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The Power of Caretaking

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The Power of Caretaking

Naomi Cahn[†]

INTRODUCTION	177
I. WOMEN AND POWER IN THE HOUSEHOLD	181
A. <i>Patterns of Caretaking in the Family</i>	181
B. <i>Family Roles and the Law</i>	186
II. MEN, WOMEN, AND PARENTAL IDENTITY	188
A. <i>Historical Underpinnings</i>	189
B. <i>Contemporary Structures</i>	192
1. <i>External Influences</i>	192
2. <i>Internal Influences</i>	195
III. COMPLEXITIES OF WOMEN'S POWER WITHIN THE HOME	198
A. <i>Power Within the Home—The Positive Side</i>	199
1. <i>Emotional Satisfaction</i>	199
2. <i>Gender Performance</i>	200
3. <i>The Economically Efficient Explanation</i>	201
B. <i>Consolidating Power—The Negative Side</i>	202
1. <i>Exercising Power—Too Much Power</i>	202
2. <i>Gendered Identities?</i>	204
3. <i>Economic Efficiency?</i>	208
4. <i>Conclusion</i>	209
IV. RECONSTRUCTING WOMEN'S POWER IN THE HOME	209
A. <i>Feminist Proposals to Recognize Women's Power Within the Home</i>	210
1. <i>Providing Support for Caretaking</i>	210
2. <i>Wages for Housework</i>	211
3. <i>Effectiveness of These Proposals</i>	212
B. <i>Relinquishing Power</i>	214
1. <i>Benefits from Change</i>	216
2. <i>Reforms</i>	217
3. <i>Difficulties with Relinquishing Power</i>	222
CONCLUSION	223

INTRODUCTION

In this article, I explore how the role of women at home is related to their roles at work. Maternal identity affects women's willingness to change both the structure of caretaking and the structure of the workplace. The power that

[†] Professor, George Washington University Law School. Thanks to Katharine Baker, Eileen Boris, June Carbone, Karen Czapanskiy, Martha Ertman, Catherine Ross, Mike Selmi, Jana Singer, and Joan Williams for comments and encouragement, and to Michelle Wu for research assistance.

women have gained from their "mother-work"¹ and housework within the home is a double-edged sword: acting as the primary caretaker, while an extremely rewarding role, is simultaneously a "confining" position. I argue that until both men and women see themselves as nurturers and workers, neither the workplace nor the family will undergo fundamental change. Encouraging men to see themselves as fathers and restructuring the workplace to accommodate the family are difficult issues that others have extensively explored;² I focus instead on the need for women to give up some of the power and control that they currently exercise within the family.³

Connecting women's home roles and workplace roles requires attention to both roles, and many of the solutions proposed by lawyers, economists, and sociologists have focused on the wage-labor role. Indeed, it may seem easier to change the workplace since there are already many laws that control the workplace environment and since the family has historically been less subject to governmental regulation. While I believe that the family and the market should not be regulated in the same manner, the law significantly affects families and family structure.⁴ The law can play a role in changing gender expectations

1. Mother-work is "women's unpaid work of reproduction and care-giving." MOLLY LADD-TAYLOR, *MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE 1890-1930* 1 (1994). Caregiving includes care not just for children but also for other adults. Almost one-quarter of all households have at least one adult who has provided care for an elderly person during the previous year. METLIFE JUGGLING ACT STUDY: BALANCING CAREGIVING WITH WORK AND THE COSTS INVOLVED 2 (Nov. 1999); MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* 37-38 (1999).

2. E.g., Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979) (recommending rearrangements in the work week, protection for part-time workers, programs to encourage occupational desegregation, and employer support for parents to fulfill familial obligations); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). There have been visible, albeit somewhat flawed, legal efforts to reconcile parenting and work roles. See, e.g. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1994); Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (Supp. 1995). For critiques of both, see Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133 (1998).

3. I am not suggesting that women necessarily feel that they have power and control in the home. Indeed, in comparison to men, women generally report a lower sense of control over their lives. See generally Catherine E. Ross & Marylyn P. Wright, *Women's Work, Men's Work, and the Sense of Control*, 25 WORK & OCCUPATIONS 333 (1998) (reporting on telephonic survey of more than 2500 respondents). The authors ascribe women's lower sense of control to the nature of housework. On the other hand, the authors report that women feel more autonomous in their work than do men.

4. See also Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415 (1991) ("family law actively promotes a gendered allocation of household labor"). See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1993) (arguing that feminists must pay more attention to the family); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985) (contending that the dichotomy of family and market has greatly impaired reform efforts).

Robin West argues that women's unequal parenting role is not, under current understandings of substantive due process, subject to Constitutional attack because it is contrary to the negative liberty guaranteed under existing doctrine, and it is not mandated by state action. ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 117-18 (1994). This observation suggests, of course, either revising constitutional doctrine or the underlying incoherence of a doctrine that distinguishes between positive and negative liberties. See Naomi Cahn & Jana Singer, *Children's Rights Under the Constitution*, 2 U. PA. J. CONST. L. 150 (1999).

within the home and in establishing the meaning and value of home-work.⁵ I argue that just as laws encourage men to relinquish their traditional hegemony in the workplace, so too must laws allow women to relinquish their traditional hegemony within the home.

Mothers' power within the home has developed not only through an ideology of domesticity that celebrates women's maternal roles, but also through women's actual performance of childcare and housekeeping. Mother-work is not necessarily a fundamental part of every woman's identity, nor is it necessarily women's choice to perform this work; it has, however, been constructed as women's work, and many women are drawn into it.⁶ Even women excluded from the traditional conception of domesticity have taken care of the children and the home; their mother-work has been a form of power for them.⁷ Domestic power is generally exercised in a two-parent relationship.⁸ Outside of that model, however, women still preserve their role as mothers; becoming a mother is often integral to their self-definition.⁹ By mothering children, they affirm their identities to themselves and to the public. This power base exists because women have done the work expected of their gender; doing the work has given women their actual (and presumed) power.

5. Indeed, as discussed *infra*, some feminists have argued that various forms of commodifying housework and bringing market concepts into the home might restructure the balance of power at home. *E.g.*, Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215, 1230-31 (1998); *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 20 (1998) [hereinafter Ertman, *Commercializing Marriage*].

6. MARJORIE L. DEVAULT, FEEDING THE FAMILY: THE SOCIAL ORGANIZATION OF FAMILY AS GENDERED WORK 11 (1991). DeVault argues that "women are continually recruited—whatever their psychological predispositions—into participation in social relations that produce their subordination." *Id.* at 13. While I generally agree with her on the source of women's collaboration in the scheme, I believe that some women, and some communities of women, have affirmatively chosen to perform such work as a sign of equality. Nonetheless, its construction as women's work is generally a badge of inequality.

In this article, I am talking about women who perform the gendered-feminine tasks of home-work and childcare. For discussion of the differences between sex and gender, see Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

7. This generalization is true for black and white women, even though the historical relationship of black women and the mothering role has been highly complex. The 1965 Moynihan report blamed black women for exercising too much power within the home, but the stereotypes of black women were as workers, or nannies for white women's children. Black women were not otherwise recognized for their roles within their own families. Evelyn Nakano Glenn, *Cleaning Up/Kept Down: A Historical Perspective on Racial Inequality in "Women's Work."* 43 STAN L. REV. 1333, 1342 (1991). See generally Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, (1997). As discussed *infra*, Professor Roberts believes that housework by African American women in their own homes has operated as a method of resistance to the dominant culture. This domestic work is thus a form of power over and against a dominant culture, in addition to acting as a form of power over a home sphere.

8. Almost 70% of children under the age of 18 are living with two parents. FRANCINE D. BLAU ET AL., THE ECONOMICS OF WOMEN, MEN AND WORK 63, tbl. 3.5 (1998) (reporting statistics for 1994). It is thus critically important to critique the allocation of power within that relationship. See JOAN WILLIAMS, UNBENDING GENDER: HOW WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 13-39 (1999).

9. *E.g.*, Carol Sanger, "M is for the Many Things," 1 S. CAL. REV. L. & WOMEN'S STUD. 15 (1992) (exploring the needs of single HIV-infected women to have children, notwithstanding their health problems).

This project—examining women’s “power”¹⁰ within the household—is deeply feminist, yet it is also extremely difficult, because I might appear to accuse women of complicity in their own subordination. My purpose is not to blame women for choices that are socially expedient. Since women have been denied other sources of power, the household has been the primary source of women’s power, and, to some extent, continues to be.¹¹ I argue that women should be “allowed” to give up power; they must feel that their children will be well cared for and that they will be able to obtain power in other spheres.

Furthermore, I do not believe that women should be required to leave the home for an outside workplace.¹² I believe that caring for children is the most important work that parents can do.¹³ Rather, I argue that women should not have a monopoly on this kind of work and that they should be encouraged to share caretaking with men. This Article is concerned with the constraints on women’s lives such that they appear to choose a life of household duties and to conserve power within that sphere, when, in fact, the choice is rigged. This Article is about the persuasive power of the rhetoric of domesticity, a rhetoric that structures women’s choices at work and at home.¹⁴

In Part I, I examine role differentiation in the caretaking household—the who and the why of the second shift—and the legal institutions that structure family roles. In Part II, I explore the historical derivation of the mother as the primary caretaker and the contemporary mechanisms that reinforce this role. In Part III, I discuss the parameters, costs, and benefits of women’s power within the home. In Part IV, I argue that women must relinquish, and must be able to relinquish, some of their historical power within the household in order to ensure more participation from men. Part IV suggests some family and workplace changes to

10. Power is an extremely complex topic, of course. See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, VOLUME 1 92-102 (1978); Lucie White, *Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992); see also Nancy Hartsock, *Foucault on Power: A Theory for Women?*, in FEMINISM/POSTMODERNISM 157, 158 (Linda J. Nicholson ed., 1990). Hartsock, who criticizes the utility of Foucauldian notions of power for women, believes that feminists “need a theory of power that recognizes that our practical daily activity contains an understanding of the world—subjugated perhaps, but present.” *Id.* at 172. Power, like the concept of choice, presupposes some notion of autonomy. For women, there are interrelated, albeit separate, axes of autonomy/connection and equality/equity. See Naomi Cahn, *Autonomy and Equality* (unpublished manuscript, on file with the author).

11. I am using power in a manner comparable to how Kathryn Abrams defines agency: “Women’s agency under oppression is necessarily partial or constrained, because women must contend with—and are not presently capable of completely disarming, either collectively or individually—structures and practices that operate to deny or mitigate that capacity.” Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 306 n.11 (1995); Kathryn Abrams, *Cross-Dressing in the Master’s Clothes*, 109 YALE L.J. 745, 770 n. 116 (2000)(book review).

12. There are some women—and some men—who make the “choice” to stay home, and who should be supported. See Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 531 (1998). See generally Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991) (exposing the gendered condemnation of women who make self-interested choices).

13. As Susan Carle points out, gender does not “always and completely disadvantage[]” women, even under a system of male privilege. Susan Carle, *Gender in the Construction of the Lawyer’s Persona*, 22 HARV. WOMEN’S L.J. 239, 271 (1999).

14. For a discussion of the power of this rhetoric of choice, see WILLIAMS, *supra* note 8.

facilitate this transition. By explaining the dynamics of household changes, this Article provides an additional understanding of the need for women's home and workplace equality.

I. WOMEN AND POWER IN THE HOUSEHOLD

A. *Patterns of Caretaking in the Family*

An overwhelming majority of labor that occurs in the household is seen and performed as "women's work." Women take, or are left with, responsibility for managing children and the household.¹⁵ This section explores the gendered nature of household labor; examining who does the work sets the stage for exploring the reasons for this labor allocation and the difficulties of changing the current structure.

The gendered parameters of parental identity are evident in the literature on who actually performs the work at home. Being a parent is an enormously time-consuming and energy-demanding project.¹⁶ Indeed, the court in *Garska v. McCoy* provided an extensive list of such duties; they ranged from meal preparation to doctors' appointments.¹⁷ In order to manage their various time demands, wealthy women have frequently hired governesses or nannies while poorer women who have had to work have often placed out their children.¹⁸

Today, women perform a disproportionate share of the household work, even when they work outside the home.¹⁹ Upon marriage or cohabitation, the

15. The term "household labor" refers to the management and control exercised by caretakers over their children, their household, their partners, and their culture. There is, of course, a distinction between motherwork and household work; the former is rewarding unto itself, and the latter is often quite unappealing. Most of the studies of domestic labor do not, however, distinguish between the two types of obligations, apparently viewing both as inherent in women's role. Moreover, difficult and unpleasant as it is, I think that even household work is an example of gender performance because it is one component of the image of the typical wife. (For example, when my mother-in-law comes to visit, she evaluates my wifely virtues based, in part, on the cleanliness of the house.)

Moreover, notwithstanding its routinized and unrecognized nature, housework can be a more autonomous form of work than out-of-home-work, and it has the added benefit of creating a "clean and pleasing environment." Chloe Bird, *Gender, Household Labor, and Psychological Distress: The Impact of the Amount and Division of Housework*, 40 J. HEALTH & SOC. BEHAV. 32, 33 (1999); cf. Ross & Wright, *supra* note 3, at 333 (reporting that women feel a lower sense of personal control over their lives than do men due to their disproportionate representation in domestic and part-time employment, but the autonomy of homemaking somewhat compensates for the negative aspects of their work). Interestingly, while spending too much time on household work increases depression, the mere doing of household work does not. Bird, *supra*.

16. For recognition of this in legal literature, see, for example, Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2416-17 (1995).

17. *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981) (establishing a primary caretaker standard for custody).

18. ROSALIND C. BARNETT & CARYL RIVERS, SHE WORKS, HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER OFF 223 (1996). See generally Nurith ZMORA, ORPHANAGES RECONSIDERED: CHILDCARE INSTITUTIONS IN PROGRESSIVE-ERA BALTIMORE (1994); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996) (discussing various childcare customs).

19. WILLIAMS, *supra* note 8; Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119 (1994); Katherine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

average woman increases her household work by 4.2 hours, while the average man decreases his household work by 3.6 hours.²⁰ Studies of the amount of time that men and women spend in parenting consistently show that women perform more childcare than men, although the data are somewhat conflicting on just how large the differential actually is.²¹ On the other hand, some studies suggest that men are participating more in the family than did their fathers. Recent studies show a dramatic increase in men's childcare and housekeeping responsibilities proportionate to women.²² Nonetheless, as a recent review suggests, these results may be distorted by men's overreporting of the amount of time they spend on this work.²³

Mothers continue to provide more caretaking within the family than do fathers, even under the most optimistic scenarios. A recent national survey of more than 1,000 children found that

20. Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. MARRIAGE & FAM. 700, 701 (1998) (need pin cite). Another recent study found, however, that both men and women performed more housework per week than did their single counterparts: women performed 14 more hours per week (a 54% increase), while married men performed 90 minutes more housework than did single men (a 10% increase). See Bird, *supra* note 15, at 37-38.

21. For a careful discussion of the data, see Amy Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 519-24 (1998). She notes that men and women in traditional marriages, where the wife stays home, work comparable numbers of hours per week. *Id.* at 519. Of course, in these relationships, all of the women's time is spent on home-work. For example, some studies suggest that the average father spends less than an hour per day with his children, and the fathers of the 1990s spend no more time on child-care activities than did the fathers of 1965, while mothers spend more than ten hours per day in solo childcare work. Krista Ramsey, *Dad's Value is Nothing to Kid About*, CIN. ENQUIRER, June 14, 1997, at B1; cf. Jerry Adler, *Building a Better Dad*, NEWSWEEK, June 17, 1996, at 58 (citing study that fathers spend about 45 minutes per day caring for children by themselves, while mothers spend more than ten hours per day). Barnett and Rivers found, in a study of approximately 250 families, that mothers of pre-school age children spent 100 hours more per month than men in childcare; with older children, women spent "only" 22 more hours than their husbands. BARNETT & RIVERS, *supra* note 18, at 226.

Yet another study found that employed women spent 6.6 hours per week in undivided childcare, compared to employed men's 2.5 hours. Laura Shapiro, *The Myth of Quality Time*, NEWSWEEK, May 12, 1997, at 62; see also WHITE HOUSE COUNCIL OF ECONOMIC ADVISERS, FAMILIES AND THE LABOR MARKET, 1969-1999: ANALYZING THE "TIME CRUNCH" 12-13 (1999) (using the most recently available time-use diaries, employed mothers spent approximately six and one-half hours per week in childcare in 1965 and 1985, while employed men spent about 2.6 hours during the same time period).

