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Recommended Citation
Joan C. Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 *Conn. L. Rev.* 249 (1999).
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Author: Joan C. Williams

Source: Connecticut Law Review

Citation: 32 Conn. L. Rev. 249 (1999).

Title: *Do Wives Own Half? Winning for Wives After Wendt*

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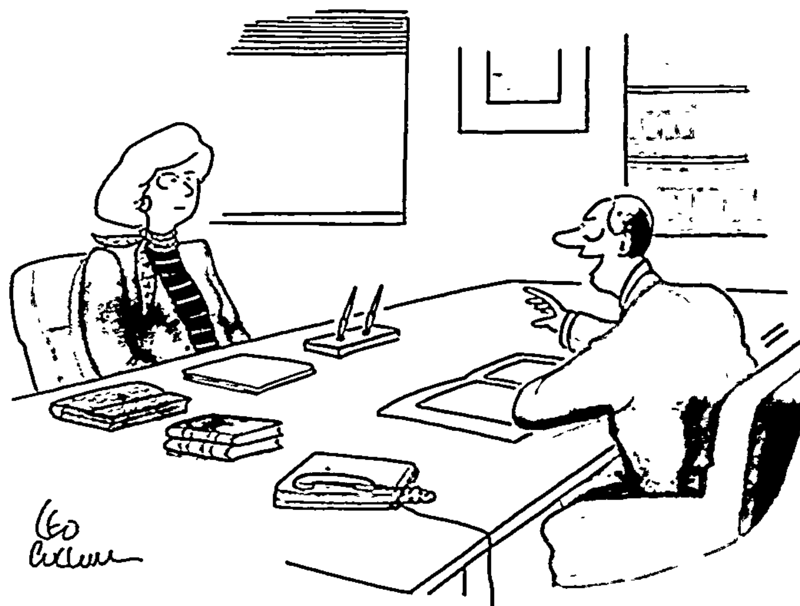
Do Wives Own Half? Winning for Wives After *Wendt*

JOAN WILLIAMS*



"Some people say you can't put a price on a wife's twenty-seven years of loyalty and devotion. They're wrong."

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Americans are confused about who owns what within the family. One common understanding is that married couples own property jointly—what we can call the joint property theory. Yet this co-exists with the sense of many homemakers that since they "don't work" they "have nothing of their own"—what we can call the "he who earns it, owns it" rule. The resulting confusion affects the economy of gratitude in on-going marriages. "My

* *Professor, American University, Washington College of Law. Many of the arguments in this essay draw on* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT *(Oxford University Press, 1999). This article grew out of a speech delivered by Joan Williams on April 9, 1999 at the 8th Gallivan Conference on Real Property Law at the University of Connecticut School of Law.*

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wife has long been on what we call the Winchester welfare system," a Mr. Winchester told me jocularly, explaining that she still was in graduate school after all these years (punctuated by long stints of caring for the family's children and disruptions as she followed him wherever his job required).

The most profound implications of our confusion occur upon divorce. Consider property division. Statutes typically provide that marital property shall be divided based on each spouse's contributions to the marriage; many states include homemaking either by statute or (as in Connecticut) by case law.[1] Yet, in applying this law, an interesting pattern emerges. Typically, courts treat property as jointly owned when dealing with modest estates, where splitting the property 50/50 often forces the sale of the family home in order to allow the husband to "get his equity out."[2] Yet, where the estate is large, courts in Connecticut and elsewhere traditionally use the "he who earns it, owns it" rule, reflecting a sense that wives do not "need" half of, say, a billion dollars.[3] Thus, in *Wendt v. Wendt*,[4] the husband (CEO of a major subdivision of General Electric) offered his wife $8.3 million of an estate whose worth he estimated at $30 to $40 million, on the grounds that this amount would meet her reasonable needs.[5] His offer reflected established practice in Connecticut, where (according to Professor Mary Moers Wenig) "the more [property] there is, the smaller [the] percentage the non-propertied spouse receives."[6] Professor Wenig found in conversations with experienced divorce lawyers a "glass ceiling" for financial awards for women in Connecticut, reflecting a principle known as "enough is enough."[7] In this country we do not ordinarily condition ownership on whether owners "need" their property. Why treat wives differently?

This sense is even more explicit in the context of alimony. In Connecticut, as in most other states, wives' entitlement to alimony is explicitly based on need.[8] "[The] marriage has not continued; why then should [the wife] . . . continue to share in her former husband's income . . .?" asks the

1. *See, e.g.*, O'Neill v. O'Neill, 13 Conn. App. 300, 308, 536 A.2d 978, 984, *cert denied*, 207 Conn. 806, 540 A.2d 374 (1988).

2. TERRY ARENDELL, MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS 29 (1986). *See also* WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, GENDER & JUSTICE IN THE COURTS 58 (1989) (describing the problems faced by women forced to sell their homes).

