Law Firms, 52 Stud. L. Pol. & Socy 169, 172 (2010) (citation omitted).

⁴² BALDWIN, *supra* note 3, at 224–25.

 $^{^{43}}$ *Id.* at 60.

⁴⁴ Id. at 219.

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their bosses, whether those relationships involved sex, caregiving, or both.⁴⁵ Anne Murdock proclaimed that she wanted to use "every weapon she could employ to hold her job, and the man who controlled the job."⁴⁶ This included attractiveness and flirtation, but she initially would not let love get in the way as it did for Mr. Fellowes's former secretary: "Poor thing. Why are women such fools?' Couldn't they keep sex out of it, save as a useful weapon? She wondered if they couldn't realize that the man was only the symbol of the earned income?"⁴⁷ For ambitious women, such favoritism also could have benefits beyond their immediate positions,⁴⁸ as women often achieved greater status at work only if the men for whom they worked succeeded or otherwise advanced.

Other women saw the work wife role as a means to improve one's chances on the marriage market and excellent training for marriage itself. Prior to becoming the editor-in-chief of Cosmopolitan magazine, Helen Gurley Brown published her advice book Sex and the Single Girl in 1962, in which she discussed office work at length, but primarily as a way to bide time while working toward marriage.⁴⁹ Gurley Brown emphasized: "What you do from nine to five has everything to do with men A job is one way of getting to them. It also provides the money with which to dress for them and dress up your apartment for them. . . . Most importantly, a job gives a single woman something to be." 50 Gurley Brown extolled the virtues of the worker identity, but she saw that identity as a path to the ultimate identity marker-wife-in large part because of the domestic aspects of women's office jobs. "A career is the greatest preparation for marriage. You are better organized, better able to cope with checkbooks, investments, insurance premiums, tradesmen, dinner parties and the mixing of a really dry manhattan. You know how to please men."51

⁴⁷ *Id.* at 46.

⁴⁹ See Helen Gurley Brown, Sex and the Single Girl 89–103 (1962).

⁴⁵ BEREBITSKY, *supra* note 16, at 4 (relying on historical records from 1890 to 1960 to conclude that "while some women suffered when men used their position to extort sexual favors, others prospered when men exercised their authority to pamper their favorites").

⁴⁶ BALDWIN, *supra* note 3, at 21; *see also id.* at 110 (stating that Miss Murdock "did not love Lawrence Fellowes, but she wanted him. She wanted too, quite honestly, the business protection and surety that a love affair with him would afford her.").

⁴⁸ However, the "office wife" was already at the top of the clerical hierarchy, with "the working-class stenographer a rung below, and filing clerks and machine operators farther down the ladder" BEREBITSKY, *supra* note 16, at 98.

⁵⁰ *Id.* at 89.

⁵¹ Id. at 103. In *The Office Wife*, several male executives believed that women could not keep themselves from thinking in this manner even if, like Miss Murdock, they claimed not to do so. "[T]hey think it's the work. Then, when they inevitably discover that it's the man they're working for, instead, they go to pieces." BALDWIN, *supra* note 3, at 11; *see also id.* at 154 (setting forth exchange between Anne and Ted, a man who wants to marry her, who states that Anne must be in love with Mr. Fellowes because "[n]o woman . . . gives herself like you do—spends herself, sacrifices herself for—a *job*. The only reason a woman drives herself all day and half the night—is for a *man*"). In many ways, these characterizations are similar to Robin West's concerns, in the 1980s,

All of these approaches assume a clear divide between the male world of work and the female world of love and the marital home. Women at the time could not comfortably exist in both realms simultaneously. Unmarried women in clerical roles "labored under a social presumption that they were in the office primarily to catch a husband,"52 and neither married nor unmarried women could continue to claim proper womanhood if they stayed in the workplace for long periods of time.⁵³ At the same time, women who wanted or needed to stay in the work world accepted that their domestic responsibilities would impede their success at work.54 Men, in contrast, lived more comfortably in both realms, although it often required a "complete separation of personality" between "office and home."55

This separate-spheres approach was maintained in part by law as it existed prior to the passage of Title VII in 1964. Although law did not prohibit women's workplace ambitions, law also did not ensure that employers respect such ambitions on the same terms as men's. In addition to limiting women's opportunities to the secretarial pool, employers could ask women to perform the domestic duties described above and fire them for failing to do so, even though male employees, including male secretaries, were not expected to perform such duties and thus would not be fired for failure to perform. Law, through its absence of explicit regulation of such practices,

⁵³ See id. at 14 ("In setting the wife-mother against the business girl or 'office wife,' public discussions pitted maternity and domesticity against sexuality and worldliness, caring compassion against a competent companion."); *id.* at 100 ("At the very moment that employment opportunities offered women the chance to forgo marriage and choose economic self-sufficiency—or at least to weigh their options—the new understanding of womanhood ratcheted up the stakes in marriage, now deemed the protector of female normalcy."). The Office Wife indeed included characters that questioned whether women who seemed more committed to work than marriage were actually women. Miss Murdock's working-class boyfriend, for example, urged her to marry him, so she would "be a woman and not a machine." BALDWIN, *supra* note 3, at 39. Anne did not contest the distinction but instead replied, "I'd rather be a machine after all—an independent one, my own master." Id. at 40.

⁵⁴ For example, one of Miss Murdock's female friends got married and had a child, but had to return to work out of financial necessity due to her husband's illness. She exclaimed that a "woman's a fool to marry, ... a woman with her living to make," id. at 14, and then described her own husband and son as "dear obstacles to the fulfillment of her once ambitious dreams, dreams which if they had become realties would have taken every ounce of her energy, every thought, sublimated every deep emotion." Id. at 18. Anne, too, characterized those with domestic responsibilities as "handicapped," id. at 72, and long maintained that she would not marry because she was "too ambitious-too darned ambitious." Id. at 17.

⁵⁵ BALDWIN, *supra* note 3, at 95.

about relationships between male professors and their female students. Robin L. West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 WIS. WOMEN'S L.J. 81, 109 (1987) ("A smart female student who defines herself as 'giving' might attach herself in this way to a brilliant professor and aspire to be like him. But it's not very likely. Unlike the male student, she is far more likely to be attracted to the brilliant professor, and aspire not to be *like* him, but to give herself to him.") [hereinafter West, *Hedonic Lives*]. ⁵² BEREBITSKY, *supra* note 16, at 12.

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permitted employers to engage in job segregation and to use differential standards in order to maintain clearly delineated gender roles at work.

Moreover, the law of marriage meant that women did receive some legal protection at home, in contrast to work. Helen Gurley Brown emphasized in 1962 that although a workplace identity had many advantages for women while they were young, the marriage alternative was more advantageous:

Gaining and keeping identity through a husband is easier in one important respect than through a job. You can't be summarily fired! A wife can be a lousy housekeeper, indifferent cook, lack-luster bedmate, self-centered mother, dull-as-grime companion, and the law protects her! When she finally *is* dismissed, the man who served her papers often has to pay her half his salary. *Quelle* severance pay!⁵⁶

Of course, such protection also came with duties and restrictions,⁵⁷ and the financial support provided post-divorce was meager by today's standards,⁵⁸ but qualified protection from financial unpredictability and hardship was better than no protection. The wife had some law on her side; the work wife did not, unless she subsequently became a legal wife.⁵⁹

Yet law at the time did recognize relationships between bosses and their secretaries in one limited context, albeit not in a manner that fully respected the ambitions of some women in the pre-Title VII office. The duty of loyalty has long prohibited executives from soliciting employees of their current

⁵⁸ Prior to the mid-1970s, wives were entitled to alimony, but those in separate property states were not entitled to an equitable distribution of property accumulated from wages during the marriage. Wives' intangible contributions to their husbands' accumulation of tangible property were thus not acknowledged in the distribution of the marital property. Instead, each spouse generally kept that property which was titled in his or her name. See, e.g., Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 Wis. L. REV. 789, 801–03 (discussing the evolution of property division upon divorce in Wisconsin); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 7–9 (1987).

⁵⁹ Even an invalid marriage ceremony could transform a work wife into a putative spouse. *See In re* Estate of Vargas, 111 Cal. Rptr. 779, 780–81 (Ct. App. 1974) (awarding, under the putative spouse doctrine, half of a husband's estate to the secretary who married him after he assured her, falsely, that he had divorced his first wife). Of course the court's finding that the secretary acted in good faith in believing her husband's assurances either casts doubt on her secretarial skills, given that she managed the details of her boss-turned-husband's life, or suggests that the court wanted to find a way to compensate the putative wife for the secretarial services she continued to provide him post-marriage, without pay.

⁵⁶ BROWN, *supra* note 49, at 89–90.

⁵⁷ This may be why Mr. Fellowes was not content with maintaining his work wife relationship with Miss Murdock despite their emotional closeness. Mr. Fellowes wanted Miss Murdock "to come back to him—not as the . . . office wife, working for him, guarding him, giving him all her energy and devotion—that would be impossible, he could no longer endure to have her near him in that capacity—but as—the wife in his home, the one woman, *his*[.]" BALDWIN, *supra* note 3, at 222.

employer when leaving for another firm.⁶⁰ Executives are exempt from that prohibition, however, when they wish to bring their secretaries to a new firm.⁶¹ This exception in some ways constitutes explicit legal recognition of the importance of secretaries to individual executives. At the same time, however, this exception positions secretaries as adjuncts or appendages to the executives instead of employees in their own right.

Indeed, the exception mirrors traditional domicile rules for marriage, long defunct, whereby the law required a wife to adopt the domicile of her husband.⁶² Although a secretary in this situation was not forced to move, she had no legal protection if her current employer instead viewed her as disloyal, given her close relationship to her departed boss, and fired her. In such situations, secretaries often had little choice but to follow their departed bosses, if asked. Until the passage of Title VII, then, work wives were subject to a restriction similar to that attaching to legal marriage without receiving any of the protections of legal marriage in return.⁶³

B. Contemporary Understandings

With the passage of Title VII in 1964, law formally granted female employees protection from most employers' sex-based decision-making.⁶⁴ Theoretically, this meant that employers could not require female employees to perform different tasks than similarly situated men. Yet by the time that Title VII was enacted, the vast majority of secretaries were women, meaning that there were few similarly situated men. Moreover, the qualifications of the position had become thoroughly feminized, such that it was difficult to argue that the positions reflected sex-based stereotypes, as opposed to the needs of the employer.

Jet Courier Serv. v. Mulei, 771 P.2d 486, 497 n.13 (Colo. 1989).

⁶⁰ See, e.g., Vigoro Indus., Inc. v. Crisp, 82 F.3d 785, 788 (8th Cir. 1996).

⁶¹ More recently, this exception has been expanded to include a few more categories of workplace relationships. As one court summarized the exception:

Under this flexible approach, traditional actions by departing employees, such as the executive who leaves with her secretary, the mechanic who leaves with his apprentice, or the firm partner who leaves with associates from her department, would not give rise to a breach of the duty of loyalty unless other factors, such as an intent to injure the employer in the continuation of his business, were present."

⁶² See Martha Minow, "Forming Underneath Everything that Grows:" Toward a History of Family Law, 1985 Wis. L. Rev. 819, 828.

⁶³ It is unclear, however, how much protection a secretary in such a situation would receive today, post-Title VII, given that she would have to prove that her termination was motivated at least in part by gender and the employer would likely argue that the decision was motivated solely by concerns about future loyalty.

⁶⁴ Title VII provides, in relevant part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2006). Title VII applies to all employers with fifteen or more employees. 42 U.S.C. § 2000e(b) (2006).

Therefore, even after Title VII, employers and some employees continued to view certain female employees as appendages to male executives rather than employees valued for their individual contributions to the firm. Rosabeth Moss Kanter, in her 1977 book Men and Women of the Corporation, praised secretaries for bringing feminine qualities to the corporation, thereby providing "a reserve of the human inside the bureaucratic."⁶⁵ Kanter viewed secretaries as successfully providing the important service of bridging the spheres of home and work. She criticized, however, the effects of the "marriage metaphor" wherein the prestige of a secretary, much like that of a traditional wife, was derived from the power of the executive for whom she worked rather than her own skills and talents.⁶⁶ Moreover, executives stated that the most important criteria for appraising secretaries' work performance was "initiative and enthusiasm" and a "personal service orientation,"67 much in the vein of Mr. Fellowes's statement. That understanding continued to position the secretary within the boss's private domain rather than within the life of the corporation.⁶⁸

The practice of secretaries performing personal work for their bosses has gradually become less common, but it still persists.⁶⁹ Felice Batlan's recent survey of legal secretaries found that 54.5% of them reported that they no longer performed personal work for partners.⁷⁰ Asked if they considered themselves "second wives," "14.3% responded in the affirmative, 64.3% answered 'perhaps in some cases,' and 21.4% responded in the negative."⁷¹ Multiple secretaries indicated that they would answer yes for male partners and no for female partners: "My partner in particular tends to forget the little things. I often find myself tailing him as he's walking out the door to a meeting going down a list of things he may need. Oddly, I don't feel like my female attorneys need that kind of attention."⁷²

⁷¹ Id. at 188.

⁶⁵ KANTER, *supra* note 4, at 70.

⁶⁶ *Id.* at 74–82. And the more successful the executive, the more likely the secretary would be expected to perform personal tasks for him. One secretary reported: "His wife does everything for him at home; I do everything for him here." *Id.* at 79.

⁶⁷ *Id.* at 86.

⁶⁸ Id. at 73–74. And some secretaries agreed. See Marion Crain, Feminizing Unions: Challenging the Gendered Structure of Wage Labor, 89 MICH. L. REV. 1155, 1204 n.283 (1991) (briefly noting that the "office wife" was seen as posing a challenge to union organizing efforts because of her perceived loyalty to her male boss and his opinions); see also BEREBITSKY, supra note 16, at 139 ("Union supporters warned women not to be seduced by the seeming intimacy of the office.").

⁶⁹ See Ritika Trikha, Having a 'Workplace Spouse'— Good or Bad?, BUS. INSIDER (Feb. 15, 2012), http://articles.businessinsider.com/2012-02-15/strategy/31057906_1_real -spouses-marriage-work-spouse ("There's at least one industry where a faux marriage among professionals is actually a long-standing tradition of trust. In the field of investment banking and hedge funds, it's common for senior executives to rely heavily on their administrative assistants (admins or AA's), says Roy Cohen, author of *The Wall Street Guide to Survival*. 'If the AA is older, they're sometimes referred to as Mrs. —, the last name of their boss.'").

⁷⁰ Batlan, *supra* note 41, at 187.

⁷² Id. at 189.

This last comment points to the most obvious way that Title VII, and the women's movements that followed, altered relationships between men and women in the workplace. Unlike when Miss Murdock entered the business world, women are no longer limited to secretarial roles within corporations. Although it is often difficult to apply Title VII's antidiscrimination mandate to positions dominated by women when men appear to have little interest in taking on such roles,⁷³ there is much less difficultly applying Title VII in the context of absolute bars to gender integration. After Title VII, employers may not channel qualified employees into certain roles on the basis of sex, at least not in the face of employees' desires to perform roles open to the other sex. Female employees therefore no longer necessarily occupy the bottom of hierarchical workplace relationships. Instead, women have joined the professions, often in substantial numbers, occupying positions traditionally available only to men. Many female employees now enjoy more horizontal relationships with male coworkers and often supervise other employees.

More recent portrayals of the work wife reflect this change, with relatively few assuming that the work wife will be a secretary. For example, David Owen wrote in the *Atlantic* in 1987:

[L]et's suppose that you, like me, are a man. In that case your work wife would be the woman in your office who

- (a) as you walk past her desk on your way to a big meeting, tells you that you have dried shaving cream behind your ear
- (b) has lunch with you pretty often
- (c) returns stuff she borrows from your desk
- (d) tells you things about her other (home) husband that he wouldn't want you to know
- (e) waits for you to finish up so you can go down in the elevator together
- (f) complains to you without embarrassment about an uncomfortable undergarment
- (g) expects you to tell her the truth, more or less, about the thing she has done to her hair

⁷³ See, e.g., DIANE BALSER, SISTERHOOD & SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES 19 (1987) ("Along with the massive entry of women into the wage-work force, a parallel and equally revolutionary phenomenon has been the development of a *sex-segregated wage-work force*, with men, in general, occupying the higher status and better paid positions and the majority of women holding the lower status and lower paid positions."); Trond Peterson & Laurie A. Morgan, *Separate and Unequal: Occupation Establishment Sex Segregation and the Gender Wage Gap*, 101 Am. J. Soc. 329, 344–45 (1995) (reporting the results of a comprehensive study finding that, on average, 89% of the wage gap between men and women would disappear if women were to work in the same occupations at the same establishments as men).