One sociologist suggests that, to the extent that men's and women's hours at home and at work are beginning to converge, this result is based primarily on women's decreasing home-work time, and increasing market-work time, rather than on dramatic changes made by men. Julie Brines, *Review of Shelton*, 98 AM. J. SOC. 938, 939 (1993). On the other hand, a recent study using data from 1997 found that fathers in two-parent families spend almost two-thirds as much time on weekdays as do mothers and more than 85% as much time on weekends. W. Jean Yeung et al., *Children's Time with Fathers in Intact Families* 23 (March 1999) (unpublished manuscript on file with author). The authors found that the higher the fathers' earnings, the less time they spent with their children during the week; "[o]nly on weekends, when fathers are not constrained by their market-work do fathers share the child-rearing responsibilities." *Id.* at 24.

22. SCOTT COLTRANE, *FAMILY MAN* 54-55 (1996) (summarizing recent studies that show that men contribute about one-third of the total household time spent on childcare). In most of these studies, Coltrane demonstrates that it is not men performing dramatically more work; it is women performing less that leads researchers to conclude the gap is decreasing. *Id.*

23. Julie E. Press & Eleanor Townsley, *Wives' and Husbands' Housework Reporting: Gender, Class, and Social Desirability*, 12 GENDER & SOC'Y 188 (1998).

[c]hildren report that mothers handle the bulk of responsibilities associated with their physical care: doctors' appointments, nursing and chauffeuring duties, preparing them for school and helping them with homework. Mothers still have the lion's share of housekeeping chores.... In the area of values instruction, mothers appear to be the primary "teachers" Most important, *mothers are still the primary emotional caregiver for their children.*²⁴

While women remain the household managers and planners, men are spending more time as caretakers and cleaners. Even when parents share responsibilities, they generally do not completely escape the traditional gender patterns; in his study of shared housework, Scott Coltrane found that women remained much more likely to do laundry, plan meals, arrange for babysitters, and mop, while men were more likely to take out the trash and do household repairs.²⁵

Many women perform household tasks and childcare because parenting remains more important to their identity as mothers than to men's identity as fathers and women are much more likely than men to structure their lives to accommodate childcare.²⁶

When we think of ideal parenting, we typically envision "mothering," rather than "fathering."²⁷ The ideal mother has a role that is very different from the ideal father. Unlike unwed mothers, who are presumed responsible, unwed fathers have no constitutionally recognized parental rights unless they take some additional affirmative acts beyond conception.²⁸

Psychologists often perceive parenthood as the "key to adulthood."²⁹ Upon becoming a parent, women are traditionally accorded a "status change," while

24. Whirlpool Corporation, *Report Card on the New Providers: Kids and Moms Speak*, at <http://www.WhirlpoolCorp.com/whr/ics/foundation/part3.html> (last visited May 11, 1999). Roper Starch Worldwide Inc. conducted the survey. The margin of error at a 95% confidence level is within +/- 3%.

25. COLTRANE, *supra* note 22, at 65-66 tbl.3.1.

26. See RHONA MAHONEY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* (1995).

27. The very awkwardness of the words betrays the concepts behind these terms.

28. *Stanley v. Illinois*, 405 U.S. 645 (1972); Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 57 OHIO ST. L.J. 1, 32-35 (1997); cf. Janet H. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993) (explaining the existing case law concerning unwed fathers, and contending that the notion that biology does not trigger social paternity as it does for social maternity may provide support for surrogates seeking recognition of maternity in opposition to a biological parent).

Prior to the mid-sixteenth century, neither parent had any responsibility; the law has evolved so that paternity can be established, while maternity is presumed. MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 24-25 (1994). See generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

29. GERALD MICHAELS & WENDY GOLDBERG, *THE TRANSITION TO PARENTHOOD passim* (1988); see Rob Palkovitz, *Parenting as a Generator of Adult Development: Conceptual Issues and Implications*, 13 J. SOC. & PERS. REL. 571, 571 (1996). For critiques of this perspective concerning expectations of women, see CAROLYN MORELL, *UNWOMANLY CONDUCT: THE CHALLENGES OF UNINTENTIONAL CHILDLESSNESS* (1994); MARDY S. IRELAND, *RECONCEIVING WOMEN: SEPARATING MOTHERHOOD FROM FEMALE IDENTITY* (1993).

men, outsiders to the process, are only "expected" to become involved.³⁰ As Karen Czapanskiy has persuasively shown, women are drafted into motherhood, while men are able to volunteer.³¹ Because women are socialized to believe parenting is central to their identity as women, they are more likely to manage the household and their children's lives.³² In one study of caretaking mothers and fathers, "[b]eing a mother was more central to the identity of the mothers than even to the [caretaking] fathers."³³

Men take less parental leave from the workplace to spend time with their families, reflecting the gendered notions surrounding parenting. In her study of one large American corporation lauded for its flexible work policies, Professor Arlie Hochschild found that women were far more interested in the company's "family-friendly" options than were men and that very few men took advantage of parental leave.³⁴ Professor Hochschild notes that while many men seem interested in changing their roles—the rhetoric of what is expected of a father may have changed—their actual roles have changed relatively little.³⁵ Yet, the Family and Medical Leave Act of 1993 (FMLA)³⁶ recognized the importance of having both mothers and fathers care for children. Its advocates hoped that it would promote a more gender-neutral allocation of work and family roles between parents and a corresponding recognition by employers of the importance of allowing both parents to care for their children.³⁷

In a survey conducted by the Commission on Family and Medical Leave, two-thirds of FMLA-covered employees took more leave in response to the Act.³⁸ Yet this increase in family leave remains highly gendered. Although men are equally entitled to take leave to care for their families, they are less likely than women to do so. In some cases, the man of the family has the higher salary

30. MICHAELS & GOLDBERG, *supra* note 29, at 119.

31. Czapanskiy, *supra* note 4, at 1415.

32. JOAN PETERS, *WHEN MOTHERS WORK: LOVING OUR CHILDREN WITHOUT SACRIFICING OURSELVES* 78-90 (1997); Scott Coltrane, *Household Labor and the Routine Production of Gender*, in *FAMILIES IN THE U.S.: KINSHIP AND DOMESTIC POLITICS* 791, 797-800 (Karen Hansen & Anita Garey eds., 1998).

33. Mary Becker, *Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 *STETSON L. REV.* 701, 720 (1994) (citing DIANE EHRENSAFT, *PARENTING TOGETHER* (1987)). The emotional response of adopting mothers to the expectation of "having" a child may, however, be different from the father's, because of the societal expectations of mothers that apply regardless of the "source" of the child. See Linda J. Lacey, "*O Wind, Remind Him that I Have No Child*": *Infertility and Feminist Jurisprudence*, 5 *MICH. J. GENDER & L.* 163, 185 (1998); see also Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 *J. LEGAL STUD.* 869, 886 (1994) ("[W]omen seem to value children more highly than do their husbands.").

34. ARLIE HOCHSCHILD, *THE TIME BIND* 131 (1997).

35. *Id.* at 131-32.

36. 29 U.S.C. §§ 2601-2654 (1993 & Supp. 1998). The FMLA provides up to twelve weeks of *unpaid* parental leave upon the birth or adoption of a child.

37. See Susan Deller Ross, *The Legal Aspects of Parental Leave: At the Crossroads*, in *PARENTAL LEAVE AND CHILDCARE: SETTING A RESEARCH AND POLICY AGENDA* 98, 98-107 (Janet Shibley Hyde & Marilyn J. Essex eds., 1991).

38. *Id.*

and the household opts for the loss of the woman's income.³⁹ Yet even in those couples where the man earns the same or less than his partner, he may be reluctant to leave the workforce because of the substantially greater penalties imposed on fathers.

The penalties attendant to parental leave that fathers fear are both concrete and intangible. Men who are interested in leaving work—temporarily or in the long-term—worry that their careers will be ruined when they “drop out” of the labor force.⁴⁰ Because society has traditionally viewed the woman as the primary caregiver, many men are reluctant to step out of their role as providers. Or, when they try to spend time at home, they are often “virtual guests” within the family because the socialization of both men and women affects the roles that they play.⁴¹ Men are often torn between “their desire to provide financial security for their families and their desires to establish close relationships with their children.”⁴² The birth of a child usually results in an increase in household expenses and a decrease in maternal financial contribution, making unpaid parental leave impossible in most households. As a result, many men who want to take time off do so by using vacation and personal days, allowing them to spend time with their family while avoiding the potential hostility that may result if they take real family leave.⁴³ Notwithstanding the obstacles, the numbers of men attempting to obtain leave under the FMLA is increasing.⁴⁴ Nonetheless, the numbers remain small and primarily confined to middle-class couples.⁴⁵

Although the allocation of work within the family is becoming more equal, women still perform a disproportionate share of childcare. Women remain responsible for “mothering” their children and for managing the household. Women remain much more likely than men to interrupt their work to care for

39. CYNTHIA FUCHS EPSTEIN ET AL., *THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER* 112 (1999) (exploring the decisions of women lawyers, rather than their husbands, to work part-time because this would maximize family income).

40. COLTRANE, *supra* note 22, at 26.

41. JULIA KIRK BLACKWELDER, *NOW HIRING: THE FEMINIZATION OF WORK IN THE UNITED STATES* 251 (1995) (“Middle-class fathers who have tried to invest time in family life have often remained virtual guests in their own homes as gendered expectations and skill-based tasks acquired in youth have restrained both mothers and fathers.”). Professor Barbara Bergmann suggests several reasons why husbands of working wives do not share responsibility for running the household, including sex-role socialization, the devaluation of housework, and “the lack of ability of wives to enforce or motivate changes in husbands’ duties.” Barbara R. Bergmann, *Work-Family Policies and Equality Between Women and Men*, in *GENDER AND FAMILY ISSUES IN THE WORKPLACE* 277 (Francine Blau & Ronald Ehrenberg eds., 1997).

42. Malin, *supra* note 2, at 1067.

43. *Id.* at 1071-72. A 1993 study supports this. Only seven percent of American men and forty-three percent of American women would take twelve weeks of parental leave. Even though a small percentage of fathers take advantage of leave under the FMLA, the majority of new fathers took paid time off by using vacation or sick days or by rearranging their work schedules. Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 *COMP. LAB. L.J.* 373, 377 (1996).

44. Robin R. Cockey & Deborah A. Jeon, *The Family Medical Leave Act at Work: Getting Employers to Value Families*, 4 *V.A. J. SOC. POL’Y & L.* 225, at 225-234 (1996) (discussing suit against employer for refusing to grant leave under the FMLA).

45. For a careful review of the data on male parental leave, see Selmi, *supra* note 2, at 52-53.

children, and having children is negatively correlated to women's earnings and positively correlated to men's earnings.⁴⁶

B. *Family Roles and the Law*

The law shapes the family in complex ways, affecting the allocation of housework. Notwithstanding the zone of privacy that surrounds the family and corresponding rhetoric of non-intervention within the family,⁴⁷ the law often has reached into the family to affect the behavior between parents and between parents and children. While this is clear with respect to family dissolution—divorce, property distribution, custody, and support—it is also true of intact families. The state strongly supports the institution of marriage by providing married partners with more protections than those afforded unwed partners,⁴⁸ thereby providing additional incentives for partners to marry. The federal tax laws were constructed around a traditional family of one wage-earning parent and one stay-at-home parent, and the biases remain.⁴⁹ Provisions that discriminate against families with two wage earners include the joint return structure, the nontaxation of imputed income, and fringe benefit laws.⁵⁰

Beyond supporting marriage as an institution, the law has constructed gendered identities for husbands and wives. Historically, doctrines such as coverture and marital rape established defined roles for husbands and wives; today, approximately twenty-five states continue to treat marital rape differently from other forms of rape.

On the other hand, the Supreme Court has protected a wife's right not to seek permission from her husband for an abortion, thereby establishing certain limits

46. Francine D. Blau, *Trends in the Well-Being of American Women, 1970-1995*, 36 J. ECON. LIT. 112, 158 (1998); Claudia Goldin, *Career and Family: College Women Look to the Past*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE, *supra* note 41, at 20, 45 (finding that only 13% of white, college-educated women between ages thirty-five and forty-four worked continuously and full-time for three consecutive years).

47. For cases on family privacy, see *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); see also *Deshaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189 (1989). See generally Janet Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1995).

The actual derivation and meaning of family privacy is contested. See generally Naomi Cahn, *The Privacy of the Family*, 67 GEO. WASH. L. REV. 1225 (1999) (discussing the interrelated meanings of family and privacy); Martha Albertson Fineman, *What Place for Family Privacy*, 67 GEO. WASH. L. REV. 1207 (1999) (explaining the implications of the judicial reconceptualization of family privacy).

48. See generally *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (listing state-created marriage benefits).

49. See Marjorie Kornhauser, *Love, Money and IRS: Family, Income-Sharing and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 64 (1993). See generally Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1972); Edward McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1992).

50. EDWARD McCAFFERY, *TAXING WOMEN* 89-160 (1997). See generally Nancy Staudt, *The Theory and Practice of Taxing Difference*, 65 U. CHI. L. REV. 653 (1998) (book review) (summarizing McCaffery's analysis).

within the ongoing marital relationship.⁵¹ The familial zone of privacy is further limited by laws governing abuse and neglect.

Contemporary law sets a minimal standard of parental behavior: Parents cannot abuse or neglect their children⁵² and they must provide financial support to their children.⁵³ Although the laws regulating the conduct of parents do not set out different roles for mothers than for fathers, their application continues to be gendered. Feminists have consistently shown how custody law appears biased against women.⁵⁴ At the same time, fathers' rights advocates have repeatedly claimed that judges favor women in custody disputes. The existence of the argument shows the strong fear of bias. The Supreme Court recently upheld a federal law that establishes a more difficult citizenship standard for the children of unwed fathers than for the children of unwed mothers, noting the "undisputed assumption that fathers are less likely than mothers to have the *opportunity* to develop relationships" with their children.⁵⁵ The Court explained that the biological differences between unwed mothers and fathers are relevant to and justify the different standards.⁵⁶

When it comes to financial matters, the law appears gender-neutral. During marriage, in common law states, whichever spouse has title can control the assets.⁵⁷ However, at divorce or death, these same assets are pooled.⁵⁸ In virtually all states, courts must consider the contributions of a full-time caretaker to acquisition of the marital estate, but there is rarely any assumption that this is an equal contribution. And, during the marriage, given that men generally earn more money than women, they are able to control the bulk of assets acquired during the marriage. The law supports their decision to allocate their resources within the family.⁵⁹

51. *Planned Parenthood v. Casey*, 505 U.S. 833, 893-94 (1992). The Court noted that to allow a husband to veto his wife's abortion decision might also allow him to prevent his pregnant wife from drinking or smoking or engaging in any behavior that might endanger the fetus. *Id.* at 898.

52. *DeShaney* shows just how minimal these requirements are. See generally *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

53. See, e.g., D.C. CODE ANN. § 16-916.1 (1981 & Supp. 1998). The child support guidelines of many states require fathers who are earning no money nonetheless to pay a minimal amount to support their children. Women on public welfare are required to cooperate with the state in establishing the child support obligation. See Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, *passim* (1997).

54. E.g., Fineman, *supra* note 4; Becker, *supra* note 33; Czapsanskiy, *supra* note 4. Many cases penalize women for working. See, e.g., *Ireland v. Smith*, 542 N.W. 2d 344 (Mich. 1995), *aff'd*, 547 N.W.2d 686 (Mich. 1996).

55. *Miller v. Albright*, 523 U.S. 420, 444 n.25 (1998).

56. *Id.* It is interesting to speculate whether these same "biological differences" exist between a married mother and father. Dolgin, *supra* note 28. The Court has also upheld gender distinctions in the law of statutory rape. See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). Yet it has struck down sex-segregated schools.

57. PETER SWISHER ET AL., *FAMILY LAW: CASES, MATERIALS AND PROBLEMS* 119 (1999).

58. *Id.* at 122, 879.

59. Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 998 (1995).

