

RESTRUCTURING WORK AND FAMILY ENTITLEMENTS AROUND FAMILY VALUES

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Society currently is structured around two conflicting norms. The first is the norm of family care, that “children should be raised by parents, not by strangers.”¹ This widely held norm is of relatively recent origin. In the past, many affluent children were cared for primarily by wet nurses, nannies, or other domestic workers, and less affluent children often were sent out as servants or apprentices at an early age.²

The second is an employment norm. Market work is structured around an ideal worker who takes no time off for child-bearing, has no daytime child rearing responsibilities, and is available “full-time” and for overtime at short notice.³

Notice the clash between these two norms. In many jobs, particularly “high-powered” ones, a parent cannot perform as an ideal worker without violating the norm of family care—unless the children’s other parent delivers the care.⁴ Caretakers typi-

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1. Note that the workers who take care of one’s children typically are not, in fact, “strangers.” This formulation illustrates the role of commodification anxiety in policing the norm of family care. See Joan Williams, *Is Coverture Dead? Beyond A New Theory of Alimony*, 82 GEO. L.J. 2227, 2279-82 (1994) (discussing the role of commodification anxiety in policing traditional gender roles).

2. See PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD* 373-75 (Robert Baldick trans., 1962) (stating that wet nurses were common in Europe among the middle class and the nobility until the Nineteenth Century); *id.* at 366-67 (reporting the blurred lines between children and servants); *id.* at 365-69 (stating that children were apprenticed, typically at age seven); JOAN D. HEDRICK, *HARRIET BEECHER STOWE: A LIFE* 6 (1995) (stating that child care was done by servants in early Nineteenth Century middle-class households). Harriet was the seventh child in a large and complex household: “Who can blame the five-year-old Harriet if she hardly noticed after her mother’s death that she was gone?” See also RUTH SCHWARTZ COWAN, *MORE WORK FOR MOTHER: THE IRONIES OF HOUSEHOLD TECHNOLOGY FROM THE OPEN HEARTH TO THE MICROWAVE* 31 (1983) (stating that, in the mid-Nineteenth Century, child care was a relatively low-status occupation, often displaced onto servants or children).

3. See Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822 (1989) (the “ideal worker”).

4. For example, the average large law firm in New York City requires billings up to 2500 hours annually, or about fifty hours per week. See S. Elizabeth Foster, *The Glass Ceil-*

cally are precluded from performing as ideal workers themselves because of time taken off for child bearing and child rearing,⁵ and an inability to work overtime at short notice.

The clash between the ideal-worker norm and the norm of family care is resolved through the economic marginalization of mothers: only thirty-seven percent of married mothers work full-time year-round⁶ in a society that rigorously marginalizes anything less.⁷ Even many mothers who work full-time are marginalized onto the "mommy track."⁸

In short, our system provides care for children by economically marginalizing their caregivers. This arrangement impoverishes caregivers and the children dependent upon them, a situation exacerbated by the laws defining entitlements within the family. Upon divorce, ownership follows what I have called the "he who earns it, owns it" rule, which defines the ideal worker's wage as his personal property.⁹ Typically the only access to the father's wealth is through child support payments,¹⁰ the constant

ing in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?, 42 UCLA L. REV. 1631, 1652 (1995). Note that one must work more than fifty hours in order to bill fifty hours. Assuming a half-hour commute, a parent who works fifty hours per week without working weekends would be away from home from about 8 a.m. until about 9 p.m. Few people would consider it appropriate to bring up children with both parents keeping this work schedule.

5. This includes everything from maternity disability leave, to working "part-time," to staying home with infants or sick children, to taking children to medical and other appointments, and so on.

6. See Howard V. Hayghe & Suzanne M. Bianchi, *Married Mothers' Work Patterns: The Job/Family Compromise*, 117 MONTHLY LAB. REV. 24, 25 (1994).

