

THE PROBLEM WITH UNPAID WORK

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This volume is dedicated to questions arising from the integration of market work and family life. I'd like to start out by highlighting three substantial pieces of good news for those concerned about the ability of families to combine paid work and parenting responsibilities. First, in 2000, mothers spent *more* time in interactive play¹ with their children than they did in 1965.² Working mothers have not sacrificed quality parental time in order to accommodate their work schedules. Second, fathers devote twice as much time to child care as they did in 1965.³ Third, the overall amount of domestic work performed has declined considerably. Married mothers spend 15 fewer hours each week performing core housework than they did in 1965.⁴ In other words, what has changed is how much time women spend sweeping the floor and how often they order pizza for dinner, not how much they read to their children. That is the good news.

Here is the more troubling news. Mothers still average 67% of the unpaid work in a household, while fathers average 64% of the paid hours for a household.⁵ Mothers still do twice as much child care as do fathers.⁶ The wage gap between men and women has

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¹ In the most recent, exhaustive study of the allocation of time in households with children, Suzanne Bianchi, John Robinson and Melissa Milkie et al define interactive play as “investment” or “enrichment” activities such as reading, teaching, and playing with children. Interactive play can be contrasted with “routine” care which involves activities like bathing, dressing and transporting children. SUZANNE BIANCHI, JOHN ROBINSON AND MELISSA MILKIE, CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 65 (2006).

² Id. at 66

³ Id.

⁴ Id. at 91

⁵ Id. at 176.

⁶ Id. at 66.

narrowed in the last four decades, from about 40% to about 22 %, ⁷ but the rate of narrowing has slowed considerably since the 1980s. ⁸ More important, as usually measured, the wage gap only incorporates workers who work full-time on a weekly or an annual basis. ⁹ It thus excludes people (mostly women) who work part-time and may exclude people who work full time but not year round (many teachers, for instance). A measure of the earnings gap for all prime aged (age 26-59) workers (including those who have left the workforce for some period of time) shows a wage gap of 62%. ¹⁰ That is, in prime earning years, women earn 38 cents for every dollar men earn.

Given women and men's different work patterns, this large gap may not be that surprising. Between 1983 and 1998, more than half of all women, but only 16 percent of men, reported one full year of no earnings. ¹¹ Thirty percent of women report more than four years of zero earnings; only .05% of men report that many years out of the labor force. ¹² Even the women most strongly attached to the workforce, those who report earnings for every year in the prime-earning years, report working nearly 500 fewer hours per year than men. ¹³

These stark statistics give rise to at least two questions. First, given what appears to be a strong political and legal commitment to gender equality, why do we continue to have such a profound disparity with regard to how much paid and unpaid work men and women do? Second (and in my view the much harder question), is there anything wrong

⁷ Heidi Hartman, Stephen Rose, and Vicky Lovell, *How Much Progress in Closing the Long-Term Earnings Gap*, in THE DECLINING SIGNIFICANCE OF GENDER? 125, 126 (Blau, Brinton and Gursky eds 2006) (hereinafter DECLINING SIGNIFICANCE)

⁸ Francine Blau and Lawrence Kahn, *The Gender Pay Gap: Going, Going . . . but Not Gone*, in DECLINING SIGNIFICANCE *supra* note 7 at 37, 41.

⁹ Hartman et al, *supra* note 7 at 126.

¹⁰ *Id.* at 131. These statistics were based on a fifteen year period between 1983-1998.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

with that gendered disparity? Part I of this short essay will discuss two standard explanations, one biological, one patriarchal, for why women do more unpaid work than do men. Although both the biological and patriarchal explanations for why women and men perform different labor are well-known, neither explanation has paid enough attention to whether there is something wrong with the gendered division of labor. People who use the biological explanation often assume that biology answers the normative question, which it does not. People who use the patriarchal explanation often assume that the normative question is easy, and I will suggest that it may not be.

Part II of this essay will address the normative question. What is wrong with a system in which women regularly do more unpaid work than men? It will address that question both for those women who opt out of the paid workforce completely (at least for a significant period of time) and for the much larger class of women who combine paid and unpaid work but still perform the lion's share of the unpaid work in the home. The analysis presented in Part II suggests that encouraging women to opt out of the paid workforce entirely is problematic both because it impedes the efforts of others to strike a meaningful balance between work and family and because it puts insufficient pressure on the workplace to afford more flexibility for workers. The analysis in Part II also suggests that it is problematic for women to engage in paid work but continue to shoulder a disproportionate share of unpaid household labor. A ubiquitous gendered division of unpaid work norm has real consequences for women. To the extent that women choose to accept the norm, they run the risk of losing many of the gains women have made towards equality with men. To the extent women wish to challenge this norm seriously, by doing less unpaid work, they may well have to put their children and their marriages

in jeopardy. Unfortunately, the law's ability to alleviate this predicament is limited because an effective challenge to the gendered division of unpaid household labor norm most likely has to come from those living and working within the household itself.

I. Why the Difference?

A. Biology

Evolutionary biology provides a very straightforward explanation for why women and men devote different amounts of energy to unpaid caretaking. Indeed, the unequal division of unpaid labor seems perfectly natural from a biological perspective because motherhood and fatherhood do not look at all alike when viewed through a biological lens. A mother, at least a mammalian mother, invests much more in every gamete than does a father because much more energy goes into making one egg than one sperm.¹⁴ A mother, at least a mother in any species that fertilizes and gestates internally, must also invest substantially in feeding and protecting the embryo before it is ever born.¹⁵ Thus, even before birth, a mother has invested much more in each child than has a father. At birth, biology and numerous cultural adages tell us that because fertilization happens internally, a male can never be completely sure that he is the father of a child.¹⁶ Because he can never be sure that any given child does carry his genetic material, he is less likely to invest in a born child than is a mother, who because she gave birth to the baby, knows that the child carries her genetic material. Thus, if the reason humans are drawn to

¹⁴ RICHARD DAWKINS, *THE SELFISH GENE* 141-42 (1989). One egg and one sperm can make a zygote that grows into a child, but many more resources go into making one egg than go into making one sperm.

¹⁵ See generally Robert Trivers, *Parental Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN* 136, 139 (B Campbell ed. 1972)

¹⁶ David M. Buss, *Sexual Conflict: Evolutionary Insights into Feminism and the "Battle of the Sexes"* in *SEX, POWER AND CONFLICT*, 296, 302 (Buss and Malamuth, eds. 1996) ("Because fertilization occurs internally within women, men are always less tha[n] 100% "certain" . . . that their putative children are genetically their own. Some cultures have phrases to describe this, such as 'mamma's baby, papa's maybe.'")

procreate stems from an unconscious desire to pass on genetic material, men's best strategy is to spread his genes widely,¹⁷ while women's best strategy is to invest heavily in each born offspring in order to ensure its survival.¹⁸

In addition, of course, human mothers used to always and now usually nurse infants. The process of nursing requires the mother to spend huge amounts of time with the child; it helps the mother feel close to the child¹⁹ and it soothes the child. The child becomes used to being soothed by the mother. The mother develops child-specific expertise that makes her particularly good at soothing the child. Once the mother clearly has greater child-specific expertise, it often seems more efficient for her to care for the child because she is simply better at it than is someone who has not had the opportunity to nurse and bond with the child.²⁰ Thus, biology provides an uncomplicated and well-known narrative that can readily explain why women are more likely to take care of children than are men.

The biological story also fleshes out why men may be more likely to engage in paid work, however. Men further their own genetic goals by demonstrating their own

¹⁷ See DAWKINS, *supra* note at 146-47 ("there will normally be some evolutionary pressure on males to invest a little bit less in each child and to try to have more children by different wives.")

¹⁸ Id. at 146 (women invest more in a child at first and at every stage the cost of them losing a child is greater than the cost to a male, so she is more likely to expend more resources in parenting.)