In a recent study of 380 married couples, almost 75% of the husbands surveyed reported "taking all or most of the responsibility for big financial decisions." Nancy Burns et al., *The Public Consequence of Private*

In the employment sphere, gender inequity persists, and married women with children have lower earnings.⁶⁰ Family status has a greater impact on women than on men. The Supreme Court has historically permitted women's alleged role as childbearer and caretaker to justify exclusion from the practice of law, to justify a shortened workday, and to support exclusion from certain occupations.⁶¹ More recently, the Court has declared that pregnancy discrimination is not a form of sex discrimination.⁶² On the other hand, it has struck down an employer's attempt to treat women with children differently from men with children, and it has prevented an employer from excluding women from the workplace based solely on their childbearing capacity.⁶³ The various employment discrimination laws provide protection to women, although there remain wage gaps between men and women. Professor Carol Sanger has documented the regulations that encourage mothers to stay home with their children rather than leaving home to work.⁶⁴ While laws regulating parenting and employment have moved towards gender neutrality, they continue to have a differential impact on men and women when they do not change the status quo. In other areas, such as statutory rape and the rights of unwed parents, the Court continues to uphold sex-based distinctions. Moreover, because gendered values are enacted into law, women may continue to be disadvantaged even with gender-neutral laws.⁶⁵

II. MEN, WOMEN, AND PARENTAL IDENTITY

Despite increases in men's participation, parenthood remains a highly gendered concept in our culture, with different expectations for mothers than for fathers. The actual performance of caretaking work in the household reveals its gendered nature. The parameters of the parental role are established through legal and social norms and based in the development of the ideal parent during the nineteenth century.

Although the relevant laws are generally phrased in gender-neutral terms, application of the laws is gendered. Moreover, some laws, such as those concerning paternity establishment or consent to adoption, set out different rights

Inequality: Family Life and Citizen Participation, 91 AM. POL. SCI. REV. 373, 378 (1997). On the other hand, 65% of the wives surveyed reported that they were primarily responsible for paying bills. *Id.*

60. See generally Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155 (1991); Marion Crain, *Women, Labor, Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9 (1995); Branch, *supra* note 19.

61. *Goesart v. Cleary*, 335 U.S. 464 (1948); *Muller v. Oregon*, 208 U.S. 412 (1908); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

62. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974); see also Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

63. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206-07, 211 (1991); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

64. Sanger, *supra* note 18, at 464-483.

65. See generally ROBIN WEST, *CARING FOR JUSTICE* (1997).

and obligations for mothers and fathers. The law thus reinforces the gendered expectations of family members. And patterns of caretaking in the family show the implications of prescribing different roles for mothers and for fathers.

This section first examines the historical development of the home/market dichotomy, and then turns to contemporary structures that support this historical development, structures that are both external and internal to women.

A. *Historical Underpinnings*

Conceptions of the roles and responsibilities of the ideal parent and the ideal childhood have changed over the past two hundred years.⁶⁶ From the mid-nineteenth century until the late twentieth century, childrearing has been viewed as a female occupation. The association of women with children is long and complex, comprising individual actions and social reinforcement of those actions.⁶⁷ The nineteenth-century rhetoric of domesticity supported middle-class white women's familial roles as distinct from those of men; although the discourse of separate spheres has eroded, the concept remains, reinforced by different myths.⁶⁸ These myths are supported in U.S. culture and have been internalized by many women.

Republican motherhood demanded that women instill virtue into their sons and maternal training into their daughters.⁶⁹ The domestic sphere became increasingly important during late eighteenth- and early nineteenth-century America, as did women's role within it. Some historians have interpreted this focus on the home as empowering: "The doctrine of woman's sphere opened to women (reserved for them) the avenues of domestic influence, religious morality, and child nurture."⁷⁰ Correspondingly, women's roles became increasingly associated with maternity.⁷¹ For white middle-class women, the home was perceived as an affirmative source of power. Advice books repeatedly counseled women on the completeness of their "dominion."⁷² By the end of the nineteenth century, mothering became a professional status.⁷³ Domesticity

66. E.g., GROSSBERG, *supra* note 28, at 4-7; VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985); Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 *NEW ENG. L. REV.* 1113 (1997).

67. See Sanger, *supra* note 18; see also Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing about Motherhood*, in *REPRESENTATIONS OF MOTHERHOOD* 56, 64-66 (Donna Bassin et al. eds., 1994) (describing the struggles for maternal empowerment of women of color); Jennifer Nedelsky, *Reconceiving Autonomy*, 1 *YALE J.L. & FEMINISM* 7, 9 (1989) ("One of the oldest feminist arguments is that women are not seen and defined as themselves, but in their relationships to others."). See generally Dorothy E. Roberts, *The Genetic Tie*, 62 *U. CHI. L. REV.* 209 (1995).

68. This is an example of what Reva Siegel calls "preservation-through-transformation." Reva Siegel, *"The Rule of Love: Wife Beating as Prerogative and Privacy"*, 105 *YALE L.J.* 2117, 2119 (1996).

69. LINDA KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 229 (1980).

70. NANCY COTT, *THE BONDS OF WOMANHOOD* 200 (1982).

71. NANCY M. THERIOT, *MOTHERS AND DAUGHTERS IN NINETEENTH-CENTURY AMERICA* 18 (1996).

72. *Id.* at 23.

73. *Id.* at 125.

elevated women's status in society, so long as they remained in that home sphere.⁷⁴

Nonetheless, this special sphere constituted family life, not family labor.⁷⁵ Historian Jeanne Boydston traces the changing perception of housework from valuable labor that provided an economic contribution to the household to domestic labor that did not constitute work.⁷⁶ When men and women worked together on the farm, men still retained control and dealt with the outside world, yet women's contributions to the household and the farms were valued because that was where work occurred as well. As men left the household for outside work, work within the household, whether childcare or laundry or cooking, began to be perceived differently because it was performed for the family, rather than for a wage-paying market employer. This transition occurred as American culture developed new concepts of childhood; children were no longer means of production, but valued and treasured innocents.⁷⁷ The mother's role became increasingly important but separate from the waged labor world. Women thus gained power within the home, but only within the home; and their forms of power remained different from men's.⁷⁸

Historical studies of women's roles outside the home show that they have been marginalized when they sought to do anything but traditional women's work. Although women became quite active in voluntary organizations in the middle and latter parts of the nineteenth century, these organizations focused on issues linked to women, such as caring for poor widows and their children and child abuse.⁷⁹ When women organized volunteer societies, the objects of their charity were generally women and children in straitened circumstances.⁸⁰ Consequently, when they were active outside the home, women worked in volunteer organizations that had as their goals domestic improvements.⁸¹ Even in

74. LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 91 (1998) ("Within marriage, women gained greater control over reproduction and sexual relations . . . [S]ociety respected and protected women only insofar as they complied with an exacting ideal of virtuous and submissive womanhood.")

75. See Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L.J.* 1073, 1092 (1994).

76. JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* 17-18 (1990).

77. See SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 29-33 (1996); LADD-TAYLOR, *supra* note 1, at 3-4.

78. As an example of women's increasing power within the home, historian Daniel Scott Smith argues that the decline in married women's fertility shows their ability to exert control over childbearing issues. Daniel Smith, *Family Limitations, Sexual Control, and Domestic Feminism in Victorian America*, in *A HERITAGE OF HER OWN* 222 (Nancy Cott & Elizabeth Pleck eds., 1979). He argues "that the domestic roles of women and the perceptions that developed out of these roles were not an alternative to social change but presented a significant and positive development for nineteenth-century women." *Id.* at 236.

79. Martha Minow, "Forming Underneath Everything that Grows:" *Toward a History of Family Law*, 1985 *WIS. L. REV.* 819, 877-82 (1985).

80. *Id.*; see also ANNE FIROR SCOTT, *NATURAL ALLIES: WOMEN'S ASSOCIATIONS IN AMERICAN HISTORY* (1993).

81. See SCOTT, *supra* note 80; Minow, *supra* note 79. Molly Ladd-Taylor quotes the goals of the National Congress of Mothers, a organization active between 1890 and 1930 that sought to unify women who were active in mothers' clubs and parent-teacher associations: "To carry the mother-love and mother-thought

their voluntary work outside of the home, women were constrained by, and constrained themselves through, the ideology of domesticity. Their expertise in these areas was based on their domestic roles.⁸² At the turn of the twentieth century, a social movement based on “maternalism” focused on child welfare and immigration issues; the unifying precepts of this movement were based in beliefs of the uniqueness of women. Even the feminists of the Progressive Era, who focused on women’s self-fulfillment as individuals, rather than on women’s domestic roles, used the powerful rhetoric of motherhood.⁸³

When women “left” the domestic sphere for work, they were paid less than men for the same jobs; women’s occupations were devalued; women who worked were social outcasts.⁸⁴ Wages were for breadwinners, and employers did not see women as supporting their families.⁸⁵ Women, because of their childbearing capacities, merited protection in the workplace in a manner that men did not.⁸⁶ Ironically, for black women, the choice of job was circumscribed to domestic jobs; even though they were not supposed to mother their own children, they were much sought after to care for white children.⁸⁷ The majority of black married mothers, however, did not work outside the home, although the number who did was dramatically greater than for comparable white women.⁸⁸

The ideology that associated women with children placed serious limitations on women’s ability to work outside the home in order to establish power in other spheres. Women’s power outside the home depended on maintaining their connection to domesticity.⁸⁹ Women’s entire lives, then, were supposed to be located within the domestic sphere. Within this limited sphere, however, they did

into all that concerns or touches childhood in home, school, church or state; to raise the standards of home-life.” LADD-TAYLOR, *supra* note 1, at 45.

82. Minow, *supra* note 79, at 880.

83. LADD-TAYLOR, *supra* note 1, at 43, 104-07.

84. The cult of true womanhood celebrated the idle, passive woman. See COTT, *supra* note 70; HELENA MICHIE, *THE FLESH MADE WORD* (1990). Many women, of course, did not conform. See generally PHYLLIS PALMER, *DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945* (1989); Linda Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Images, and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 (1985) (discussing historical images of black women); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989).

85. ALICE KESSLER-HARRIS, *A WOMAN’S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 7 (1990).

86. See Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, UCLA WOMEN’S L.J. 457, 467-77 (1996) (contrasting Muller and Lochner).

87. Indeed, they were often employed as “domestics.” See TERA HUNTER, *TO ‘JOY MY FREEDOM’: SOUTHERN BLACK WOMEN’S LIVES AND LABORS AFTER THE CIVIL WAR* (1997) (reporting that in 1880 Atlanta, 98% of wage-earning black women were employed as domestics); Glenn, *supra* note 7, at 1339 (“Before World War II, the most common areas of nonagricultural employment for women of color were domestic service and its close relative, laundry work.”). Their employment was, of course, circumscribed by racialized gender stereotypes. See *id.* See generally JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985).

88. See generally DONNA FRANKLIN, *ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN-AMERICAN FAMILY* (1997).

89. Minow, *supra* note 79, at 875-76.

enjoy some actual and moral authority,⁹⁰ and they did gain respect for that authority. In the nineteenth century, women "claimed a new jurisdiction, the home, in which they exercised oversight and emotional power to an unprecedented degree."⁹¹

I do not conceive of the nineteenth-century development of a separate sphere as women's "choice"; rather, women's actions reflected their circumscribed roles. Nonetheless, the ideology of domesticity served to provide women a limited form of power, at least within the household.

B. Contemporary Structures

Notwithstanding changes in the percentages of women employed outside of the home, women are still expected to devote themselves to the home. Women's role is supported through a series of general cultural expectations, as well as internalized role expectations.⁹²

1. External Influences

There is an ongoing debate in contemporary culture over the propriety of mothers working (a debate with strong historical resonance).⁹³ The public exhibits ambivalence over whether women with young children should work. Indeed, when asked whether they respected mothers who worked full time outside of the home, or mothers who stayed at home full time with their pre-school children, forty-four percent of *working women* respected the stay-at-home mothers more, while only twenty-four percent were more respectful of mothers who worked full-time.⁹⁴ While public opinion is generally more approving towards mothers working outside of the home, more than fifty percent believe that a pre-school child is likely to suffer when her mother works.⁹⁵ Once women

90. The association of women with morality has been consistent for at least the past century, although it has not always been historically true. Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1151-59 (1990).

91. Sarah Barringer Gordon, "Our National Hearthstone: Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America," 8 YALE J.L. & HUMAN. 295, 314 (1996). This authority was a dramatic change from the world described by Blackstone at the turn of the century, when mothers were entitled only to "reverence and respect." Dolgin, *supra* note 66, at 1130 n.52.

92. There is obviously a close relationship between internal and external structures that support domesticity: each influences the other. While "external" is meant to refer to cultural forces, and "internal" is meant to refer to pressures within individual women's psyches, women are clearly influenced by social expectations. Nonetheless, in full recognition of the falseness of the dichotomy, it is a useful artifice for discussing different forms of pressure on women.

93. See WILLIAMS, *supra* note 8, for an elegant framing of this problem; see also Carol Tavris, *Goodbye to Momism*, N.Y. TIMES, May 3, 1998, § 7, at 16 (stating that contemporary feminists make the "exact same arguments about working mothers that modern feminists were raising in the 1970's—and that their predecessors were in the 1920's").

94. Kirstin Downey Grimsley & R.H. Melton, *Full Time Moms Earn Respect, Poll Says*, WASH. POST, Mar. 22, 1998, at A16. The survey appears not to have asked about stay-at-home fathers.

95. DAPHNE SPAIN & SUZANNE BIANCHI, *BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN* 182-83 (1996).

work outside the household, there is similar public ambivalence over whether women should earn more than men;⁹⁶ this sends the message that women should not be too successful outside the home.

There is a general set of societal proscriptions with respect to being a good parent.⁹⁷ These proscriptions are set forth in myriad forms, including through advice books,⁹⁸ in novels,⁹⁹ through other media,¹⁰⁰ and through transmission from one generation to another. In discussions of which parent will provide the parenting, it is assumed that the mother will do so. For example, in an analysis of the importance of having two wage earners in a family, an article with the gender-neutral title, "Lies Parents Tell Themselves About Why They Work," notes, "the second earner often doesn't contribute as much as people think. Two thirds of the wife's typically lower salary can disappear."¹⁰¹ By noting that it is the "wife's" salary that disappears, the article subtly suggests that the wife may not need to work, after all.

The idealization of the mother-child bond continues. Like many others, psychologist Brenda Hunter urges women to stay home with their children, to make the right decision to fulfill their womanhood.¹⁰² Most of the extremely popular manuals on child-raising praise the intensive and extensive mothering work that women are expected to perform.¹⁰³

When mothers do work in the wage labor market, accommodation of their parenthood often leads to perceptions that they are not "real" workers. In a

96. One national poll reported that 53% of women and 34% of men felt it would be a problem if a woman earned more than her husband, and 52% of divorced or widowed men believed it would be a problem. Sherri Dalphonse, *Love & Money*, WASHINGTONIAN, Feb. 2000, at 48. In slightly less than one-quarter of all marriages, women do earn more. *Id.*

97. *E.g.* Carl E. Schneider, *On The Duties and Rights of Parents*, 81 VA. L. REV. 2477, 2481-82 (1995); Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat: Poll Shows Sexes Agree on Pros and Cons of New Roles*, WASH. POST, Mar. 22, 1998, at A1; Michelle Singletary, *Survival Skills on One Salary: Stay-at-Home Parenting Requires Financial Forethought*, WASH. POST, Mar. 22, 1998, at H2. See generally PENELOPE LEACH, CHILDREN FIRST: WHAT SOCIETY MUST DO—AND IS NOT DOING—FOR OUR CHILDREN TODAY (1994). For historical perspectives on such proscriptions, see LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994); GROSSBERG, *supra* note 28; Sanger, *supra* note 9.

98. *E.g.*, HEIDI EISENBERG ET AL., WHAT TO EXPECT THE FIRST YEAR (2d ed. 1994); LEACH, *supra* note 97. For a critique of the images set forth in such advice books, see HELENA MICHIE & NAOMI R. CAHN, CONFINEMENTS (1997).

99. *E.g.*, SUE MILLER, THE GOOD MOTHER (1986); Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521, 525 (1988).

100. *E.g.*, BABY BOOM (1987) (starring Diane Keaton); *Mad About You* (NBC television broadcast, 1997-1999). Even computer games reinforce gendered roles. In the developing market for girls, games are likely to bear the names of *Barbie's Fashion Party*, rather than *Doom*. See Beth Berselli, *Girls Tired of Nuking Aliens Get Software to Call Their Own*, WASH. POST, Feb. 2, 1998, at A1; Katie Hafner, *Girl Games: Plenty and Pink*, N.Y. TIMES, Sept. 10, 1998, at G8.