7. The average part-time worker makes only about 60 percent of the average hourly wage that a full-time worker earns. See Arne L. Kalleberg, *Part-time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 780 (1995). Fully one-fourth of part-time workers earn the minimum wage, as contrasted with one in twenty full-time workers. See Chris Tilly, *Reasons for the Continuing Growth of Part-time Employment*, 114 MONTHLY LAB. REV. 10, 12 (1991). A calculation that included women on the "mommy track" would place the proportion of mothers whose work force participation is marginalized by child rearing even higher.

8. For an extensive listing of articles in the "mommy track" debate, see Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1601 n.242 (1991).

9. See Williams, *supra* note 1, at 2248-53.

10. Few women are awarded alimony. See *id.* at 2231. The mean alimony award is \$3,370 per year, an amount too low to support anyone, no matter how modest her lifestyle. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 152, CURRENT POPULATION REPORTS — CHILD SUPPORT AND ALIMONY: 1985, at 6 (1989). In addition, most divorcing families have so few assets that "for the typical divorcing couple, no property division rule will make a substantial difference in economic well-being after divorce." Marsha Garrison, *Good Intentions Gone Awry*, 57 BROOK. L. REV. 619, 730 (1991).

dollar value of which has fallen since the late 1970s,¹¹ when child support payments were less than the typical car payment.¹²

High rates of childhood poverty result: roughly forty percent of divorced women with children live in poverty, an astonishing statistic.¹³ Even those children who do not sink into poverty often experience dramatic downward mobility when their parents divorce. One study found that well over half of the children of the divorced families studied were downwardly mobile: they were less likely to go to college, more likely to drop out because of financial difficulties, and only about half as likely as their fathers to enter professions.¹⁴

I have proposed two legal theories to address the problems created by the clash between the ideal-worker norm and the norm of family care. The first proposes changes to family law. It begins by pointing out that the ideal worker's wage reflects the work of *two* adults: the ideal worker's market work, and the marginalized caretaker's child rearing and other family work. According to standard Lockean theory, property produced by two adults should be owned jointly by them. Thus, in families with children, divorce courts should treat parents' wages as joint property rather than as treating the ideal worker's wage as his personal property alone.¹⁵ If society cherishes "family values," it should act consistently to protect caregivers and the children

11. See Robert G. Williams, *An Overview of Child Support Guidelines in the United States*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 10 (Margaret Campbell Hayes, Center on Children and the Law, Am. Bar Ass'n ed., 1994); see also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHILD SUPPORT AND ALIMONY: 1989, at table F (1989). This is true despite the fact that the level of child support payments has increased in recent years. See *id.* at 9-10.

12. See Lucy M. Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DENV. L.J. 21, 36 (1979).

13. See DEMIE KURZ, FOR RICHER, FOR POORER 3 (1995). Fourteen and one-half percent of the general population lives in poverty. See U.S. HOUSE OF REPRESENTATIVES, COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS, 1994 GREEN BOOK 1154 (1994).

14. See Judith S. Wallerstein & Shauna B. Corbin, *Father-Child Relationships After Divorce*, 20 FAM. L.Q. 109, 122-23 (1986), quoted in Barbara Bennett Woodhouse, *Toward a Revitalization of Family Law*, 69 TEX. L. REV. 245, 269 (1990) (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989)).

15. See Williams, *supra* note 1, *passim*. Note that custodial mothers continue to support fathers' ability to perform as ideal workers while having their children raised according to the norm of family care *even after divorce*. See *id.* at 2256-57. The specific proposal is to equalize the incomes of the two post-divorce households for the period of the children's dependence, and an additional period designed to address the long-term effects of the caretaker's economic marginalization. See *id.* at 2257-66.

dependent upon them.