3. *See* Ralph T. King, *Wrong Number? A Phone Fortune is as Stake as McCaws Wrangle Over Divorce*, WALL ST. J., Aug. 7, 1996, at 1.

4. No. FA96 0149562 S., 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998).

5. *See id.* at *43. The wife's expert valued the estate at $90 million. *See id.* at *42.

6. Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future* 1990 WIS. L. REV. 807, 873.

7. *Wendt*, 1998 WL 161165, at *42.

8. *See* CONN. GEN. STAT. § 46b-82 (1999).

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influential commentator Ira Ellman.[9] The answer of many courts is that she should not. This conclusion is probably inevitable as long as alimony is conceptualized as a sort of privatized welfare system at the expense of the husband. The husband in one executive divorce case was blunt: "The amount of money she'd end up with irrespective is more than enough for anything she would ever want to do. I have a lot of other goals and aspirations and if I were picking places to charitably expend my money, this would not be [one of them] . . . ."[10] Again, the themes of charity and ownership: the Winchester welfare system at work.

This essay explores our cultural confusion about ownership within the family. Traditional approaches justify wives' claims on one of three theories: market replacement value, opportunity costs, or human capital theory.[11] Each has important limitations. The *market replacement approach* uses the market's depressed valuation of domestic work as the measure of the wife's contributions: what is the value of twenty-seven years of love and devotion when child care workers are among the lowest paid workers in the economy?[12] The *opportunity costs* approach works well for one narrow category of woman: the wife who trained for, and then gave up, a lucrative professional career. But it leaves out in the cold the 80% of women who do low-paid traditional "women's work," which includes virtually all working-class women as well as middle-class women who trained for traditionally female careers instead of higher-paid traditionally male ones. Because the opportunity costs approach helps only "social males," it will not help most women.[13]

The problems with the *human capital* approach are subtler. In *Wendt*, for example, human capital theory led to extensive testimony by expert witness Myra Strober about what precisely Mrs. Wendt did during four different periods of the marriage. Strober then testified that "it was very

9. Ira Mark Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. REV. 259, 274.

10. King, *supra* note 3, at 1.

11. *See Wendt*, 1998 WL 161165, at *33-37 (describing the testimony of Myra Strober).

12. *See* GINA C. ADAMS & NICOLE OXENDINE POERSCH, KEY FACTS ABOUT CHILD CARE AND EARLY EDUCATION: A BRIEFING BOOK B-7 (1997) (reporting that workers in the child care industry face low pay and high turnover).

13. Most women work in fields in which there are substantially greater numbers of female than male workers. *See* RISKS AND CHALLENGES: WOMEN, WORK & THE FUTURE 147 (Wider Opportunities for Women ed., 1990) (providing statistics from National Commission of Working Women of Wider Opportunities for Women); Dahlia Moore, *Feminism and Occupational Sex Segregation*, 25 INT'L L.J. SOC. FAM. 99, 101 (1995) (asserting that 70 percent or more of all working women are still concentrated in very few female occupations in which at least 70 percent of the workers are women). *See also* GLASS CEILING COMMISSION, U.S. DEPARTMENT OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 16 (1995) (reporting that three-fourths of working women are concentrated in predominantly female occupations); Christine A. Littleton, *Reconstructing Sexual Equality*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS 248, 254 (D. Kelly Weisberg ed., 1993) (describing the effect of the adoption of the accomodation model on the employment patterns of women).

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difficult, under the 'human capital' theory, to come up with a dollar amount for the evaluation of the nonmonetary contributions by the plaintiff during those four stages of the marriage."[14] She felt it was easier to come up with a percentage figure applying "equal efforts and equal sacrifice."[15] While the "equal efforts and equal sacrifice" standard is apt, the linkage between the laborious process of enumerating specific contributions and the 50% figure seems obscure.

The *Wendt* court also objected to the human capital approach for another reason. Quoting Professor Ann Estin, it noted that "efforts to value and divide precisely the particular aspects of changes in human capital that have occurred during marriage have the effect of objectifying both husband and wife and their relationship."[16] The human capital approach is "fraught with danger,"[17] said the court, because "the attempt to value investments in human capital pushes the institution of marriage from a relationship based on love and obligation toward one based on self-interest."[18] The court quotes the New Jersey Supreme Court: "[M]arriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce."[19]

"A dominant theme of family law scholarship over the past decade has been the search for firm theoretical grounding for financial obligations that survive divorce,"[20] and much of this scholarship has imported commercial metaphors into family law. Thus, Cynthia Starnes has argued that ongoing financial obligations to wives should be viewed as the wind-up expenses incident to the dissolution of a partnership.[21] Martha Ertman has argued that the wife should be viewed as a secured creditor, whose claims must be paid off when the marital enterprise is placed under receivership.[22] Ira Ellman analogizes the wife to a real estate investor: "Just as the building owner might have invested in making his building larger than in customizing it for a particular tenant, the wife might have invested in her own market earning capacity rather than in her marriage. . . . [Yet t]here is no reason why someone else should cover it if she invests in her husband . . . and he does poorly. . . . She invested in the wrong building."[23]

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14. *Wendt*, 1998 WL 161165, at *37.