¹⁹ See LOUIS GENEVIE & EVA MARGOLIES, *THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS* 95, 100-09 (1987) (childbirth and nursing are often emotionally charged and even erotic experiences for many women); SARA RUDDICK, *MATERNAL THINKING* 18 (1983) (mothers often amazed at how passionately they feel about their babies). Not all women experience the intensity of this connection. As Mary Becker writes "May women feel differently about different babies or become passionately involved at different points in babyhood for different babies. There is an enormous range of responses. But most women feel differently about their babies – more strongly, more intensely – than most men." Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. OF L AND WOMEN'S STUD. 133, 142 (1992).

²⁰ See RHONA MAHONEY, *KIDDING OURSELVES: BREADWINNING, BABIES AND BARGAINING POWER* 79-80, 111-112 (1995) (discussing the gains from specialization that parents receive when only one parent focuses on childcare).

success or potential for success.²¹ Men are attractive to women when they appear to be able to provide ample resources for offspring.²² The more a man demonstrates his prowess vis a vis other men, the more a woman will feel confident of that man's ability to protect her and her offspring.²³ Thus, the argument goes, men care about resources and status; women care about babies.

There may be much to criticize in this highly abbreviated biological account and there are very sound reasons not to use evolutionary biology too comprehensively when describing how human beings behave today.²⁴ Nonetheless, I think it important to acknowledge the biological explanation of the gendered division of familial labor because so many people believe it is relevant. Ask any parent shortly after the birth of his or her first child whether he or she thinks there is a biological component to attachment and, in my experience, both men and women will say (usually in hushed tones) "yes." Very successful, professional women who seem to defy many biological norms often invoke biology to explain their choices to opt out of paid labor or cut back substantially.²⁵ People speak reluctantly about biology, either because they have been

²¹ David M. Buss, *Sex differences in Human Mate Preferences: Evolutionary Hypotheses Tested in 37 Cultures*, 12 BEHAV & BRAIN SCIENCES 1, 12 (1989) ("Ambition and industriousness . . . tend to be valued more heavily by females than by males across cultures.")

²² Id. ("Females value the financial capacity of potential mates more than males do.")

²³ Douglas Kenrick, Melanie Trost and Virgil Sheets, *Power Harassment and Trophy Mates: The Feminist Advantages of an Evolutionary Perspective*, in SEX, POWER AND CONFLICT, *supra* note 16 at 29,45 ("On any dimension related to social dominance, status or resources, females were more selective . . .")

²⁴ See Stephen Jay Gould, *Sociobiology and the Theory of Natural Selection*, in SOCIOBIOLOGY: BEYOND NATURE/NURTURE? 257 (Barlow and Silverberg eds. 1980); Katharine K. Baker, *Gender, Genes and Choice: A Comparative Look at Feminism, Evolution and Economics*, 80 N.C.L. REV 465, 485-514 (2002) (evolutionary biology can be criticized for the methodological flaws one often finds in economics, namely, over-reliance on unitary metrics and presumptions of optimality).

²⁵ Numerous highly educated, elite women quoted in Lisa Belkin, *The Opt-Out Revolution*, NEW YORK TIMES MAGAZINE, Oct. 26, 2003 invoke biology to explain why they invest so much in child care ("[m]aybe evolution has endowed us with the ability to turn back our rheostat faster;" "It's all in the MRI [men and women] 'light up' differently when they think or feel;" "I think we were born with these (mother/caregiver) feelings"). See also MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 84 (2003) (quoting one woman saying "[m]aybe it's genetic . . . I have more of a link [to my kids] than my husband does.")

taught to believe that biology is not destiny or because they think it defeatist to assume that biology plays such a strong role in determining our predispositions.²⁶ Nonetheless, the biological explanation continues to surface.

This reticence people display for the biological argument is understandable given the historical misuse of biology, but the reluctance is misplaced. The fact of biological predisposition in no way condones the propriety or inevitability of biological roles. As those who strive to use evolutionary biology responsibly are quick to point out, “an is does not imply an ought.”²⁷ The fact that caretaker and provider roles may be rooted in biological differences in no way suggests that we must continue to let those roles map onto lived differences. After all, biological predisposition may explain many, many things – rape,²⁸ sexual harassment,²⁹ child abuse³⁰ – and virtually no one uses the fact of that predisposition to justify those activities. The law’s job – and society’s job – is to structure laws and norms that we endorse as good and fair and beneficial, regardless of whether we have to buck biological predisposition to do so.

The problem is ascertaining what we think of as good and fair and beneficial when it comes to the division of unpaid work. Unlike rape, sexual harassment and child abuse, which are all wrong according to anyone’s moral code, the disproportionate

²⁶ See Belkin, *supra* note 21 (“so much of recent history (the civil rights movement, the women’s movement) is an attempt to prove that biology is not destiny. To suggest otherwise is to resurrect an argument that can be – and has been – dangerously misused.”)

²⁷ See Owen Jones, 94 *The Impact of Behavioral Genetics on the Criminal Law*, 69 L. & CONTEMP. PROB. 81, 94 (2006) (discussing what is known as the “naturalistic fallacy”).

²⁸ RANDY THORNHILL AND CRAIG T. PALMER, *A NATURAL HISTORY OF RAPE* (2000) (arguing that rape is reproductively beneficial to men and that men are therefore biologically inclined to do it).

²⁹ Kingsley R. Browne, *An Evolutionary Perspective on Sexual harassment: Seeking Roots in Biology Rather than Ideology*, 7 J. CONTEMP. LEGAL ISSUES 5, 23 (1997) (explaining the prevalence of sexual harassment as being due to the biological fact that men see the world “through sexual glasses.”)

³⁰ Owen K. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. Rev. 1117 (1997) (explaining that step-fathers are biologically inclined to abuse their step-children because they would rather the mother’s energies be devoted to her later (second husband’s) children.

division of household labor is not so obviously wrong.³¹ Women do not work that much more than men;³² they just work at different jobs. It may be wrong that men get market wages for their work when women do not, though, as we will see in Part II, many women do get paid – by their husbands – for the work they perform in the house.³³ Other women, at least women in other countries, get state subsidies for the work they do in the household.³⁴ Thus, much of women’s unpaid work is compensated, just not by the market. This makes it particularly hard to identify the wrong in the disproportionate distribution of unpaid work. Before analyzing that conundrum in more depth, though, it will be helpful to evaluate the other standard explanation for the gendered division of labor. Perhaps it is not biology, but patriarchy, that explains men’s and women’s work patterns.

B. Gender as Social Construction

Many theorists root women’s continued disproportionate commitment to household labor in a system of sex inequality, or male dominance, or patriarchy, all of which operate by and through a system of gender that assigns different roles to men and women.³⁵ Although the origins of patriarchy have never been identified with scientific

³¹ Nancy Chodorow commented that “[p]schoanalytically oriented psychologists and social psychologists with whom I have talked about [the reproduction of gender roles] have argued that there is nothing inherently *wrong* with the sexual division of functions or roles – with the sexual division of labor..” NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* 214 (1978) (emphasis supplied).

³² The most recent studies suggest that women do work more than men, but, combining both paid and unpaid work, women only work 7 more hours a week than men do. Bianchi et al., *supra* note 1 at 55 (married women average 71 hours of combined paid and unpaid work a week; married fathers average 64 hours of combined paid and unpaid work.). The authors of this study classify it as “gender equality across mothers and fathers in overall workloads” *Id.* at 169.

³³ See *infra* notes 87-890 and text accompanying.

³⁴ See *infra* notes 78-86 and text accompanying.