A proposal to end the economic marginalization of caregivers requires changes, as well, to the work side of work-family conflict. The ideal-worker norm is not ungendered: instead, it is framed around the life patterns typical of men.¹⁶ Most fathers, but few mothers, have been free to perform as ideal workers with the assurance that their spouses will raise their children according to the norm of family care. For this reason, the current definition of "full-time" committed work disproportionately excludes women from jobs traditionally held by men.¹⁷

This critique of the ideal-worker norm represents a change to the feminist mainstream, set forth by Betty Friedan in the 1960s. Friedan proposed to free up mothers to perform as ideal workers along with the men by delegating child care to the market.¹⁸ This solution has not delivered equal access to nonmarginalized work. Particularly in view of the increasing number of hours Americans spend at work,¹⁹ having both parents perform as ideal workers is a questionable ideal: most people think that small children need more from parents than a few exhausted hours after nine, ten, or even twelve hours away from home.²⁰

A more promising alternative is to restructure market work around family values, notably the norm of family care. I have argued elsewhere that Title VII,²¹ the federal statute prohibiting discrimination in the terms and conditions of employment, prohibits employers from designing workplaces around the current ideal-worker norm because of its disparate impact on women.²²

This analysis of market and family work suggests a central point about women and victimhood. As important as it is not to ignore women's agency and choice, it also is important not to ignore the constraints within which their choices occur. Men

16. See Marley Weiss & Joan Williams, *Cockpits, Lifts and Family Values: Using Title VII to Challenge Male Norms* (unpublished manuscript, on file with author).

17. See *id.* (arguing that male norms disproportionately bar women from the best jobs traditionally held by men).

18. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

19. See JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 17-41 (1991) (documenting sharp increases in Americans' time at work).

20. See *supra* p. 753. In calculating the work day I am assuming an average American commute of roughly one hour per day. One-fourth of all American workers spend forty-nine or more hours on the job each week. See SCHOR, *supra* note 19, at 30.

21. See 42 U.S.C. § 2000e to 2000e-17 (1988).

22. See Weiss & Williams, *supra* note 16.

typically can perform as ideal workers while their children are raised according to the norm of parental care; women typically cannot. Consequently, most women face a sharp trade-off between work and family that few men face. Women who perform as ideal workers often sacrifice family life altogether: roughly sixty-five percent of managerial women have no children by the age of forty.²³ Mothers who observe the norm of family care rather than the ideal-worker norm typically end up economically marginalized, as discussed above.

The point is not that women are victims: they are adults acting with full agency. But men and women operate within different constraints. Men generally know that if they do not care for children personally, women will, whereas women generally know that, if they do not care for children personally, no one will,²⁴ or care will be delegated to the market.

This is not to say that only women suffer under the current system. Marginalizing committed parents hurts everyone. It hurts women by forcing them to pay for their family values in the coin of economic marginalization. It hurts children by depriving them of parental care²⁵ and often relegating them to poverty if their parents divorce. Last but not least, it hurts men, who may well spend so much time at work that they wake up and realize they hardly know their own children: fathers may end up as marginalized in family life as mothers are in the workplace.

In this context, the target of feminist criticism should not be men. Instead, we need to take aim through family and employment discrimination law at a gender system that hurts everyone.

23. See Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65, 69. Another study reported that 95 percent of male corporate leaders but only 39 percent of women at equivalent levels of management have children. See FELICE N. SCHWARTZ, *BREAKING WITH TRADITION: WOMEN AND WORK, THE NEW FACTS OF LIFE* 106 (1992).

24. See SCHOR, *supra* note 19, at 12 (reporting that local studies find that up to one-third of school-age children are "latchkey kids").

25. See William A. Galston, *When the Bough Breaks: The Costs of Neglecting Our Children*, NEW REPUBLIC, Dec. 2, 1991, at 40 (reviewing SYLVIA ANN HEWLETT, *WHEN THE BOUGH BREAKS: THE COSTS OF NEGLECTING OUR CHILDREN* (1991)) (reporting that parents have much less time to devote to parental care than in the past).