15. *Id.*

16. *Id.* at *39 (citation omitted).

17. *Id.* at *40.

18. *Id.* at *41.

19. *Id.* (quoting Mahoney v. Mahoney, 453 A.2d 527, 533 (N.J. 1982)).

20. Jana Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119, 121 (1997).

21. *See* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Disassociation Under No-Fault*, 60 U. CHI. L. REV. 67, 122 (1993).

22. *See* Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 23 (1998).

23. Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 3, 54, 67 (1989).

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These commercial metaphors are jarring when applied to family life. They send the message that to justify entitlements for wives we must commodify the marital relationship in ways most people find distasteful. This essay articulates an alternative theoretical grounding for post-divorce financial obligations. Instead of using commercial metaphors, it requires us to revisit the intersection of property law and family life. Once we do, we find the persistence of a gender system historians have called domesticity. An analysis of domesticity provides a new rationale for post-divorce economic obligations that can defuse the kind of commodification anxiety expressed by the *Wendt* court, as well as provide important guidance in child custody cases where the mother is made to suffer because of her work outside the home.

At a more sweeping level, the analysis of domesticity provides the template for a new understanding of work and family issues. This essay shows how domesticity's peculiar organization of market work and family work first marginalizes mothers from market work, then limits their access to entitlements based on family work. The result is a system that is inconsistent with our commitment to gender equality, and leads to the widespread impoverishment of mothers and the children who depend on them. In this essay, I will argue that we need to deconstruct domesticity and develop in its place a new vision of morality in family life.

A. *The Economy of Mothers and Others: How Domesticity Limits Women's Access to Market Work*

Most women now work. This is true as far as it goes. Whereas in 1950, only 37% of women between the ages of twenty-five and fifty-four were in the labor force, by 1994 women's labor force participation had jumped to 75%.[24] More and more women are working full-time.[25] The wage gap between men and women is falling.[26]

These facts are true as far as they go, but they do not go far enough. Although women have joined the workforce, they have not achieved equality there. Wage gap data, which compares full-time women workers with full-time male ones, gives an unduly optimistic picture. If we look not at women in general, but at mothers of childbearing age, we find that *two-thirds* do not work full-time, full year.[27] Roughly one-fourth still are

24. *See* DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN 81 (1996).

25. *See id.* at 84.

26. *See Wage Gap Between the Sexes Is Narrowing*, N.Y. TIMES, June 10, 1998, at A20.

27. These statistics are based on the computations of Professor Manuelita Ureta, who used machine-readable versions of Bureau of the Census, U.S. Department of Commerce, Current Population Survey, March Supplement, Public Use Files (1996) [hereinafter Ureta Census Data]. Grateful thanks to Professor Ureta for her help. Full time full year is defined as working at least forty hours a week, at least forty-nine weeks a year—the definition of "full time" in traditionally male jobs. Note that some traditionally female jobs define the ideal worker differently; school teaching is a notable

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housewives;[28] many more work part-time in an economy that rigorously marginalizes part-time workers.[29]

Moreover, in an economy where prestigious, fulfilling, and high-paid jobs often require overtime, 93% of mothers of childbearing age do not work substantial overtime.[30] The implications of this statistic are rarely noted: *mandatory overtime environments exclude these mothers virtually completely.*[31] This goes a long way towards explaining why 87% of partners in law firms are still men,[32] and why virtually all upper-level management jobs remain held by men.[33] The pervasive marginalization of mothers stems from a clash between two social norms. The first is the norm of parental care, the widespread sense that children should be raised by parents, not by strangers. The second is the ideal worker norm, which enshrines as ideal the worker who takes no time off for childbearing or child rearing and is available for work full-time and overtime. The ideal worker norm is designed around men's bodies, for they need not take time off for childbearing. It is also designed around men's life patterns in a society where women's still do 80 % of the child care.[34]

Women who can perform as ideal workers are on their way to reaching equality with men: single women without children earn about 95% of men's wages.[35] Most mothers do not. In deference to the norm of parental care, most mothers of childbearing age remain off the "fast track" and on the "mommy track," either at home or in jobs where they work only part-

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example. The Census Bureau classifies as "full time" any worker who works more than 35 hours a week, an approach that, in my view, underestimates the extent of mothers' exclusion from jobs traditionally held by men. *See also* Anne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 780 (1996) (discussing the marginalization of part-time workers).