³⁵ Gender systems assign mutually exclusive scripts to the masculine and feminine so as to legitimate and perpetuate differences on the basis of sex. See SANDRA LIPSITZ BEM, *THE LENSES OF GENDER* 79-80 (1993).

precision,³⁶ most feminists agree that a system of patriarchy operates such that men's roles get status and respect. Women's do not.³⁷ Joan Williams describes gender as a force field which pulls women into more caretaking work than they actually want.³⁸ Implicit in Williams' discussion – and in the title to her important book, *UNBENDING GENDER* – is the assumption that this gender force field is problematic.³⁹ Other authors speak in starker terms. M. Rivka Polatnick writes “It is to men's advantage that women are assigned childrearing responsibility, and it is in men's interest to keep things that way.”⁴⁰ Nancy Chodorow writes “The sexual division of labor and women's responsibility for child care are linked to and generate male dominance.”⁴¹ Julia Wood writes “encouraging women to continue caring for others because it is good, it needs to be done and no one else will do it [encourages women] to participate – or to continue participating – in their own subordination.”⁴² Catharine MacKinnon explains the

³⁶ See GERTA LERNER, *THE CREATION OF PATRIARCHY* (1986) (rooting patriarchy in a variety of historical and cultural forces); Veronica Beechey, *On Patriarchy*, 3 *Feminist Review* 66, 69, 73 (1975) (describing the rather inadequate explanations that foundational feminists give for the origins of patriarchy, but explaining how they all share a belief that a system of patriarchy operates as a power system that allows men to dominate women). Catharine MacKinnon puts it this way, “[O]n the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the system differential delivery of benefits and deprivations required making no mistake about who was who.” CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987) (emphasis supplied).

³⁷ LERNER, *supra* note 36 at 239 (“patriarchy in its wider definition means the manifestation and institutionalization of male dominance over women . . . it implies that men hold power in all important institutions of society and that women are deprived of access to that power. It does not mean that women are either totally powerless or totally deprived of rights, influence and resources.

³⁸ See JOAN WILLIAMS, *UNBENDING GENDER* 245 (2000).

³⁹ *Id.* (emphasis supplied).

⁴⁰ M. Rivka Polatnick, *Why Men Don't Rear Children: A Power Analysis*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* (J. Trebilcock ed., 1983).

⁴¹ CHODOROW, *supra* note 27 at 214.

⁴² JULIA WOOD, *WHO CARES? WOMEN CARE AND CULTURE* 167 (1994). Few dispute the proposition that women do more care work than men. See Becker, *supra* note 38 at 154 (“Caretaking is done by women most of the time in most families.”); Martha Albertson Fineman, *The Neutered Mother and Other Twentieth Century Tragedies* 162 (1995) (“Intimacy and its maintenance have always been and continue to be disproportionately allocated to women.”)

gendered distribution of anything – including work - this way: “Gender is an inequality of power, a social status based on who is permitted to do what to whom.”⁴³

For all of these theorists it is clear that women’s disproportionate investment in domestic work is part of a system of gender designed to perpetuate male privilege. Thus, for these theorists it is perfectly obvious why women’s work is not paid while men’s is. Men, who benefit from sex inequality, have no interest in affording women’s work a status that would compete with their own. Women do unpaid work because patriarchy affords them no choice. After all, who would choose to do unpaid labor?

Curiously, the answer to that question appears to be: Many, many people. Of course, there are legitimate reasons to be skeptical of the freedom with which women make the choice to do so much unpaid work.⁴⁴ Women may “choose” to caretake because their parenting partner refuses to do so,⁴⁵ or because the workplace does not provide them an opportunity to balance minimal amounts of caretaking with work.⁴⁶ Accepting low status work and subordination can seem like a perfectly rational choice when the alternative seems so radical, so potentially damaging to those one loves, and so unknown.⁴⁷ Seemingly ubiquitous gendered norms allow individual men the privilege of

⁴³ See MACKINNON, *supra* note 34 at 8 (1987).

⁴⁴ There are numerous feminist critiques of choice, see Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 NYU L. REV. 1559, 1612-1632 (1991); Kathryn Abrams, *Ideology and Women’s Choices*, 24 GA. L. REV. 761 (1990); Robin West, *Colloquy: Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1455-56 (1986).

⁴⁵ See RHONA MAHONEY, KIDDING OURSELVES 44-45 (1995) (discussing the difficulty mothers face when bargaining with their spouses over who should accept childcare responsibilities);

⁴⁶ See WILLIAMS, *supra* note 21 at 66-77 (discussing how ideal worker norms require a commitment to the workplace that is inconsistent with minimal levels of caretaking).

⁴⁷ See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 161 (1992) (“For women as a group, avoiding stress can mean accepting the status quo rather than pushing for change even, or especially, when it hurts.”)

assuming that they do not have to caretake⁴⁸ and they allow firms to demand very long hours from their workers.

Still, those who so readily emphasize the constraints within which women make the choice to do unpaid work must take a hard look at what contemporary patterns are telling us. For many, the choice to do unpaid work feels more like a luxury than a response to oppression. Many single mothers who do not have to worry about supporting or accommodating a spouse's schedule often express a desire to do *more* unpaid work.⁴⁹ Single mothers are more than twice as likely as married mothers to report sacrificing family time for work.⁵⁰ They wish they had more (unpaid) family time. Perhaps more powerfully, the women who appear to have the most power, both within their relationship and in the workforce, are the ones who are most likely to choose to do unpaid work exclusively.

Today, a mother who was born between 1965 and 1979 whose spouse earns more than \$120,000 a year is more likely than not to be at home full time.⁵¹ The number of working mothers with children under age one fell between 1997 and 2000 and the drop was concentrated among white, well-educated women over age thirty.⁵² Twenty-two percent of women with professional degrees do not work at all so that they can stay home

⁴⁸ As Joan Williams writes, "Women know that if *they* do not sacrifice *no one* will, whereas men assume that if *they* do not, *women* will. Joan Williams, *Deconstructing Gender*, 87 MICH L. REV. 797, 831 (1989) (emphasis supplied).

⁴⁹ Almost 30% of single mothers report having made a "a lot" of sacrifices in personal or family life for their job or career. Bianchi et al, *supra* note 1 at 139 -140, though a greater number (44%) report also having made a lot of job sacrifice for family. Single women, quite understandably, have to make sacrifices in both their family and professional life, but, notably, a sizable number say that they wish they could spend more time with their families.

⁵⁰ Bianchi, *supra* note 1 at 139 . Single mothers also report sacrificing work for family more than single mothers do. That is, single mothers are less likely to be happy with whatever balance they have struck between work and family.

⁵¹ Claudia Wallis, *The Case for Staying Home*, TIME, Mar. 22, 2004 at 53.

⁵² *Id.* at 52.

with their children.⁵³ A survey of women from the Harvard Business School classes of 1981, 1985 and 1991 found that 62% worked part time or not at all.⁵⁴

The above statistics suggest that highly educated women are particularly likely to subordinate their market work to family work. This is especially notable because education level correlates with a belief in gender equity.⁵⁵ Espoused belief in gender equity, in turn, correlates with a more equal division of domestic duties, at least before children arrive.⁵⁶ Thus, the women with the highest levels of education, who are also likely to have the highest incomes and the strongest commitment to gender equality, are the ones who, before children arrive, are most likely to distribute household work evenly. Children change both these women's commitment to paid work and their commitment to ungendered work. This means that it is the women with the most social capital, the women with the greatest access to quality child care, the women in marriages with the greatest commitment to gender equality, that are the ones choosing very traditional gender roles. It is hard to call this subordination.⁵⁷

There is also a perfectly rational, non-gendered reason why these women may choose more traditional roles: They get to work a lot less. Married non-employed

⁵³ Id.

⁵⁴ Belkin, *supra*, note 21.

⁵⁵ Education level correlates with belief in gender equity for both men and women. Richard J. Harris & Juanita Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis*, 38 SEX. ROLES 239, 240 (1998).