- (h) doesn't comment on how much you eat, drink, and smoke
- knows at least one thing about you—such as the fact that you can do a pretty good imitation of Liza Minnelli—that your home wife doesn't know.⁷⁴

This portrayal does not contemplate an explicit hierarchy between the man at issue and his work wife, nor does it assume that the work wife will be working exclusively for the man, if at all. In this portrayal, the work wife also has a spouse at home, eliminating the power imbalance between married and single workers as well. Although clearly flirtatious, Owen's account assumes there is no romantic longing on the part of either party because that need is fulfilled at home.⁷⁵

The work wife in Owen's account, however, is still largely performing what have long been considered to be feminine activities. Indeed, Owen's work wife is providing the type of companionship and intimacy expected of the traditional, middle-class, stay-at-home wife. She is sharing confidences, flirting, and making sure her work spouse is presentable and not alone. There is, though, one crucial distinction in Owen's view—no nagging. Indeed, like Mr. Fellowes and his colleagues, Owen concluded that a work marriage is in many ways an improvement on what he called "the real thing":

For example, your work wife would never ask you why you don't just put your dishes right into the dishwasher instead of leaving them in the sink—she doesn't know you do it! Also, she would never . . . grab hold of your stomach and ask, "What's this? Blubber?" She knows you only as you appear between nine and five: recently bathed, fully dressed, largely awake, and in control of your life.⁷⁶

Therefore, although Owen's account of the work wife is less hierarchical, it remains modeled on the type of care found within traditional, gender-differentiated marriage.

⁷⁴ David Owen, Work Marriage, THE ATLANTIC, Feb. 1, 1987, at 22.

⁷⁵ See also Lauren Lipton, Office Wife? Time for a Split, CBS MONEYWATCH (Mar. 8, 2011), http://finance.yahoo.com/news/pf_article_112279.html ("If so much as a whiff of romance enters your relationship with an office spouse, it has become inappropriate and you should distance yourself from that person before it spins out of control. 'You need to be open with your real spouse, so they're comfortable that this is a business relationship' says Peter Post, a director of the Emily Post Institute and author of *The Etiquette Advantage in Business: Personal Skills for Professional Success.*").

⁷⁶ Owen, *supra* note 74, at 22. For a more recent analysis, see Emily Yoffe, *Temptation Island: My Wife Is Taking a Fun-Filled Trip With Her "Work Husband." Will They Cheat?*, SLATE (Feb. 23, 2012), http://www.slate.com/articles/life/dear_prudence/2012/ 02/work_husband_my_wife_is_going_away_with_her_close_work_friend_should_i_ worry_.html ("You're right that some people have office spouses. This can be tricky because while it doesn't offer conjugal privileges, it also doesn't include such romance killers as wiping the kids' noses and hauling the groceries.").

Heterosexual gender roles remain front and center in other contemporary accounts of the work wife. For example, a 2003 *Wall Street Journal* article summarized an organizational psychologist's understandings of work marriages as "no different from same-sex workplace friends, except in one respect."⁷⁷ The psychologist claimed, "We're sort of wired in our male-female relationships to take on supportive roles, as opposed to same-sex relationships which tend to be more dominative or competitive."⁷⁸ These supportive roles can "keep the partners from flying off the handle,"⁷⁹ with the psychologist emphasizing, "It wasn't an affair. It was like a second marriage. It was an intimacy and caring for each other."⁸⁰ Sexual affairs, of course, are still a fact of work, but "[f]ar more common—and more rewarding—are the workplace relationships that seem like an old marriage: inseparable, sex-free, sometimes cranky."⁸¹

This gendered and heteronormative, yet de-sexualized, conception of work marriage can be seen in what has been perhaps the most famous work marriage portrayed to date: that between George W. Bush and Condoleezza Rice during Bush's presidential administration. Of course, that relationship was in part transgressive,⁸² because the President was permitted to have a work wife of a different race, whereas it seems unlikely that he would have been elected President with a "real wife" of a different race. Indeed, the relationship may have been acceptable only because it was assumed to be "sex-free." Otherwise, however, the relationship reinforced heterosexual gender roles, with Rice supporting President Bush more than he supported her, or at least that was how the media portrayed it. For example, when Rice left the White House to become Secretary of State, the press speculated on who would become President Bush's new work wife⁸³—the answer was generally Harriet Myers,⁸⁴ although Karen Hughes could have also returned to

⁷⁷ Jared Sandberg, *The Second Marriage: Workplace 'Couples' Keep Each Other Sane*, WALL ST. J., Sept. 24, 2003, at B1.

⁷⁸ *Id.* (quoting Dory Hollander).

⁷⁹ Id.

⁸⁰ *Id.* (quoting Dory Hollander).

⁸¹ *Id.* Sandberg added that even though one of the work couples chronicled in the article did not have to worry about "hanky panky" because of "mismatched orientations," they still "more or less agreed to take each other's hand to be unlawfully wedded work-husband and work-wife." *Id.*

⁸² See, e.g., ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINE-LANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY (forthcoming June 2013) (discussing, in the context of a broader discussion of interracial marriage, the hurdles that President Obama likely would have faced if he had been married to a white woman, while asserting that Condoleezza Rice's chances at the Presidency would have been greater had she been married to a white man).

⁸³See Timothy Noah, Prexy Sks Wrk Wf, SLATE (Nov. 17, 2004), http://www.slate. com/id/2109876.

⁸⁴ See e.g., Elisabeth Bumiller, A Woman of Low Profile In a Job High-Powered, N.Y. TIMES, Nov. 20, 2004, at A16.

the role⁸⁵—whereas no one asked who would become Rice's new work husband.

The assumptions that men, particularly men in power, will need care more than women, and that women will be better able to provide that care than men—why weren't Karl Rove and Andy Card serious candidates for President Bush's new work wife?—mirror traditional patterns of care provided by women within the family home.⁸⁶ Women's physical and emotional carework within the home has long been portrayed as natural and effortless, more akin to love than to work and therefore undeserving of compensation.⁸⁷ That portrayal remains to this day, seeping out of the home into other aspects of life, including the workplace: "wherever intimacy is, there is no compensation."⁸⁸ Rice was thus portrayed as meeting President Bush's needs for companionship and counsel while needing little to nothing herself (a few afternoons off to watch football on TV with the President was all she seemed to require).⁸⁹ Women's provision of care at work may therefore seem effortless to both men and women, much like women's provision of care at home.⁹⁰

Even emergent portrayals of the "work husband" reinforce these gendered patterns. The *New York Times* recently described Tim Armstrong, the CEO of AOL, as Arianna Huffington's "work husband" after AOL's acquisition of the *Huffington Post* in 2011.⁹¹ Yet, in an interview with a *Times* reporter, Armstrong was primarily portrayed as Huffington's economic pro-

⁸⁵ See Ross Douthat, *The Year of the Spouses*, THE ATLANTIC (July 26, 2007), http:// rossdouthat.theatlantic.com/archives/2007/07/the_year_of_the_spouses.php (describing Karen Hughes as George Bush's "work wife" during the 2000 election).

⁸⁶ Moreover, some men may believe (consciously or not) that workplace care is due to them in order to preserve their dignity at work, now that they have to compete with women.

⁸⁷ See JEANNE BOYDSTON, HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOL-OGY OF LABOR IN THE EARLY REPUBLIC 146 (1990). For some attempts to challenge that framework, see generally Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEx. L. Rev. 17 (1998) (arguing that homemakers should be granted a security interest in half of all marital property, including their husbands' post-divorce income); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (proposing that household labor be taxed as a means of valuing both market and nonmarket labor).

⁸⁸ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 59 (1988) [hereinafter West, *Jurisprudence*]. Many scholars have challenged that portrayal, however. *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 158–208 (2005) (examining ways that women within caring relationships may be compensated even as they are also accused of undue influence); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 499–517 (2005) (examining ways that law refuses to enforce certain economic exchanges between intimates while respecting and even forcing other economic exchanges between intimates).

⁸⁹ See supra notes 83–85.

⁹⁰ See supra note 88.

⁹¹ Andrew Goldman, Arianna's Work Husband, N.Y. TIMES, Feb. 26, 2012, at MM12.

vider.⁹² Indeed, the interview came close to positioning Armstrong as Huffington's savior, or at least the savior of the *Huffington Post*, as Armstrong himself emphasized that traffic at the website was "up 46 percent" after its acquisition by AOL.⁹³ Armstrong also emphasized the intangible qualities that Huffington adds to their venture: "Arianna brings a special sauce to the *Huffington Post*. She was hoping to build a long-term legacy brand, and she has injected *Huffington Post* with a huge amount of her DNA."⁹⁴ Armstrong thus brought the cash to the venture and Huffington added the personal touch.

Although seeped in traditional gender roles, such portrayals may not be harmful to individual women in the workplace. Women may benefit from the assumption that they, more so than men, are capable of providing care and emotional support at work and, indeed, women may benefit by actually providing that care and support. For example, the intimacy Rice came to share with President Bush, in addition to her academic and professional credentials, may have helped propel her to the Secretary of State position. Rice may have been helped, and other candidates for the job may have been harmed, by the special relationship she shared with the President. Likewise, Huffington may one day join the board of AOL, and Armstrong claims to be ready for that possibility: "[O]ne of my core skill strengths is that I'm O.K. playing on an all-star team. My job, as coach and captain, is to bring in multiple Michael Jordans."⁹⁵

In other contexts, however, such portrayals of the work wife may naturalize gendered dynamics of care, potentially impeding workplace success for both men and women. Not all women may desire to provide care and emotional support at work, particularly if it is not related to the tasks of their jobs, yet they may be expected to do so. Other women, regardless of desire, may take on such support to the detriment of other workplace tasks.⁹⁶ Yet other women may want to engage in relationships of care and emotional

⁹² AOL paid \$315 million for the *Huffington Post*: \$300 million in cash and the remainder in stock. Jeremy W. Peters & Verne G. Kopytoff, *Betting on News, AOL Is Buying the Huffington Post*, N.Y. TIMES, Feb. 7, 2011, at A1.

⁹³ Goldman, *supra* note 91.

⁹⁴ Id.

⁹⁵ *Id.* For a portrayal of the work husband that is more parallel to that of the work wife, see Yoffe, *supra* note 76 (addressing a husband's concerns about his wife's "work husband," used to describe a relationship in which the coworkers have "lunches together, drinks after work with their co-workers, texts and calls at home, inside jokes, birthday presents").

⁹⁶ Female academics, for example, devote a greater percentage of their time to institutional service than do their male colleagues. Because this emotional labor is "generally not viewed as involving valuable skills," they are poorly rewarded for such service, if at all, even when the service means they have less time for scholarship. Marcia L. Bellas, *Emotional Labor in Academia: The Case of Professors*, 561 ANNALS AM. ACAD. POL. & Soc. Sci. 96, 97 (1999); see also Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 790 (2001); Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 150–53.

support with men at work but not perform their gender in ways that make those relationships readily available. Men also may be harmed if they do not conform to gendered expectations about who should give and receive care.

Modern portrayals of the work wife generally fail to acknowledge any potentially negative effects, instead assuming that care and intimacy are provided equally by both parties to work marriages, making the relationships mutually beneficial.⁹⁷ A 2008 article posted on CNN.com, for example, claimed that you know you have a work spouse when you depend on a coworker for "supplies, snacks and aspirin"; share inside jokes; are "bluntly honest" with the other person regarding appearance and hygiene; want him or her to be the first person you tell about work events; know each other's coffee, breakfast, and lunch preferences; are able to "finish each other's sentences"; and realize he or she "knows almost as much about your personal life as your best friend or real-life spouse does."98 These "signs" need not be gendered or domesticated, and the article goes on to explain that one wants a work spouse in order to receive benefits that presumably could also be provided by friends, including "emotional support at work during challenging times"; the formation of "a very productive team" because "[w]ork spouses often complement each other in terms of skills, abilities and their approaches to work"; and the existence of a "trustworthy co-conspirator."99 Yet by extolling the virtues of the work spouse as opposed to the work friend, the article implies that something more is provided by work marriages than could be provided by other types of supportive relationships at work. Gendered provisions of emotional support, intimacy, and care like those found in traditional marriage appear to be the unique ingredients. For example, who tends to keep aspirin at work?

Evidence of the gendered nature of the intimacy and care provided by more horizontally-aligned work spouses may also be found in contemporary anxiety over whether such relationships will "cross the line." Such concerns were prevalent when women first entered the white-collar workplace around the turn of the century.¹⁰⁰ In 1962, however, Helen Gurley Brown rejected these concerns, endorsing such line-crossing for single women as a potential path to marriage when their work husbands were not otherwise married or, when they were, as a source of sex while single.¹⁰¹ By the time of a 2005 *Boston Globe* article listing the "[s]ecrets of a successful office marriage," the focus returned to conducting work marriages in ways that would not

⁹⁷ Indeed, this is one way to read David Owen's account of the work wife. *See supra* text accompanying notes 74–76.

⁹⁸ Patrick Erwin, *Seven Signs You Have a Work Spouse*, CNN.сом (Nov. 10, 2008), http://www.cnn.com/2008/LIVING/worklife/11/10/cb.seven.signs.work.spouse/index. html.

⁹⁹ Id.

¹⁰⁰ See BEREBITSKY, supra note 16, at 21–48.

¹⁰¹ BROWN, *supra* note 49, at 89–103.

disrupt marriages at home, thereby maintaining what is in some way a polygamous lifestyle.¹⁰²

The first three secrets of the successful office marriage, we are told, hinge on the appropriate boundaries of a work marriage: "Keep work and home lives separate. Demystify the relationship at home and at the office. Be explicit from the very beginning about what the relationship is and is not."¹⁰³ The next five secrets are about practical ways to maintain those boundaries and avoid temptation: "Leave office doors open. Always accept phone calls from spouse or significant other. Introduce at-home spouse to workplace spouse. Don't set up an environment that makes it easy to cross the line. Minimize physical contact."¹⁰⁴ These rules likely would not be needed if work marriages did not mirror to some extent the dynamics of intimacy, support, and care assumed to occur within marriage more generally. Indeed, if care is being provided without nagging or financial stress, then infidelity may be even more tempting than in other situations of sexual opportunity.

Of course, work marriages are now also portrayed as occurring between members of the same sex, as Ari and Lloyd on Entourage attest.¹⁰⁵ But such same-sex relationships do not refute the gendered and heteronormative aspects of either traditional or more modern portrayals of work marriages. The relationship between the high-powered Hollywood agent Ari and his gay male assistant Lloyd in fact replicates many of the traditionally gendered aspects of the hierarchical relationships at issue in The Office Wife. Ari orders Lloyd to perform a range of tasks beyond clerical work, including running errands for Ari's family and handling other personal matters. Moreover, Ari repeatedly refers to and disparages Lloyd's homosexuality and mocks him for being effeminate, gesturing toward the sexual potential of the relationship even as Ari attempts to distance himself from that potential by proclaiming his own straight masculinity.¹⁰⁶ The show's portrayal of a same-sex work marriage thus mirrors the sexual and gender hierarchy of past work wife portrayals, feminizing Lloyd and over-emphasizing Ari's performance of masculinity.

Unlike *The Office Wife*, however, the story line of *Entourage* develops by Ari promoting Lloyd from assistant to junior agent. Lloyd is thus not confined to an administrative role, much like women may now move from assistant positions into management in the post-Title VII age. When Ari

¹⁰² Kate M. Jackson, *It's a Marriage of Sorts: 'Workplace Spouses' Share Office Goals, Long Hours, and a Need for Boundaries, BOSTON GLOBE, Oct. 23, 2005, at G1; see also Nikki Weingartner, Polygamy May Be Good for Career People: The Work Spouse, DIGITAL J. (Feb. 19, 2009), http://www.digitaljournal.com/article/267574.*

¹⁰³ Jackson, *supra* note 102.

¹⁰⁴ Id.

¹⁰⁵ See Sheila Marikar, 'Entourage's' New Addition on What's to Come This Season, ABCNEWS.COM (June 28, 2010), http://abcnews.go.com/Entertainment/entourages-jona than-keltz-season/story?id=11013303 (referring to Lloyd as Ari's work wife).

¹⁰⁶ For further discussion of the dynamics of maintaining masculinity in the face of homosocial intimacy, see *infra* text accompanying notes 214–17.