101. Shannon Brownlee et al., *Lies Parents Tell Themselves About Why They Work: Few Topics Are as Important—And Involve as Much Self-Deception and Dishonesty—As Finding the Proper Balance Between Child-Rearing and Work*, U.S. NEWS & WORLD REP., May 12, 1997, at 58 (quoting Martha Bullen).

102. See generally BRENDA HUNTER, THE POWER OF MOTHER LOVE (1998).

103. Sharon Hays argues that Benjamin Spock, T. Berry Brazelton, and Penelope Leach, authors of perhaps the most widely-read child-rearing manuals "demand . . . intensive mothering. First, they assume childcare is primarily the responsibility of the individual mother. Second, the methods they recommend are child-centered, expert-guided, emotionally absorbing, labor-intensive, and financially expensive." HAYS, *supra* note 77, at 54.

telling comment, an editor of the New York Times recently explained that a woman with children will generally not be able to spend as much time and energy on her job as could a man, and thus, she is unlikely to be as successful as her male counterparts.¹⁰⁴ Although many people have attacked the editor for this blunt statement, her underlying point is right: going part-time, not staying as late as everyone else, and acting like a mother are held against women workers. There is enormous pressure for women who want to succeed professionally not to let mothering interfere with their work—the Mommy Track really does exist, in other words. Because the workplace requires a certain kind of “ideal worker,” when women do not perform in this manner, their work suffers.

The debate over mothers who work plays out on many different levels. Is it better for children when mothers stay home? Is a mother inevitably compromising her career if she doesn't put her job first? Although we who are working mothers hope the answers are no, there is plenty of evidence on both sides of these issues.¹⁰⁵ The issue of whether children are better cared for by their parents than by day-care providers remains highly contested, with more recent data suggesting that children in good day care thrive, thereby refuting earlier studies that had suggested otherwise.¹⁰⁶

In addition to the various myths that cabin women within the home, men are also subject to myths that enable them to elude responsibility. In *The Mother Dance*, popular author Harriet Lerner explains that, men don't worry as much as women do about making parental mistakes because they see their primary responsibility as breadwinning.¹⁰⁷

Another significant source of women's power within the home comes from the father's power not to assume various responsibilities. As Iris Marion Young argues, “Men fail to take equal responsibility for housework and childcare, often doing little of either, because they have the power not to.”¹⁰⁸ Men may even cultivate this incompetence, because they have had the power to do so, to assume a certain allocation of household work.¹⁰⁹ Men have colluded in the maintenance of the existing household structure. Indeed, this Article asserts that men must change and assume more power within the household.

104. Joan Beck, *Commentary: When Kids Get in the Way of Careers*, CHI. TRIB., May 28, 1998, at N21.

105. See, e.g., LEACH, *supra* note 98; Susan Chira, *Still Guilty After All These Years: A Bouquet of Advice Books for The Working Mom*, N.Y. TIMES, May 8, 1994, § 7, at 11.

106. See generally NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT, THE NICHD STUDY OF EARLY CHILDCARE (1998) (hereinafter NICHD STUDY).

107. See generally HARRIET LERNER, *THE MOTHER DANCE: HOW CHILDREN CHANGE YOUR LIFE* (1998).

108. Iris Marion Young, *Mothers, Citizenship, and Independence: A Critique of Pure Family Values*, 105 ETHICS 535, 545 (1995).

109. See FRANCINE DEUTSCH, *HAVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS* 73-81 (1999) (detailing strategies by which men resist taking responsibility for childcare, such as praising their wives' work).

2. Internal Influences

Women continue to view themselves as mothers, and to make decisions to support that role. At an early age, girls learn the importance of caring for others.¹¹⁰ As Rhona Mahony shows, women train themselves to become the primary caretaker through the choices they make with respect to education and work and long before they find a partner.¹¹¹ Girls' decisions not to take math in high school are related to the professions that they will ultimately choose, one that will cause them, not their children's fathers, to drop out of the workplace.¹¹² In college, women face a strong peer culture that values sexual attractiveness and that encourages women to temper their career aspirations.¹¹³ In order to attain a relationship with a man, many women who entered college with strong professional aspirations tend to relinquish those goals.¹¹⁴ When they work, women also specialize in female occupations that are lower-paying than male occupations, notwithstanding comparable college graduation rates.¹¹⁵ Although workplace participation by women with young children has increased dramatically,¹¹⁶ they are far more likely to work part-time.¹¹⁷ More than two-thirds of all part-time workers are women, and women constitute almost seventy percent of all "voluntary" part-time workers.¹¹⁸ Women between the ages of twenty-five and forty-four are more than eight times as likely as men of the

110. WEST, *supra* note 65, at 81.

111. MAHONEY, *supra* note 26; VICTOR FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 43 (1988) ("Under current conditions in the United States, socialization for the roles of wife and mother can . . . affect the choices women make in school and in the labor market, choices that limit their lifetime earning power."). Law and economics scholars, as well as their critics, have looked at the family to examine the alleged logic of role differentiation. *E.g.*, Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119 (1997).

112. MAHONEY, *supra* note 26, at 137. She recommends that parents who want their daughters to have financial independence should "insist on one simple discipline: That their daughters take at least three years of math in high school." *Id.*

113. DOROTHY C. HOLLAND & MARGARET A. EISENHART, EDUCATED IN ROMANCE: WOMEN, ACHIEVEMENT, AND COLLEGE CULTURE 8, 223-224 (1990).

114. *Id.* Based on a study of college students at two different schools, Holland and Eisenhart explained that "the peer culture established an ethos for women that emphasized romantic relationships with men as a major route to self-worth and prestige." *Id.* at 118. By the time they left college, most women in the study seemed to have "willingly scaled down their aspirations for careers and entered into marriage in economic positions inferior to their husbands." *Id.* at 5.

115. Kristin McCue & Manuelita Ureta, *Women in the Workplace: Recent Economic Trends*, 4 TEX. J. WOMEN & L. 125, 149-151 (1995); BLAU, *supra* note 8, at 125-29. The Sears case dramatizes how women's workplace choices lead to lower earning capacity. See *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988). See generally WILLIAMS, *supra* note 8.

116. McCue & Ureta, *supra* note 115, at 135, 136.

117. Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799, 804 (1995); *Social Security and Women: Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 101st Cong. (statement of Joan Entmacher, Vice-President, National Women's Law Center) [hereinafter Entmacher] (42% of mothers with children under six were employed full-time compared to 90% of fathers with children under six, and 18% of mothers with children under six, compared to 3% of such fathers, were employed part-time).

118. Bookman, *supra* note 117. Voluntary workers are those who have chosen, for whatever reason, not to work full-time. See Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 776 (1995).

same age to work part-time, and the data suggest that this is due to childrearing responsibilities and choices.¹¹⁹ The majority of women with children younger than five either stay at home or work part-time.¹²⁰ Only two percent of fathers of pre-schoolers, compared to twenty percent of mothers, allowed child-related concerns to affect their work schedules.¹²¹ And, although the wage gap between men and women has declined, as women get older, their earnings decrease relative to their male age cohorts because of interruptions in their participation in the workplace.¹²²

Women acquiesce, or “choose”¹²³ this lifestyle, sometimes consciously, sometimes not. Although women claim to want to share household chores equally with men, they remain reluctant to do so.¹²⁴ When women want to spend more time with their children, there is endless advice on how to do so. For example, in the “Can You Help?” section of a summer 1998 issue of *Parents* magazine, the female questioner wanted suggestions on how she could stay home with her baby. None of the eight responses were from men, and they focused on how the mother could restructure her life (clip coupons, etc.) to live on her husband’s income.¹²⁵

The question remains: why do women “collude” in this situation?¹²⁶ Women’s earlier decisions may leave them feeling weak, and they may experience guilt about working outside of the home.¹²⁷ Certainly, women feel pressure from societally-gendered expectations of mothering. And men are often more than willing to let women have control. But women’s “choice” is also partially due to our unwillingness to give up power in the domestic sphere.

Even women who wanted everything—to be workers, wives, and parents—are surprised by the overwhelming desires they feel to become mothers; their “hysterical narratives” culminate in the epiphany that they have always wanted to be wives and mothers.¹²⁸ Hysterical narratives develop in three parts: in the first phase, women’s desire to stay home is constructed as inevitable; in the second phase, anything that interferes with that desire is a symptom of a lack of

119. *Id.* at 775.

120. Peggy O’Mara, *Homing in on Motherhood: Stay-at-home Mothers*, 66 *MOTHERING* 32 (1993).

121. Ellis Cose, *The Daddy Trap: After All the Talk about Equality of the Sexes, A Man is Still Expected to Be the Breadwinner*, CHI. TRIB., June 18, 1995, at C12 (citing 1991 Census Bureau study).

122. McCue & Ureta, *supra* note 115, at 153. Indeed, almost half of the wage gap between men and women is due to women’s different, and interrupted, amount of work experience. Audrey Light and Manuelita Ureta, *Early Career Work Experience and Gender Wage Differentials*, 13 *J. LAB. ECON.* 121, 143 (1995).

123. Choice is a problematic concept. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 *CORNELL L. REV.* 1169, 1193 n.140 (1998). On the culture of choice with respect to working women, see WILLIAMS, *supra* note 8; Carle, *supra* note 13, at 250.

124. Victor Fuchs quotes a 1983 Erica Jong statement, in which she notes that women are unwilling to “relinquish” their home power. FUCHS, *supra* note 111, at 70-71.

125. “Can You Help?,” *PARENTS*, July 1998, at 20.

126. See Nigella Lawson, *So Much for “New Man,”* *TIMES* (London), Oct. 21, 1995, (Page Unavail.), 1995 WL 7705831.

127. See *id.*; Chira, *supra* note 105.

128. MICHIE & CAHN, *supra* note 98, at 150-51.

femininity; and finally, the narratives culminate in the individual woman's realization that she has, in fact, always wanted to stay home with her children.¹²⁹

In her book, *Surrendering to Motherhood*, Iris Krasnow explores her lifelong search for fulfillment, which remained unsatisfied by gurus, religion, boyfriends, and a high-powered job; not until she became a wife and the mother of four boys, and gave up her full-time job, did she find a "lasting high."¹³⁰ She somewhat apologetically explains that: "I would never have dreamed in 1975 as a junior at Stanford fired up by radical feminism that two decades later I would be warmed to the heart by calling for delivery of an extra-large, extra-cheese pizza under the name of "Mrs. Anthony."¹³¹ Her decision to devote herself substantially to her family came after watching other mothers (not fathers) who felt unable to be both good mothers and good workers.¹³²

Similarly, *Motherhood Deferred*, by popular author Anne Taylor Fleming, is an account that illustrates the progress of the hysterical narrative. The book traces the author's personal journey away from maternity, her late discovery of her strong maternal instinct, and then her (futile) attempts to overcome infertility. During her treatment in the late 1980s, as she approached age forty, she questioned her earlier choices not to have children. She wonders,

Had I been led astray, had we, by bruised and bitter women who had warned us away from something magic, important, noble even? Had we, in the name of liberation, simply ended up aping the cultural dismissal of women, femaleness, motherhood, our mothers? . . . And who—what women, what men, what pieces of culture—had . . . helped push me so emphatically away from motherhood for so long?¹³³

Her questions blame a surrounding culture for her own subjugation of maternal feelings; she seems to accept that the feminists whom she revered encouraged her to believe that she could choose to have a career and then to have children. Yet her questions also reveal the first phase of the hysterical narrative, that all women want to have children and to stay with them, and, moreover, that it is "noble" to reproduce. Wanting to wait exemplifies the second stage, because "liberation" is equated with being anti-mother. Finally, in the third phase of her narrative, she recognizes that she wanted children all along, that she has always wanted to be a mother. Fleming seems to be cautioning women not to wait too long to fulfill their noble dreams of becoming mothers. These women are choosing—and are urging others to choose—a lifestyle of domesticity.

129. *Id.*

130. IRIS KRASNOW, *SURRENDERING TO MOTHERHOOD: LOSING YOUR MIND, FINDING YOUR SOUL* 2-3 (1997).

131. *Id.* at 190.

132. *Id.* at 110. The hysterical narrative supports women staying home as mothers.

133. ANNE TAYLOR FLEMING, *MOTHERHOOD DEFERRED* 17, 23 (1994).

The socialization in which women are expected to become mothers is difficult to escape. It is more "comfortable" for a woman to adhere to the traditional gender stereotype than to share fully in the parenting.¹³⁴ Women are able to convince themselves and, as the motherhood books show, will try to convince others that they want to stay home or do most of the childcare and household work.¹³⁵

III. COMPLEXITIES OF WOMEN'S POWER WITHIN THE HOME

This section discusses the positive and negative aspects of women's power within the household.¹³⁶ Caring for children is a wonderfully rewarding experience that women should be justifiably reluctant to relinquish. On the other hand, being unable to see the importance of allowing others to share in that power is damaging. And, failing to recognize reasons for the reluctance to share power other than the sheer joy of maternity is also damaging.

I believe that childbirth and childrearing are sources for, and of, women's power within the home.¹³⁷ Doubtless part of this power stems from the cultural mystification of the mother/child bond that typically surrounds pregnancy, childbirth, and nursing. This mystification leads many to assume not only that women should exercise power over their children, but also that men cannot. Women's only dominion has been over children, so, historically, women have become associated with this kind of power.¹³⁸ Thus, the source of women's power may be more derivative than affirmative; this is the sphere in which women have been "allowed" to act within a patriarchal society.¹³⁹

This power is, obviously, quite complex. It is, of course, affirmative; women want to build and cherish their relationship with their children, protecting it from encroachment even while they seek equal participation within, and outside of, the household. While I conceive of it as power over the household, it includes

134. BETTY CARTER & JOAN PETERS, *LOVE, HONOR, NEGOTIATE: MAKING YOUR MARRIAGE WORK* 33 (1996).

135. *Id.* at 63. I am not accusing women of false consciousness, nor of being unable to make valid choices. I am simply arguing that the surrounding cultural context reinforces the belief that women should do the mothering.

136. Power within the home may relate to financial issues as well. See Jon Puhl, *The Allocation of Money and the Structuring of Inequality Within Marriage*, 31 *SOC. REV.* 237, 254 (1983) (distinguishing between control of the large financial division-making issues, generally handled by the primary wage-earner and management of household budgeting, generally handled by the dependent spouse); see also J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 *LAW & CONTEMP. PROBS.* 99, 101-04 (1993); Lee Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 *UTAH L. REV.* 537, 556 (1996). See generally Carite B. Burgoyne, *Money in Marriage: How Patterns of Allocation Both Reflect and Conceal Power*, 38 *SOC. REV.* 634 (1990).

137. Joan Williams notes the "traditional view that real women don't need power" and points out that "[w]omen's traditional roles have always required them to be able to wield power with self-confidence and subtlety." WILLIAMS, *supra* note 8, at 843.

138. Minow, *supra* note 79, at 819; SCOTT, *supra* note 80.

139. CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 39 (1987) ("Women have a history all right, but it is a history both of what was and of what was not allowed to be."); see also Minow, *supra* note 79; COTT, *supra* note 70.

power over men's participation and children's roles within the family, as well as the woman's own perception of herself as a mother. And mothering may represent other forms of power, depending on the culture.¹⁴⁰

A. Power Within the Home—The Positive Side

1. Emotional Satisfaction

For women, childbearing and childrearing responsibilities are often envisioned as a source of injustice and oppression.¹⁴¹ Simultaneously, however, they are also envisioned as a source of great joy.¹⁴² Some feminists argue that women's lives are defined by their roles as childbearers and caretakers.¹⁴³ It is because of the capacity to mother and to nurture that many women's lives are characterized by interconnectedness and relational thinking. They argue that women are closer to their children than men.¹⁴⁴ Marie Ashe writes that the law "fails to recognize certain experiences that, for many women, are constitutive of knowledge—perhaps of truth—and of personhood."¹⁴⁵

Regardless of whether women are especially capable of caring for children, being a mother is a joyous experience for most women.¹⁴⁶ Motherhood is justifiably celebrated as rewarding and fulfilling (it is, of course, also frustrating and enraging).¹⁴⁷ Staying home to care for children can be an affirmative and affirming choice for women able to do so; for poor women and many African-American women, it has been in many ways an unaffordable luxury.

140. Roberts, *supra* note 7, at 55, 57-58; Devon W. Carbado, *Motherhood and Work in Cultural Context: One Woman's Patriarchal Bargain*, 21 HARV. WOMEN'S L.J. 1, 17 (1998).