⁵⁶ Couples with expressed commitment to gender equity are share domestic duties more evenly than do couples with less expressed commitment to gender equity, Theodore N. Greenstein, *Economics Dependence, Gender and the Division of Labor in the Home: A Replication and Extension*, 62 J. MARRIAGE & FAM. 322, 323-24 (2000)

⁵⁷ This phenomenon also contrasts with the picture Catharine MacKinnon has traditionally painted of privileged women being the ones who were most able to challenge gender stereotypes. "The women that gender neutrality [and equal rights rhetoric] benefits . . . are mostly women who have been able to construct a biography that somewhat approximate the male norm, at least on paper. They are the qualified, the least of sex discrimination's victims." MACKINNON, *supra* note 37 at 37. Privileged women may be the least of sex discrimination's victims, but they are the ones living the most gendered lives.

mothers average 52 hours a week of total workload.⁵⁸ That is 25% less than married employed mothers and 19% less than (employed or unemployed) married fathers.⁵⁹ Perhaps the women who choose not to do paid work are more in touch with reality. These women might very well respond to the feminist question, “who would choose to do unpaid work?” with a question of their own: “If one can afford to *not* to do paid work, why do it?” As one former successful journalist who eventually chose to leave the workforce commented “[s]ometimes I worry that we’re really just a little bit lazier . . . but in my heart of hearts, I think it’s really because we’re smarter.”⁶⁰

Is there something problematic about the choice these women are making, regardless of whether it stems from sloth or savvy? As a policy matter, should we discourage women from opting out of the paid workforce and into very traditional gender roles? Part II analyzes that question and it begins to unpack the more nuanced question of whether there is something disturbing about women accepting, but subordinating, their own paid work so that they can disproportionately shoulder the unpaid familial workload.

II. What’s Wrong With Difference?

Because the issues raised by those women who choose to forsake all paid work and those women who choose to subordinate but not forsake paid work are different, this part addresses two different normative questions. First, are there policy reasons to discourage women from opting out of the paid work force completely? Second, are there policy reasons to discourage two-earner households from dividing unpaid work in a traditionally gendered way?

⁵⁸ Bianchi et al, *supra* note 1 at 56.

⁵⁹ *Id.*

⁶⁰ Belkin, *supra* note 21 (quoting Sally Sears).

A. The Opt-Outs

Despite what may, given the differential amounts of work involved, seem like sound reasons for abandoning paid work if one can afford to, there are two reasons that policy makers should be wary of household arrangements in which one adult shoulders all of the paid work and the other adult shoulders virtually all of the unpaid work. The first reason has to do with the effect that this distribution of labor has on all the households that cannot afford to do it. The second has to do with how optimal a complete division of paid and unpaid labor is for the households that do it.

First, couples who choose to specialize completely, that is, couples in which women specialize in unpaid work and men specialize in paid work, are almost always elite.⁶¹ The trend toward staying home, particularly staying home full time, is clearly concentrated in households that earn the most money.⁶² As elites, these households set norms, but the norms that these households set are totally at odds with the needs, or at least desires, of the vast majority of parents who are striving to achieve some acceptable sense of balance. Most non-elite mothers work outside the home.⁶³ Most men in most dual earner families are responsible for much more child care than they used to be.⁶⁴

Thus, most parents have to struggle to provide good care for their children while

⁶¹ See *supra* text accompanying notes 45-48.

⁶² *Id.*

⁶³ The Bureau of Labor Statistics reports that 75% of mothers with children under 18 work outside the home and 65% of married mothers work outside the home. U.S. DEPT. OF LABOR., BUREAU OF LAB. STATISTICS, NEWS, EMPLOYMENT CHARACTERISTICS ON FAMILIES IN 2005, <http://www.bls.gov/news.release/pdf/famee.pdf>.

⁶⁴ Bianchi et al., *supra* note at 55 (married fathers work almost twice as many hours in the home as they did in 1965). M.R. Nakhaie, *Class, Breadwinner Ideology and Housework Among Canadian Husbands*, 34 REV. RADICAL POL. ECON. 137, 152 (2002) (arguing that men in working and managerial classes do more housework than men in elite households).

maintaining their paid income. The elites who fall into traditional gender roles avoid that struggle.

Even though elites are, by definition, a minority, they have a disproportionate impact on how public resources are allocated and on what private markets look like. When elites opt out, there is less social pressure to have programs and services that could help those struggling with work/family balance.⁶⁵ The impetus to have quality day care, full-day, full year after school and camp programs, emergency care and the like is lessened when those parents with the most financial and social capital do not need them. It is not just that our elites might pressure the government to subsidize these programs in the ways that governments in most of the industrialized world do,⁶⁶ it is that elite families are not asking private markets to provide any of these comprehensive services either. There is not nearly as much demand for high quality day care as there could be because the people who could actually afford to pay for high quality day care do not want it. When a norm is not set at the high end, it is harder to develop a cultural understanding for what quality should look like.⁶⁷

By the same token, the individuals running the firms that could institute more flexible work policies are almost always supported by a spouse who specializes in unpaid

⁶⁵ I have written about this somewhat more depth, elsewhere, see Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359, 385-386 (2007).

⁶⁶ *Early Education and Child Care: Does the United States Measure Up? Hearing of the Committee on Health, Education, Labor and Pensions*, 107th Cong. 4 (2001) (statement of Sen. Jeffords, Chair, Senate Comm. On Health, Education, Labor and Pensions) (“Of total funds spent on early education and care in the united States, government pays for 39 percent, private sources – one percent, and parents – 60 percent. This is pretty much the reverse of the cost-sharing between parents and government in other industrialized nations. In all of the other industrialized nations, the costs of early education and care for 3- and 4-year-olds rests with government or employers, or a combination. Parents are responsible for a small percentage of the costs, generally in the 10- to 20-percent range”)

⁶⁷ See generally, Cass R. Sunstein, *Social Norms and Social Roles*, 96 COL. L. REV. 903, 927-931 (1996) (discussing how cultural understandings of “normal” are set by elites, or at least leaders).

work.⁶⁸ There is minimal internal demand for flexible scheduling, reasonable hourly requirements and emergency leave provisions when success at a firm is defined by people who have no need for these policies themselves. When we let our elites specialize, we do not have the pressure for balance that the vast majority of the workforce needs.⁶⁹

Second, it is clearly the case that many women's decisions to specialize in unpaid work is a decision made only after their pleas for more manageable hours go unheeded.⁷⁰ One reason we should encourage women not to opt out completely is because they do not actually want to opt out completely. They want the labor market to respond to their demand for part-time work. They understand what the empirical evidence appears to show, which is that some balance of paid and unpaid work works best because paid work has many benefits and unpaid caretaking has many drawbacks. Numerous studies show that paid work is emotionally beneficial for mothers.⁷¹ Other work shows that complete financial dependence on one's spouse can drain one's self-confidence. Formerly

⁶⁸ See WILLIAMS, *supra* note 32 at 77. “[S]uccessful men tend to have marriages with gender patterns that disappeared a generation ago in the bulk of the population, with wives operating virtually as single parents and not bothering their husbands with domestic details. ‘The higher up you go, the likelier it is that you will have a traditional marriage.’” (quoting ARLIE HOCHSCHILD, *THE TIME BIND, WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 61 (1997)).

⁶⁹ One may question whether people really do “need” balance. Perhaps both parents only work because they have fallen victim to an overly materialistic culture. The vast amount of what the average two parent household earns, however, goes to providing basic housing, food, clothing, healthcare and child care for their children. For a breakdown of typical household expenses, see <http://www.cnpp.usda.gov/Publications/CRC/crc2006.pdf>.

Moreover, in a country that ties educational quality to land value, prioritizing children's education often means buying an expensive house. It is not clear that this is materialism. Comparably, when a child's success is often dependent on having a range of extra-curricular activities, buying lessons and enrichment activities for one's child is often considered to be a basic part of education.

⁷⁰ See WILLIAMS, *supra* note 32 at 72-731; Belkin, *supra* note 21 (management never responded to litigator's part-time proposal).