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hires a much younger man as Lloyd's replacement, the choice initially seems to reestablish the hierarchal relationship, and largely one-way flow of care, that was temporarily lost with Lloyd's promotion. Yet this new same-sex work relationship comes to be portrayed as something other than a work marriage: "If Lloyd has been Ari's work wife, Jake [is] his work son."¹⁰⁷ Ari takes on a mentoring role, more explicitly preparing Jake to take on an agent role. Not surprisingly, Jake is portrayed as much more masculine, and straight, than Lloyd. A same-sex relationship that does not conform to the gendered and heteronormative aspects of marriage is thus removed from the work wife category altogether.

Other portrayals of same-sex work marriages are more horizontal and less overtly gendered. Yet close workplace relationships between straight men are often portrayed as work marriages with nervous humor.¹⁰⁸ We are also told that women are much more likely to have a work wife of the same sex than are men.¹⁰⁹ The gender differential may be due to higher rates of homophobia among straight men than among straight women,¹¹⁰ or because women realize that they are likely to give and receive care on more equal terms with a female work spouse than with a male work spouse, regardless of sexual orientation.¹¹¹ Either way, although some portrayals of same-sex work marriages may challenge traditional gender roles and heteronormativity, others serve as support for the idea that work marriages largely remain gendered and heteronormative even after robust implementation of Title VII's antidiscrimination mandate.

C. Theorizing the Constitutive Elements of Marriage at Work

The increasing diversification of what constitutes a work wife and portrayals of work wives challenges the meaning of the marriage metaphor at work. Depending on the portrayal, a work wife is a secretary in a

¹⁰⁷ Marikar, *supra* note 105.

¹⁰⁸ See, e.g., John Sullivan, Overexposed and Underestimated, INVESTMENT ADVISER, Oct. 1, 2010, available at http://www.advisorone.com/2010/10/01/overexposed-and-un derestimated ("Co-portfolio managers Brian Schaub and Chad Meade are joined at the hip, so much so that 'work wives' jokes invariably fly around the company's Denver headquarters; but, whatever . . . the partnership works.").

¹⁰⁹ Belser, *supra* note 9 (reporting that "67 percent of married women reported they have had a same-sex office spouse (like Thelma and Louise?), while 34 percent of married men said their office spouse was a dude, kind of 'Brokeback Mountain' with office furniture'').

¹¹⁰ See, e.g., MICHAEL S. KIMMEL, THE GENDERED SOCIETY 211 (1st ed. 2000) ("Homophobia is one of the central organizing principles of same-sex friendships for men, and virtually nonexistent for women. Homophobia is more than simply the irrational fear and hatred of gay people; it is also the fear that one might be misperceived as gay by others.").

¹¹¹ Cf. Laura A. Rosenbury, Friends with Benefits?, 106 MICH. L. REV. 189, 233–34 (2007) (describing ways that women are thought to receive and provide care more equally within female friendships as compared to marriage) [hereinafter Rosenbury, Friends with Benefits?].

subordinate role, a flirtatious equal, a trusted confidante, a source of other forms of emotional support in the workplace, or multiple combinations thereof. Such portrayals also exist alongside portrayals of work spouses and work husbands that are similarly diverse. And work wives, work husbands, and work spouses may all be male or female, gay or straight, involved in different-sex relationships or same-sex relationships. Work wives may therefore no longer cohere as a unitary concept.

Marriage has also diversified outside of work. Married individuals refer to their spouses as wives, husbands, spouses, partners, or their better halves. Some different-sex spouses adopt traditional gender roles, others reverse those roles, still others embrace various conceptions of egalitarian marriage or otherwise attempt to eschew gender roles, and some claim such roles were irrelevant in the first place. Some same-sex spouses may attempt to replicate the roles found in traditional marriage, others may seek to transcend those roles, and still others may perform gender in ways that do not map onto traditional understandings of male and female. And spouses may live together or not, have sex or not, raise children or not, love each other or not, care for each other or not, be monogamous or not, and so on.¹¹²

Despite this diversity, marriage remains a coherent concept. This coherence may be a function of the state's involvement: states serve a gatekeeping role,¹¹³ conferring marriage licenses on those couples that meet their typically minimal requirements.¹¹⁴ In light of the diversity described above, one might even claim that marriage today means nothing more than having such a license. Yet people generally understand that individuals are married without inspecting their marriage licenses. Invoking the term is enough.¹¹⁵ Diversity of performances within legal marriage has not made the concept unintelligible.

¹¹² For a similar characterization of legal marriage as a "thin" concept, see Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. Rev. 1199, 1203–05 (2010); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. Rev. 1758, 1765 (2005).

¹¹³ Cf. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003) (emphasizing that the plaintiffs seeking same-sex marriage recognition did "not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law").

¹¹⁴ The requirements do not seem minimal, of course, for same-sex couples wishing to marry in states that limit marriage to mixed-sex couples. However, for same-sex couples in the states that recognize same-sex marriage and for mixed-sex couples in all states, the pathway to marriage is relatively easy: couples must obtain a license from the state and solemnize it in a ceremony that need be nothing more than a brief city-hall formality. To obtain the license, a couple must be a twosome, of age, and not closely related. In some states, couples must also undergo blood tests and wait a certain period of time between obtaining the license and solemnizing it. Before marriage, no state requires couples to assert anything else, including that they will live together, have sex, or care for each other, although lack of sex may be grounds for subsequent annulment in some states.

states. ¹¹⁵ This may be why same-sex marriage advocates urge states to extend the term "marriage" to same-sex couples even when same-sex couples in registered domestic partnerships or civil unions receive the same legal benefits as married couples.

Of course, work marriages are not the same as legal marriages but for their location. Instead, differences abound, most obviously the absence of state recognition. At the same time, some resonance to legal marriage must remain for the metaphor to persist at work. After all, other metaphors are available to describe close workplace relationships—most obviously the metaphor of friendship—yet the labels of work wives, work spouses, and work husbands continue to distinguish portrayals of some increasingly diverse workplace relationships from others.¹¹⁶ Marital terminology must therefore evoke in the cultural imagination both more than what is mandated by the state and more than the existence of any other type of close relationship.

Indeed, it may take a relationship that is clearly *not* legal marriage to elucidate what separates marriage from other close relationships in the cultural imagination. The portrayals of work wives described in the preceding sections indicate that four characteristics have generally distinguished work marriages from other workplace relationships over time: care, interdependence, exclusivity, and commitment. Earlier portrayals also hinged on explicit gender hierarchy and the possibility of sex. Now that legal marriage no longer mandates gender hierarchy, and marriage is not the only legal site for sexual activity,¹¹⁷ those characteristics seem less defining. Sex may now in fact be a disqualifying act.¹¹⁸ But care, interdependence, exclusivity, and commitment remain.

Portrayals of marriage at work consistently emphasize the care and other forms of emotional support that flow to at least one of the parties to the relationship. This care and support in many ways resembles that thought to be provided within the marital home. Such emotional work cannot be the sole defining characteristic of the marriage metaphor, however, because similar emotional work is also performed in other contexts. For example, parenting is another care-based relationship, yet workers providing emotional support are generally portrayed as work wives, not work mothers.¹¹⁹ Similarly, certain jobs are care-centered—such as the work of therapists—and other jobs involve the provision of intimate care—such as the work of hair stylists and waxers—yet portrayals of workplace relationships rely on the marriage metaphor to the exclusion of these more indigenous metaphors. Finally, friends also provide emotional support, intimacy, and care to one another, but work friends and work wives are portrayed as distinct.

¹¹⁶ For a discussion of a broader range of workplace relationships, see Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117, 121–22 (2011) [hereinafter Rosenbury, *Working Relationships*].

¹¹⁷ See infra text accompanying notes 126–41.

¹¹⁸ See supra note 75 and text accompanying notes 77-81.

¹¹⁹ For one exception, see portrayals of Valerie Jarrett as President Obama's work mother, not his work wife. *See, e.g.*, Jo Becker, *The Other Power in the West Wing*, N.Y. TIMES, Sept. 2, 2012, at A1 ("Parsing the psychology of the President's bond with Ms. Jarrett has become something of a West Wing pastime: is she some sort of mother or sister figure to an only child whose own parents variously abandoned him?").

The care at the core of the marriage metaphor at work is therefore not just any type of care. Portravals of marriage at work instead appear to hinge on care provided in a particular form, thus distinguishing work wives, work spouses, and work husbands from other caregivers. That is where interdependence, exclusivity, and commitment come into play, mirroring many cultural aspirations of marriage even as law does not require them.

The interdependence in earlier portrayals of work wives was a gendered, hierarchical one like that found in traditional marriage. Executives were portrayed as needing work wives to organize and support their work lives, and work wives were portrayed as needing executives to access the white-collar workplace and support themselves financially until they became a "just wife." The interdependence now portrayed is often not hierarchical, but it frequently still hinges on need. For example, in the television show In Plain Sight, two federal marshals, one male and one female, work together as equal partners. When the male partner, Marshall, becomes engaged to someone outside of work, his fiancée Abigail demands that he sever the emotional ties he has to his partner, Mary.¹²⁰ Abigail does not seem to mind the general emotional support the partners provide to one another. Instead, Abigail complains, "When Mary calls, you always go,"¹²¹ implying that when both women need him, he should provide for his real (future) wife's needs, not those of his work wife. Marshall then seeks to save the engagement by employing the language of friendship to ask Mary to no longer need him: "You're my partner. You're my best friend. And I love you. I love Abigail deeply and because I do, I need you to release me. I need to be free enough to have a life with Abigail and I need you to be OK enough for that to happen. Because if you call, I'll come every time."122

Such portrayals of interdependence also implicate exclusivity and commitment. Just as many spouses aspire to life-long monogamy, portrayals of work marriages often assume that work spouses will care for each other exclusively as long as at-will employment allows.¹²³ For example, when Condoleezza Rice became Secretary of State, the media speculated about who would become President Bush's new work wife, not about who would become his new work wives. Moreover, this speculation may have been misplaced. After all, Rice stayed in the Bush Administration, growing in the

¹²⁰ In Plain Sight: All's Well That Ends (USA Network television broadcast May 4, 2012). For more information about *In Plain Sight*, see the show's official website at http://www.usanetwork.com/series/inplainsight/ (last visited Apr. 8, 2013).

¹²¹ In Plain Sight: All's Well That Ends (USA Network television broadcast May 4, 2012). ¹²² *Id*.

¹²³ Cf. Seth Stevenson, How to Score an Office Wife, GQ MAGAZINE, Mar. 2013, available at http://www.gq.com/news-politics/mens-lives/201303/get-an-office-wife (expressing a preference for work spouse monogamy, given that "every work three-way will end in tears," although "[o]ne man-happily married at home-may be capable of juggling a bevy of work sister-wives at the office" and a woman in a "'queen bee' structure" may be able to "maintain[] a buzzing hive of worker-bee dudes," where "[t]he work boy toys are at her beck and call").

relationship but not abandoning it. As such, there was no "divorce," and a new work wife was not actually needed.

The assumption that work marriages will be both monogamous and enduring mirrors the cultural presumption that marriage should last "'til death do us part," barring unforeseen circumstances. At work, those unforeseen circumstances are different than at home, including layoffs desired by neither party or opportunities for better employment elsewhere.¹²⁴ Yet the presumption of job-term commitment appears to distinguish portrayals of work marriages from portrayals of other workplace relationships. The exception to the duty of loyalty permitting executives to bring their secretaries to new firms also embodies this notion of a long-term, even career-term, commitment.

These four characteristics—care, interdependence, exclusivity, and commitment—bring coherence to the marriage metaphor at work, even as that metaphor is used to describe an increasingly diverse array of relationships. At the same time, however, the characteristics must be viewed in context. Surveys about work wives, and their portrayals in popular culture, tend to be limited to white-collar, business settings. Other settings, such as factories, schools, and hospitals, are ignored. It is unclear whether the marriage metaphor could nonetheless be applicable in such settings, or whether the constitutive elements of the marriage metaphor are more difficult to achieve, or even undesirable, in those workplaces.

A few examples illustrate this point. In unionized settings, it is very possible that workers may prioritize solidarity with multiple coworkers over a caring, interdependent, exclusive, committed relationship with one coworker. The marriage metaphor may also be less salient in schools and hospitals, given that relationships in such settings tend to be non-dyadic, with multiple subordinate employees working under one or more bosses to provide services to multiple students or patients. Moreover, hospital shifts often change, limiting the time workers are able to spend with any particular coworker, boss, or subordinate. Finally, the marriage metaphor seems to be irrelevant in those situations where employees work alone, such as when workers are each assigned a set of floors to clean at night.

Even in white-collar, business settings, the marriage metaphor may be employed to describe only certain caring, interdependent, exclusive, and committed relationships. For example, Condoleezza Rice notwithstanding, if the market for work marriage mirrors the general marriage market, in which African-American women marry at much lower rates than women of other

¹²⁴ See *id.* (describing the impact of being "work divorced" after a work wife had a baby and decided to freelance from home, and the need to "work remarry"); *cf.* Catherine Bergart, *Losing the Income, and the Camaraderie*, N.Y. TIMES, May 17, 2009, at BU10 (describing how laid-off employees lose not just paychecks and job security but also the community and camaraderie of coworkers).

races,¹²⁵ then African-American women may less often be portrayed as work wives. This could benefit African-American women if they are viewed as workers instead of wives, or harm them if they are assumed to work outside of networks of care linked to workplace success. Likewise, women who conform to gender stereotypes may more likely be portrayed as work wives. Once again, whether such women will benefit from or be harmed by these portrayals is contextual and complex. The next two Parts analyze how such dynamics may thwart attempts to achieve gender equality at home and at work while also creating opportunities for different, potentially more diverse, constructions of gender across the public/private divide.

II. WORK WIVES AND MARRIAGE LAW

Work wives theoretically could be called many other names. Friends, work friends, close friends, close coworkers, and colleagues are just a few possibilities. But at least some commentators, and workers, continue to use the metaphor of marriage to describe a subset of workplace relationships, as discussed in the previous Part. Marriage outside of work therefore becomes the norm against which these workplace relationships are measured. In turn, the use of the marriage metaphor at work sheds light on the role that marriage, and husbands and wives, have come to perform in various aspects of society. This Part examines evolving justifications for the state's recognition of marriage and the ways those justifications have shaped understandings of the parties to a marriage. In particular, the Part analyzes ways in which the roles of wives have remained distinct from those of husbands, and spouses more generally, despite de jure change.

A. Marriage Roles

The state traditionally recognized marriage as a means to channel sex acts into an acceptable form of intimacy, crucially one that privatized the dependencies of women and children.¹²⁶ By criminalizing sex outside of

¹²⁵ See Ralph Richard Banks, Is Marriage for White People? How the African American Marriage Decline Affects Everyone 5–16 (2011) (analyzing low rates of marriage among African-Americans).

¹²⁶ COTT, PUBLIC Vows, *supra* note 11, at 3–8 (recounting how the state recognized marriage as an incentive for individual men to assume responsibility for women and children in an era when women had few political and economic rights). In many ways, this rationale for state recognition of marriage remains relevant to this day. *See* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 14 (2000) ("The assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend that it is not a public problem."); Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 417 (2005) ("[S]ociety has called upon family law to address the economic needs of women and

marriage,¹²⁷ the state attempted to confine sex to those situations in which men would be readily available to provide consistent financial support to any children conceived as a result of that sex and to the women who would bear and care for them.¹²⁸ In exchange for their husbands' financial support, wives were expected to provide all other forms of daily care and support to their children and husbands.¹²⁹ Marriage therefore was the exclusive site of legal sex as well as a site in which care, both financial and nonfinancial, was repeatedly exchanged.

The gendered nature of this exchange of care within marriage created well-defined and distinct roles for husbands and wives.¹³⁰ Husbands were the breadwinners and wives were the caregivers.¹³¹ More crucially, these roles were hierarchically arranged. Wives supported their husbands so husbands could more successfully compete within the market and maximize the financial resources available to the family. The term "wife" therefore came to be associated with the provision of tasks necessary for success within the market but deemed unworthy of a market competitor's time.¹³² Wives performed the household tasks of cooking, housework, and childrearing; the market tasks of grocery shopping, clothes shopping, dropping off and picking up dry cleaning, and home decorating; and the community tasks of entertaining, sending greeting cards, and volunteering at schools, churches, and other organizations.¹³³ Such tasks remained the exclusive domain of wives even

children at precisely the moment when it is dismantling the welfare state and public financial assistance has become increasingly scarce.").

¹²⁷ LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 127–28 (1993) (discussing prohibitions on sexual behavior in early American history and the criminalization of sex outside of marriage); *see also* Zablocki v. Redhail, 434 U.S. 374, 386 (1978) ("And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.").

¹²⁸ See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496–505 (1992) (explicating and defending the law's channeling of certain activities, including sexual activities, into marriage).