141. Catharine MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759 (1987); Maureen A. Sweeney, *Between Sorrow and Happy Endings: A New Paradigm of Adoption*, 2 YALE J.L. & FEMINISM 329, 334 (1990).

142. See generally Ashe, *supra* note 99; Mary Becker, *Maternal Feelings, Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992). Cultural feminists celebrate women's connection to others as the basis for a progressive legal system. E.g., Robin West, *Love, Rage, and Legal Theory*, 1 YALE J.L. & FEMINISM 101, 102 (1989). See generally MOTHERING: ESSAYS IN FEMINIST THEORY (Joyce Trebilcock ed., 1983); NEL NODDINGS, *CARING, A FEMINIST APPROACH TO ETHICS AND MORAL EDUCATION* (1984); FINEMAN, *supra* note 4.

143. E.g., SARA RUDDICK, *MATERNAL THINKING* (1989); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (arguing that women's biological and cultural differences from men are real); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 142 (1987).

144. Lacey, *supra* note 33, at 170. ("My belief that women are more connected to their children than men may seem to conflict with my rejection of the 'biological feminist' emphasis on gestational motherhood. But my assertion is based on the undisputed fact that women are socialized from birth to be mothers and men are not.") I agree with Professor Lacey that the socialization of girls into mothering is much stronger than the comparable socialization of boys into fathering.

145. Ashe, *supra* note 99, at 525.

146. Sanger, *supra* note 18.

147. LERNER, *supra* note 107, at 241-253 (noting the wildly varying emotions that mothers feel toward their children, ranging from fury to hatred to guilt to adoration).

2. Gender Performance

Some sociologists suggest that women perform household work as a means of producing gender, of reinforcing their own identity as women.¹⁴⁸ This "gender construction" model is concerned with the creation of gender differences, specifically how femininity and masculinity are produced and reproduced in a dynamic fashion rather than established as pre-determined categories.¹⁴⁹ By this account, gender is "something that one *does*, and does recurrently, in interaction with others."¹⁵⁰

The gendered nature of work is not a static identity, but is rather created and recreated through women's actual performance of childcare and housework.¹⁵¹ That is, not only are women supposed to do household work, but also, by doing this work, they affirm their own gender identification and reinforce the work's gendered identification.¹⁵² Women are supposed to mother; to not mother calls into question a woman's femininity.¹⁵³ Thus, many women seek out opportunities to perform gender-associated tasks in order to affirm their identity as women. Staying home to care for children reinforces motherhood as well as women's right to expect financial support from men.¹⁵⁴ Even when they do work, women may engage in "gender display (in this case participation in household labor) that would appear irrational if housework were conceptualized only as a means of producing a meal or a clean house, rather than a means of producing gender itself."¹⁵⁵ Housework symbolizes women's domesticity and role conformance.¹⁵⁶ Breadwinning symbolizes men's conformance; many employed women resist seeing themselves as primary wage-earners, thereby resisting the male role.¹⁵⁷

148. Beth Anne Shelton & Daphne John, *The Division of Household Labor*, 22 ANN. REV. SOC. 299, 312 (1996). See also Naomi Cahn, *Gendered Performances*, 44 VILL. L. REV. 525 (1999).

149. JEAN L. POTUCHEK, WHO SUPPORTS THE FAMILY? GENDER AND BREADWINNING IN DUAL-EARNER MARRIAGES 26 (1997).

150. Candace West & Don Zimmerman, *Doing Gender*, 1 GENDER & SOC. 125, 140 (1987).

151. JUDITH BUTLER, GENDER TROUBLE 136-41 (1990) (discussing gender as socially constructed through performance).

152. West & Fenstermaker, *supra* note 148, at 151, 162-63; West & Zimmerman, *supra* note 151, at 144.

153. DEVAULT, *supra* note 6, at 119.

154. POTUCHEK, *supra* note 149, at 195.

155. Shelton & John, *supra* 148. In her book discussing women's meal production, Marjorie Devault concludes that women's "feeding work" is not just created by the family, but also helps to create the family. DEVAULT, *supra* note 6, at 236. She also argues that, because family feeding is conceived of as women's work, it produces gender in the family. *Id.* at 95. She explains: "activities like feeding a family are understood by those in families as 'properly' women's work, and therefore become resources for the production of gender. By feeding the family, a woman conducts herself as recognizably womanly." *Id.* at 118.

156. "It is not simply that household labor is designated as 'women's work,' but that for a woman to engage in it and a man not to engage in it is to draw on and exhibit the 'essential nature' of each. What is produced and reproduced is not merely the activity and artifact of domestic life, but the material embodiment of wifely and husbandly roles, and derivatively, of womanly and manly conduct." West & Zimmerman, *supra* note 150, at 144; see also Ertman, *Commercializing Marriage*, *supra* note 5, at 91 ("drag queen and homemaker are both representations of idealized femininity").

157. POTUCHEK, *supra* note 149, at 63-64. This concept of performance, of constructing identity through interaction and display, has become a consistent theme in feminist critical theory. *E.g.*, Leila J. Rupp & Verta Taylor, *Forging Feminist Identity in an International Movement: A Collective Identity Approach to Twentieth-*

It is difficult to determine the gender display model's validity. Yet Professor Julie Brines examined data drawn from the University of Michigan's Panel Study of Income Dynamics.¹⁵⁸ She found that the more husbands economically depend on their wives, the less likely they are to perform housework. This is, she believes, consistent with the gender performance model because men are reluctant to engage in the feminine occupation of housework.¹⁵⁹ Their male status could be jeopardized by taking responsibility for housework.

Within the African-American community, childcare and other forms of household work may have implications for the community's continuity. Professor Dorothy Roberts suggests that housework, rather than reinforcing prescribed roles, is "a form of resistance, directly benefiting Black people rather than their white masters and employers alone . . . social reproduction carries the added importance of preserving cultural traditions under assault by the dominant society."¹⁶⁰ Unlike white women's performance of the same work which reaffirms gender and race, African-American mothering and household work challenges dominant stereotypes. It is gender performance, but against a background of race discrimination. It disturbs existing conceptions of African-American women who were (are) excluded by the myth of domesticity. Again, however, it is women who perform these responsibilities, whether as acts of resistance against, or in compliance with, a white culture.

3. *The Economically Efficient Explanation*

The standard law and economics approach to marriage is that women perform the caretaking role because they are better at it than men. Gary Becker and Richard Posner contend that women have an advantage over men when it comes to bearing and raising children.¹⁶¹ They argue, first, that labor specialization in which one family member works primarily in the market sector and the other works in the household sector, maximizes utility.¹⁶² Second, Becker argues men and women's intrinsic differences dictate that women are more biologically suited to staying home and raising the children while men are better suited to market production.¹⁶³

Century Feminism, in 24 SIGNS: J. WOMEN IN CULTURE & SOC'Y 363, 365 (1999) ("The concept of collective identity . . . allows an understanding of feminism as a political identity that is continuously negotiated and revised . . . as a characteristic that is constructed, activated, and sustained through interaction in social movement communities").

158. Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 AM. J. SOC. 652 (1994).

159. *Id.* at 682-83.

160. Roberts, *supra* note 7, at 69-70.

161. GARY BECKER, A TREATISE ON THE FAMILY 21-22 (1981); GARY BECKER, A TREATISE ON THE FAMILY 135 (1991 rev. ed.); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 155-57 (5th ed. 1998); *see also* Estin, *supra* note 59, at 1002.

162. GARY BECKER (1981), *supra* note 161, at 14-21.

163. *Id.* at 21-22. Sociobiologists agree with this second point. Posner points out two causes for women staying home. First, sex discrimination in the labor market means that women earn less than men. Second,

Women inevitably have different preferences for market jobs.¹⁶⁴ Women specialize in building human capital, while men specialize in market capital.¹⁶⁵ Traditional gender roles, in which the woman stays home while the man is the breadwinner, provide the most efficient mechanism for family resource allocation. This allocation is the way of measuring marital success because "happiness or utility or welfare [are] synonyms."¹⁶⁶ Thus women perform household roles because it is not only economically efficient, but also because they "choose" to do so. Although he disagrees with the explanatory power of the Becker model, Victor Fuchs also uses economic theory to argue that women care more about raising children than do men and are thus at a comparative economic disadvantage because they experience stronger conflicts between work and family.¹⁶⁷ The specialized roles reinforce women's primary relationship to children in ways that continue to disadvantage them even as they move to relatively more independent roles.

B. Consolidating Power—the Negative Side

Power within the household is an assertion of identity. Although caring for children may be joyous and while it may also reinforce identity, we must question the identity it reinforces. Moreover, the economic efficiency of women providing childcare depends on a series of questionable assumptions. I want to emphasize again that the nature of power within the household is quite complex. While battered women have almost no such power or authority within the family and may be unable to leave an abusive situation,¹⁶⁸ paradoxically their batterers fear them because of their perceived power.

1. Exercising Power—Too Much Power

Contemporary feminists exhibit ambivalence about women's power within the home from several perspectives. Some feminists argue that simple equality, with men and women splitting all child-care, is the appropriate goal since in that

because "women bear the children and are better adapted to child (especially infant) care, the wife's costs of household production will be lower than the husband's." POSNER, *supra* note 161, at 157.

164. Gillian K. Hadfield, *Household at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 93-94 (1993) (discussing what she terms the "supply-side preference" theory).

165. GARY BECKER (1981), *supra* note 161, at 23.

166. POSNER, *supra* note 161, at 157.

167. FUCHS, *supra* note 111, at 3-4, 68.

168. As Martha Mahoney shows, however, battered women are capable of taking extraordinary steps to care for and protect their children. Mahoney, *supra* note 26. The law views battered women as responsible for their children, holding them liable for failing to protect, regardless of the actual power situation within the family. E.g., Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579 (1998); Amy R. Melner, *Rights of Abused Mothers vs. Best Interest of Abused Children: Courts' Termination of Battered Women's Parental Rights Due to Failure to Protect*, 7 S. CAL. REV. L. & WOMEN'S STUD. 299 (1998); G. Kristian Miccio, *A Reasonable Battered Mother?: Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89 (1999).

scenario neither the father nor the mother has a disproportionate amount of power.

Many feminists agree that women's performance of household work privileges men. When women perform childcare, this frees men from responsibility for those tasks and gives men their personal service providers.¹⁶⁹ Patriarchy creates and benefits from women's help at home. The gendered division of labor enables men to perform well at their jobs. Given a choice between no power and power in the home, women will choose power within the home.¹⁷⁰ Having made that "choice," women place themselves in a weaker bargaining position that further erodes their power.

Catharine MacKinnon shows a strong impatience with placing a high value on women's nurturing behavior.¹⁷¹ MacKinnon tends to characterize the "nurturance" touted by some feminists as merely the learned behavior of victims.¹⁷² She would characterize cultural feminists' positive valuation of such behaviors as "false consciousness."¹⁷³ MacKinnon's analysis refuses to recognize positive and empowering experiences that some women report even within the limits imposed by motherhood as a cultural institution.¹⁷⁴ Her discourse angers many women who read it as denying or erasing the significance of their central relationships with their children.¹⁷⁵ Nonetheless, her claim of "false consciousness" must be taken seriously. Do women celebrate their power within the home because they have nothing else to celebrate?

Because the home and children are women's responsibilities, mothers have been blamed for exerting too much or too little power over their children. When children become juvenile delinquents or go on welfare, the explanation centers on how they were mothered.¹⁷⁶ An implicit assumption of western political theorists has been that it is the mother's responsibility to raise children who are well-adjusted citizens.

Beginning in the 1930s, child guidance professionals began to blame mothers for their children's neuroses and psychoses.¹⁷⁷ In a study of mental

169. HAYS, *supra* note 77, at 163; WILLIAMS, *supra* note 8; cf. ABRAMS, *supra* note 123, at 1171 (emphasizing the importance of grounding an analysis of sexual harassment in women's subordination to men).

170. HIRSHMAN & LARSON, *supra* note 74, at 26-27. Feminist game theorists emphasize the constraints on women's "choices." See generally MAHONEY, *supra* note 26.

171. MacKinnon asserts: "Women value care because men have valued them according to the care we give them." MACKINNON, *supra* note 139, at 39; see also Catharine A. MacKinnon, *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFF. L. REV. 11, 44 (1985).

172. MACKINNON, *supra* note 139, at 39.

173. *Id.*

174. Brenda Waugh, *When Did We Last Meet? Let Us Now Speak*, 12 LEGAL STUD. F. 221 (1988) (reviewing MACKINNON, *supra* note 139).

175. For further discussion of this point, see Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993); see also Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 LAW & SOC. INQUIRY 373 (1991) (reviewing MACKINNON, *supra* note 139 and CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989)).

176. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 103 (1993).

177. Kathleen W. Jones, "Mother Made Me Do It": *Mother-Blaming and the Women of Child Guidance*, in "BAD MOTHERS": THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 99, 101 (Molly Ladd-Taylor &

health journal articles published between 1970 and 1982, researchers found that mothers were consistently blamed for their children's behaviors, ranging from "bed-wetting to schizophrenia."¹⁷⁸ Indeed, mothers are blamed when their children become murderers, regardless of how they had behaved towards their children.¹⁷⁹ Simply acting as a mother may lead to catastrophic results. Because of their power as mothers, women become culpable for their children's failures. Yet when women fail to exercise their power to protect their children, they are blamed for their inaction. The mother's actual situation provides no excuse if she failed to protect her child in the manner approved by child neglect authorities.¹⁸⁰ Although women who fail to protect their children from violence are often battered themselves, this becomes irrelevant if they have failed to prevent abuse against their children.¹⁸¹ Mothers are blamed without recognizing the complexity of their circumstances; they are either completely guilty or completely innocent.¹⁸²

When women seemingly step out of their roles as good mothers, for example, by taking drugs during pregnancy, they are condemned for their non-conformance regardless of any actual harm experienced by their children.¹⁸³ Similarly, women who "neglect" their children by failing to provide adequate housing are punished by having their children taken away. Thus, poverty is not a basis for helping mothers keep their children, but for punishing them.¹⁸⁴

2. Gendered Identities?

Mothers may be unwilling to cede power within the household for a variety of reasons besides the pleasures that they experience from childcare. This reluctance may stem from jealousy, guilt that they are not adequately performing their gender roles, or simply from an unwillingness to give up the power that they experience.

Laura Umansky eds., 1998) [hereinafter BAD MOTHERS]; Jane Taylor McDonnell, *On Being the "Bad" Mother of an Autistic Child*, in BAD MOTHERS 220, 225.

178. Paula Caplan, *Mother-Blaming*, in BAD MOTHERS, *supra* note 177, at 127, 135.

179. Su Epstein, *Mothering to Death*, in BAD MOTHERS, *supra* note 177, at 257.

180. Annette R. Appell, *On Fixing "Bad" Mothers and Saving their Children*, in BAD MOTHERS, *supra* note 177, at 356, 376; Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect: A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287, 293 (1998).

181. Roberts, *supra* note 176, at 111-12.

182. Mary Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 16 (1995). Professor Becker would hold women liable for failure to protect because they are stronger than their children. *Id.* at 17.

183. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 159-62 (1997).

184. See generally Daan Braveman and Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMPLE L. REV. 447; Naomi Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L. J. 1189 (1999).

a. Guilt and Gender Display.