⁷¹ Vicki Schultz, *Lifes' Work*, 100 COLUM. L. REV. 1881, 1908-12 (2000) (citing studies showing that mothers are happier when they work); ROSALINE C. BARNETT & CARYL RIVERS, *SHE WORKS, HE WORKS: HOW TWO INCOME FAMILIES ARE HAPPIER, HEALTHIER AND BETTER-OFF* 56-59 (1996) (work outside the home acts as a buffer against stresses and anxieties of parenting).

dependent women who are forced to provide for themselves after divorce often feel a sense of pride in providing for themselves, even at a much reduced standard of living.⁷²

Just as important, mothering can be a source of exquisite pain for women. Many contemporary women who have chosen to invest heavily in mothering are guilt-ridden, stressed and unable to make healthy distinctions between themselves and their children.⁷³ The emotional intensity that many women bring to mothering is not always enjoyable in the short term and is often problematic in the long term.⁷⁴ Exclusive motherhood is not necessarily good for mothers or children.⁷⁵

Reforming the workplace so that it can more readily accommodate the flexible scheduling demands of many of the mothers who now opt-out will afford these mothers an opportunity to live a more integrated, balanced life. As discussed, such reforms would also likely benefit the less elite workers who need flexibility even though opting out of paid work is not an option. Some legal manipulation of the workplace may be needed because the workplace may be unnecessarily stuck in outdated beliefs about the necessity of excessive hours⁷⁶ and the availability of someone else to shoulder family responsibilities.⁷⁷ In reality, many workplaces can probably work perfectly efficiently if

⁷² “Trying to be my own person, well, it’s scary . . . [But t]here’s a certain kind of exhilaration in taking yourself seriously, thinking about yourself as an entity, trying to be whole unto yourself.” CATHERINE KOHLER REISSMAN, *DIVORCE TALK* 179-80 (1990)

⁷³ JUDITH WARNER, *PERFECT MADNESS: MOTHERING IN THE AGE OF ANXIETY* (2005) (describing various neuroses that seem to haunt the current generation of mothers of minor children)

⁷⁴ See Becker, *supra* note 41 at 145-146 (describing the pains of motherhood especially as children start to break away from their mothers in adolescence).

⁷⁵ See Katharine K. Baker, *Taking Care of Our Daughters*, 18 *CARD. L. REV.* 1495, 1518-19 (1997) (book review of MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (studies from different cultures suggest that children may benefit from more collective child-rearing.)

⁷⁶ See WILLIAMS *supra* note 32 at 72-75 (discussing how managers presume that one cannot do an adequate job unless one puts in a (very high) minimum number of hours).

⁷⁷ *Id.* at 80 (many jobs provide very limited sick time, thus preventing workers who need to be home with a sick child from taking them).

they incorporate part-time work and flexible schedules into their programs.⁷⁸ Firms that now invest considerable resources in training young women only to lose them to full time motherhood can save money by developing the accommodations necessary to retain these women.⁷⁹ For all of these reasons, using the law to demand flexibility from the workplace seems like a good idea.⁸⁰ By demanding flexibility, the law will provide the opt-outs with a meaningful way to stay in. More people will find accommodating workplaces, more women will be able to achieve the balance they ask for⁸¹ and more workplaces will be enriched by the contributions of women who currently leave.

B. The Remaining Disproportionate Division of Unpaid Labor

Even with all of the benefits that may come from more legal pressure for workplace flexibility though, even if the opt-outs opt back in and the non-elites benefit from less rigid scheduling, even if all that workplace training does not go to waste, current trends still suggest that it is very likely that the women who opt back in will be doing twice as much unpaid labor in the household, while their spouses do twice as much paid work.⁸² The lives of non-elite families may become less stressful, but little suggests that the burdens of unpaid work are likely to change. Is there a problem with that?

⁷⁸ See Joan Williams and Cynthia Thomas Calvert, *Effective Part-time Policies From Washington Law Firms*, Final Report (2d ed. 2001), available at www.uchastings.edu/site-files/WLL/BalancedHours2nd.pdf.

⁷⁹ See Joan Williams, *supra* this volume (EDS: Won't Joan be contributing a piece that highlights how firms can save money if they work harder to retain those whom they have trained. This argument was certainly a part of her power point presentation.)

⁸⁰ For a more skeptical perspective on whether workplaces can really provide flexibility without incurring real cost, see Michael Selmi, *supra* this volume (suggesting that the empirical data is mixed on how much employers can benefit from more flexible scheduling).

⁸¹ See *supra* note 67.

⁸² See *supra* note 5-6

This is the conundrum that we left at the end of the biological explanation for the gendered division of labor. Is there something wrong with a dynamic in which men and women work close to equally hard, but men get compensated by the market for much more of their work than women do. The discussion that follows offers a preliminary analysis of that question. Part IIB1 explains why the problem with the gendered division of unpaid labor cannot just be that women do not get paid for their labor because many women either do not want to get paid or do get paid, albeit indirectly. Part IIB2 suggests that if there is a problem with the disproportionate division of unpaid labor it lies in the ramifications for future women who may not want to live with a gendered norm that could seriously undermine their ability to compete with men.

1. It's Not About Money

On its face, women's disproportionate burden of unpaid work seems problematic because money brings power and status. Men get paid more money; therefore they get more power and status than women. What makes the analysis so puzzling though is that when one tries to solve this money problem with money, by giving women more access to it, men still retain more power and status because the allocation of roles does not change much.

There are three ways to fix the money problem with money. First, we can do more of what we have already done with other domestic work, send it out to a specialized market so that women can buy domestic services and spend more time earning money. Second, we can pay women with public money (government subsidy) for the work they do in the home. Third, we can force men to compensate women for the unpaid labor that

men reap the benefits of. Curiously, none of these solutions eliminates the gendered division of labor.

As mentioned earlier, women spend much, much less time each week doing unpaid housework than they did 40 years ago. This reduction in hours (15 hours a week for married mothers)⁸³ has probably come from a combination of technological advances (today, one cleans an oven by pushing a button), some reduction in standards for cleanliness,⁸⁴ and a significantly expanded service industry that washes more clothes, cleans more bathrooms, and prepares much, much more food than it used to.⁸⁵ As also mentioned earlier, however, in the last 40 years, households have not reduced the amount of time spent in direct parenting activity. Indeed, the number of hours devoted to parenting has increased.⁸⁶

The fact that parents have not reduced their child care hours in the ways in which they have reduced other housework hours suggests that there is something about child care that parents do not want to delegate to others. And of course there is. A good deal of parenting requires spending enough time with one's children to just *know* them. Part of the joy of parenting comes from having the kind of connection to a child that can only come from enough hours spent interacting. This is true whether a child is 2 or 10 or 16 years old. Comparably, one cannot provide the kind of emotional support a child needs

⁸³ See Bianchi et al. , *supra* note 1 at 91.

⁸⁴ John Robinson and Melissa Milki, *Back to Basics: Trends in and Role Determinant of Women's Attitudes toward Housework*, 60 J. OF MARRIAGE AND THE FAM. 205-18 (1998) (suggesting women's standards for cleanliness may have declined); Bianchi et al., *supra* note 1 at 92 (speculating that homes may be less clean today than they used to be)

⁸⁵ See Bianchi et al, *supra* note 1 at 92 (referencing the tasks performed by the service industry); Hayden Stewart, Noel Blisard, Sanjib Bhuan & Rodolfo M. Nayga, Jr., *The Demand for Food Away from Home: Full-Service or Fast Food?* Economic Research Service Research Brief, US Dept. of Agriculture, available at <http://www.ers.usda.gov/publications/awr829/aer829researchbrief.pdf> (evaluating how much more food is now bought prepared).

⁸⁶ See *supra* text accompanying notes 1-2 .

after a bad soccer game, a fight with a friend, or a troubling homework assignment if one does not know enough about the substance of a child's life to provide advice that is sensitive and believable. Moreover, as children grow, a good deal of parenting requires "just being there." Older children want parent-specific interaction precisely because older children want to know who their parents are, what they think, or how they would handle different kinds of issues.⁸⁷ No one but a parent can be the parent that older children want access to. The market simply cannot provide these household services because, by definition, only a parent can.