¹²⁹ See Martha Albertson Fineman, Progress and Progression in Family Law, 2004 U. CHI. LEGAL F. 1, 2 (2004) [hereinafter Fineman, Progress and Progression].

¹³⁰ COTT, PUBLIC Vows, *supra* note 11, at 7 ("Marriage decisively differentiated the positions of husband and wife.").

¹³¹ Fineman, *Progress and Progression, supra* note 129, at 2 ("[T]he sexes [traditionally] had distinct and well-defined gender roles: husbands were economic providers, disciplinarians, and the heads of families, while wives were nurturers, caretakers, and subservient to their husbands.").

¹³² See MARY ROMERO, MAID IN THE U.S.A. 50–53 (10th anniversary ed. 2002); cf. Joan Williams, From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition, 76 CHI.-KENT L. REV. 1441, 1461 (2001) ("'Care' reinscribes domesticity in other ways as well. It perpetuates the pastoralization of household work, with its intimation that where there is 'care' there is no 'work.'") [hereinafter Williams, Care as Work].

¹³³ See Williams, Care as Work, supra note 132, at 1462–65 (delineating types of carework traditionally performed by women).

when they also worked outside of the home,¹³⁴ as was the case for many immigrant women, lower-class women, and women of color.135

1. Legal Change

The law of marriage has evolved in important ways over the past fifty years. First, marriage is no longer the exclusive site of legal sex.¹³⁶ Life-long sexual exclusivity is also no longer a defining characteristic of legal marriage given that specific fault grounds for divorce, such as adultery, have given way to no-fault divorce regimes in which one or both spouses may assess what types of activities are good for the marriage and which are not.137 Second, as a necessary corollary to the first change, the state has also extended child support obligations to all biological fathers (unless they are explicitly sperm donors), whether married to their children's biological mothers or not.¹³⁸ As such, the state developed ways to privatize the dependency of children outside of marriage.

Third, and most saliently, the state no longer assumes that women will always be dependent on men,¹³⁹ and thus no longer mandates gender role divisions within marriage.¹⁴⁰ Instead, family law statutes now place husbands and wives in the same position, subject to the same obligations and receiving the same benefits. Gender matters de jure only at the point of access to

 ¹³⁴ See, e.g., Amott & Matthaei, supra note 33, at 307–10.
¹³⁵ See, e.g., Romero, supra note 132, at 77–126.

¹³⁶ The state gradually lifted criminal bans on consensual sex between adults, so that marriage no longer serves as the sole legal haven for those seeking sex. Some bans lingered into the twenty-first century, but were finally struck down after the Supreme Court's decision in Lawrence v. Texas, which overturned Texas's criminal ban on samesex sodomy. 539 U.S. 558, 578-79 (2003). For a discussion of the effects of Lawrence, see Laura A. Rosenbury & Jennifer E. Rothman, Sex In and Out of Intimacy, 59 EMORY L.J. 809, 816-18, 829-35 (2010).

¹³⁷ See, e.g., Brenda Cossman, Sexual Citizens: The Legal and Cultural Reg-ULATION OF SEX AND BELONGING 109-14 (2007) (discussing ways that monogamy has become a marital project since the advent of no-fault divorce laws) [hereinafter Coss-MAN, SEXUAL CITIZENS].

¹³⁸ See Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.) (providing states with federal block grants for the Temporary Assistance For Needy Families (TANF) program only when the states have programs in place to establish paternity to enforce child support payments, regardless of the putative father's marital status to the child's biological mother). Indeed, biological fathers have been held responsible for child support even when they did not consent to insemination. See Michael J. Higdon, Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support, 46 GA. L. REV. 407, 420-31 (2012).

¹³⁹ Instead, increased employment and educational opportunities have given many women the means to support themselves.

¹⁴⁰ See, e.g., Linda C. McClain, The Place of Families: Fostering Capacity, EQUALITY, AND RESPONSIBILITY 60-61 (2006); Fineman, Progress and Progression, supra note 129, at 7-8; Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443, 1517-22.

marriage, with forty-one states still limiting marriage to mixed-sex couples.¹⁴¹

Marriage remains, however, the only vehicle for adults to enter into intimate relationships officially recognized and supported by all fifty states.¹⁴² Beyond invocations of tradition, lawmakers and scholars generally justify this exclusive recognition as a way to support the emotional, financial, and domestic interdependencies thought to arise between even equal partners and their children.¹⁴³ Although marriage is no longer the exclusive site of legal sex, it does remain the exclusive status that automatically confers full state support of the care and interdependence thought to arise between mixed-sex adult partners.¹⁴⁴

Therefore, as sex has lost its defining role in legal marriage, emotional support and caregiving have grown to fill its place. Indeed, "emotional infidelity has become as much a violation of the marriage as sexual infidelity,"¹⁴⁵ with some commentators calling for the reinvigoration and extension of the alienation of affection tort in such contexts.¹⁴⁶ This new conception of legal marriage is also at the heart of campaigns for same-sex marriage, with advocates seeking to shift the focus of lawmakers and judges away from same-sex sex acts, and the disgust that may still attach to those acts,¹⁴⁷ toward the care and domesticity that is thought to be no different in same-sex households than in mixed-sex households. Opponents of same-sex marriage

¹⁴¹ Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington currently extend legal marriage to same-sex couples, as does the District of Columbia. Peter Nicolas & Mike Strong, The Geography of Love: Same-Sex Marriage & Relationship Recognition in America (The Story in Maps) 2, 10–11 (3d ed. 2013).

¹⁴² Rosenbury, *Friends with Benefits?*, *supra* note 111, at 212–19 (discussing how the state recognizes certain relationships between adults—marriage—but not other relationships between adults—friendships).

¹⁴³ See, e.g., Mary Becker, Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One, 2001 U. ILL. L. REV. 1, 31 ("Companion-ship is the core good of marriage, not procreation or sex."); see also Turner v. Safley, 482 U.S. 78, 95 (1987) (describing marriages as, in part, "expressions of emotional support and public commitment").

¹⁴⁴ Although some states recognize same-sex marriage, and others confer state support on couples in registered domestic partnerships or civil unions, those couples do not receive full state support, given the Defense of Marriage Act, which denies federal benefits to all same-sex couples. *See* 1 U.S.C. § 7 (1996). Two circuit courts recently held that this aspect of the Defense of Marriage Act was unconstitutional, and the Supreme Court has granted certiorari in one of them. *See* Mass. v. U.S. Dept. of Health & Human Servs., 682 F.3d 1, 15–16 (1st Cir. 2012); Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12–307).

¹⁴⁵ COSSMAN, SEXUAL CITIZENS, *supra* note 137, at 90.

¹⁴⁶ See, e.g., Elizabeth Ellen Gordon, Alienation of Affection Torts: Love 'Em or Leave 'Em?, 3 Pol. & GENDER 475 (2007).

¹⁴⁷ Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law 54–93 (2010).

in turn bemoan the shift away from the procreative aspects of marriage toward the more generalized aspects of care and support.¹⁴⁸

2. Convergences Between Marriage at Home and at Work

With this move from sex to care and support, the differences between legal marriage and portrayals of work marriage diminish. Indeed, now that marriage has become desexualized as a matter of law, both commentators and employees may feel more comfortable using the metaphor of marriage at work. Taking sex out of the picture frees individuals to analogize workplace relationships to marriage without invoking fears of sexual harassment or sexual infidelity. Sex acts are still assumed to occur within marriage, of course, whereas they are no longer a constitutive element of work marriage portrayals. Yet the aspect of legal marriage that justifies its exclusive state recognition and support now arises in the workplace as well as outside of it.

Moreover, in both constructions of marriage, sexual pleasure apart from or outside of emotional care is overlooked and often stigmatized.¹⁴⁹ Now that the state permits consensual sex outside of legal marriage, sex within marriage is assumed to be about more than "just sex." Even more so than in the past,¹⁵⁰ sex within marriage is constructed as simply one way of furthering the intimate bonds of the complete relationship.¹⁵¹ Sex has thus become a tool to further the good of marriage rather than a good in and of itself.

¹⁴⁹ Indeed, from a queer theory perspective the construction of the work marriage may be just as problematic as campaigns for legal marriage for same-sex couples. *See, e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 37, 88, 111–13 (1999); Katherine M. Franke, *Longing for* Loving, 76 FORD-HAM L. Rev. 2685, 2687–89 (2008).

¹⁴⁸ Indeed, procreation is invoked as the primary state interest potentially justifying state bans on same-sex marriage. *See, e.g.*, Andersen v. King Cnty., 138 P.3d 963, 969 (Wash. 2006) ("[T]he legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents."); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (implicitly emphasizing that procreation justifies state support of marriage by setting forth "two grounds that rationally support the limitation on marriage that the Legislature has enacted," including the importance of promoting stability in opposite-sex relationships "for the welfare of children" and the belief "that it is better, other things being equal, for children to grow up with both a mother and a father"); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (stating that the state's rationales for limiting legal marriage to mixed-sex couples included "providing a 'favorable setting for procreation" and "ensuring the optimal setting for child rearing, which the [state] defines as 'a two-parent family with one parent of each sex'").

¹⁵⁰ See, e.g., Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

¹⁵¹ COSSMAN, SEXUAL CITIZENS, *supra* note 137, at 90 (describing how marital sex is now "an expression of the underlying emotional intimacy, rather than the *sine qua non* of marriage"). Sex is constructed in this way even outside of marriage, revealing the power of this new construction of marriage. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person,

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In turn, sex is thought to be destructive to the work marriage, transforming it into a workplace affair. Work marriages may embody the ideal of the emotional care and support now at the heart of legal marriage without being sullied by the baseness of sexual pleasure between coworkers. In a similar manner, the metaphor of marriage may be deployed to signal that sex is in fact not happening at work, as is often desired when two straight men develop a close relationship at work.¹⁵²

Justifications for legal marriage therefore lend support to the use of the metaphor of marriage at work. Those justifications alone, however, do not explain why the marriage metaphor has more traction at work than other potential metaphors, such as those of friendship or other nonmarital relationships. Marriage is not the exclusive site of caregiving in society,¹⁵³ and increasing numbers of individuals live outside of it.¹⁵⁴ Caregiving in and of itself does not a marriage make. Yet, marriage is distinguished from other caregiving, interdependent relationships in that the state has determined that marriage alone is automatically deserving of full state recognition and support. The state thus creates a hierarchy of caregiving relationships, one that signals that the care assumed to arise within marriage is more worthy of state recognition and support than care arising within other relationships.¹⁵⁵

This hierarchy of relationships has effects at work as well as at home, even though the state obviously does not recognize or support work marriages. Marriage is the term that signals the importance and value of one relationship over all others.¹⁵⁶ Just as marriage confers a privileged legal status on couples outside of work, analogies to marriage can confer a special

¹⁵⁵ Rosenbury, Friends with Benefits?, supra note 111, at 217–19.

the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."). For a critique of this construction, see Rosenbury & Rothman, *supra* note 136, at 825–29.

¹⁵² Cf. LILLIAN B. RUBIN, JUST FRIENDS: THE ROLE OF FRIENDSHIPS IN OUR LIVES 103–05 (1985) (discussing how some straight men respond uncomfortably to the potential homoeroticism of male friendship); Barbara J. Bank & Suzanne L. Hansford, *Gender* and Friendship: Why Are Men's Best Same-Sex Friendships Less Intimate and Supportive?, 7 PERS. RELATIONSHIPS 63, 75 (2000) (concluding that homophobia partially explains why most male friendships are less intimate and supportive than female friendships).

¹⁵³ See, e.g., Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. Soc. PoL'Y & L. 307, 368–70 (2004) (calling on the state to recognize and economically support dependent caretaking that occurs outside of the family context); Rosenbury, *Friends with Benefits?*, *supra* note 111, at 208–11 (discussing ways friendship may be a site of care in individuals' lives).

¹⁵⁴ These include unmarried parents, cohabitating couples, and other unmarried individuals who rely on friends for caregiving and support. *See, e.g.*, CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 102–20 (2010).

¹⁵⁶ As such, most advocates for same-sex marriage argue that civil unions are not sufficient, even if a same-sex couple that enters into a registered civil union or domestic partnership enjoys the exact same legal benefits, obligations, and default rules as a mixed-sex couple that enters into a legal marriage. Four courts have agreed. *See In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009); Opinions of the Justices to the Senate, 802 N.E.2d 565, 566–72 (Mass. 2004).

status on a relationship at work. The use of the term marriage at work thus signals more than the existence of caregiving in the workplace. The marriage metaphor signals a particularly valuable type of caregiving that distinguishes a work marriage from friendships and other lesser relationships arising at work.

The privileging of marriage need not mean, however, that all workers in relationships portrayed as work marriages receive higher status in the workplace. Even if the relationship itself is seen as a closer and more worthy relationship than other relationships at work, the power dynamics within the relationship may be such that one member is subordinated to the other. Indeed, the law mandated such subordination within traditional marriage, and initial portrayals of the work wife were infused with similar forms of subordination.¹⁵⁷ Similar power dynamics may linger to this day, despite the advent of gender-neutral marriage laws, making some relationships portrayed as work marriages less equitable for one of the parties than other work relationships might be.¹⁵⁸ At the same time, other relationships portrayed as work marriages may reflect the turn toward egalitarian marriage. The next section therefore examines the roles of spouses in both legal and work marriages, focusing on what it means to be a wife today in various social contexts.

B. Wifely Roles

If life precisely mirrored law, the terms husband and wife would carry much less cultural salience today than they did in the past, at work and elsewhere. Now that family law no longer officially mandates that husbands perform certain roles and wives perform others, the terms husband and wife legally matter only at the point of access to marriage in the forty-one states that limit marriage to mixed-sex couples.¹⁵⁹ In the District of Columbia and in the nine states recognizing same-sex marriage, the terms carry no legal significance whatsoever. The terms husband and wife thus legally signify only that a spouse is male or female, and that matters only before marriage, if at all. Once married, the distinction becomes irrelevant for purposes of law.

1. Gender Potential and Gender Tenacity

This turn to gender neutrality theoretically has the potential to transform understandings of both gender roles and gender itself. If women no longer must be caregivers, and men no longer must be wage-workers, the

¹⁵⁷ See supra text accompanying notes 21-63.

¹⁵⁸ Cf. Rosenbury, *Friends with Benefits?*, *supra* note 111, at 233–34 (describing ways that women are thought to receive and provide care more equally within female friendships as compared to marriage).

¹⁵⁹ See supra text accompanying note 141.

terms husband and wife begin to lose their coherence. Spousal roles that are no longer tied to gender call into question why gender is relevant to marriage at all. In turn, if gender does not matter to marriage, it becomes unclear why it should matter outside of marriage, particularly in a legal regime that prohibits gender discrimination in the public sphere.¹⁶⁰

Some commentators celebrate this potential for gender transformation;161 others fear it. Indeed, "gender panic" underlies some of the opposition to same-sex marriage.¹⁶² Mixed-sex marriage requirements constitute the last remaining gender distinction mandated by family law.¹⁶³ In most states, and for purposes of the federal government, marriage still must consist of one man and one woman.¹⁶⁴ Therefore, even if marital roles are no longer legally assigned on the basis of gender, those roles will necessarily be divided between a man and a woman. Many opponents to same-sex marriage emphasize that such a division is necessary to model gender roles to children; children will see men and women working together to build a family life, even if their particular roles are not mandated by the state. As New York's highest court emphasized in rejecting a challenge to that state's mixed-sex marriage requirement, "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."165 Such arguments suggest that if children are instead exposed to men building families with other men, or women building lives with other women, notions of gender will become less distinct and meaningful for future generations.

Life does not precisely mirror law, however, making both hopes and fears of a gender transformation largely beside the point. Gender-neutral marriage law has not de-gendered marriage in all or even most instances.¹⁶⁶ Although law's turn toward gender neutrality means that women within mar-

¹⁶⁰ Here, the term public sphere refers both to state action and the market. The Supreme Court has interpreted the Equal Protection Clause to prohibit most state classifications based on sex. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531–34 (1996); J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 136–37, 137 n.6 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). Title VII of the Civil Rights Act of 1964 also prohibits sex discrimination by private employers with more than fifteen employees, providing only a limited exception for bona fide occupational qualifications. *See* 42 U.S.C. § 2000e (2006).

¹⁶¹ See, e.g., JUDITH BUTLER, UNDOING GENDER 174–203 (2004); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 103–20 (2005); Rosenbury, *Friends With Benefits?*, *supra* note 111, at 233–42.

¹⁶² See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. REV. 187, 218–21. Of course, homophobia also underlies much of the opposition to same-sex marriage. *See* NUSSBAUM, *supra* note 147, at 126–66.