28. *See* Ureta Census Data, *supra* note 27.

29. *See* Kalleberg, *supra* note 27, at 771, 780.

30. *See* Ureta Census Data, *supra* note 27 (93% of mothers work 49 hours a week or less).

31. *See* Joan C. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1594-608 (1991); Rachel Williams Dempsey, Working on Weekends, Science Fair Project, April 1997 (on file with author). *See also* JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 5 (1991) (noting increase in workforce participation by women).

32. *See* A.B.A. Commission on Women in the Profession, *Basic Facts from Women in the Law: A Look at the Numbers* 3 (1995). *See also* Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1764 (1991) (noting that women hold only 6% of partnerships in large law firms).

33. *See* Rhode, *supra* note 32; Julia Lawlor, *Cracking the Glass Ceiling: A Report on Women's Climb to the Top*, WORKING MOTHER, May 1995, at 30; Bette Woody & Carol Weiss, Barriers to Work Place Advancement: The Experience of the White Female Work Force 18 (Dec. 1993) (unpublished manuscript, on file with the Federal Glass Ceiling Commission) (on file with author); *Work/Family Directions, Corporate Consulting* (visited June 7, 1998) <http://www.wfd.com/corp_desc.htm> (on file with author).

34. *See* JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 105 tbl. 3 (1997).

35. *See* Jane Waldfogel, *The Family Gap for Young Women in the U.S. and Britain*, 16 J. LAB. ECON. 505, 506-07 (1998).

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time or part year or do traditional "women's work."

Consequently, mothers as a group earn only 60% of the wages of fathers.[36] In fact, while the wage gap between men and women has been *falling*, the "family gap" between mothers and others has been *rising*.[37] In an economy where men's bodies and life patterns still define our work ideals, mothers remain marginalized as a group.

The economy of mothers and others stems from our practice of providing for children's care by marginalizing their caregivers. This practice is the central tenet of the gender system historians have called domesticity, which arose during the Industrial Revolution, circa 1780. The original version of domesticity prescribed a system where fathers were breadwinners, earning 100% of the family income, while mothers were housewives. In the contemporary version, the typical father is still viewed as the breadwinner and earns 70% of the family income,[38] while the typical mother does most of the child care and also engages in economically marginalized part-time, volunteer, or "women's work."[39]

B. *Men Own and Women Need: How Domesticity Limits Women's Access to Entitlements Based on Family Work*

Domesticity not only limits women's access to market work; it also limits entitlements based on work performed within the family. This is important because U.S. women still do the lion's share of family work: about 80% of the child care and two-thirds of the housework.[40] This sec-

36. *See id.* at 505.

37. *See* Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 153 (1998).

38. *See* STEPHEN J. ROSE, ON SHAKY GROUND: RISING FEARS ABOUT INCOMES AND EARNINGS 24 (National Commission for Employment Policy Research Paper No. 94-02, 1994).

39. *See generally* JEAN L. POTUCHECK, WHO SUPPORTS THE FAMILY?: GENDER AND BREADWINNING IN DUAL EARNER MARRIAGES 6 (1997) (noting that women often work part-time jobs).

40. *See* ROBINSON & GODBEY, *supra* note 34, at 105 tbl. 3 (1997). In assessing who does the housework, I have counted only what Robinson & Godbey call "core housework," a term that excludes shopping. *See also* Erik Olin Wright et al., *The Non-Effects of Class on the Gender Division of Labor in the Home*, 6 GENDER & SOC'Y 253, 266-67 (1992) (comparing the relationship between class and the gender division of labor in Sweden and the U.S.). Not surprisingly, considerable controversy exists about how much family work men do. Studies based on self-reporting are notoriously unreliable. One study found that reports by women of their husbands' contribution are generally about 75% of the men's reports of their own contributions. *See id.* at 260. Another also found high levels of over-reporting, that high-status men tend to exaggerate their level of contribution the most, and that the reporting gap is so high that it is large enough to overshadow the small increases in husbands' housework observed in recent years. *See* Julie E. Press & Eleanor Townsley, *Wives' and Husbands' Housework Reporting*, 12 GENDER & SOC'Y 188, 203, 208-09 (1998). Studies based on self-reporting include the influential reports of the Families and Work Institute, one of them being a study which announced to much fanfare in 1998 that men are assuming a bigger share at home. *See* Tamar Lewin, *Men Assuming Bigger Share At Home, New Survey Shows*, N.Y. TIMES, Apr. 15, 1998, at A18; *see also* ELLEN GALINSKY ET AL., THE CHANGING WORKFORCE: HIGHLIGHTS OF THE NATIONAL STUDY 47 (1993) (finding that although men have begun to share in household labor, traditional divisions still

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tion will enumerate the ways domesticity, as a gender system, undermines wives' ability to win favorable settlements in divorce cases; the next section will suggest ways domesticity jeopardizes the ability of some mothers to retain custody of their children upon divorce.