Other aspects of parenting are similarly difficult to purchase on the market. Managing a household, particularly a household with children, is a formidable task. There are clothes to buy, doctors' appointments to schedule, aftercare and camp programs to choose between, parent-teacher conferences to fit in. It does not take a great deal of time to pick up the phone to call the dentist to make an appointment for one's child, but it takes a great deal of energy to remember to do so. For the most part, it is women who perform this management function.⁸⁸ Women cannot delegate this work to the market because it is work that requires family-specific knowledge (How badly do the children need new clothes? When was the last time they had a check-up?) and/or important discretionary decision-making (What kind of camp would be good for my child? Do I

⁸⁷ As my sister-in-law, a mother of two teenagers put it, "you can pay someone else to put a diaper on your kid, but you can't pay someone to talk to your kid about race . . . or sex." Conversation with Tracy Baker-White, December 2006

⁸⁸ Bianchi et al *supra* note 1 at 1790 ("mothers' greater subjective sense of time pressures may derive from their being the one who continues to orchestrate family life."). As Dorothy Roberts has analyzed, women have performed this household managerial function in this country at least since the 19th century, even when they were wealthy enough to delegate virtually all of the menial housework to others. Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J. L. & FEMINISM 51, (1997). See also, Katharine C. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW U. L. REV 65, 102-108 (1998) (women perform most of the household specific labor (planning, counseling, companionship) that is particularly hard to put a monetary value on).

want my child to have a playdate with that boy?). In all likelihood, this kind of labor is not even captured in the time-diary studies,⁸⁹ so the distribution of unpaid labor is probably even greater than the statistics suggests. This organizational labor, like “being there” labor and “getting-to-know” labor simply cannot be farmed out to the market.

So if the solution does not lie in buying parental services in the market, then the solution could lie in recognizing that much parenting work must be done in the home and compensating the women who do it there. To a large extent, this is what family allowance programs do. Most of the industrialized world has family allowance policies that pay money directly from the state to households in which children are being raised.⁹⁰ Many countries also have guaranteed family leave policies, at close to full pay, to ensure that parents can leave the workforce temporarily when a child is born without being too penalized financially.⁹¹ In essence, these policies require employers to pay parents for being in the home.

Several Scandinavian countries also have laws that grant parents the right to work fewer hours if they choose,⁹² making it more possible for both mothers and fathers to integrate caregiving needs with paid work. Scandinavian and some European countries also have excellent, state-subsidized child care that helps make it easier to accommodate different kinds of working schedules and helps take pressure off a norm that equates good mothering with full-time mothering.⁹³

⁸⁹ See Bianchi, *supra* note 1 at 1790 (women’s greater acceptance of family organizational tasks is “a reality that is difficult to capture in time-diary data.”)

⁹⁰ Lee Rainwater and Timothy Smeeding, *Doing Poorly: The Real Income of American Children in a Comparative Perspective*, LUXUMBOURG INCOME STUDY 8, 2122 (1995)

⁹¹ Eva Merysson Milgrom and Trond Petersen, *The Glass Ceiling in the Untied States and Sweden: Lessons from the Family-Friendly Corner of the World, 1970-1990* in DECLINING SIGNIFICANCE, *supra* note 7 at 158.

⁹² CATHERINE HAKIM, WORK-LIFESTYLE CHOICES IN THE 21ST CENTURY 243 (2000).

⁹³ WILLIAMS, UNBENDING GENDER, *supra* note 32 at 49.

Perhaps surprisingly, these policies do little, if anything, to equalize earnings between men and women or catapult women into top, high-paying management positions. Women are still much more likely than men to work part time in Sweden.⁹⁴ Although women appear to more attached to the labor force than they used to be in Sweden, they still opt out of paid work much more than men do.⁹⁵ Indeed, one is less likely to find women at top management positions in Scandinavian countries than one is to find women in top management positions in the United States.⁹⁶ As one set of researchers concluded, “What family policies undoubtedly do is make life easier for children and parents. Whether they are also good for achieving gender equality is less clear.”⁹⁷ In fact, it seems clear that paying women for the work they do in the home does little to help achieve gender equality in the workplace. After studying women in the child-care and household subsidy rich countries of both Sweden and France, Nancy Dowd concluded “women [are still] paid less, on the whole, than men, are concentrated in a small number of occupations, and are at the bottom of the occupational and managerial hierarchies.”⁹⁸ In short, using public subsidies to compensate women for the work they do in the home does not appear to give women the power and prestige that men achieve by earning more money in the marketplace and it does not appear to alter the allocation of roles within families.

Finally, then, the most equitable solution may be to have fathers pay mothers for the parenting work that mothers disproportionately do. This decreases the amount of

⁹⁴ Milgrom et. al. *supra* note 79 at 184.

⁹⁵ Id. at 181-82 (using age as a proxy for experience, one finds that the average age of women in the workforce is much lower than men [suggesting that more women leave once they have children], though it is higher for women than it used to be).

⁹⁶ Id. at 157.

⁹⁷ Id. at 158.

⁹⁸ Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311, 336 (1989)

control men have over the money that brings them power and prestige and it allows mothers to enjoy the benefits of money. This is probably a fine idea, but it is also what already happens in the vast majority of houses that disproportionately divide unpaid labor. Most mothers share the rewards of their spouse's market earnings. They do get paid – by their husbands.

Others have analyzed how women who disproportionately invest in unpaid work are penalized at divorce because, for the most part, a husband/father is able to take his paycheck with him.⁹⁹ He is able to reap the financial benefits of having committed so many hours to paid work because his spousal and child support liabilities do not equalize post-divorce status of living in the two households created by the divorce. The wife/mother is forced to incur the economic hardship that follows from not committing herself more fully to paid work. The solution, some argue, is to equalize the standard of living in the households after divorce so that at divorce husbands do not disproportionately benefit from the unequal division of household labor.¹⁰⁰

These shared income proposals may indeed be the fairest way to allocate revenue after divorce, but they will not do much for the much larger proportion of households that divide labor but never divorce. Approximately twenty percent of first marriages end in

⁹⁹ Allan Parkman, *Bargaining Over Housework*, 63 *Am J. Econ. & Soc.* 765 (2004) (arguing that it is too easy for men to leave marriage without a compensating women adequately); Williams, *supra* note at 126 (arguing that men retain their ideal worker wages at divorce, but now do not have to share as much of them with their ex-spouse who still provide them with caretaking services); Katharine C. Silbaugh, *Turning Labor into Love*, 91 *NW. L. REV.* 1 (1996) (arguing that because women's household labor is not treated as real work, women are undercompensated at divorce).

¹⁰⁰ See WILLIAMS, *supra* note 32 at 129-130 (proposing an income sharing arrangement). See also Jane Rutherford, *Duty In Divorce: Shared Income as a Path to Equality*, 58 *FORDHAM L. REV.* 539, 577-92 (1990) (proposing a comparable plan).

divorce within the first 5 years of marriage.¹⁰¹ Many couples do not have children before year 5 and even those that do have not had time to develop an entrenched gendered division of paid and unpaid work. Only 37.5% of the marriages that make it past year 5 end in divorce.¹⁰² It is the sizable majority (67.5%) of marriages that do not end in divorce after five years that raise the most vexing questions because the women in those marriages end up sharing in their husbands' wealth until the end.

If most of the women who do a disproportionate amount of unpaid labor in married households do get paid, albeit indirectly, for the labor they perform, then the problem with the gendered division of labor cannot be just that men get rewarded for their labor and women do not. Men may get more status from their work because it is work that a market values, but many women, not only the ones who opt out of the workforce completely, seem willing to forego the extra status that more paid work would bring. Most employed married mothers report feeling "very successful" in balancing work and family life.¹⁰³ This means that a sizable number of women are content with the choice to do less high status work, presumably because there are some benefits that come from doing more low status work. If most married women do get compensated for their unpaid labor and if most married women are fairly comfortable with the status tradeoffs

¹⁰¹ Centers for Disease Control, *Advance Data*, Number 323, May 31, 2001, p. 5 (20% of first marriages end within the first five years. Another 13% have ended by year 10, another 10% at year 15, and another 7% at year 20 or after. Thus, only 30% of the marriages that make it past year 5 end in divorce.)

¹⁰² The CDC report, see *supra* note 89, suggests that the divorce rate for first marriages is still, eventually, 50%, but other studies suggest that it is lower. See Robert Shoen & Robin M. Weinick, *The Slowing Metabolism of Marriage: Figures from 1988 US Marital Status Life Tables*, 30 DEMOGRAPHY 7737, 742 (1993) (Divorce rate is 43%). The 37.5% figure assumes a 50% divorce rate: After year 5 another 30% of first marriages will end in divorce. 30% of 80% (the percentage of first marriages that do not end in the first 5 years) is 62.5%.