¹⁶³ See, e.g., Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. REV. 197, 218–19 (1994) (arguing that the distinction should be ruled unconstitutional just as other gender distinctions have been).

¹⁶⁴ See supra text accompanying note 141; see supra note 144.

¹⁶⁵ Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

¹⁶⁶ See Jill Elaine Hasday, The Canon of Family Law, 57 STAN. L. REV. 825, 866–70 (2004).

riage are no longer required to take on caregiving roles, that turn did not address how the work previously assigned to wives would otherwise be performed. The state's evolving care-based justifications for legal recognition of marriage assume that at least some of this work will remain within marriage,¹⁶⁷ as opposed to being outsourced, but gender-neutral marriage law does not assign the work to one spouse or the other. Husbands, for instance, are not required to take on a portion of the caregiving tasks previously reserved for wives. In the face of this silence, gendered patterns of care remain in many marriages.¹⁶⁸

Indeed, the turn toward gender neutrality has primarily worked as a one-way ratchet: wives now increasingly engage in the wage-work traditionally assigned to husbands, but husbands have been much slower to engage in the carework traditionally assigned to wives.¹⁶⁹ The term wife has thus retained much of its traditionally distinctive meaning—a meaning that goes well beyond merely indicating that a spouse is female—whereas the term husband has not, given that both husbands and wives now engage in the type of wage-work that traditionally distinguished a husband from a wife. Spouses, both male and female, bring home the bacon, but wives, much more so than husbands, continue to fry it up in a pan.¹⁷⁰

2. "I Need a Wife"

The term wife thus remains culturally salient in a way that the term husband does not. In many ways, though, women's participation in the market has served to separate, at least partially, the role of wife from the wife (or spouse) herself. Female spouses often no longer are defined solely by their wife role, and many do not have the time or desire to perform all of the tasks traditionally performed by wives.¹⁷¹ But the package of tasks traditionally

¹⁶⁹ See supra note 168.

¹⁶⁷ See supra text accompanying notes 143–148.

¹⁶⁸ In fact, over the last few decades, wives have continued to perform the majority of the carework that was traditionally assigned to wives. *See* HOCHSCHILD, SECOND SHIFT, *supra* note 12, at 290 (finding that only eighteen percent of the men she interviewed in the 1980s "shared the second shift," meaning that they took on half of the tasks in each of Hochschild's three categories: housework, parenting, and management of domestic life); JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 105 tbl.3 (1997) (reporting a carework gender divide over the 20-year period from 1965–1985); BIANCHI, ROBINSON & MILKIE, *supra* note 12, at 90 fig. 5.1, 91–92 (reporting that, in the early 2000s, wives traditionally engaged in twice as much child care as their husbands and performed more housework).

¹⁷⁰ This is a reference to the popular 1970s television commercial for Enjoli, a women's perfume. The commercial highlighted the changing roles of women in society, and the anxieties about those changes, by featuring a woman who sang: "I can bring home the bacon. Enjoli. Fry it up in a pan. Enjoli. And never, never, never let you forget you're a man. 'Cause I'm a wooo-man. Enjoli." *Retro Enjoli Commercial*, YouTube (Mar. 7, 2006), http://www.youtube.com/watch?v=4X4MwbVf5OA.

¹⁷¹ See, e.g., BIANCHI, ROBINSON & MILKIE, supra note 12, at 92 (finding that the total amount of housekeeping has decreased for married mothers engaged in market work, as they "seem to have swapped paid work for housework almost hour for hour").

performed by wives remains defined by the term wife. Gendered and hierarchal notions of care thereby persist in the role of wife even if individual wives cannot or choose not to engage in the carework previously mandated by the state.

Consider the common plea, "I need a wife."¹⁷² That plea rarely means the speaker wants to get married to just any woman or even wants to get married at all; indeed, the speaker is often a heterosexual woman.¹⁷³ Instead, the speaker desires someone in her (or his) life who will pick up the dry cleaning, keep track of appointments, do the laundry, take the kids to soccer practice, get dinner on the table, manage the social calendar, and vacuum, dust, and scour the tub.¹⁷⁴ In other words, the speaker wants someone to perform the caregiving tasks that legal wives previously were required to perform when marriage was a gendered hierarchy, with men at the top and women at the bottom.¹⁷⁵

Yet, while the speaker seeks someone to fill the wife role, that role is often detached from legal marriage. In fact, the speaker may already be married, may be seeking a spouse who will be an equal partner rather than a servant, or otherwise may not view marriage as the path toward finding someone to fill the wife role. "I need a wife" therefore signals a desire for subservient care in a world where many marriages no longer provide that care in a comprehensive way. Marital roles remain gendered even as the parties to marriage have come to embody those roles in different ways.

Consider also the role of the wife in same-sex relationships. Such relationships are often assumed to transcend traditional gender role divisions, as discussed above. Many commentators thus have argued that same-sex marriage will make the institution of marriage less gendered and oppressive.¹⁷⁶ However, some same-sex couples replicate gendered divisions of care in order to emphasize that their relationships are no different from the mixed-sex unions recognized and supported by the state.¹⁷⁷ The role of wife may there-

¹⁷² That plea first entered popular consciousness as satire, in order to critique traditional gender roles within marriage. *See* Judy Syfers, *Why I Want a Wife*, Ms. MAGAZINE, Dec. 1971, *available at* http://content-english.org/stuff/Why-I-want-a-wife.pdf. The plea is now seen as less satirical, even if difficult to realize. *See*, *e.g.*, Sara Sarasohn, *Once Political, Now Just Practical*, N.Y. TIMES, Aug. 30, 2009, at ST6.

¹⁷³ See, e.g., Sarasohn, supra note 172.

¹⁷⁴ This meaning of "I need a wife" appears throughout popular culture. For just one example, see *I Need a Wife*, WOMEN FOR HIRE (Jan. 30, 2008), http://blog.womenforhire. com/2008/01/i-need-a-wife.html. For a critique of this usage, see Sarasohn, *supra* note 172 (critiquing the reduction of "wife" to a list of chores).

¹⁷⁵ See supra text accompanying notes 130–133.

¹⁷⁶ See, e.g., Thomas B. Stoddard, Why Gay People Should Seek the Right to Marry, 6 OUT/LOOK: NAT'L LESBIAN & GAY Q. 9, 13 (1989); see also Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010) ("[T]he movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage.").

¹⁷⁷ See, e.g., Courtney Megan Cahill, Celebrating the Differences That Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality, 70 Оню Sт. L.J. 943, 969–79 (2009); cf. Nancy D. Polikoff, We Will Get What We Ask For: Why

fore be inhabited by a man caring for another man or by a woman caring for another woman. Even if same-sex couples do not replicate gendered divisions of care, individuals outside of the couple may still ask who is the wife and who is the husband. The roles thus trump gender, while remaining deeply gendered in form.

Against this backdrop, the terms "wife," "work wife," "spouse," and "work spouse," carry multiple meanings, embodying different gender performances. At one end of the spectrum are those wives, real or desired, who perform the package of caregiving tasks traditionally mandated by the state, whether at home or at work. The interests of these wives are generally viewed as subordinate to the interests of their husbands or bosses, as the wives take care of the details of life in order to support their husbands' or bosses' success. At the other end of the spectrum are those spouses who support each other at home or at work in ways unmoored from traditional gender roles. Such spouses just happen to be male or female; the sex of the participants is irrelevant to the support provided. As such, the terms wife and work wife can refer to the person who picks up the dry cleaning and keeps the calendar or to a close confidant and supporter whose sex is mere happenstance.

Most wives and portrayals of work wives now fall somewhere between these poles, thus taking on multiple guises. The very use of the term wife implies, however, that work wives remain related to the traditional wife in at least in some fashion. For example, as previously discussed, many legal wives either cannot perform all of the caregiving tasks traditionally assigned to wives or choose not to perform them, and legal husbands generally have not picked up the slack.¹⁷⁸ Spouses may still long for someone to perform more of the functions embodied in the role of wife, however. A work wife may be viewed as someone to fill some, but not all, of that gap, whether that wife is male or female or is labeled a work wife or work spouse. In fact, more workplace relationships may be portrayed as work marriages in response to increasing gender neutrality within legal marriage.

Importantly, using the metaphor of marriage to describe relationships at work creates an assumption that the substance of such workplace relationships is related to the type of care traditionally provided within marriage, and that care was and continues to be gendered despite gender-neutral language and laws. Work wives may thus thwart gender-neutral family law. Work wives may even be an end-run around such laws; if husbands are not receiving the type of care that was traditionally expected from legal marriage, they need not engage in that care themselves, thereby taking on traditionally female roles, but instead may rely on work wives. Gendered

Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage," 79 VA. L. REV. 1535, 1541 (1993) ("[A]ny effort to legitimize lesbian and gay marriage would work to persuade the heterosexual mainstream that lesbians and gay men seek to emulate heterosexual marriage as currently constituted.").

¹⁷⁸ See supra note 168.

caregiving is thus maintained, even as wives may engage in less of it within the home. Gender performances that are often questioned or rejected within marriage may simply be transported to the workplace, evolving into shadow marriages that thwart the official law of gender neutrality.¹⁷⁹

In other ways, the metaphor of marriage at work challenges the gendered division between carework and wage-work, as care is provided amidst work and work is performed amidst care. Blurring these activities, for both women and men, may be the only way to escape gender inequality in substance, as well as in form.¹⁸⁰ Workplace blurring may, in turn, transform the gendered nature of marital roles. "I need a wife" may come to mean something different if the term wife is defined in relation to care provided at work as opposed to the care traditionally provided by wives at home. Moreover, the provision of care at work may ensure that women receive care as well as provide it, so long as work marriages do not completely mimic hierarchal marriage but instead provide care in more fluid ways.

In either case, work wives highlight the tenacity of gender even within a gender-neutral marital regime. When law got out of the business of explicitly mandating gender roles within marriage, gender persisted through the gendered provision of care at home and elsewhere.¹⁸¹ In fact, both men and women may have embraced the gendered nature of that care in order to stave off fears of what gender might come to mean, or not mean, as increasing numbers of wives moved into the workforce.¹⁸² The breadwinner role no longer distinguishes the role of husband from wife, but the caregiver role still distinguishes wives from husbands, and women from men, even when that care is provided in the workplace. This reinforcement of wifely roles coexists alongside attempts to achieve gender equality both within marriage and at work. The next Part thus turns from marriage law to employment discrimination law, situating work wives within attempts by feminists and others to use paid work to remedy gender subordination.

III. WORK WIVES AND EMPLOYMENT DISCRIMINATION LAW

Although the "wife" in work wife is metaphorical, the "work" is not. Work wives are portrayed in a sphere explicitly governed by Title VII, a legal regime designed to eliminate gender discrimination (as well as discrimination based on race, color, religion, and national origin) in most work-

¹⁷⁹ Cf. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 250–69 (1999) (describing shadow marriages between white men and slave women that thwarted anti-miscegenation laws).

¹⁸⁰ Cf. Leslie Bender, Sex Discrimination or Gender Inequality?, 57 FORDHAM L. REV. 941, 949–53 (1989) (advocating such blurring in the workplace in general).

¹⁸¹ As Mr. Fellowes's legal wife stated, "some one has to manage every man. When the wife at home can't or won't the proxy wife in the office must." BALDWIN, *supra* note 3, at 178.

¹⁸² The Enjoli ad, discussed *supra* note 170, is but one manifestation of this desire to stave off gender uncertainty.

places.¹⁸³ Indeed, the Supreme Court has interpreted the plain language of Title VII to mean that "gender must be irrelevant to employment decisions."¹⁸⁴ Such decisions must instead be based on gender-neutral employer assessments, presumably rooted in merit or other nondiscriminatory considerations.¹⁸⁵ This regime has eliminated absolute barriers to women's participation in various forms of paid work and provided redress for gender-based harassment, including unwelcome sexual or romantic attention, that is sufficiently severe or pervasive to alter the terms of women's (or men's) employment.¹⁸⁶

Despite Title VII's goals, however, gender remains an animating feature of many workplaces. Women have not been fully integrated into traditionally male jobs, particularly blue-collar and technical positions, and men have not been fully integrated into traditionally female jobs in the teaching, support, and caring professions.¹⁸⁷ Moreover, beyond regulating sexual harassment, Title VII largely ignores consensual personal relationships at work.¹⁸⁸ Such

¹⁸⁶ See infra text accompanying notes 197–200.

¹⁸⁸ See Rosenbury, Working Relationships, supra note 116, at 121–22. Employment law in general tends to focus on vertical relationships between employers and employees, focusing on horizontal relationships between employees only if they are discriminatory, whereas labor law acknowledges and seeks to foster solidarity between employees. Cf. Katherine V.W. Stone, The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law, 48 UCLA L. REV. 519, 572–75 (2001)

¹⁸³ See 42 U.S.C. § 2000e-2(a) (2006).

¹⁸⁴ Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

¹⁸⁵ This nondiscrimination mandate applies to all claims potentially falling under Title VII, including race discrimination claims. *See* United States v. Burke, 504 U.S. 229, 247 (1992) (Souter, J., concurring) (stating that Title VII "vindicates an interest in dignity as a human being entitled to be judged on individual merit"). However, the nondiscriminatory reason need not be reasonable or economically rational; it just needs to exist. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.").

¹⁸⁷ Peter Fronczek & Patricia Johnson, Occupations: 2000, U.S. CENSUS BUREAU, 2 (2003), http://www.census.gov/prod/2003pubs/c2kbr-25.pdf (reporting that, as of the 2000 census, "men and women still showed differences in the types of jobs they held," with men more likely to work in production, transportation, and construction occupations, and women more likely to work in sales and office occupations); Kim A. Weeden, Profiles of Change: Sex Segregation in the United States, 1910–2000, in OCCUPATIONAL GHETTOS: THE WORLDWIDE SEGREGATION OF WOMEN AND MEN 131, 159 fig.5.4 (Maria Charles & David B. Grusky eds., 2004) (showing trends in sex segregation within eight major occupations between 1970 and 2000); id. at 162–76 app. tbl.A5.1 (providing a detailed list of occupations and demonstrating trends in sex segregation for each between 1910 and 1990); see also Scott A. Moss, Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law, 27 HARV. WOMEN'S L.J. 1, 5 (2004) (noting that "women disproportionately choose workplaces already employing a significant number of wo-men"); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2174 (2003) (advocating that one way to minimize sexual harassment in the workplace is to fully integrate workforces such that women are "in a position of complete equality" with "equal power to shape the environments and cultures in which they work") [hereinafter Schultz, Sanitized Workplace].

relationships are outside of Title VII's scope even if some, such as consensual romantic relationships between male supervisors and female employees, may benefit some women to the exclusion of others,¹⁸⁹ and other relationships, such as those between male friends, may benefit men to the exclusion of women.¹⁹⁰

Therefore, although Title VII strives to make gender irrelevant to employment decisions, many workplaces remain segregated along gender lines, and employees and employers continue to interact as men and women. Such manifestations of gender may often be benign, in that gender is a "human characteristic[] of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion."¹⁹¹ At other times, however, such dynamics reveal that gender, and other factors thought to be unrelated to merit, continue to influence workplace success despite Title VII's antidiscrimination mandate. Individual employees may appear to succeed according to their individual abilities, but in fact they may also benefit from gender-segregated work structures,¹⁹² or from friendships, romantic relationships, and other forms of supportive relationships, some or most of which may be formed with gender in mind.¹⁹³

Portrayals of work wives provide yet another example of how workplace success may be affected by gender despite Title VII's mandate. Even more explicitly than job segregation or favoritism, the metaphor of the work wife resists the notion that conceptions of workplace merit might ever be completely separated from gendered social dynamics. After all, the very terms work wife or work spouse reveal a cultural tendency to import marriage into work, and the concept of marriage continues to rely on gendered roles, as illustrated in Part II. Moreover, this tendency not only survived the

⁽briefly contrasting collective bargaining laws—"designed to promote the self-organization of workers"—with employment law and employment discrimination law—"rights and benefits for individual workers").

¹⁸⁹ Federal courts have consistently held that employment preferences for lovers do not constitute prohibited discrimination but instead are forms of favoritism legitimately within employers' prerogatives. *See, e.g.*, Tenge v. Phillips Modern Agric. Co., 446 F.3d 903, 908 (8th Cir. 2006) (collecting cases); Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002); DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304, 308 (2d Cir. 1986).

¹⁹⁰ Preferences for friends are treated the same as preferences for lovers. *See, e.g.*, Greene v. Potter, 557 F.3d 765, 771 (7th Cir. 2009); Brandt v. Shop 'n Save Warehouse Foods, Inc., 108 F.3d 935, 938–39 (8th Cir. 1997); Foster v. Dalton, 71 F.3d 52, 56 (1st Cir. 1995).