The most basic way domesticity disadvantages wives is through the "he who earns it, owns it" rule, as when a husband assumes that he is the sole owner of the family wage, and that his wife's claims are based on welfare, charity, or gift. Though typically unstated, this rule was stated explicitly in the case of *Rasmussen v. Oshkosh Savings & Loan Ass'n.*[41] That case involved a breadwinner husband who turned his wages over to his wife.[42] She spent money frugally, saving a significant sum towards the college education of their sons.[43] After she died, the father claimed that sum was his, and demanded it back for the use of himself and his new wife. The court agreed, holding that the father owned the funds since there was no evidence he had gifted it to his first wife.[44]

It's obvious, you might say, that a worker owns "his" wage. Yet basic Hohfeldian property theory, which views property as defining relationships among people, shows that while a worker clearly owns his wage with respect to his *employer*, it does not necessarily follow that he owns it with respect to his *family*.[45] Ownership within the family has never followed ownership within the market in Anglo-American law. At common law, ownership within the family was governed by coverture, which held that the husband's ownership of all family assets (including the labor of his wife and children) stemmed from his status as the head of the family. The husband was "naturally" in charge of the property of the wife, who was "the weaker vessel"—morally, intellectually, and physically weaker than men.[46]

One consequence of coverture was that wives' household labor was seen as husbands' property. With the advent of the Married Women's Property Acts in the nineteenth century, confusion reigned over whether husbands would continue to own their wives' services. Courts and legis-

remain). Note that some men do much more than other men; it is important that men who do a lot recognize that they are being penalized along with the women. It is not in their interest to overestimate the amount of household work done by the large majority of men doing very little. When Arlie Hochschild interviewed fifty men in the 1980s, she found that 80% did not share household work or child care at all. *See* ARLIE HOCHSCHILD, THE SECOND SHIFT 173 (1989). Fathers' family work increases most when they and their wives work split shifts, or the wives work weekends and evenings. *See* Carol S. Wharton, *Finding Time for the "Second Shift,"* 8 GENDER & SOC'Y 189, 190 (1994) (quoting Brayfield & Hofferth's study).

41. 151 N.W.2d 730 (Wis. 1967).

42. *See id.* at 731.

43. *See id.* at 734.

44. *See id.* at 733-34.

45. *See, e.g.*, Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (discussing how property defines relationships among people).

46. *See* ANTONIA FRASER, THE WEAKER VESSEL 5 (1984).

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latures eventually held that they did. This conclusion was expressed in marital services cases striking down contracts in which husbands granted wives entitlements based on their household work on the theory that services already owned by the husband could not provide consideration to support a contract between husband and wife.[47]

Remarkably, this situation persists up to the present, as emerges clearly in the will contest case of *Borelli v. Brusseau*.[48] *Borelli* involved a May/December marriage where both spouses had children by prior marriages. In 1988, the husband became very ill and needed 24-hour/day care. His doctors recommended a nursing home.[49] Instead, he persuaded his wife to provide the care herself, promising to give her a very considerable amount of money and property in excess of what she had been promised under their prenuptial agreement.[50]

To quote the *Borelli* court: "Appellant performed her promise but the decedent did not perform his."[51] The court held the contract invalid for lack of consideration.[52] It did not, of course, acknowledge that it was applying a rule inherited from coverture. Rather, the majority "[did] not believe that marriages would be fostered by a rule that encouraged sickbed bargaining . . . . [S]uch negotiations are antithetical to the institution of marriage."[53] It rejected the notion that

> spouses can be treated just like any other parties haggling at arm's length. Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.[54]

The *Borelli* dissent responds tartly that the majority's view implies that the wife had "a pre-existing or pre-contract nondelegable duty to clean the bedpans herself."[55] In response to the majority's protest that it was interpreting the duty of marital support in a nongendered way, the dissent points out that for this to be true, it would be the case that "if Mrs. Clinton becomes ill, President Clinton must drop everything and personally care for her."[56] Nonetheless, the dissent shares with the majority the sense that

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47. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor*, 1850-80, 103 YALE L.J. 1073, 1184-86 (1994).

48. 16 Cal. Rptr. 2d 16 (1993).

49. *See id.* at 17.

50. *See id.* at 17-18.

51. *Id.* at 18.

52. *See id.* at 19-20.

53. *Id.* at 20.

54. *Id.*

55. *Id.* (Poche, J., dissenting).

56. *Id.* at 24.