Susan Chira describes how she experienced “waves of unusual jealousy and self-doubt,” rather than relief, when her husband assumed some of her formerly maternal responsibilities.¹⁸⁵ Instead of happily sharing her role, she felt (temporarily) insecure in it. Yet when mothers fail to relinquish control, it can destroy the family. Arlie Hochschild tells the following story of how one woman’s marriage ended:

[W]hen the baby arrived, and Diane [the wife] wanted to stay home for six months to take care of him, her husband objected . . . She said her husband had suffered a blow at work, that she had criticized him strongly . . . He had been extremely involved with the birth of his son, and wanted to share the care of him. Perhaps if things were not going well at work, he wanted to devote more of his identity to being a father. It was when Diane began to crowd him out of his role at home that Jim began to urge her back to work. She would not share the power at home with him or appreciate the identity as a father he was trying to build....Jim walked out on his wife and nine-month-old baby...If women want men involved at home, they will have to share the power and the respect for the work it takes.¹⁸⁶

Diane got what many women want—a man who wanted to spend more time taking care of his child. And, like some women, she reacted by seeking to protect the power that she had within the home by discouraging and ultimately alienating that man. Her identity depended on acting as the primary caretaker and perhaps on her husband’s continuing to act as the breadwinner. Women thus may undercut men’s attempts to nurture children.¹⁸⁷

In another study of families, Barnett and Rivers suggest that working mothers may find it particularly hard to relinquish childcare because women view children as their responsibility or feel guilty for not being good-enough mothers. “A working mother may feel that the end of the day is her time with the kids, and may be more reluctant to let the father intervene . . . fathers may back off, having internalized the social message that a man’s proper role is to keep a respectful distance away.”¹⁸⁸ Even in light of the overload that many working women experience, they are still reluctant to cede too much responsibility to

185. SUSAN CHIRA, *A MOTHER’S PLACE: CHOOSING WORK AND FAMILY WITHOUT GUILT OR BLAME* xv (1998).

186. ARLIE HOCHSCHILD, *THE SECOND SHIFT* 213-214 (1989).

187. Brownlee et al., *supra* note 101, at 58 (quoting Dr. William Pollack).

188. BARNETT & RIVERS, *supra* note 18, at 226; **INCOMPLETE SITE: MOTHERS WHO WORK** at 82, 105.

their husbands.¹⁸⁹ Women generally feel that they are better at understanding and caring for their children than are their husbands. Even when a woman and a man earn approximately equal amounts, it is the woman who stays home from work to take care of a sick child because she feels more competent than her husband.¹⁹⁰ Women are often reluctant to trust their husbands with the responsibility of providing adequate care.¹⁹¹

Psychologists have labeled this phenomenon of retaining power within the household "gatekeeping."¹⁹² The mother may try to control the father's childcare role by limiting his participation.¹⁹³ In one of the first studies attempting to measure this behavior, researchers found that approximately 20% of their sample were maternal gatekeepers.¹⁹⁴ Mothers may not actively discourage fathers from assuming more responsibilities; instead, they may act more subtly by criticizing men for not doing a good job when they take care of the children.¹⁹⁵ Because fathers are often willing to relinquish control, the situation becomes collusive.¹⁹⁶ Fathers have recourse to a series of behaviors, such as ignoring requests for their help in childcare, claiming incompetence, and complimenting their wives on their housecare.¹⁹⁷

In study after study, women express strong desire for men to share parenting equally.¹⁹⁸ Nonetheless, women often accept the gendered situation and

189. MACCOBY & MNOOKIN, DIVIDING THE CHILD, SOCIAL AND LEGAL DILEMMAS OF CUSTODY 26 (1992); Lisa Bellein, *The Grapes of Marital Wrath*, N.Y. Times, Mar. 15 2000, at G1.

190. Liza Burby, *When a Child is Sick, Who Stays Home?*, NEWSDAY, Jan. 18, 1997, at B1 (observation of Joan Atwood, Director of Hofstra University's graduate program in marriage and family therapy). A study of who cares for children aged six to ten when they are found that mothers stayed home in 85% of cases, and fathers in 6%. *Id.* Another study found that 83% of mothers stay home with a sick child, compared to 22% of fathers. Margaret Carlson, *Does He or Doesn't He?*, TIME, Apr. 27, 1998, at 22.

191. Ron Taffel, *Five Secrets of Good Parents*, PARENTS, July 1998, at 109; HAYS, *supra* note 77, at 101.

192. R. WILLIAM BETCHER & WILLIAM S. POLLACK, IN A TIME OF FALLEN HEROES: THE RECREATION OF MASCULINITY 236 (1993); see also CHIRA, *supra* note 185, at 248 (citing MAHONEY, *supra* note 26, at 109).

193. Malin, *supra* note 2, at 1067; Sarah M. Allen & Alan J. Hawkins, *Maternal Gatekeeping: Mothers' Beliefs and Behaviors that Inhibit Greater Father Involvement in Family Work*, 61 J. MARRIAGE & FAM. 199, 200 (1999).

194. *Id.* at 209. The authors note many limitations to their study, such as the fact that it does not measure paternal gatekeeping in other contexts, the derivation of maternal gatekeeping (it may result from paternal behavior, rather than be caused by it), and a selection bias, because fewer than half of the women in the study returned their survey instruments. *Id.*

195. BETCHER & POLLACK, *supra* note 192, at 236. They explain that the process of gatekeeping was generally:

[S]ubtle, such as handling the baby to the father at an inopportune moment and then saying, "Oh dear, don't hold her like that," . . . Often the father, who already felt inadequate, would unconsciously collude by hastily giving the baby to his wife and then backing off. With men and women increasingly invading each other's traditional "turf," it is understandable that women may feel inclined to maintain some control over the household, especially over parenting.

Id.; see also T. Berry Brazelton, "What do We Do Now?" *Adjusting to Your Newborn*, CHATTANOOGA NEWS-FREE PRESS CO., June 5, 1996 ("gatekeeping . . . [may] make[] the father feel shut out"); Mary Jo Kochakian, *New Mothers Should Resist "Gatekeeping."* HARTFORD COURANT, Aug. 8, 1995, at E1 ("Women do [gatekeeping] all the time, even though it is inimical to what they say they want—a partner fully involved in the work of having a family").

196. Alison Bass, *Making Room for Fathering*, CHI. TRIB., May 5, 1988, at C2.

197. FRANCINE DEUTSCH, HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS (1999) (reporting on National Science Foundation study on how dual income couples share domestic responsibilities).

198. *E.g.*, Bird, *supra* note 15.

rationalize the status quo. As Sharon Hays found in her ethnographic study of mothering, none of the women suggested that men give up their jobs to stay home with the children, and most of them identified various problems with men's caring for children.¹⁹⁹ They believed—often correctly—that the men were incompetent and less able to handle the needs of the children's needs.²⁰⁰ One woman explained: “[My husband will] just watch [the children] to make sure things don't go wrong. But he doesn't *interact*. When I'm gone and I'll come home, he'll be watching TV. I like to do stuff with them.”²⁰¹

For stay at home mothers, there is even more pressure to retain control over the family. The family is their primary source of fulfillment. Because the home and her children are her primary work, a woman may feel psychological pressure to keep her husband out of these spheres, or to prevent him from acting as her partner.²⁰²

Even working women found ways to emphasize the importance of their roles as mothers. Just like stay-at-home mothers, they believe in an ideology of “intensive” mothering that is “emotionally demanding, financially draining, [and] labor-consuming.”²⁰³ In her study of nurses working the night shift, sociologist Anita Ilta Garey found that, notwithstanding their full-time jobs, the women constructed themselves as full-time, stay-at-home mothers.²⁰⁴ She explains that the mothers did so by “limiting the visibility” of their work and by being present at their children's school and extracurricular activities.²⁰⁵

Unfortunately, men are most likely to participate in childcare and housekeeping when the mother has longer hours of work, and when she is willing to negotiate for changes in the allocation of duties.²⁰⁶ Most of the barriers to men's participation in the family are *not* due to women, but result instead from male gender ideology, workplace structure, and other factors. Women's

199. HAYS, *supra* note 77, at 101. She interviewed 38 women with various backgrounds. As she recognizes, her sample is not representative of the ideology of American mothering; nonetheless, she was surprised at the consistency of the ideology between participants, given the diversity of her sample as well as its consistency with more general societal proscriptions for mothering. *Id.* at xi-xii.

200. HAYS, *supra* note 77, at 103; JOAN K. PETERS, *WHEN MOTHERS WORK: LOVING OUR CHILDREN WITHOUT SACRIFICING OURSELVES* 118 (1997) (When it comes to childrearing, “most women still do not trust [men]”).

201. HAYS, *supra* note 77, at 103. When I have presented this paper to various groups, women have invariably come up to me with similar stories.

Men too are subject to the societal role constraints of fatherhood, and gender performance of masculinity is confining. Nancy Dowd, *Rethinking Fatherhood*, 48 FL. L. REV. 522 (1996); Cahn, *supra* note 148, at 539. As Sandra Bem points out, deviance from the male gender role is treated far more severely than deviance from the female gender role. SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 114 (1993).

202. Alice S. Rossi, *Women Re-Entering the Work Force: Socio-Psychological Concerns of Working Women*, SOCIETY, Jan. 11, 1998, at 11.

203. HAYS, *supra* note 77, at 4, 149-50.

204. Anita Ilta Garey, *Constructing Motherhood on the Night Shift: “Working Mothers” as “Stay-at-Home Moms,”* in *FAMILIES IN THE UNITED STATES: KINSHIP AND DOMESTIC POLITICS* 709 (Karen V. Hansen & Anita Ilta Garey eds., 1998).

205. *Id.* at 722.

206. COLTRANE, *supra* note 22, at 167.

gatekeeping is simply one aspect of a complicated series of reasons that men are not equal participants.²⁰⁷

3. *Economic Efficiency?*

Although the explanations of Becker and Posner carry some power, there are several problems with the law and economics approach to the family. First, although these theories are offered as a neutral explanation and examination of what occurs in the family, the seeming absence of values is deceptive.²⁰⁸ The economic discourse, while attempting to be positive, is normative when describing the ideal efficient family; it is prescriptive as to the ideal family form of breadwinner, homemaker, and children. It also focuses on only one type of family, the traditional nuclear family,²⁰⁹ which delegitimizes alternative forms.

Moreover, the specialization and role-differentiation assumed by the economic approach may not even be the most efficient manner for organizing family life. It may be more efficient, albeit less optimal, to contract for other parties to perform housework and childcare.²¹⁰ And, the model does not account for "psychic costs," only for financial income and household production.²¹¹ As Jana Singer argues, the existence of specialization in marriage may result from "successful strategic and rent-seeking behavior on the part of husbands" rather than from the achievement of economic efficiency.²¹²

Third, as Victor Fuchs notes, specialization in and of itself does not lead to economic disadvantage; instead, there is an inherent power differential because women are socialized to want children more than men.²¹³ Even if women do not actually want children more than men, there is a perceived difference.²¹⁴ It is this preference difference that leads to a power difference, not the mere concept of specialization.

Finally, focusing only on the family overlooks the context of forces outside of the family that intersect with family behavior. To the extent that gender discrimination in the workplace is not based on employees' actual capabilities—and much of it is not²¹⁵—employers' discriminatory behavior affects the wife's

207. See also Allen & Hawkins, *supra* note 193, at 200.

208. Milton Regan, *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605 (1994); Estin, *supra* note 59, at 1016.

209. Estin, *supra* note 59, at 1019.

210. See Margaret F. Brinig, *Comment on Jana Singer's Alimony and Efficiency*, 82 GEO. L.J. 2461, 2471 (1994) [hereinafter Brinig, *Comment*]; Margaret F. Brinig, *The Law and Economics of No-Fault Divorce—A Review of No-Fault Divorce: What Went Wrong*, 26 FAM. L.Q. 453, 456-57 (1993) [hereinafter Brinig, *No-Fault Divorce*]; Jana Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2439 (1994).

211. Brinig, *Comment*, *supra* note 210, at 2472; Singer, *supra* note 210, at 2439.

212. Singer, *supra* note 210, at 2440.

213. FUCHS, *supra* note 111, at 68.

214. Cf. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 450-54 (1992) (arguing that a cultural perception functions the same as actual desire, contributes similarly to the disparity in bargaining, and results in disproportionate property ownership between men and women).

215. Selmi, *supra* note 2.

economic incentives to stay home. If wages more accurately reflected actual work performance, then the household-work specialization might, even on its own terms, be less efficient. If women were able to receive their actual worth in the marketplace, then it becomes less economical for women to stay home.

4. Conclusion

Thus, women are socialized into accepting the role of motherhood for many reasons. It is important, however, not to overlook the extremely positive experience of providing childcare, an experience that should not be denigrated. The dilemma should be redefined so that men and women can find power both within and outside of the home; and so that power within the home is not devalued. Just as men must give up the power they have traditionally exercised in the workplace, so too must women feel comfortable in giving up the power they have exercised within the household. And, our cultural stereotypes of the "good mother" must accommodate mothers who want to work and remain mothers.²¹⁶

IV. RECONSTRUCTING WOMEN'S POWER IN THE HOUSE

In arguing that the structure of women's power in the home must change, I hope that women will feel less pressure to manage household work and that other caretakers will assume more household responsibilities. There are several methods for achieving this goal. One alternative is to provide greater societal and economic recognition of the caretaking role in order to support the power of the household worker; this can be done through greater state support of caretaking or through commodifying housework. A second is to change the structure of the workplace so that both men and women can function as workers and parents, such that women are not dependent on their home-work for feelings of power. A third is to restructure home roles so that women feel safe relinquishing power.²¹⁷ This part first discusses various proposals for recognizing women's power within the home and then turns to suggestions on how women can relinquish this power. Thinking about women's role within the home provides an additional framework for appreciating the importance of these proposals which are often supported on other bases.

216. CHIRA, *supra* note 185.

217. There are additional alternatives, of course. We could try, as a culture, to persuade women that children are not really that important, and that women's priorities should change: they should care less about children. While I support the concept of decoupling motherhood from womanhood, of redefining womanhood so that it does not necessarily include motherhood, I don't think that women who do become mothers should simply care less about children because I think this would be destructive to children's well-being.

Instead, I think that women should demand more caretaking in their relationships with men, and that this caretaking should be supported in the structure of the workplace and through the law. If men refused to provide this caretaking, and women chose to leave, then the cost of dissolving the relationship should increase: the noncustodial parent could be required to pay higher child and spousal support. This should at least serve as a disincentive in middle-class heterosexual relationships.

*A. Feminist Proposals to Recognize Women's Power Within the Home*²¹⁸

Some feminists have sought to build on women's power within the home by arguing for support of—and even wages for—mothers' caretaking and household responsibilities, either from the state or the market breadwinner. Under these proposals, women would be able to continue their caretaking responsibilities, but the value of these responsibilities would be socially recognized.²¹⁹ There are historical echoes to this effort to recognize women's economic contributions to the household, thus perhaps helping to assimilate them into the contemporary feminist agenda.²²⁰ These proposals build on women's acknowledged strengths but have no direct impact on the gendering of familial roles or on reforming the workplace.

1. *Providing Support for Caretaking*

Professor Martha Fineman has eloquently argued for public support for the nurturing family unit composed of one caretaking parent and child.²²¹ Her theoretical work requires that feminists think carefully about mothering. She emphasizes the dependence of caretakers on others to support them for providing care to the necessarily dependent.²²² Under her proposal, "unsubjugated motherhood . . . would be given privacy (without paternity), subsidy (without strings), space (to make mistakes)."²²³ Although she provides few details, she argues for a state subsidy to this caretaking entity to ensure its existence without a (male) breadwinner, to help create some independence for the caretaker, and to show the connection between caretaking dependency and other forms of state-based dependence. She believes that the family, the state, and the market must redistribute their responsibilities for caring for dependent people.²²⁴

In addition to changes in the domestic sphere, Professor Fineman also argues for changes in the workplace to support women's ability to do caretaking so that

218. The proposals of some within the law and economics movement—such as Gary Becker—similarly build upon the existing division of labor within the household to support women's caretaking role. The proposals discussed in this section, however, attempt to approach women's household power from a more radical perspective, even if, ultimately, the policy prescriptions sound remarkably comparable.

219. Nancy Fraser terms this the "Caregiver-Parity Model," and describes it as enabling "women with significant domestic responsibilities to support themselves and their families either through carework alone or through carework plus part-time employment." NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* 55 (1997).

220. HIRSHMAN & LARSON, *supra*, note 74 and accompanying text; Siegel, *supra* note 75 and accompanying text; see also, generally Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

221. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES* 23-33, 228 (1995).

222. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 13-14 (2000).

223. FINEMAN, *supra* note 221, at 233.

224. *Id.* at 1.

women can both work and care for children.²²⁵ She further calls for a national dialogue on how best to support caretakers.²²⁶ This dialogue would serve to raise consciousness about the meaning of derivative dependency.

Similarly, economist Victor Fuchs has suggested that women's childcare work be supported through subsidies that would allow women either to stay home or to purchase adequate childcare so that they could work.²²⁷ A similar proposal is found in Carol Sanger's idea of "maternal pensions," providing financial support for children so they can be raised by their families.²²⁸ What these proposals have in common is broad-based support for caretaking. The next set of proposals seeks to quantify the cost of mothers' providing childcare.