¹⁰³ Bianchi et al *supra* note 1 at 139 (52% of married mothers report feeling very good about the balance they have struck).

they have made once becoming parents, what is the problem with having a gendered norm?

2. It Is About The Norm

There are two potential concerns with a gendered distribution of unpaid labor norm. The first has to do with how hard it will be for those women who want to stray from the norm. The second has to do with how likely we are to even maintain the gains we have made toward gender equality so far.

a. Challenging the Norm

First, the more women and men conform to the norm, the harder it will be for those who may want to stray. If one can safely assume that some women will want to work long hours, compete at the highest levels, work to save the world or earn a lot of money, accepting a disproportionate division of unpaid labor norm will hinder these women's ability to do so – if they also want to be parents. If a woman wants to compete in the market and parent, she will have to demand that her spouse do a disproportionate share of unpaid work. She has to convince him that it is appropriate and fulfilling and ennobling to do twice as much unpaid work as she does. The more ubiquitous the gendered division of household labor is elsewhere, the harder time she is going to have convincing her partner to shoulder more of the domestic workload because it will require convincing him to both (i) do more unpaid work and (ii) do *less* paid work.

For self-evident reasons, it is much easier to tell women that they really may want to be well-paid, high powered, professionals commanding esteem than it is to tell men that they really may want to be low powered, househusbands whose work has never been valued. Men today do perform more unpaid work than they used to, but women still do

twice as much routine child care as do men.¹⁰⁴ Studies suggest that in the households that most approximate an equal division of household labor (which are also the households in which spouses incomes are closest to equal), women still do approximately 60% of the domestic work.¹⁰⁵ Moreover, as discussed, it appears that men do little of the invisible family organizational work that is essential to a functioning household.¹⁰⁶

It is possible that time will simply erode the male privilege that seems to let men avoid such a large percentage of unpaid work in the home, but it is also possible that movement toward a more equal distribution will just stall, as has the movement to eliminate the wage gap.¹⁰⁷ The amount of time women spent in paid work quadrupled in the 30 years from 1965 to 1995, while the time men spent in unpaid caregiving did not even double.¹⁰⁸ This pace differential cannot be explained by the decreased need for caregiving because, for the most part, the number of hours devoted to caregiving (unlike the number of hours devoted to other housework) has stayed constant.¹⁰⁹ Suzanne Bianchi and her team of time diary analysts emphasize that men's lesser commitment to unpaid work is not about laziness – men work almost as hard as women if one combines paid and unpaid work,¹¹⁰ but that does not mean that the woman who wants to flip the tables and ask her spouse to accept the greater portion of low status work will be able to do so. In short, many more women seem willing to accept the non-financial benefits of

¹⁰⁴ Bianchi et al, *supra* note 1 at 66.

¹⁰⁵ Catherine Ross, *The Division of Labor at Home*, 65 SOC. FORCES 816, 816, 181 (1987); Julie Brines, *Economic Dependency, Gender and the Division of Labor at Home*, 100 AM. J. SOC. 652, 652 (1994); Harriet Proesser, *Employment Schedules Among Dual Earner Spouses and the Division of Labor by Gender*, 59 AM. SOC. REV. 348 (1994); Theodore N. Greenstein, *Economic Dependence, Gender and the Division of Labor in the Home*, 62 J. MARRIAGE & FAM. 322, 324, 333 (2000).

¹⁰⁶ See *supra* notes 76-77 and text accompanying.

¹⁰⁷ See *supra* text accompanying notes 7-8.

¹⁰⁸ Bianchi et al, *supra* note 1 at 90.

¹⁰⁹ *Id.*

¹¹⁰ See *supra* note 28 .

low status work than do men. Biology may explain why women get more benefit from low status work (they care more about children); patriarchy may explain why women would care less about status (they are socialized to believe they do not deserve status), but if we want to honor the desires of some women to not do non-delegable, low status family work than we have to find others who will do that work. The stronger a norm that assumes this work will be done by women, the harder it is to convince men to do it.¹¹¹

Possibly more difficult than asking men to do low status caregiving work, though, is asking them *not* to do high status work. Asking a man to accept the kind of unpaid work burden that the average married woman accepts will be asking him to relinquish his role as provider. As numerous scholars of gender have recognized, providing is critical to cultural understandings of fatherhood. Robert Griswold writes “[b]readwinning has remained the great unifying element in fathers’ lives. Its obligations . . . shape their sense of self, manhood and gender.”¹¹² Men are doing more child care than they used to but they are not doing much less providing. The hours that men now spend in child care have come as much from their leisure hours as their paid work hours.¹¹³ Men still care a great deal about paid work. Whether one thinks the importance of men’s provider identity comes from biology or culture, it has remained deeply entrenched, and it is difficult, in the abstract, to criticize the behavior it produces.

¹¹¹ See generally Sunstein *supra* note 1 at 912 (social norms affect, if not control, peoples’ willingness to behave in certain ways).

¹¹² ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* 2 (1993). See also Joseph H. Pleck, *Husband’s Paid Work and Family Roles: Current Research Issues in Research in THE INTERWEAVE OF SOCIAL ROLES, FAMILIES AND JOBS*, 251, 305 (Lopata & Pleck eds. 1983) (“the breadwinner role is socially defined as men’s primary family role”).

¹¹³ Bianchi et al. *supra* note 1 at 90-91. Moreover, there is some indication that the decrease in total paid work hours for men is more attributable to the men who have left the paid labor force altogether, not to men who have decreased their paid work hours in order to devote more time to unpaid work. See Paula England, *Toward Gender Equality: Progress and Bottlenecks* in *DECLINING SIGNIFICANCE*, *supra* note 1 at 245, 254.

As providing fathers, men want to work hard, they want to be good at what they do, they want to provide for their families and be esteemed community citizens. For them, yearning to fill this role does not feel like a yearning to put someone else down or assert power over a spouse, so much as it feels like desire to do the best job they can – to gain public esteem or at least esteem among their peers. It is not easy to ask men to give that up. And it is extraordinarily difficult to ask women to ask the men they love to give that up. A woman must ask her spouse to give up that which defines him as a good father culturally. She must ask him to give up that which, for whatever reason, brings him tremendous personal satisfaction. She must ask him to sacrifice a great deal so that she can compete as she wishes.

Like many feminist issues, this really is a question of the personal being political, but instead of being - as it was 40 years ago – about sexual attitudes and the primacy of women’s sexuality,¹¹⁴ it is about who is going to drive carpool. In addition to being inherently less interesting to most people, it is a private bargaining process with obvious potential third party casualties: children. It is hard to engage in hard bargaining when much of the work being bargained over is so invisible it does not even get recorded in time diaries. It is hard to demand change from a male provider norm that looks to the outside world and feels to the father fulfilling it, noble. It is, for many, simply unthinkable to engage in a game of chicken when walking away might mean that one’s children will not be picked up from school, brought to the dentist on time or helped with their homework each night.

¹¹⁴ SARA EVANS, *PERSONAL POLITICS* 83-101 (1980); JO FREEMAN, *THE POLITICS OF WOMEN’S LIBERATION* 51 (1975) (describing the growing feel of women in the civil rights’ movement that they were not being respected for their political and organizational contributions and were being treated primarily as sexual objects.)

Professor Paula England has suggested that the most dramatic change in living patterns and gender dynamics in the last 50 years has not been about women entering the labor force, or single mothers, or divorce, per se, it has been “the reduction in the proportion of the typical adult life spent co-residing with a person of the other sex.”¹¹⁵ In other words, as women have begun demanding more power and more respect, the genders have split up. This does not bode well for the bargaining process. People are walking away from each other not coming to agreement. That is a very bad option, though, if children are already in the picture. Divorce is extraordinarily difficult financially and emotionally for women and most research suggests that it is not good for children either.¹¹⁶ That women with an espoused commitment to gender equality might rather provide their children with a gendered, two parent household rather than a nongendered single parent household is hardly surprising. If, as a parent, one is put in a bargaining position in which it seems that one’s choices are to walk away or to accept the carpool duty, it is very likely that you will accept the car pool duty. It is by far the least worst option.