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"there is something profoundly unsettling about an illness becoming the subject of interspousal negotiations conducted over a hospital sickbed. Yet sentiment cannot substitute for common sense and modern day reality."[57]

Borelli continues not only domesticity's allocation of entitlements to men; it also continues its rationale for why wives' work cannot give rise to entitlements. This differed from the original common law explanation that men owned women's property because women were the weaker vessel.

With the advent of domesticity, two different rationales emerged to justify men's ownership. The first recharacterized women's sewing, cooking, and childrearing as not "work." "Thus, the responsibilities of wives in their households were generally described in the prescriptive literature less as purposeful activities . . . than as emanations of an abstract but shared Womanhood."[58] Historian Jeanne Boydston documents that the economic value of women's household work was recognized in a wide variety of legal contexts before the nineteenth century, in a social context where fathers' ownership of the labor of their wives and children was unquestioned.[59] This open acknowledgment of the economic value of women's work ended with the rise of domesticity. Boydston argues that the erasure of family work served to evade the need to explain why husbands still owned their wives' domestic services. "One cannot confiscate," she notes tartly, "what does not exist."[60] If women's work was not work, one did not have to explain why men still owned it.

The second argument that emerged to justify husbands' continued ownership of wives' household work was the view that awarding women entitlements threatened the integrity of family life, by introducing market motivations into the "Home Sweet Home." A staple of domesticity was the notion that women, and their domestic sphere, should not to be sullied by "that bank note world."[61] The anxiety about commodification in the domestic sphere was a way of policing the boundary between home and work. In the domestic literature there emerged the kind of negative imagery of the market that reappeared in Marx's alienation critique. Domesticity, from the beginning, has been a Marxism you can bring home to Mother.[62]

Both the erasure of household work and the theme of commodification anxiety present important challenges to lawyers representing wives in divorce cases. The erasure of household work creates the sense of mothers at home that the reason that they "own nothing" is that they "don't work."

57. *Id.* at 25.

58. JEANNE BOYDSTON, HOME AND WORK 145 (1990).

59. *See id.* at 4-8.

60. *Id.* at 158.

61. *See* NANCY F. COTT, THE BONDS OF WOMANHOOD 68 (1977) (exploring the distinctions between domesticity and pecuniary values in the 19th century).

62. *See id.*

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Said one:

> I get so sick of people asking me, "Do you work?" Of course I work! I've got five children under ten—I work twenty-four hours a day! But of course that's not what it means when people say, "Do you work?" They mean do you work for pay, outside your home. Sometimes I hear myself say, "No, I don't work," and I think: "That's a complete lie! I work harder than anyone I know!"[63]

Clearing up this confusion is the first step in competent representation of a divorcing wife. Attorneys representing wives in large "executive divorce" cases spend large amounts of time getting the wife to enumerate precisely what she did with her time and helping her to see that she did not in fact "do nothing:" she did important family work that freed her husband to devote his attention exclusively to his job.[64] Said one executive's wife, "We've been married eight years and he's always traveled. . . . I've adjusted to it. . . . I've molded my life to his."[65] Said another, "I don't bother him with petty domestic details. He doesn't have time for that. His work is very demanding. . . . He expects me to handle situations as they arise."[66] A third was asked what she thought would have happened if she had objected to her husband's constant travel. She responded without hesitation, "He probably wouldn't be the chairman of the board today."[67] The more successful the husband, sociologists have found, the less likely he is to share domestic work.[68] Reversing the erasure of wife's family work is an important first step in making the wife a confident witness who can testify as to content and the value of her own work.

The erasure of household work also affects judges' attitudes towards alimony, as when one judge opposed alimony on the grounds that he did not believe in keeping women in "a perpetual state of secured indolence."[69] Such "indolence," of course, typically involves full-time child care as well as cooking, laundry, decorating, entertaining, and other tasks that in market contexts are often highly paid and defined as work performed by caterers, decorators, etc. In 1999, one executive husband told his wife he had increased her life insurance. When she asked why, he said he had been thinking about how much he would have to pay people to take care of the house and the children if she were to die, and he realized he was underin-

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63. MARTHA N. BECK, BREAKING POINT 62 (1997).

64. Based upon the author's experience as an expert in a major divorce case.

65. SUSAN A. OSTRANDER, WOMEN OF THE UPPER CLASS 43-44 (1984).

66. *Id.* at 42.

67. *Id.* at 43.

68. *See* LORRAINE DUSKY, STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA 318 (1996). *See also* KATHLEEN GERSON, NO MAN'S LAND 233 (1993) ("[W]hen a woman's career commitment is high, her share of domestic labor drops substantially.").

69. LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 144 (1985) (quoting judge).

sured.[70] Wives' attorneys need to bring the same point home to judges.