2. *Wages for Housework*

Women's work within the household is uncompensated. Childcare and housework, when performed by the mother or wife, are unpaid services.²²⁹ When women sought the right to keep their own earnings during the nineteenth century, they also sought payment for their in-home services; although they were somewhat successful in the former, they still have not succeeded in the latter.²³⁰ Within contract law, the assumption is that women perform housekeeping services for men with whom they live, or other relatives, without even the expectation of compensation.

In seeking work equality for women, most contemporary feminists have emphasized equal pay for equal work, or equal pay for work of equal value. The focus has been on workplace equality with men.²³¹ But some feminists have revisited the nineteenth-century effort to value appropriately women's work within the household. They have argued for wages for housework or for taxes on the value of housework in an effort to recognize the enormous contribution made by women's supposedly "unproductive" household labor. Their goal is to ensure that caregiving and housework are "counted" as economic contributions.²³² Professor Katherine Silbaugh argues for the importance of increasing the status

225. Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287, 308 (1996).

226. Fineman, *supra* note 222, at 21-22.

227. FUCHS, *supra* note 111.

228. Sanger, *supra* note 18, at 500-02. Lest the idea of maternal pensions be dismissed as contrary to contemporary notions of parenthood, she notes that foster care parents are a somewhat analogous form of "waged parenthood." *Id.* at 501.

229. This is, of course, true of men's performance of such work as well. I focus on women's work for several reasons: first, it is still women who are much more likely to become homemakers; second, even when both husband and wife work, the wife still performs overwhelmingly more household work than the husband; and finally, the proposals discussed in this section are articulated in a sexed fashion. Nonetheless, the analysis applies to whichever parent is gendered female.

230. Siegel, *supra* note 75, at 1083-85.

231. Silbaugh, *supra* note 19, at 5-6; Ashe & Cahn, *supra* note 175.

232. See generally SHIRLEY BURGRAFF, *THE FEMININE ECONOMY AND ECONOMIC MAN* (1996) (arguing for economic incentives to continue parental investment in their children).

of housework in order to increase the status of women.²³³ She carefully documents the contemporary legal approach throughout a variety of different fields (divorce, tax, contract, etc.) towards the devaluation of housework as work and towards its valuation as “merely” affection based, and thus not worthy of compensation. Professor Nancy Staudt believes that imposing taxes on housework could help “change the gendered nature of work.”²³⁴ Among other benefits, women would receive access to social security and other employee benefits that are tied to wage labor. To implement the tax, Professor Staudt would impute to women a wage based on the value of their household labor.²³⁵

A final set of proposals protects women upon divorce by, for example, guaranteeing them some portion of their ex-husbands’ assets. Unlike the other suggestions, which provide ongoing support to the caretaking unit, these proposals only provide support once a marriage dissolves. While the form for guaranteeing women post-divorce support ranges from premarital security interests²³⁶ to an entitlement to a certain percentage of the primary wage-earner’s post-divorce income.²³⁷ Nonetheless, the central goal of these proposals is to protect the primary caretaker’s opportunity costs in forgoing market work and to compensate her for her work in the home (even if she is fully employed, the assumption is that women will perform most of the caretaking work). Although the proposals only take effect upon divorce, they have the potential to change the power allocation during marriage.²³⁸

3. Effectiveness of These Proposals

These various proposals attempt to provide support for caretaking through public or private means. This is, I believe, an important means for drawing attention to the work that mothers perform in the household and for recognizing the value of this uncompensated household labor. The power that women exercise in the household is a subject of deep cultural ambivalence, and the caretaking support proposals seek to dissolve this ambivalence by providing affirmative support to women for household work. Fuller recognition of this work would help women’s status within the family and could provide greater security for them.

These proposals however, may serve to support women’s continued power within the home at the expense of the involvement of other parents and at the expense of women’s involvement outside of the home. This is, I think, an

233. Silbaugh, *supra* note 19, at 5-6.

234. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1635 (1996).

235. *Id.* at 1642.

236. Ertman, *Commercializing Marriage*, *supra* note 5.

237. See generally Jane Rutherford, *Duty in Divores: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 577-84 (1990); Singer, *supra* note 210; Cynthia Stames, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993); Joan C. Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

238. Ertman, *Commercializing Marriage*, *supra* note 5.

intended consequence for Professor Fineman who gives the power to choose additional caretakers to the mother. But this is an unintended consequence for others seeking to value this work, who presumably want to encourage additional involvement from the other parent(s) and who are at least neutral on women's relationship to the world of market work. The concept of wages or benefits for housework presupposes the primacy of the full-time parent over the other caretaker, thereby marginalizing the other parent. Even the post-divorce support proposals, which I generally support because they prevent the impoverishment of women upon divorce, may ratify a status quo in which women continue to provide primary caretaking. The proponents of the post-divorce support mechanisms recognize this criticism. For example, Professor Ertman suggests that this support might encourage men to compete with women to become the primary caretaker, and would encourage a revaluation of housework.²³⁹

As a second criticism of these proposals, there will remain a difference between market wages and domestic wages that will not easily disappear; and domestic wages will still remain undervalued.²⁴⁰ Those seeking to value housework run the risk of reinforcing the devaluation of women's work by perpetuating the association of women with children and the household. This will also have long-term implications when the caretakers seek to return to work and find few jobs available because they have been out of the labor market.²⁴¹ Moreover, the argument for publicly-provided support for caretaking, while important rhetorically, is unrealistic in the political climate of the contemporary United States.²⁴²

A final criticism of the proposals that argue for commodification²⁴³ of housework is that they apply only narrowly to poor families, where there may be no wages, and no ability to pay any additional taxes. Even in working class families, the combined effect of child and spousal support may be financially overwhelming.²⁴⁴

239. *Id.* at 76, 86. Ertman argues that these mechanisms might result in a higher valuation of women's household work. *Id.* at 66.

240. If they are valued by use of a comparable wage method, this may achieve some rough equality. This valuation method seems unlikely.

Nancy Fraser notes that even if caretakers receive a basic minimum wage, this is not income equality with men. FRASER, *supra* note 219, at 57.

241. Katherine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1521-22 (1997) (book review).

242. Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons From Foster Care*, 8 AM. U. J. GENDER SOC. POL'Y & L. 55, 68 (2000); Ertman, *Commercializing Marriage*, *supra* note 5, at 105.

243. There is, of course, an extensive critique of commodification. *E.g.*, Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

244. Professor Ertman provides a response to this criticism, suggesting, for example, that poor divorcing women receive a lower proportion of household debt. Ertman, *Commercializing Marriage*, *supra* note 5, at 104-05.

B. *Relinquishing Power*

Because women's identities as mothers and primary caretakers are so much stronger than men's identities as fathers and primary caretakers, the gendered division of labor will continue. Not only must men change, but so must women—they must still continue to identify themselves as parents, but they must also share fully in that status with men. Women must give up some of this carefully “husbanded” power, albeit without caring less about children. My argument assumes that fathers must change to become more caring towards their children; rather, I am insisting that mothers must also change to become more accepting of fathers' caring. The transformation in fathers' behavior will be far more revolutionary than any corresponding changes in mothers' behavior, of course. This section also argues that the workplace must change to respect workers' identity as parents.

The rhetoric of many feminists accepts that women must change the structure of household work. The actual unfolding of women's lives, however, shows an understandable reluctance to do so. While my arguments about the need for women to give up power in the home may sound anti-woman, that is not my intent at all. If I turn the argument around and talk about the need for men to relinquish power in the workplace so that women can break through the glass ceiling, I am not making a particularly controversial statement. When I say the same thing about women in the home, however, my statement becomes more problematic.

What would it mean for women to give up this power? Other structures must be in place to support women and to support children, and, in two-parent families, men must be willing to participate more within the family so that women are able to relinquish their control. The home will not change unless men are truly able to perform the caretaking that is associated with mothering.

But there's more: women must be willing to share the nurturing role in practice and in theory. Nurturing and caretaking are integral to our cultural definition of mothering, while our definition of fathering is primarily centered on economic support. The definition of mothering need not change so that economic support becomes equally integral to both parents, but women must be committed to facilitating changes in what we expect of fathers at the expense of their own “special” bonds with children.

Just as we see “motherhood as a cornerstone of women's self-esteem within our society,”²⁴⁵ so too must involved fatherhood become a cornerstone of men's self-esteem. Fatherhood is still defined in terms of the breadwinning role, rather than the emotional caregiving role.²⁴⁶ Fatherhood remains less important to men's self-definition than to women's.

245. Sanger, *supra* note 18, at 66.

246. For contemporary support of fathers as breadwinners, see DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995).

Such a change in self-definition is occurring in the workplace for women, as they begin to derive their identity from their jobs outside of the home in the same manner that men have always done so. Arlie Hochschild shows how women are finding their real “home” to be at the workplace.²⁴⁷ She argues that work has become the place where both men and women feel emotionally fulfilled and has become a refuge from their heartless homes. Women go to work because they want to.

On the other hand, women continue to see the family as their core responsibility, even as they are beginning to accept their roles as breadwinners as well.²⁴⁸ Women don’t necessarily want what men have traditionally had—ideal worker status.²⁴⁹ Rather, many want to restructure the workplace so that it is more respectful of balancing work and family, and to restructure gender roles so that they are more respectful of caregiving fathers. Fathers with stay-at-home mothers have earned more than fathers with working mothers.²⁵⁰ Nancy Fraser suggests that the new model should be “universal caregiver,” such that all waged labor is designed for caregiving workers, and caregiving is publicly supported.²⁵¹

In many ways, this vision revisits the images of equality promoted by liberal feminists. Liberal feminists have celebrated women and men’s abilities to act as individuals outside of gender constructs. This celebration has, however, typically involved workplace reform, with less attention given to what occurs in the home. By extending this vision to the home—allowing the individual to act within the family without gendered constraints—the liberal feminist agenda is broadened. Just as work roles must become de-gendered, so too must home roles. This vision requires that men relinquish their traditional power in the market²⁵² and correspondingly, that women relinquish their traditional power within the home. Even though men and women have achieved this power in quite different

247. Arlie Russel Hochschild, *There’s No Place Like Work*, N.Y. TIMES, Apr. 20, 1997, § 6, at 51. She discusses how women “choose” longer hours because of their warm feelings towards work.

While I believe that Hochschild has identified part of the motivation that some women stay at work, she ignores the very real economic pressures on families and women. Kristin Downey Grimsley, *Fighting the Family Hour?: Arlie Russell Hochschild’s New Book Says Many Put Working Ahead of Parenting; She May Be Overlooking the Real Reason Why*, WASH. POST, May 18, 1997, at H4; see also Betty Kwong, *Parents’ Dilemma: Paycheck vs. Child-Rearing*, STAR TRIB., Mar. 18, 1996, at 3E. A recent Families and Work Institute study found that two-thirds of workers who had children under the age of 18 felt that they did not have enough time with their children. *Id.*

248. Whirlpool Foundation and Families and Work Institute, *Study Women: The New Providers: A Study of Women in North America*, 1995. Whirlpool Corporation, *supra* note 25.

249. WILLIAMS, *supra* note 8, at 801. Professor Williams noted, almost a decade ago, that “all workers currently are limited to two unacceptable choices: the traditional male life pattern or women’s traditional economic vulnerability.”

250. See generally Martha H. Peak, *Fathers Earn the Most . . . When Their Wives Stay Home*, 83 MGMT. REV. 6 (1994).

251. FRASER, *supra* note 219, at 61; see also HOCHSCHILD, *supra* note 186 (advocating more equal allocation between men and women).

252. I am not arguing that all men have market power; I am simply arguing that the market has been a traditionally male sphere.

ways—men preempted the primary role in the market—the genealogy of the power²⁵³ should not interfere with the transformation and sharing of that power. Such a change remains unrealistic. Notwithstanding their rhetoric, men have not dramatically changed their workdays to accommodate children, nor has the workplace changed dramatically to accommodate new parenting patterns.

Certain feminists have developed a prospective approach on how fathering must change in their attitudes regarding the significance of joint custody. They argue that requiring joint participation after the dissolution of the family will lead to greater paternal participation in intact families.²⁵⁴ The law can enforce a certain vision of family life outside of an intact family. The dilemma, however, is how to effect changes in intact families—how to change what it means to be a parent. This section discusses the benefits that would accrue to families by changing the nature of caretaking, before turning to specific proposals on how to change the caretaking structure.

1. *Benefits from Change*

Encouraging paternal involvement in the family would benefit both children and parents in a variety of ways. Contrary to the rhetoric of those who blame absent fathers for breakdown of the family,²⁵⁵ increased paternal involvement will not solve society's problems. The ambiguous support for the proposition that "increased parental involvement in itself has any clear-cut or direct effects"²⁵⁶ is ambiguous. One study of children's health, school activities, and conduct found that children in two parent families performed better than children in single-parent families, *except* when household income exceeded \$50,000.²⁵⁷

The primary benefits to children of paternal presence are financial stability and support for the nurturing parent.²⁵⁸ In addition, a recent National Center for Education Statistics study showed that paternal involvement is associated with a child's success in school, including good grades.²⁵⁹ The study, which examined parental involvement for almost 17,000 children, found that in two-parent families fathers were half as likely as mothers to be involved in their children's

253. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978).

254. E.g., Katherine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986).

255. See generally DAVID BLANKENHORN, *FATHERLESS AMERICA* (1995).

256. Adler, *supra* note 21, at 58 (quoting researcher Michael Lamb).

257. Deborah A. Dawson, *Family Structure and Children's Health: United States, 1988*, Vital and Health Statistics, Series 10, No. 178, at 1 (June 1991). Based on their extensive analysis of family structure, Sara McLanahan and Gary Sandefur are "convinced that loss of income—or the lost resources for which income is a proxy—plays a major role in explaining why children in single-parent families have lower achievement than children in two-parent families." SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 92 (1994). For further discussion, see Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997) (review essay).

258. NANCY DOWD, IN *DEFENSE OF SINGLE-PARENT FAMILIES* 18-27, 114 (1997).

259. NATIONAL CENTER FOR EDUCATION STATISTICS, *FATHERS' INVOLVEMENT IN THEIR CHILDREN'S SCHOOLS* ix (1997).

school. When fathers were more involved, "involvement of both parents in school is significantly associated with a greater likelihood that their children in 1st through 12th grade get mostly A's and that they enjoy school and a reduced likelihood that they have ever repeated a grade. Fathers' involvement has a stronger influence on the children getting mostly A's than does mothers' involvement."²⁶⁰

The other benefit to paternal involvement is conferred on fathers themselves, who enjoy a more satisfactory marriage and better self-image.²⁶¹ Several studies have shown that fathers who were more deeply involved with their children had fewer health problems, and/or were more likely to advance in the workplace.²⁶² Parenting is a positive experience for men.

2. Reforms

Supporting a stay-at-home parent, revaluing parenting duties by paying parental dividends, or paying wages for housework all provide solutions to part of the problem²⁶³ by making women appreciated for the work that they are already doing and also by making this work more appealing to men. These solutions are, however, limited and inadequate because they serve to reinforce women's confinement within the home. They emphasize women's dependence on others (men or the state) for their support, rather than emphasizing society's dependence on caretaking.

There are two additional conditions necessary for a fundamental change: the workplace must be restructured, and women must feel comfortable relinquishing the power they currently exercise within the home. Restructuring the workplace involves pay equity as well as allowing more flextime, flexible hours, telecommuting, and other options.²⁶⁴ Such alternatives must be equally available

260. *Id.* at viii. As Jean Yeung notes, "The beneficial effects of fathers' involvement on children's well-being have only recently been supported empirically in longitudinal studies." W. Jean Yeung, *Multiple Domains of Paternal Involvement with Children 7* (April 1999) (unpublished manuscript on file with author). In his study, Yeung found that fathers who reported a warm and involved relationship with their children were more likely to have children with fewer behavior problems, such as lying, or feeling fearful or anxious. *University of Michigan Press Release, American Fathers* (June 10, 1999), available at <<http://www.umich.edu/~newsinfo/>>.

261. Adler, *supra* note 21, at 58.

262. JAMES A. TODD & TODD L. PITTINSKY, *WORKING FATHERS: NEW STRATEGIES FOR BALANCING WORK AND FAMILY* 46-51 (1997); BARNETT & RIVERS, *supra* note 18, at 7. *See generally* TOM HIRSCHFELD, *BUSINESS DAD: HOW GOOD BUSINESSMEN CAN MAKE GREAT FATHERS AND VICE VERSA* (1999)

Columnist Maggie Gallagher has suggested that, rather than gender role equality, we should "expand the male role," so that it is manly to perform such tasks as cleaning the toilet. Maggie Gallagher, *Peace Talks Over the Housework Wars*, SACRAMENTO BEE, April 21, 1999, at B9.