¹⁹¹ Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

¹⁹² See, e.g., Schultz, Sanitized Workplace, supra note 187, at 2139–52; cf. Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 460 (2001) (discussing how contemporary "manifestations of workplace bias are structural, relational, and situational" such that "social practices and patterns of interaction" can create in-groups to the disadvantage of those excluded).

¹⁹³ See Rosenbury, Working Relationships, supra note 116, at 132–34; see also CLAUDE S. FISCHER, MADE IN AMERICA: A SOCIAL HISTORY OF AMERICAN CULTURE AND CHARACTER 133–34 (2010) (describing the formation of workplace ties from the beginning of the twentieth century).

passage of Title VII but in fact became more expansive, as marriage metaphors are now used to describe both vertical and more horizontally arranged relationships.

Portrayals of marriage at work therefore shed new light on the limits of Title VII. One response is to strengthen Title VII in order to more robustly root out decisionmaking influenced by gender, and existing sex discrimination doctrine provides some tools for doing so. Another response, however, is to reexamine Title VII's stated goals. Gender at work need not be confined to the benign or the subordinating. Instead, portrayals of work wives lend support to new understandings of the potential role of gender, and gendered relationships, in the workplace. This Part examines both possible responses and, in doing so, argues that portrayals of work wives provide fertile ground for thinking beyond the limits of existing employment discrimination doctrine.

A. Deploying Existing Sex Discrimination Doctrine

With the passage of Title VII in 1964, most employers could no longer explicitly exclude women from their workplaces.¹⁹⁴ Advocates for women's equality soon realized, however, that women could be excluded, pushed out, or denied advancement in more subtle ways. Formal equality theory, purporting to provide women with the same opportunities traditionally provided to men,¹⁹⁵ was inadequate to deal with these forms of discrimination.¹⁹⁶ Feminist legal theorists and activists thus developed more nuanced conceptions of sex discrimination, designed to achieve substantive equality, in addition to formal equality, in the workplace. Two of these conceptions—sexual harassment and sex stereotyping—provide insight about the potential of employment discrimination law to address dynamics found in some portrayals of marriage at work.

¹⁹⁴ Title VII's antidiscrimination mandate applies to all employers with "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" 42 U.S.C. § 2000e(b) (2006).

¹⁹⁵ This formal, or liberal, equality theory was the primary approach to women's equality deployed by the Supreme Court in its early gender equal protection cases. *See* Hon. Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 11 (emphasizing that the early equal protection cases "all rested on the same fundamental premise: that the law's differential treatment of men and women, typically rationalized as reflecting 'natural' differences between the sexes, historically had tended to contribute to women's subordination—their confined 'place' in man's world—even when conceived as protective of the fairer, but weaker and dependent-prone sex"). The Court largely continues to embrace that approach in gender equal protection cases. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 130–31 (1994).

¹⁹⁶ See, e.g., Fred Strebeigh, Equal: Women Reshape American Law 209–29 (2009).

Sexual Harassment 1

In 1986, the Supreme Court held that unwanted sexual advances in the workplace may constitute discrimination on the basis of sex if they are "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."197 The Court emphasized that sex discrimination could be found even if the employee was not threatened with termination or other adverse action for failure to submit to the advances, or if such threats were unfulfilled.¹⁹⁸ The Supreme Court has repeatedly affirmed this "hostile work environment" conception of sexual harassment,¹⁹⁹ even extending it to same-sex sexual harassment so long as employees provide that it actually constituted "discrimination 'because of ... sex."²⁰⁰

This conception of sexual harassment directly grew out of feminist theories, largely developed by Catharine MacKinnon,²⁰¹ arguing that men's sexual domination of women defines gender relationships throughout society, including at work.²⁰² This so-called "dominance theory" thus challenges the notion that paid work might easily be separated from the dynamics that pervade the private, domestic sphere even in a legal regime committed to formal equality, or gender neutrality, at work. In contrast to formal approaches to workplace equality, then, hostile work environment conceptions of sexual harassment reject a clear divide between work and home,²⁰³ instead acknowl-

also extended this analysis to unwelcome behavior occurring after a consensual relationship between an accused harasser and an alleged victim ends. See, e.g., Forrest v. Brinker Int'l Payroll Co., 511 F.3d 225, 229 (1st Cir. 2007).

²⁰⁰ Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (quoting Title

²⁰² As Catharine MacKinnon has emphasized, "[m]an fucks woman; subject verb object." Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 SIGNS 515, 541 (1982).

¹⁹⁷ Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (internal quotation marks, citations, and alterations omitted).

¹⁹⁸ Id. at 64-67. The Meritor court emphasized that such advances may be sex discrimination even if the victim does not suffer tangible, economic loss. Id. at 64. The Supreme Court later clarified, in Burlington Industries, Inc. v. Ellerth, that an actionable hostile work environment claim of sexual harassment is not limited to cases resulting in tangible employment actions. 524 U.S. 742, 753-54 (1998). As such, hostile work environment claims do not require any "quid pro quo" exchange. *Id.* at 752. ¹⁹⁹ See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Lower courts have

VII). ²⁰¹ See MacKinnon, Sexual Harassment, *supra* note 2, at 117–18 (setting forth an "the dominance or preference of one sex over the "inequality approach," focused on "the dominance or preference of one sex over the other," in contrast to the liberal equality approach adopted by Congress and the Supreme Court).

²⁰³ Of course, this divide has been extensively critiqued on other grounds as well. Reva Siegel, for example, has argued that the Supreme Court should have read the Equal Protection Clause in light of the constitutional history of the Nineteenth Amendment, with its broad-based attack on the position of women within the family, in order to mandate changes in the private sphere as well as in the public sphere. See generally Reva B. Siegel, She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947 (2002).

edging the ways that male norms in the domestic sphere may influence workplace practices, thereby limiting women's ability to compete at work.²⁰⁴ Law therefore must do more than open the doors of workplaces to women; law must also change workplace practices built around male needs and norms.²⁰⁵

Portrayals of work wives may highlight another way in which the gendered practices of the home have shaped workplace norms. In a workplace structured around male needs, women may be confined to a limited range of roles: either they are sexualized as potential girlfriends or play-things,²⁰⁶ or they are viewed as nurturing caregivers who are expected to assume at least some of the functions of the traditional wife.²⁰⁷ As Katherine Franke has emphasized when discussing the potential range of sexual harassment, "I now ask my students which practice they would find most humiliating, objectifying, or objectionable: having a male boss ask you, out of nowhere, to (i) kiss him, (ii) babysit for his kids, or (iii) be responsible for serving coffee at staff meetings."²⁰⁸ Although dominance theory has long focused on kisses and other forms of sexual conduct as the essence of sexual harassment, Franke reports that "[f]ew of my female students select the kiss as the most objectionable encounter."²⁰⁹

²⁰⁴ Although such acknowledgment is at the core of dominance theory, it is not limited to that theory. In fact, it even appears in one piece of legislation motivated by liberal equality theory: the Family and Medical Leave Act (FMLA). While providing genderneutral unpaid leave, the text of the FMLA begins with the finding that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5) (2006).

²⁰⁵ CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (1989) (arguing that men's "socially designed biographies defined workplace expectations and successful career patterns"); CATHARINE A. MACKINNON, FEMINISM UNMODI-FIED: DISCOURSES ON LIFE AND LAW 42–43 (1987) ("From the point of view of the dominance approach, it becomes clear that the [liberal equality] approach adopts the point of view of male supremacy on the status of the sexes. Simply by treating the status quo as 'the standard,' it invisibly and uncritically accepts the arrangements under male supremacy.") [hereinafter MACKINNON, FEMINISM UNMODIFIED]. This is dominance feminism's primary critique of formal equality. *See* MACKINNON, FEMINISM UNMODIFIED, *supra*, at 34 (arguing that under liberal equality theory "man has become the measure of all things").

²⁰⁶ See, e.g., Miller v. Dep't of Corr., 115 P.3d 77, 80 (Cal. 2005) (concluding that widespread sexual favoritism may create a hostile work environment because "the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the work-place is by engaging in sexual conduct with their supervisors or the management"; Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1207 (1998) [hereinafter Abrams, *Sexual Harassment*].

²⁰⁷ Cf. Kathryn Abrams, Sexual Harassment, supra note 206, at 1209–10 (describing that most forms of sexism "involve a valuation of masculine norms... and a devaluation of feminine norms," such as the devaluation of "a woman who performs a traditionally feminine task (such as secretarial work or food service)").

²⁰⁸ Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 201–02 (2001) [hereinafter Franke, *Theorizing Yes*].

²⁰⁹ Id. at 202. When I have asked the question in my classes, however, the kiss remains a close contender to babysitting and pouring coffee, suggesting that the sexual

The use of the marriage metaphor at work may therefore provide new insight about the diversity of oppressive gendered practices that remain prevalent at work despite Title VII's antidiscrimination mandate. Such practices are not necessarily perpetuated in order to maintain male dominance; instead, they may be the result of attempts "to secure familiar working conditions or re-establish a comfort level, rather than resist change or preserve explicitly masculine norms."210 In fact, some women and men may affirmatively embrace the metaphor of marriage at work even as they remain committed to workplace equality. Yet dominance theory has long interrogated women's choices to take on gendered roles, including caring, nurturing roles, under conditions of gender hierarchy, and has sought to deploy law to free women from such expectations.²¹¹ For example, some women may (consciously or unconsciously) embrace work wife portrayals in order to protect themselves from sexualization at work; if they are perceived to be work wives, they may be insulated from the sexual advances of other male employees.²¹² Other women may embrace the work wife label, in relationships

dynamics identified by Catharine MacKinnon remain particularly salient for many students. This salience is likely the product of many factors, including the ways sexual advances may affect bodily or psychic integrity, *see* Robin West, *Unwelcome Sex: Toward a Harm-Based Analysis, in* DIRECTIONS IN SEXUAL HARASSMENT LAW 138, 140–42 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004), and the success of so-called "governance feminism," *see* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM *passim* (2006).

²¹⁰ Abrams, *Sexual Harassment, supra* note 206, at 1197; *see also* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1347–48 (2009) (discussing how members of groups prefer other in-group members in ways that are not motivated by animus or discomfort with others). Abrams adds, "Some employers and workers have responded to the increasingly palpable presence of women by affirming the norms and practices that had characterized the all male or strongly sex-differentiated setting." Abrams, *Sexual Harassment, supra* note 206, at 1197.

²¹¹ See MACKINNON, FEMINISM UNMODIFIED, supra note 205, at 39 ("Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men."). Dominance theorists have also famously questioned women's ability to freely choose to engage in sexual activity, whether at work or elsewhere. See *id.* at 218 ("Sex feeling good may mean that one is enjoying one's subordination; it would not be the first time. Or it may mean that one has glimpsed freedom, a rare and valuable and contradictory event."). For a critique of this limited view of female sexual agency in various contexts, see Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 COLUM. L. REV. 304, 324–29 (1995); Katherine M. Franke, What's Wrong with Sexual Harassment?, 49 STAN. L. REV. 691, 746–47 (1997) [hereinafter Franke, Sexual Harassment]; Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 612–15 (1990) [hereinafter Harris, Race and Essentialism].

²¹² *Cf.* West, *Hedonic Lives, supra* note 51, at 94–95 (stating that men are often oblivious to the pain and fear that women experience, including that from sexual harassment in the workplace, because men do not harass women when they are accompanied by other men); *see also* Abrams, *Sexual Harassment, supra* note 206, at 1197 ("[W]omen [at work] are sometimes forced to place self-protection above economic opportunity, professional experience, or advancement.").

with male or female employees, in order to fit into a work culture that provides a limited range of acceptable social roles for women.²¹³

Even men may be constrained by networks of gendered practices at work.²¹⁴ As Angela Harris writes, "all men experience the pressure not to be women and not to be 'faggots.'"²¹⁵ At first glance, portrayals of straight men serving as work wives to other men could be viewed as resisting that pressure. But, upon closer examination, such portrayals may in fact be responding to such pressure, not resisting it. A close relationship between two men, at work or otherwise, often raises questions about the men's sexuality and masculinity.²¹⁶ The work wife label may insulate men from that suspicion, emphasizing that they are not gay and still masculine. Here, the desexualization of marriage,²¹⁷ and particularly of work wives, is vital; the metaphor of marriage at work signals that no sex is occurring within the relationship even if it is otherwise close and supportive. At the same time, the male gender of the participants clearly distinguishes these work wives from traditional ones. In this way, then, the work wife label is used as a joke to signal that men involved in close relationships with each other are neither gay nor women.

Portrayals of work wives therefore elucidate a broader range of gendered practices at work than has been previously acknowledged by hos-

²¹⁷ See supra text accompanying notes 136–48.

²¹³ See, e.g., Naomi Ellemers & Manuela Barreto, *Maintaining the Illusion of Meritocracy: How Men and Women Interactively Sustain Gender Inequality at Work, in* IN-TERGROUP MISUNDERSTANDINGS: IMPACT OF DIVERGENT SOCIAL REALITIES 191, 193 (Stéphanie Demoulin, Jacques-Philippe Leyens & John F. Dovidio eds., 2009) (summarizing arguments that "gender discrimination can easily become institutionalized" because of "the differences in social roles and expectations applying to men and women"); Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as (2001)* ("[B]enevolent sexism is used to reward women who embrace conventional gender roles and power relations, whereas hostile sexism punishes women who challenge the status quo.").

status quo."). ²¹⁴ Theorists extending the ideas of dominance theory have emphasized that both male and female agency is constrained by gender hierarchy. *See, e.g.*, Abrams, *Sexual Harassment, supra* note 206, at 1201–03, 1213; Franke, *Sexual Harassment, supra* note 211, at 693–94, 760–68. Just as women may be presented with a limited range of acceptable social roles in the workplace, men too may confront limits on their workplace relationships with both men and women.

²¹⁵ Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 780 (2000); *see also id.* at 786 n.35 ("[U]nder dominant social conventions, if you are born anatomically male, you should act in a 'masculine' fashion at all times and desire only women.").

only women."). ²¹⁶ See, e.g., *id.* at 787 ("In order to be true men, they must not be homosexual; yet many paths toward hegemonic masculinity—such as sport, battle, and mentorship—involve just the sort of close, emotionally intense, and frequently physical and sexually charged relationships that subject men to the suspicion that they are homosexual."); Abrams, *Sexual Harassment, supra* note 206, at 1212 ("[W]orkers may engage in vigorous disciplinary action against colleagues whose action or self-presentation threatens to undermine the primacy of masculine norms."); Elizabeth J. Chen, *Caught in a Bad Bromance*, 21 TEX. J. WOMEN & L. 241, 257–58 (2012) (analyzing how the "bromance" label permits straight men to have intimate frienships with each other while maintaining male and heterosexual privilege).

tile work environment doctrine. To the extent these practices reinforce masculine norms in the workplace, advocates of gender equality may want to extend the doctrine to contexts in which women or men feel subordinated by work wife portrayals or the expectations that flow from them. Scholars such as Kathryn Abrams and Katherine Franke have already urged courts and advocates to focus less on sexual advances at work and more on the ways sexualized practices "preserve[] male control or entrench[] masculine norms in the . . . workplace,"²¹⁸ or reinforce "a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects."²¹⁹ If the metaphor of marriage at work participates in that gendered system, it too could be brought into the fold of sexual harassment theory and doctrine.

Indeed, the case of Jew v. University of Iowa²²⁰ foreshadows this possibility. There the court held that repeated suggestions that the plaintiff, a professor of anatomy, was having a sexual affair with her department chair constituted a hostile work environment when combined with other sexually denigrating comments.²²¹ Although the rumors implied that the plaintiff's "professional accomplishments rested on sexual achievements rather than achievements of merit,"222 such rumors arose out of a relationship that could be portrayed as a work marriage. The plaintiff had done substantial research work under the chair's supervision when they were both at another university; she then moved with the chair to the University of Iowa.²²³ The court found that their professional relationship had "been close for many years" and they also enjoyed a "good social friendship," but they had never engaged in a "romantic or sexual relationship."²²⁴ When the chair's conduct as chair subsequently angered many faculty members, the plaintiff continued to work closely with him.²²⁵ The rumors of a sexual affair, and subsequent harassment, began soon thereafter.²²⁶

The *Jew* case does not involve harms flowing from work wife portrayals, but it does illustrate how perceptions of close relationships between male and female colleagues may reinforce male workplace norms. In *Jew*, colleagues came to believe the plaintiff was succeeding because of that relationship rather than her work and harassed her accordingly. Although the harassment took the form of sexually denigrating comments, it could just as

²²¹ Jew, 749 F. Supp. at 958.