None of this is that big a problem though if most women do not care about having a spouse who does a greater share of unpaid work. If most women who can *imagine* a world in which they were free to do more paid work because their spouse would do more unpaid work *would still choose* not to do more paid work, then there are not really that many women hurt by the gendered disproportionate division of unpaid work norm. If

¹¹⁵ England, *supra* note 106 at 254.

¹¹⁶ In addition to divorce being difficult financially for women and children, see *supra* notes 87-88 and text accompanying, single mothers report much less satisfaction in being able to balance work and family obligations. See *supra* 43-44. Most research also confirms that children are better off being raised in a two parent household than a single parent one. See generally, JUNE CARBONE, FROM PARTNERS TO PARENT: THE SECOND REVOLUTION IN FAMILY LAW 111-118 (2000) (discussing the research on how children fare in single parent households)

there are only a few women out there who do aspire to both parent and compete at the highest levels, then perhaps the law need not be concerned, because though these women will have a hard row to hoe, their numbers are small.

2. Erosion of Progress

There is another problem though. If we simply accept the gendered disproportionate burden of unpaid labor norm, we may be jeopardizing the substantial equality gains that women have already achieved. Women have made great strides in the last 40 years. It is not just that they have entered the workforce in such great numbers; at all but the top levels, they compete and win. In 1968, 43 percent of college freshman were women. Today, 55% of college freshman are women.¹¹⁷ In 1965, women constituted 7% of first year medical students and 4% of law school graduates. In 2005, they constituted 47% of both medical and law school graduates.¹¹⁸ Women who have committed themselves to this kind of educational course often become wonderful first, second and third year law firm associates, medical residents and business consultants. They are men's equals in these fields; they know they are men's equals; and they do very well. But then, they have children, and a huge number of them stop competing anywhere near so hard. If, as a culture, we simply come to accept the gendered division of unpaid caretaking norm, how long is it going to be before women stop competing earlier.¹¹⁹

¹¹⁷ Dept. of Health Education and Welfare, Office of Education, Opening Fall Enrollment in Higher Education, No. 188,, 1968 Statistical Abstract of the United States and US Census Bureau, Statistical Abstract of the United States: 2007, Table 274.

¹¹⁸ See www.aamc.org/members/wim/statistics/statsUS/2004-01.pdf (for medical schools) and www.abanet.org/legaled/statistics/charts/stats%206.pdf (for law schools).

¹¹⁹ There are some reports that women will keep competing while they are young because entrance into the world of elite wage earners is critical to finding the best partner, and/or an important step in qualifying one as a good mother. See Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, NEW YORK TIMES, Sept. 20, 2005 (undergraduate women at Yale say that they plan to finish graduate school but then marry and stay home with their children because that is the best way to be a mother). Though, there is also some indication that the educational community may chafe at being used as a "finishing school" in this

How long are women going to compete and think of themselves as equals if they know they are going to stop playing at that level. If women know they are going to work 500 hours less in the years that matter later,¹²⁰ why compete so hard earlier?¹²¹

The concern that women may stop trying so hard to prove they are equal is related to the concern that the workplace will stop trying so hard to treat them equally. If women's less ambitious work patterns continue, labor markets may return to the practice of suspecting that female laborers are less stable investments as workers. In the last 30 years, the law has made clear that employers are not allowed to assume that women cannot do traditionally male jobs.¹²² Neither are employers allowed to discriminate against women on the basis of pregnancy,¹²³ the ability to become pregnant,¹²⁴ or motherhood.¹²⁵ These anti-discrimination laws were necessary, supposedly, because employers made baseless assumptions about how pregnancy and motherhood rendered women unable to work as hard or as well as men. Ideally, once laws like this have been in place long enough to help eradicate stereotypical, but inaccurate, assumptions about

way. See *id.* (former Director of Undergraduate Admissions at Harvard commenting “[i]t really does raise this question for all of us and for the country: when we work so hard to open academics and other opportunities for women, what kind of return do we expect to get for that?”)

¹²⁰ See *supra* note 13.

¹²¹ It is also possible that women work so hard in college and graduate school because the educational process is inherently rewarding and women want an education for education's sake. Professional schools, which women have flocked to in the last 40 years, seem like a curious choices to make if what many women really want is just a complete education. Moreover, given the vast subsidization of education by both private and public sources (the federal government allocated over 76 billion dollars in student financial assistance in 2006, see U.S. Census, Statistical Abstract of the United States, table 279, Federal Student Financial Assistance: 1995-2006), policymakers may reconsider whether policy goals support subsidizing those who are pursuing an education only for its inherent value.

¹²² Title VII of the Civil Rights Act of 1984 § 701 et seq., as amended, 42 U.S.C. § 2000e et seq (1994).

¹²³ The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .”)

¹²⁴ *UAW v. Johnson Control Inc.* 499 US 187 (1991) (company cannot exclude fertile women because exposure to lead might hurt fetuses)

¹²⁵ *Phillips v. Martin-Marietta*, 400 US 542 (1971) (Title VII does not permit employers to treat mothers with small children differently than fathers with small children).

qualification, the market itself ensures equality as employers simply look for the best people to do the necessary jobs.¹²⁶

In light of these laws, it has become virtually impossible for an employer to ask a potential employee about her plans for parenthood. Any such conversation could be used as evidence in a subsequent gender discrimination lawsuit because it would suggest that the employer was treating the applicant differently because she planned to or had become a mother. How long can we continue to expect employers not to treat mothers differently though, when so much of the current data suggests that many mothers behave differently as employees? Mothers choose to work less hard at paid work than their male counterparts. Can the norms the law has set with regard to equal treatment withstand the rational pull of the market which will be to allow firms to make statistically accurate assumptions about the likelihood of productivity? If women between the ages of 25 and 49 really do work 500 hours less on average than men, why can't employers take that into account?

Ironically, given the number of women who choose to pursue a high status career and stay childless, the people with the greatest desire to re-institute the employer questioning with regard to parenthood may be women themselves, not the ones who plan to become pregnant but the ones who do not.¹²⁷ If employers do start making statistically accurate predictions about the chances of women working less hard than men, it will be the woman who does plan to work just as hard as men who will want the employer to ask more questions, so that she can distinguish herself from the mother workers.

¹²⁶ Francine D. Blau, Mary C. Brinton and David B. Brusky, *The Declining Significance of Gender?* In DECLINING SIGNIFICANCE, supra note 7 at 3, 10 (competitive forces will eliminate statistical discrimination when it is based on *erroneous* inferences about group differences . . .)

¹²⁷ See generally, Deborah Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV 1163, 11876 (1988) (professional women are forced to choose between work and family, while men can have both).

III. Conclusion

Whether one adheres more to the biological or the patriarchal explanation for the gendered distribution of unpaid labor, the analysis presented here suggests that it is time for everyone concerned about the integration of work and family life to start asking the normative question and articulating a normative vision. If the goal, as some people (including feminists) say, is to give women choices, choices about whether to have children, choices about whether to do paid work, choices about whether to do more caretaking than their spouse, then we must recognize that different choices have different consequences, not just for the women who make the choices, but for the gender norms that are reified when women choose to do more unpaid labor. The more women who choose a more traditional allocation of work, the harder it will be for women who do not wish to make the same choice. On the other hand, if the goal, as some people (including feminists) say, is to eliminate a gendered division of labor, then more radical and probably unpleasant measures are necessary. The analysis presented here suggests that much, if not all, of the fight for a less gendered distribution of unpaid work needs to take place in the home. It is there that the unpaid labor is performed. It is there, where children are needy and everyone is busy. It is the home, where love is required and love is enjoyed, that needs to be the locus of the struggle. Few people look forward to that.