263. BURGRAFF, *supra* note 232.

264. BARNETT & RIVERS, *supra* note 18, at 239. *See generally* NANCY DOWD, *REDEFINING FATHERHOOD* (2000); WILLIAMS, *supra* note 8.

to men and women; and, more importantly, must be equally supported. Too many men and women assume that the man should be the breadwinner.²⁶⁵

a. Restructuring the Workplace

There are many concrete ways to make the workplace more accommodating to parents, including flexible hours and better support for part-time work.²⁶⁶ As a method for forcing companies to take seriously their commitment to family life, Barnett and Rivers suggest a "family impact" statement for companies that would routinely examine business decisions in the light of the needs of the workforce of the twenty-first century. "What if every major corporate policy included in its planning stages a projection of what impact that policy would have on the family life of its employees?"²⁶⁷ While such statements might be even less useful than environmental impact statements, they would at least show corporate concern for the family. The rhetoric conveys respect for the reality.

Indeed, not accommodating family concerns may constitute sex discrimination under existing Title VII case law.²⁶⁸ We could even amend Title VII to provide that failure to respond to the needs of men and women who are parents constitutes "family discrimination," that is, discrimination based on family status. This new cause of action would be available when employees sought flextime or similar accommodation of their ability to spend time with their families or to care for family members, subject, of course, to the defense that business necessity precludes this accommodation.²⁶⁹

Ironically, some have claimed that the workplace is too accommodating of families—that employers offer benefits, such as health and life insurance, that are of far greater value to parents than to single or childless employees and that single employees work harder than their married counterparts.²⁷⁰ Empirically, however, single and married employees work a comparable number of hours,²⁷¹ although working parents are more likely to utilize certain benefits.²⁷² Moreover,

265. BARNETT & RIVERS, *supra* note 18, at 230 (citing Deutsch study). On the other hand, outside of the workplace, some courts seem to bend over backwards to award custody to men who exhibit any caretaking ability. *Young v. Hector*, No. 96-2847, 1998 WL 329401 (Fla. Dist. Ct. App. June 24, 1998).

266. As the recent UPS strike indicates, part-time workers have not been treated fairly in the workplace.

267. BARNETT & RIVERS, *supra* note 18, at 240.

268. WILLIAMS, *supra* note 8, at 101-110.

269. This would provide enforcement for some of the proposals to amend the Family and Medical Leave Act. See Family and Medical Leave Enhancement Act of 1999, H.R. 2103, 106th Cong. (1999). More importantly, it would send a strong message that failure to restructure constitutes actionable employment discrimination.

270. *E.g.*, Daniel Akst, *On the Contrary: In Defense of the Single and Childless*, N.Y. TIMES, June 6, 1999, at 3, p. 5.

271. *Id.*

272. *Family-Friendly Policies Anger Childless Employees*, 11 ABOUT WOMEN & MARKETING 7 (Dec. 1998).

there are countless economic rationales for the contemporary investment in children.²⁷³

A second means of reforming the workplace depends on pay equity. Women still do not earn as much as men.²⁷⁴ In a recent survey of working women, the AFL-CIO found that equal pay was a primary source of concern; the women also sought improvements in childcare and after-school care for older children as well as improved health care and retirement benefits.²⁷⁵ If the workplace becomes less job-segregated by gender, and if more women are working, then this should result in higher rates of men's participation at home.²⁷⁶

b. Changing Home Roles

In order for these changes to take place, women must also be able to relinquish the power they have in the household.²⁷⁷ Establishing alternative sources of power is one solution; women with highly demanding jobs married to employed men are more likely to have participatory husbands. Workplace equality does indeed have some impact on the household allocation of labor.²⁷⁸ But the real change requires a transformation in the gendered expectations of parenthood, so that mothering and fathering involve comparable assumptions of time, labor, and commitment. This is trickier, as a legal process, than is restructuring the workplace. It is hard to legislate changes in how men and women perform their parental roles during an ongoing relationship. Due to the policy of explicit non-intervention in intact families,²⁷⁹ the law does not direct

273. In fact, Professor Lynn Stout argues that society underinvests in children. See generally Lynn A. Stout, *Some Thoughts on Poverty and Failure in the Market for Children's Human Capital*, 81 GEO. L.J. 1945 (1993).

In response to some of the dissatisfaction expressed by childless and single workers, the term "work/life issues" is used to encompass a range of concerns centering around balancing work with other obligations and interests. Bonnie Miller Rubin, *Workers with Kids Aren't Only Ones who Want a Break*, CHI. TRIB., March 16, 1998, at 1. For example, about 25% of households are providing extensive support for an elderly parent. Margaret Steen, *Balancing Work and Life; How to Satisfy Career Expectations While Keeping the Home Fires Burning*, INFOWORLD, June 8, 1998, at 105. Women comprise almost 75% of the people who give informal care to elderly persons, and more than two-thirds of these women have had to make adjustments in their work schedules. Entmacher, *supra* note 117.

274. Selmi, *supra* note 2.

275. AFL-CIO, WORKING WOMEN SAY... (2000) (published findings of the *Ask a Working Woman* telephone survey) at <http://www.aflcio.org/women/survey1.htm>.

276. COLTRANE, *supra* note 22, at 214.

277. In the context of gender equity in the workplace, Professor Hadfield reminds us that an exclusive focus on changes in the labor market does not "reach the major determinant of male-female earning difference—the household." Hadfield, *supra* note 164, at 103.

278. As one study explained, "Women who feel that they have fewer alternatives to marriage and women whose earnings would put them below the poverty threshold if divorced are more likely to view an unequal division of housework as fair." Mary Clare Lennon & Sarah Rosenfeld, *Relative Fairness and the Division of Housework: The Importance of Options*, 100 AM. J. SOC. 506, 525 (1994). Professor Scott Coltrane notes that husbands participate more when their wives "are employed more hours . . . [and] if their wives earn more of the total household income, especially if they are defined as economic providers." COLTRANE, *supra* note 22, at 200-01.

279. This policy is, in general, illusory. As discussed in the text, however, there are certain private areas of the family into which the law does not, and should not, intervene.

how non-neglectful parents interact on a daily basis. It remains inappropriate, and highly unrealistic, to legally mandate equal responsibility for childcare or housework.

There are, however, other methods of achieving this goal. First, as my colleague Mike Selmi suggests, it may be appropriate to require fathers to take parental leave²⁸⁰ because such a requirement could help ensure fathers' early involvement with their children. Mandating paternal involvement when the child is young could help to overcome men's feelings of discomfort and ignorance at this early stage. It might also set the stage for additional paternal involvement throughout childhood because fathers may feel more connected and responsible for their children. In addition, providing quality childcare regardless of the parents' income might allow parents to feel more comfortable in working outside of the home.²⁸¹ While the studies of the impact of childcare on children present conflicting conclusions, it does appear that good childcare poses few risks to children's development.²⁸² Furthermore, protecting men against both overt and covert discrimination if they "act like mothers"²⁸³ might provide incentives to intensive fathering.

Second, a more indirect manner of affecting roles in intact families would be to modify expectations for post-dissolution behavior.²⁸⁴ If laws change so that parents are awarded joint legal and physical custody upon dissolution, then this may influence men's behavior during the marriage; alternatively, if the primary caretaker invariably receives custody, at the expense of a primary breadwinner, this too may affect intra-relationship behavior. One solution might be a child custody system with a rebuttable presumption that the children's best interest would be served by remaining with the primary caretaker; the presumption would be rebutted upon a showing of joint and equitable caretaking.²⁸⁵ This would provide the maximum amount of continuity of care for children, while also providing incentives for certain forms of behavior. Financially, at dissolution, the primary wage earner continues to enjoy the economic benefits of

280. See Selmi, *supra* note 2. An anecdote illustrates the benefits of this approach. A male colleague recently told me that his stay-at-home wife signed up for an early morning class when their son was an infant, thereby ensuring that her husband would remain home with the baby for several hours each day. My colleague ascribes (in part) his close relationship with this child to those early morning experiences.

281. Sanger, *supra* note 18, at 507. In addition to day care, employers could provide better support for breast-feeding mothers by establishing lactation rooms and breast pumps. The Federal Office of Personnel Management recently sponsored a childcare summit that considered such "cutting-edge" issues as lactation rooms. *OPM Will Host Childcare Summit*, 6 FED. HUMAN RES. WEEK (April 26, 1999).

282. NICHD STUDY, *supra* note 106.

283. In this context, the recent attention to effeminate men in the workplace provides potential protection for men who do not conform to gender stereotypes. See generally Case, *supra* note 6; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Francisco X. Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

284. Feminists have proposed various methods to require equivalent parental involvement after family dissolution, such as joint custody, adequate child support, enforced visitation. E.g. Czapan斯基, *supra* note 4; Bartlett & Stack, *supra* note 254.

285. The presumption could also be rebutted upon a showing that this was not in the child's best interests, of course.

that position. The focus of contemporary alimony is on rehabilitating the more dependent spouse so that she can support herself; assets acquired during the marriage remain the possession of the one who "earned" it.²⁸⁶ As discussed earlier, increasing the financial costs of divorce might provide more leverage to the economically dependent spouse within the marriage. The equitable distribution statutes of many states require courts to consider homemaking contributions in deciding on property allocations.²⁸⁷

Third, providing explicit support for caretaking parents reinforces the importance of their work, and, in conjunction with other reforms, may remove the gender "stigma." As discussed above, this reform alone would be insufficient, but in conjunction with other changes in the work/family environment, it could be valuable. Such explicit financial incentives also serve to allow one parent to stay home, rather than forcing both parents into the workplace. There are various proposals for making this arrangement economically feasible to a wide range of families.²⁸⁸ Questions about a commodification discourse need to be balanced against questions about the invisibility of household labor in the absence of commodification.²⁸⁹ The work that occurs in the household, ranging from doing the dishes to arranging play dates for children, is often invisible and unappreciated.²⁹⁰

Fourth, we as a society have not provided enough support to single-parent caretakers, who are generally unable to stay home.²⁹¹ Indeed, we are forcing most single parents to work in order to support their families, implicitly for middle-class women with children and explicitly for women receiving public welfare who receive inadequate public support. The childcare available to these women is inadequate; the new welfare law provides minimal safeguards to ensure that children will be cared for. Within the workplace, women still do not

286. For example, in all but two states, degrees, licenses, and related forms of personal property are not subject to property distribution; the two exceptions are New York and (possibly) Michigan. *E.g.*, *Postema v. Postema*, 471 N.W.2d 912 (Mich. Ct. App. 1991) (holding that one partner's law degree was the product of a concerted family effort); *Elkus v. Elkus*, 572 N.Y.S.2d 901 (App. Div. 1991) (holding that celebrity status is marital property subject to equitable distribution); *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985) (holding that one spouse's medical license was part of the marital estate). See generally June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359 (1994); Rutherford, *supra* note 237; Singer, *supra* note 210; Williams, *supra* note 237).

287. D.C. CODE ANN. § 16-911 (2000); UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 288 (1973); ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.15 cmt. c (Proposed Final Draft Feb. 14, 1997). See generally Martha Albertson 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 (noting problems for the economically dependent spouse by looking at contribution rather than need).

288. See generally Martha Albertson Fineman, *Privacy and the Family: Panel III What Place for Family Policy*, 67 GEO. WASH. L. REV. 1207 (1999); Silbaugh, *supra* note 19; Staudt, *supra* note 50.

289. Kathryn Abrams, *Destabilizing Domesticity*, 32 CONN. L. REV. 281, 287 (1999); Ertman, *Commercializing Marriage*, *supra* note 5; Katherine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J. L. & FEMINISM 81 (1997).

290. Some courts examine this work at divorce to determine which parent is the better caretaker. *E.g.*, *Garska v. McCoy*, 278 S.E. 2d 357, 363 (W. Va. 1981).

291. See generally BARBARA BERGMANN, *SAVING CHILDREN FROM POVERTY: WHAT THE UNITED STATES CAN LEARN FROM FRANCE* (1996); FINEMAN, *supra* note 221; Ross and Cahn, *supra* note 242.

earn as much as men, even when they perform the same work, nor have women attained the same degree of power within professions as men. Thus, single parents (who are overwhelmingly women) find it difficult to support their children.²⁹²

3. Difficulties with Relinquishing Power

It may not be safe for women to relinquish this power, not only because men will not perform home-work,²⁹³ but because relinquishment will have other detrimental impacts. When it comes to child custody, for example, working women are penalized for leaving home by losing custody to working men.²⁹⁴ While I am not suggesting that women in a relationship consciously calculate the costs of a child custody proceeding, they often know, through television and other media, the realities.

In addition, battered women and their children may be physically endangered when the women seek to relinquish power at home. The threat of violence against women may have caused women to undertake and continue in the caring role in an effort to prevent further violence.²⁹⁵ By performing the caring work within their homes, women may be protecting both themselves and their children. The women may also be prevented from working by their abusers, or harassed so severely that they must quit. When battered women give up responsibility in the home, this may be dangerous for their children; it is often true that men who abuse women batter their children as well.²⁹⁶

In addition, without the types of support discussed above, women will not be able to relinquish power, and the status quo will continue. In the absence of quality childcare, of flexible workplaces, of changes in the ideology surrounding motherhood and fatherhood, women will continue to exercise power in the home. The perception—if not the reality—that working men are penalized for acting like mothers will deter many men from changing their caretaking patterns,

292. NANCY DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES *passim* (1996).

293. Professor Scott Coltrane explains: "Talking about Gary's parenting, Susan made it clear that she had to take some risks in the beginning to trust him with the kids Eventually, he developed a full range of parenting skills." COLTRANE, *supra*, note 22, at 13.

294. *E.g.*, Ireland v. Smith, 547 N.W.2d 686, 688 (Mich. 1996) (lower court awarded custody to father because mother would place child in day care while she attended college); Krista Carpenter, *Why Mothers are Still Losing: An Analysis of Gender Bias in Child Custody Cases*, 1996 DET. C.L. MIC. ST. U.L. REV. 33 (1996); Julie Kunce Field, *Damned for Using Daycare: Appellate Brief of Jennifer Ireland in Ireland v. Smith*, 3 MICH. J. GENDER & L. 569 (1996); Sanger, *supra* note 18, at 417-36.

295. WEST, *supra* note 65, at 82, 114. Professor West argues: The hypothesis I would like to propose is that women's apparent altruism in the private sphere is a source of harm rather than either individual or communal well-being, to the extent that the altruistic acts women perform, unlike true altruistic acts, stem neither from self-interest nor from a caring instinct but, rather, from fear. *Id.* at 114.

296. *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501, 1597-1620 (1993); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1055-56 (1991).

while the perception that children are best cared for at home by their mothers will encourage women to stay there.

CONCLUSION

Even assuming that all of these difficulties could be overcome, the exact parameters of this household change are difficult to predict. I am not advocating that women relinquish all responsibility for children, that childcare be removed from the home so that women can participate *fully* in the workplace. Instead, I believe that the workplace should be restructured to accommodate parenting roles and responsibilities,²⁹⁷ and that home life should be restructured so that women can share responsibilities safely—safely in the sense that they know their children will be well-cared for, and in the sense that they need not rely solely on the family for feelings of power and self-identity and competence.

Just as women need not relinquish all responsibilities within the household, neither must they all work outside of the home; I hope and expect that many women—and many men—would want to stay home with their children, and would be able to do so culturally and financially. Similarly, the expectations that women on public welfare should and will work need to be reexamined, not just because of the discriminatory assumptions about welfare mothers,²⁹⁸ but also because of the critical role that mothering plays in women's and children's lives. Allowing women and men to have power in the home and the workplace will not lead to interchangeability and androgyny, but will result in better parents and better workers.

297. *E.g.* Frug, *supra* note 2; Williams, *supra* note 8; Garey, *supra* note 204, at 723. "[T]he choice to become a mother can, itself, be figured as a challenge to conventional stereotypes when the woman seeks to change her workplace to accommodate her, to act as a role model to other women, or to share, fully, in childcare responsibilities with her partner." MICHIE & CAHN, *supra* note 98, at 153.

298. For discussions of these images, see Naomi Cahn, *Representing Race Outside of Explicitly Radicalized Contexts*, 95 MICH. L. REV. 965 (1997); Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817 (1994); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1 (1993); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992).