An attorney representing the wife in a divorce case also needs to spend considerable time and energy addressing the argument that any decision that awards economic entitlements to the wife sullies the intimacy of family life—for any competent attorney representing the husband will try to use commodification anxiety to ridicule claims that twenty-seven years of love and devotion should have a price.

The key point to be pressed home by the wife's attorney is that awarding family property to the husband does not avoid commodifying it: the issue is not *whether* the property will be owned, but *who will own it. Someone* has to own family property: refusing to award it to the wife simply means that it will be a commodity solely owned by the husband.

Nor will awarding sole ownership to the husband avoid strategic behavior within the family. Take the classic "dumping" case in which a rich husband decides to divorce the wife of his youth in order to marry a younger "trophy wife." (This habit of very successful people hangs as a threat over the wives of successful men: "Good luck, Joan," said one to me, "Go change the world, and do it quick: I'm of the dumping age.") Wives' attorneys need to point out that, by the time the husband asks for a divorce, he already has commodified the marriage. He now takes a strategic view, and sees the marriage chiefly in terms of how expensive it will be for him to get out of it. The husband already has commodified the marriage; the only issue is whether the court will allow the wife to do so, too, in order to protect her rights.

A closer look at *Borelli* focuses a related point concerning commodification and bargaining within marriage. The *Borelli* case highlights the bargaining that already occurs within marriage. Mr. Borelli had the power to insist that his wife clean the bedpans herself by virtue of hypergamy: he was the older and richer spouse. Mrs. Borelli tried to equalize their bargaining positions, to insist that their relationship not be defined solely by his superior economic position. The court refused to let her do so. By refusing to let the wife improve her bargaining position, the court allowed Mr. Borelli to cheat his wife. The remarkable thing is that the court countenances and enables his cheating with the argument that the *wife's* behavior was unseemly. The dissent makes matters worse by speculating that the wife threatened to leave her husband unless he handed over the disputed property.[71] No evidence exists (at least in the appellate opinion) that she ever threatened to leave; all she said was that by committing herself to 24-hour/day nursing duty she deprived herself of an independent life. No doubt this was true. It is hard to imagine an independent life if one is committed to nursing a terminally ill man around the clock.

70. Letter from Arlene Hirschfield to Joan Williams (on file with author).

71. *See* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 24, 24 n.3 (1993) (Poche, J., dissenting).

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This issue is important not because there are many cases like *Borelli*— there aren't— but because commodification anxiety also undercuts wives' claims in other, more common situations. This pattern emerges strongly in the "degree cases," which once again often involve unsavory behavior by the husband. In the typical degree case, just as the husband has come to the end of his need for his wife's financial support, he decides to divorce his wife, and reacts with outrage when the wife who has been supporting him for years suggests that he support her back.[72] Yet many courts gloss over the unsavory behavior of the husband and focus instead on demonizing the wife. A 1980 Wisconsin court denied recovery for the wife on the grounds that "[i]t treats the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other's professional training, expecting a dollar for dollar return. We do not think that most marital planning is so coldly undertaken."[73] A Maryland court found that giving the wife a claim "demean[ed] the concept of marriage."[74] Concluded a West Virginia court, "Marriage is not a business arrangement, and this Court would be loathe to promote any more tallying of respective debits and credits than already occurs in the average household."[75]

Again, the issue is not *whether the family wage will be owned*, but *who will own it*. In addition, the issue is not *whether negotiations will take place*, but *whether those negotiations will be so one-sided that they will involve overreaching* by one of the parties. The effect of decisions that use commodification anxiety to justify awarding family assets to husbands is not to avoid strategic behavior but to strengthen the hand of the husband in on-going marital (and divorce) negotiations.

In conclusion, attorneys representing wives should argue for the "he who earns it" rule in ways that do not trigger commodification anxiety. This does not satisfy some theorists, who stress the importance of challenging and destabilizing domesticity's commodification anxiety, as a manifestation of domesticity's rigorous division of home and work. While it is true that destabilizing the dichotomy between home and work is an important part of the feminist agenda, the question is whether the right place to do it is in cases involving entitlements for divorcing wives. Probably not. Domesticity makes divorcing women so vulnerable that this is not the right context in which to challenge courts' instinctive revulsion against commodification within the family. Note that my formulation also, commodifies, by calling "housework" and "child care" "family work." In the context of cases involving entitlements for wives, going further and

72. *See, e.g.*, O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985); Martinez v. Martinez, 818 P.2d 538 (Utah 1991).

73. DeWitt v. DeWitt, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980).

74. Archer v. Archer, 493 A.2d 1074, 1077 (Md. 1985).

75. Hoak v. Hoak, 370 S.E.2d 473, 478 (W. Va. 1988).

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using business metaphors, along with a highly intellectual analysis telling courts why they should ignore the commodification anxiety such language triggers, strikes me as a mistake. Given the strength of domesticity, we have to choose our battles, and this strikes me as one we will lose for our clients without significantly helping the overarching cause of deconstructing gender.