²¹⁸ Abrams, Sexual Harassment, supra note 206, at 1172.

²¹⁹ Franke, Sexual Harassment, supra note 211, at 693.

²²⁰ 749 F. Supp. 946 (S.D. Iowa 1990). For a more detailed discussion of the case, see Martha Chamallas, *Anatomy of a Lawsuit:* Jean Jew v. University of Iowa, *in* SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY AND STUDENTS 248 (Bernice R. Sandler & Robert J. Shoop eds., 1997).

²²² *Id.*

²²³ *Id.* at 948. ²²⁴ *Id.* at 948–49.

 $^{^{225}}$ Id. at 948.

²²⁶ Id. at 949-51.

easily have taken the form of disparaging comments about her emotional relationship with the chair, defining her as a caregiver as opposed to a temptress but still subjecting her to harassment because of her sex. Moreover, under a different set of facts, the plaintiff could have been harassed for not meeting the expectation that she take on such a supportive role.

Existing hostile work environment doctrine and theory could be extended to redress such harm. At the same time, however, the *Jew* case also suggests how modern portrayals of work marriages may in fact limit some forms of sexual harm. Wrapping the relationship between the plaintiff and the chair in the garb of a modern work marriage might have signaled to coworkers and others that the relationship was not in fact sexual. After all, a defining aspect of modern work marriages is their emotional, rather than sexual, nature. The metaphor of marriage at work may therefore have reduced the harassment directed at the plaintiff or it may have merely transformed sexually disparaging comments into derogatory comments about other gender-based expectations.

2. Sex Stereotyping

The Supreme Court has also developed a doctrine of sex stereotyping to address situations in which employers open their doors to women but then penalize them for failing to conform to traditional understandings of femininity. In 1989, the Court held in *Price Waterhouse v. Hopkins* that

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.²²⁷

The Court therefore upheld the lower court's finding that the employer was motivated by gender when, in denying partnership to a female employee, its decisionmakers described her as "macho" and suggested that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."²²⁸

This doctrine, like the hostile work environment doctrine, acknowledges that expectations from the domestic sphere often infiltrate the workplace. Unlike the dominance theory that motivated the development of hostile work environment theory, however, advocates of anti-stereotyping

²²⁷ Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).

²²⁸ Id. at 235.

doctrine generally do not seek to alter gender relations throughout society.²²⁹ Instead, they seek to increase the freedom of all people to succeed in the public sphere and market by eliminating sex-based roles and stereotypes in those zones.²³⁰ As such, the doctrine embraces the assumption that employees will be free to succeed at work according to their own merit once impermissible stereotypes are eliminated, often ignoring the ways that traditional inequalities in the domestic sphere may influence women's ability to perform at work. The elimination of sex stereotypes may free some men to take on caregiving duties in the private sphere, but that possibility is merely a byproduct of the doctrine's focus on eliminating sex stereotypes at work.²³¹

This sex stereotyping doctrine could be extended to cover gender-based expectations flowing from work wife portrayals. If the metaphor of marriage at work represents the transfer of gendered care from the realm of traditional marriage to the realm of work, then such expectations may be so infused with gender stereotypes as to violate Title VII. In particular, employers could be found to be engaging in sex stereotyping if they expect employees to be, or not be, work wives on the basis of sex. Indeed, although no reported case has alleged such facts, sex stereotyping doctrine seems poised to address such situations in its current form.

Assume, hypothetically for purposes of this analysis, that an employer required some women, but not men, to engage in caregiving at work or to otherwise take on the role of work wives as they are portrayed by the media and in popular culture. For example, an employer might expect some female employees to provide relationship advice, keep track of office birthdays, take minutes at meetings, or to otherwise provide emotional support at work. If such women refused to take on those work wife functions, and were fired

²²⁹ See Mary Anne Case, *No Male or Female, in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 83, 94 (Martha Albertson Fineman ed., 2011) (endorsing "standard dictionary definition[s]" of feminism, which "generally talk about a commitment to the equality of the sexes, a commitment to women's rights and the removal of restrictions that discriminate against them" in the public sphere).

²³⁰ This meant that men benefited from many of the early equal protection cases. *See*, *e.g.*, Orr v. Orr, 440 U.S. 268, 281–83 (1979) (holding a statute authorizing judicial awards of alimony from husbands to wives but not from wives to husbands unconstitutional); *see also* MARGARET A. BERGER, LITIGATION ON BEHALF OF WOMEN: A REVIEW FOR THE FORD FOUNDATION 18–19 (1980) (discussing how the Women's Law Project of the ACLU shifted its strategy to concentrate "on chipping away at sexual stereotyping through cases that demonstrated the inequities that may result to males from an unthinking application of generalizations about the sexes"). For critiques of this strategy, see MACKINNON, FEMINISM UNMODIFIED, *supra* note 205, at 35 ("[T]he sameness standard has mostly gotten men the benefit of those few things women have historically had"); Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 48 (arguing that liberal equality theory cannot challenge patriarchy because it "entitles only women who look like men to the rules and practices worked out by and for men").

²³¹ And, as illustrated in Part II, men in fact have not taken on caregiving roles to the same degree that women have taken on breadwinning roles.

or denied a promotion as a result, they likely would have a viable Title VII claim *so long as* no male employee was ever asked to perform such duties.²³²

Similarly, imagine a female employee who is denied a promotion because she seems "more like a work wife" than a manager or executive. In many ways, this is the opposite scenario of *Price Waterhouse*, and scholars have questioned whether the sex stereotyping doctrine developed in that case extends to discrimination against women who are stereotypically feminine as opposed to those who are facing Hopkins's double bind.²³³ Yet, in a related context, courts have held that employment decisions violate Title VII when they have been influenced by stereotypes that mothers are insufficiently devoted to paid work.²³⁴ The stereotype that women perceived to be work wives are not management material seems analogous. Women denied promotions based on that stereotype would therefore likely have a viable Title VII claim so long as courts viewed the concept of the work wife as supplying the requisite inference of gender discrimination.²³⁵

At the same time, many courts would likely uphold unequal treatment of female employees perceived to be work wives if that treatment did not result in materially adverse harm, such as termination or failure to promote. Unlike hostile work environment harassment, sex stereotyping is actionable only if it leads to an adverse employment action.²³⁶ Disparate requirements of care, without more, would likely be viewed as only "de minimus" discrimination outside the scope of sex stereotyping doctrine.²³⁷

Moreover, such hypothetical applications of both sex stereotyping doctrine and hostile work environment doctrine assume that women will be harmed in workplaces embracing the metaphor of marriage at work. That

²³² Gender arguably would be a motivating factor for the employment decision in this situation, if not the "but for" cause, and the Civil Rights Act of 1991 amended Title VII to establish "an unlawful employment practice" whenever sex "was a motivating factor" for the practice. 42 U.S.C. § 2000e-2(m) (2006).

for the practice. 42 U.S.C. § 2000e-2(m) (2006). ²³³ See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Ori entation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995) ("[T]here is little indication, for example, that the Court would have found it to be sex discrimination if a prospective accounting partner had instead been told to remove her makeup and jewelry and to go to assertiveness training class instead of charm school.").

²³⁴ See, e.g., Chadwick v. WellPoint, 561 F.3d 38, 47–48 (1st Cir. 2009); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2d Cir. 2004).

²³⁵If courts instead viewed the concept as ambiguous, women subject to such stereotypes would likely have difficulty proving the decision was "because of sex."

²³⁶ In other words, sex stereotyping is like other disparate treatment claims brought under Title VII, requiring employees to prove they suffered an adverse employment action. 42 U.S.C. § 2000e-2(a) (2006). The Supreme Court waived that requirement in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998), but only in hostile work environment cases, as set forth *supra* note 198.

²³⁷ See, e.g., Bruno v. City of Crown Point, 950 F.2d 355, 362 (7th Cir. 1991) (finding no violation of Title VII when family-oriented questions were asked only of the female job applicant who ultimately received the job). For a critique of this approach, see Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1147–54 (1998).

assumption may be wrong in some, or even many, situations. The concept of marriage at work may instead represent just one of the various intangible factors that contribute to workplace success and satisfaction, more on par with employees' friendships and social connections from college, community and professional organizations, or other jobs. The next Section considers that possibility and what it might mean for gender equality projects.

B. Gender Beyond Subordination

Portrayals of work wives insert gender into popular notions of the workplace. Given Title VII's mandate that gender be irrelevant to employment decisions,²³⁸ that insertion immediately seems suspect. Yet the metaphor of marriage at work may in fact further, not thwart, some forms of gender equality. This Section considers the potential value of such relationships and the ways in which they might produce new conceptions of gender, for both men and women.

1. The Value of Workplace Relationships

Another theory of gender equality has long embraced the value of relationships and caregiving, critiquing those who seek success for women within traditional male frameworks (reformed or not) instead of embracing traditionally female activities and values.²³⁹ This so-called "difference feminism" or "relational feminism" may be particularly salient for analyzing the metaphor of marriage at work, as it has long emphasized that "[i]f caregiving is moral work, there is no reason to restrict its domain to family life."²⁴⁰ Yet difference theory to date has tended to focus on child care,²⁴¹ to the

²³⁸ See supra text accompanying note 184.

²³⁹ See, e.g., Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 60 (2002) (stating that difference feminism "stresses the need to value community, relationships, and traditional feminine qualities because these valuable qualities have been so undervalued in our overly individualistic and masculinist culture," and arguing that feminists "need to target *both* the cultural *over*-valuation of masculine qualities and the cultural *under*-valuation of feminine qualities") [hereinafter Becker, *Care and Feminists*]. Difference theory therefore critiques the world of paid work as lacking the important values of care and connection. *See* West, *Jurisprudence, supra* note 88, at 2 (critiquing "liberal legalism" and critical legal theory as "essentially and irretrievably masculine" because of the value it places on autonomy as opposed to connection); Joan C. Williams, *Domesticity as the Dangerous Supplement of Liberalism*, 2 J. WOMEN's HIST. 69, 79–80 (1991). ²⁴⁰ ROBIN WEST, CARING FOR JUSTICE 34 (1997).

²⁴¹ See, e.g., West, Hedonic Lives, supra note 51, at 140 ("[B] ecause of our biological, reproductive role . . . [w]omen's lives are not autonomous, they are profoundly relational."); see also Williams, Care as Work, supra note 132, at 1485 (constructing women who are not mothers as gender-neutral "adults" or possibly even men when she asks "What does it mean to be an adult? What does it mean to be a responsible mother?"). There is little, if any, room within difference feminism for a woman who is not a mother or who does not take on "mothering" activities within the home. For a critique of the inevitability of motherhood in most approaches to feminist theory, see Franke, *Theorizing Yes, supra* note 208, at 183–86.

exclusion of the care provided to husbands, other adult partners, or adult dependents,²⁴² calling for policies that would better permit women to balance work and parenting and otherwise integrate childrearing into public life.²⁴³

Work wives provide an opportunity to extend existing arguments in order to situate care within the larger market system. Joan Williams, drawing upon difference feminism, has already attempted to situate care in this manner by using the term "domesticity" to refer "not only to women's role in the home but also to a particular organization of market work and family work, and to the conceptions of masculinity and femininity that support breadwinner/primary caregiver gender roles."²⁴⁴ Williams thus recognizes that the carework women have traditionally performed within the home has effects outside of the home, in particular by serving as the (feminine) work against which (masculine) wage-work is defined. Williams's definition overlooks, however, the ways that carework is also performed outside of the home.²⁴⁵

Portrayals of work wives fill this gap by providing an example of the ways domesticity and care not only organize market work, but may also pervade market work. In crossing the divides between public and private realms, these dynamics of care may reinforce male authority or thwart women's autonomy, as both hostile work environment doctrine and sex stere-otyping suggest.²⁴⁶ But such dynamics of care may also operate in multiple ways beyond male dominance and female submission. Care may even, in some instances, be vital to workplace satisfaction and success.²⁴⁷

Studies of "old-boys networks" and other forms of social networking have long provided support for the notion that workplace relationships, in addition to other considerations of work performance, often determine employee success.²⁴⁸ Judge Richard Posner recently recognized this potential in

²⁴⁸ See, e.g., ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIEND-SHIP—AND WHAT THE LAW HAS TO DO WITH IT 52 (2011). Indeed, "[t]he vast majority of the social science literature . . . chronicles the ways that relationships at work may lead

²⁴² Martha McCluskey has best illustrated this dynamic. *See* Martha T. McCluskey, *Caring for Workers*, 55 Me. L. Rev. 313, 321–32 (2002).

²⁴³ See, e.g., Becker, *Care and Feminists, supra* note 239, at 109–10; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

²⁴⁴ Williams, *Care as Work, supra* note 132, at 1442.

²⁴⁵ Some of Martha Fineman's work contains this blindspot as well, *see, e.g.*, FINEMAN, AUTONOMY MYTH, *supra* note 2, at 188–95, although her more recent work seeks to analyze vulnerability arising in more varied contexts, *see generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

²⁴⁶ In addition, difference theory has been critiqued for valuing the care that has long oppressed women. Such criticisms emphasize that such care has been imposed upon women, calling into question whether women would choose to value care and connection but for patriarchy. As MacKinnon has famously proclaimed: "Take your foot off our necks, then we will hear in what tongue women speak." MACKINNON, FEMINISM UNMODIFIED, *supra* note 205, at 45.

²⁴⁷ See Rosenbury, Working Relationships, supra note 116, at 125–34.

McReynolds v. Merrill Lynch,²⁴⁹ a Title VII case alleging race discrimination. In determining whether class certification was warranted, Judge Posner considered a company-wide "teaming" policy, in which brokers, rather than their managers, were authorized to form teams to share clients.²⁵⁰ He emphasized that "there is no doubt that for many brokers team membership is a plus; certainly the plaintiffs think so."²⁵¹ And that is what made the policy suspect as potential "disparate impact" employment discrimination. Judge Posner emphasized that the African-American plaintiffs described the teams as "little fraternities (our term but their meaning), and as in fraternities the brokers choose as team members people who are like themselves. If they are white, they, or some of them anyway, are more comfortable teaming with other white brokers."²⁵²

In *McReynolds*, then, the plaintiffs invoked Title VII to gain access to workplace relationships, not to be freed from them. Women and men may similarly seek to benefit from relationships portrayed as work marriages. Indeed, unlike old-boys networks or the Merrill Lynch teams, marriage at work is portrayed as providing an additional layer of support at work that is not simply about making connections or ingratiating oneself with the right people. Instead, the relationship may offer a trusted sounding board and daily care that helps one or both work spouses endure uncertain work situations.²⁵³ Such support is similar to the support long provided by wives in the home, but many workers may desire support in both domains in light of increasing workplace demands and women's increased workforce participation.

Moreover, women may have more access to relationships portrayed as work marriages than they have to other relationships at work. Men often make work connections, and find other sources of workplace support, through sports and fraternities,²⁵⁴ as Judge Posner suggests.²⁵⁵ While most women have difficulty breaking into such structures, they may more easily be able to step into relationships analogized to marriage. Female workers

²⁵⁴ *Cf.* LEIB, *supra* note 248, at 52 ("To the extent the friendship gives one access to information, knowledge, networks, and clubs, supporting friendship might contribute to helping men retain power over certain domains of society."); Schultz, *Sanitized Workplace, supra* note 187, at 2189 ("In organizations in which training or learning occurs horizontally, among coworkers, women are frequently frozen out of the social networks through which crucial job information is shared.").

²⁵⁵ See McReynolds, 672 F.3d at 489.

to improved outcomes for employees and employers alike." Rosenbury, Working Relationships, supra note 116, at 129.

 ²⁴⁹ McReynolds v. Merrill Lynch, Pierce, Fenner, 672 F.3d 482 (7th Cir. 2012).
²⁵⁰ Id. at 488.

 $^{^{251}}$ *Id*.

²⁵² *Id.* at 489.

²⁵³ *Cf.* Keianna Rae Harrison, *Close, but No Chocolate*, INDIANAPOLIS STAR, Feb. 12, 2012, at G6 ("Robby Slaughter, principal of Slaughter Development, a productivity and workflow consulting company in Indianapolis, cautioned that in some cases, the need for a work spouse could signal an unfriendly office environment where people seek each other out for emotional refuge.").

may in fact benefit from the gendered nature of traditional marriage, in that women, more so than men, may assume nurturing roles at work without disrupting gendered expectations.²⁵⁶ And, unlike the uncompensated work of the traditional wife, such care may be compensated at work through promotions and pay raises (or the avoidance of layoffs and pay cuts), as well as other forms of workplace stability, power, and prestige.

2. **Opportunities for New Gender Performances**

The metaphor of marriage at work may also do more than hurt or benefit individual women, or men, in the workplace. In contrast to the approaches to gender equality already discussed, other approaches have focused on the ways gender is constructed and performed in multiple contexts, including work. Postmodern, anti-essentialist theories resist any one characterization of women or women's needs.257 These theories instead emphasize that "gender itself is a product of power and language and social institutions, including law, not a reality that preexists those structures."258 This emphasis is postmodern in that it embraces an understanding of the subject as "decentered, polymorphous, contingent";259 it is anti-essentialist because it challenges the notion that women are "ontologically distinct from men"260 or that there otherwise exists a universal conception of woman that transcends differences of race, class, sexual orientation, and other identity categories.²⁶¹ Such theories seek to understand how gender construction operates in order to destabilize that system, in part by recognizing the multiple, fluid, and shifting gender performances amidst the constraints of law and other social practices that construct gender.

Portrayals of work wives provide insight into the complexity of gender constructions and the multiple ways of performing gender within those constructions. In some portrayals, work wives are subordinated; in others they

ences and the impact that historical specificity has on any individual identity"). ²⁵⁸ Tracy E. Higgins, "By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice, 80 CORNELL L. REV. 1536, 1570 (1995).

²⁵⁹ Frug, *supra* note 257, at 1046.

²⁶⁰ Harris, Race and Essentialism, supra note 211, at 602 (critiquing West).

²⁵⁶ In fact, men may be punished by other men at work if they are perceived to value domestic caregiving on par with work responsibilities, whereas women are given more room to value both. See JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: Why Men and Class Matter 88-91 (2010).

²⁵⁷ See, e.g., Mary Joe Frug, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), 105 HARV. L. REV. 1045, 1046 (1992) (critiquing both dominance and difference theory for "depict[ing] male and female sexual identities as anatomically determined and psychologically predictable" instead of recognizing "the semiotic character of sex differ-

²⁶¹ Id. at 591–92 (critiquing MacKinnon); see also Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 BERKELEY WOMEN'S L.J. 191, 208 (1988–1990); Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 140-50; Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House, 10 BERKELEY WOMEN'S L.J. 16, 19-22 (1995).

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are privileged and rewarded; in still others they may operate outside of familiar, or even intelligible, power relations. There is no one work wife. The law's placement of such relationships outside of marriage law or employment discrimination law permits each of these multiple possibilities, and infinite others, to exist. Yet each possibility arises within a legal regime that still makes distinctions between work and home, recognizing marriage at home, but not at work, and prohibiting discrimination at work, but not at home. The law thus shapes portrayals of work wives even as no law explicitly recognizes or regulates the relationship.²⁶²

Most importantly, this divide between work and home was traditionally gendered de jure, and it remains deeply gendered de facto. Given this history and ongoing reality, it is tempting to engage in analysis designed to eradicate such gendering for good. Yet such reform would participate in the construction of gender even as it attempts to challenge existing gender dynamics. Gender, and the gendered division of labor, might be constructed somewhat differently, creating different possibilities for gender performances, but gender dynamics would not be eradicated. At least for now, and maybe for eternity, gender would remain at work and elsewhere.²⁶³

Portrayals of work wives thus highlight the ways that gender is reproduced and maintained by multiple forces, including portrayals of work marriage and legal responses, or nonresponses, to it. Although persistent, these gender dynamics are neither static nor do they operate in ways that are always detrimental to women. As previously discussed, if the market for work marriage mirrors that for legal marriage, then African-American women may have less access than white women to relationships portrayed as work marriages.²⁶⁴ This could be good or bad. On the one hand, African-American women could benefit from being viewed as workers, not wives, with their

²⁶² As Elizabeth Emens reminds us, a litigation-free zone is not coextensive with a law-free zone. Emens, *supra* note 210, at 1310–15. As such, the relationship between work wives and law is similar to the relationship between friendship and law, *see* Rosenbury, *Friends with Benefits?*, *supra* note 111, at 202–06, even though law intervenes in a narrow range of disputes between friends, *see* LEIB, *supra* note 248, at 84–105.

²⁶³ Some adherents of such approaches believe that the "the goal is to destabilize the sex hierarchy such that the traditional categories—'man' and 'woman'—are eventually rendered irrelevant to identity creation." Jessica Knouse, Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotypes Through the Institution of Marriage, 16 HASTINGS WOMEN'S L.J. 159, 166 (2005). Others, however, acknowledge the tenacity of gender: "The question … is not whether sex differences exist—they do—or how to transcend them—we can't—but the character of their treatment in law." Frug, supra note 257, at 1052; see also JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 111 (1990) ("The mark of gender appears to 'qualify' bodies as human bodies … . If gender is always there, delimiting in advance what qualifies as the human, how can we speak of a human who becomes its gender, as if gender were a postscript or a cultural afterthought?") [hereinafter BUTLER, GENDER TROUBLE].

²⁶⁴ Ås of the 2000 census, only 27.5% of Black women were legally married with a present, opposite-sex spouse as opposed to 53.2% of white women. Rose M. KREIDER & TAVIA SIMMONS, U.S. CENSUS BUREAU, MARITAL STATUS: 2000, 3 tbl.1 (2003). For a discussion of the market for legal marriage in the African-American community, see BANKS, *supra* note 125, at 5–16, 29–48.

work performance evaluated more on work product than on care. On the other hand, they could be denied support and connections that contribute to workplace success and satisfaction.

Even more so, however, it is unlikely that the market for work marriage would always mirror the market for legal marriage. Returning to the relationship between Condoleezza Rice and President Bush, for example,²⁶⁵ it is possible that African-American women in white-collar work settings may benefit from conceptions of sexuality that have de-sexualized them.²⁶⁶ That de-sexualization, among other factors, may contribute to lower rates of marriage among middle- and upper-middle class African-American women.²⁶⁷ Given the de-sexualized nature of work marriage portrayals, however, African-American women may in fact be more attractive work wives to powerful white men than are white women. Gender always intersects with other aspects of identity, but such intersections may play out differently in the work wife context than in other contexts.

Portrayals of marriage at work therefore resist any categorization as good or bad for women or men as categories. Other approaches to gender equality tend to assume that care and work occur either within a traditional gender framework or completely outside of it (once feminist reforms are adopted). Postmodern, anti-essentialist approaches embrace a much broader spectrum between traditional gender roles and complete freedom from those roles. Even though gender remains tenacious, multiple gendered performances of care and connection may exist along this spectrum.²⁶⁸

In this space, women and men may even engage in gender performances that, in the words of Judith Butler, "enact and reveal the performativity of gender itself in a way that destabilizes the naturalized categories of identity and desire."²⁶⁹ The metaphor of marriage at work may permit both women and men to experience intimacy and support in new forms that escape traditionally gendered dynamics of care without eschewing gender altogether. New performances of gender might result, performances that lie between gender hierarchy and the aspirations of gender neutrality that pervade both family law and employment discrimination law today. Gender

²⁶⁵ See supra text accompanying notes 82–85, 89.

²⁶⁶ Cf. Evelynn Hammonds, *Black (W)holes and the Geometry of Black Female Sexuality*, 6 DIFFERENCES 126, 131–39 (1994) (discussing the denial of black female sexuality in the face of myths about black women's hypersexuality).

²⁶⁷ Rick Banks discusses several additional reasons for these lower rates of marriage among middle-class and upper-middle class African-American women, including the superior bargaining power of African-American men, BANKS, *supra* note 125, at 60–61, African-American women's assumption that white men are not attracted to them, *id.* at 129–32, and African-American women's desire to counter the historical pathologization of single-parent black families by marrying within the race, *id.* at 139–42.

²⁶⁸ See BUTLER, GENDER TROUBLE, *supra* note 263, at 140 ("Gender ought not to be construed as a stable identity or locus of agency from which various acts follow; rather, gender is an identity tenuously constituted in time, instituted in an exterior space through a *stylized repetition of acts.*").

²⁶⁹ *Id.* at 139.

may therefore be reproduced at work in ways that are neither harmful nor liberating, just multiple.

C. Thinking Beyond the Limits of Employment Discrimination Law

In *The Office Wife*, Anne's new boss "was a very different chief. He treated her in a rather more personal manner, and yet as if she were an intelligent boy. There was no consciousness of her sex in his attitude."²⁷⁰ Faith Baldwin thus projected, in 1929, the hope that female employees would one day be judged like men were judged. Thirty-five years later, Title VII realized that hope, at least on paper. However, an antidiscrimination regime that relies on an embrace of individual merit and a clear divide between public and private is unlikely to make gender irrelevant in the work-place even if that goal were to be unequivocally embraced.

The shifting meanings of the marriage metaphor at work call into question the very nature of Title VII's workplace equality project. Title VII addresses identifiable harm flowing from gender at work. Although harm may be a feature of some work wife portrayals, harm likely mixes with many other factors and may often be largely, or even entirely, absent. That does not mean, however, that the care at the core of such portrayals is necessarily less gendered. Rather, the care may be gendered in ways that do not map on to current understandings of either discrimination or equality.

Indeed, examining workplace care in all its complexity permits a new analysis of three important aspects of the theories undergirding employment discrimination law as a whole: merit, intent, and identity performance. This analysis highlights some of the limits and gaps in existing approaches to workplace equality and suggests paths for beginning to address such limits. Most importantly, the analysis reveals that identity—and gender itself—is not exogenous to the workplace but instead is produced, at least in part, by the interactions occurring within it.

First, with respect to merit, the metaphor of marriage at work provides yet another challenge to the concept itself.²⁷¹ The very idea of the work wife indicates that something more than individual effort and talent may be necessary to succeed at work. Feminist legal theorists have long made a similar point, emphasizing the support that many male employees receive from sources outside of the workplace, namely the free domestic carework that husbands often receive from their wives.²⁷² Such support is rendered largely

²⁷⁰ BALDWIN, *supra* note 3, at 241.

²⁷¹ For other challenges, see Ellemers & Barreto, *supra* note 213, at 192–200 (describing and analyzing various critiques of meritocracy).

²⁷² See, e.g., FINEMAN, AUTONOMY MYTH, supra note 2, at 34–40, 47–51. Sociologist Zillah Eisenstein has also discussed this connection between women's carework and men's workplace success. Zillah Eisenstein, *Constructing a Theory of Capitalist Patriarchy and Socialist Feminism, in* WOMEN, CLASS, AND THE FEMINIST IMAGINATION 114, 136–37 (Karen V. Hansen & Ilene J. Philipson eds., 1990).

invisible in workplace law, however, maintaining the myth of individual merit. Employees without access to such support, primarily women, are in turn disadvantaged.

Feminist legal theorists have not, until recently, examined the support that workers do or do not receive from personal relationships within the workplace itself.²⁷³ The ongoing traction of the marriage metaphor at work indicates, at the very least, a desire for the exchange of care and support at work, if not the actual exchange of such care and support. That the metaphor is even intelligible at work highlights that care is not confined to the private sphere but instead crosses the public-private divide, albeit often in complex and contradictory ways, disrupting attempts to separate individual merit from dependency and support.

Such flow of care complicates efforts to achieve gender equality in the workplace. Some advocates of women's equality have posited engagement with paid work as necessary for achieving women's equality with men, constructing work as the place where women are freed from the gendered caregiving expectations that pervade the domestic sphere.²⁷⁴ Yet women, like men, may need to engage in at least some forms of supportive relationships at work in order to succeed. To the extent that some of those relationships are loaded with caregiving obligations, they may at times impede women's abilities to assert their individual talents. Other relationships may give women access to care at work that was previously unavailable to them, however, supporting their ability to succeed at work rather than thwarting it. Finally, still other relationships may permit women to exchange care for access to power, achieving more than they could based on individual talent alone.

Second, with respect to employer intent, the metaphor of marriage at work illustrates the difficulties of separating discriminatory intent from all other workplace dynamics.²⁷⁵ The general deference to employer prerogatives in all hiring, firing, and promotion decisions, absent discrimination,

²⁷³ In addition to this Article, see Rosenbury, *Working Relationships, supra* note 116. ²⁷⁴ See, e.g., LINDA R. HIRSHMAN, GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD 49–63 (2006); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1908–09 (2000). And in fact, women's entry into paid work after the passage of Title VII "gave some women an opportunity both to perform roles distinct from those of caregiver, nurturer, object of affection or of sexual titillation and to understand more fully the constraint of those traditional roles by experiencing alternatives." Abrams, *Sexual Harassment, supra* note 206, at 1195–96. Critics of gender-neutral antidiscrimination law therefore argue that it best helps those women who are most like men. *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 205, at 37 ("The women that gender neutrality benefits... are mostly women who have been able to construct a biography that somewhat approximates the male norm, at least on paper. They are the qualified, the least of sex discrimination's victims. When they are denied a man's chance, it looks the most like sex bias.").

²⁷⁵ As such, ongoing analyses of the marriage metaphor at work may lead to new normative underpinnings of employment discrimination law that do not depend on eradicating irrational discrimination. *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 34–42 (2006).

assumes that discriminatory intent is a phenomenon distinct from all other workplace dynamics. This assumption merges with the emphasis on individual merit to support the theory that the workplace will promote equality so long as assessments of individual merit are not tainted by employer animus. Yet gender, race, and other aspects of identity flow through work in complex ways often unmoored from employer intent.

For example, if relationships contribute to workplace success and if some employees are more likely to be portrayed as work wives than others—whether for reasons of gender performance, race performance, or other factors—then employees who are not in the preferred categories may have to engage in additional work to succeed. Conversely, those employees easily considered work wives may have to engage in additional work to prove they have something beyond care or support to offer to employers. These forms of work may be unequally distributed on the basis of gender or race, but such inequality is not necessarily the result of discriminatory intent. Rather, it is a response to workplace structures and employees' desires to achieve a sense of belonging and respect in the workplace.²⁷⁶ These factors may affect work trajectories as much or more than does irrational discrimination, but antidiscrimination law does not currently include them in its analysis.

Finally, the metaphor of marriage at work provides a new lens to examine the complexity of gender performance. Such examination reveals new forms of inequality and empowerment, highlighting the limits of existing doctrine's aspirations of gender-neutrality. For example, although women generally may not be liberated from care expectations in the workplace, and supervisors and coworkers may thus subtly treat them differently than male employees, such expectations at work may be preferable to those in the home. Both women and men may, in fact, enjoy opportunities to experience, and experiment with, emotional ties in the workplace that are less subsumed by the domesticity and dependent care at the core of many marriages outside of work.²⁷⁷ Accordingly, some women may embrace the metaphor of marriage at work even as it continues to insert gender into the workplace.

That embrace leads neither to the conclusion that such women are freely choosing to engage in gendered care nor to the conclusion that they are falsely conscious. Instead, performances of marriage and gender at work may be the product of a complex combination of individual choice, the structural constraints of home and work, and the relationships that both me-

²⁷⁶ This dynamic is similar to the ways that individuals of color must often modify, or "work," performances of identity in order to appeal to other employees in the power structure. These employees must engage in additional work because of their race even though no decisionmaker requests that work, let alone requests it with discriminatory intent. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1267–69 (2000) (analyzing how people of color work to offset implicit stereotypes by actively employing stereotype-negating strategies).

²⁷⁷ See Arlie Russell Hochschild, The Time Bind: When Work Becomes Home and Home Becomes Work 35–45 (1997).

diate and contribute to those constraints. Only by acknowledging such complexity will scholars be able to develop more meaningful conceptions of equality and discrimination for the workplace and beyond.

CONCLUSION

Marriage works in multiple ways, flowing between the public and private divides of work and home. This feedback effect is key to understanding the tenacity of traditional gender roles both at home and at work. Law, of course, guides these relationships, but as this Article emphasizes, law is at times a catalyst for change and at others a mere backdrop for individual negotiations and performances of gender. Seemingly gender-neutral laws therefore are not necessarily so, and they are unlikely to eliminate the relevance of gender or its performance at home or at work.

The ongoing salience of the marriage metaphor at work specifically means that gender remains a fact in many workplaces despite antidiscrimination law. The metaphor inserts gender into the workplace in ways that may further or thwart gender equality or be indifferent to it. Some portrayals of work wives may continue to reinforce gender hierarchy by portraying women providing traditionally gendered care from positions of subordination, much like the relationships between many male executives and their secretaries prior to the passage of Title VII. But other portrayals of work wives may engage in strikingly different performances of gender than are generally available in legal marriages rooted in the home. Such performances may ultimately permit more individuals to reimagine the roles of both men and women within families and workplaces. Studying work wives therefore leads to new understandings of the limits and potential of Title VII, the complexity of gender tenacity, and the meanings of gender equality.