C. *Selflessness for Mothers, Self-interest for Others: How Domesticity's Mandate of Selfless Motherhood Disadvantages Mothers in Custody Cases*

Domesticity not only serves to make women economically vulnerable upon divorce; it also affects their claims to custody. "To force women into the marketplace and then to penalize them for working would be cruel," noted one court.[76] But that is precisely what some courts have done. The best known case is that of Marcia Clark, the prosecutor in the O.J. Simpson case, whose husband sued for custody of their two children after the trial on the grounds that she spent all her time at work. "Like all moms, Marcia Clark can't have it all," concluded an article in the *Detroit News*, glossing over the fact that fathers have always had both jobs and children. (Clark ultimately retained custody).[77]

In another well known case, Sharon Prost, a mother who was chief counsel for the Republicans on the Senate Judiciary Committee, lost custody of her two children to her husband, who also worked full-time.[78] The judge faulted Ms. Prost for failing to make the children her first priority: "her devotion to her job and/or her personal pursuits often takes precedence over her family."[79] Ms. Prost was awarded only six days of visitation a month and ordered to pay $23,000 a year in child support, although by agreement with her ex-husband she continued to do half or more of the care.[80] One year after the appeals court awarded custody to her former husband, Ms. Prost was awarded half-time custody when she took a job that allowed her to leave work by 3:00 p.m.[81] This was a singularly explicit message that "good" mothers of young children work part-time or less (which, in fact, two-thirds do.)[82]

In a third case, a college student nearly lost custody when she placed her three-year-old daughter in day care so she could attend the University

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76. Burchard v. Garay, 724 P.2d 486, 496 (Cal. 1986) (Bird, J., concurring).

77. BETTY HOLCOMB, NOT GUILTY! 95 (1998) (quoting Marney Rich Keenan, *Like All Moms Marcia Clark Can't Have it All*, DETROIT NEWS, Mar. 4, 1995).

78. *See* Prost v. Greene, 652 A.2d 621, 623 (D.C. 1995), *aff'd following remand*, 675 A.2d 471 (D.C. 1996).

79. *Id.* at 625.

80. *See* NANCY DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 6 (1997).

81. *See* Margaret A. Jacobs, *Court Custody Rulings Favor At-Home Dads*, WALL ST. J., July 17, 1998, at B1.

82. *See* Ureta Census Data, *supra* note 27.

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of Michigan.[83] In yet another case, Ruth Parris lost custody of her son when a judge held she was "career oriented" because of her "aggressive, competitive" career as a real estate agent.[84] The judge ignored the fact that she had taken a year off work after her son's birth and was closely involved in his daily care. The court instead was impressed by the father's commitment to parenting, as evidenced by his cooking on weekends, attending his son's swim meets, and taking his son for doctor's visits.[85]

Another highly publicized case involved a protracted custody battle over the two children of Alice Hector, a partner at a major Miami law firm, and Robert Young, an unemployed architect.[86] Hector was granted primary custody by a trial court. This decision was reversed upon appeal by a court that granted custody to the father on the grounds that he had been the primary caretaker. The appellate court changed its mind upon rehearing, and affirmed the trial court's award of custody to the mother.[87]

As the appellate court acknowledged upon rehearing, the case differed substantially from the classic case involving a mother at home. Most notably, the mother had spent fourteen months as a single parent while the father lived apart from the family hunting treasure in New Mexico.[88] The appeals court concluded that "the mother had been a constant factor and dominant influence in the children's lives and the father had not."[89] Moreover, unlike in most cases where the nonemployed spouse is a mother, the family always had either a live-in nanny, a housekeeper, or an au pair to care for the children. In addition, the testimony illustrated a common pattern in families with ideal-worker mothers, where a complex allocation of family work arises in which the ideal-worker mothers continue to do many caretaking tasks most ideal-worker fathers do not do. The most obvious is that Alice Hector took responsibility to provide the children continuity of care, but there are other examples as well. Though the father made weekday play dates, the mother did the sleepovers; though the father picked up the kids from school, the mother took over on weekends. The initial appellate court seemed much impressed by the father's volunteer work at the children's school, which only started after the father had an affair, the mother filed for a divorce, and the father started to worry about losing custody. "Every moment that you're not with your kids is a moment that can be used against you. . . . This means that if you work, there is a

83. *See* Ireland v. Smith, 542 N.W.2d 344 (Mich. Ct. App. 1995), *aff'd as modified*, 547 N.W.2d 686 (Mich. 1996); DOWD, *supra* note 80, at 8.

84. Parris v. Parris, 460 S.E.2d 571, 573 (S.C. 1995); DOWD, *supra* note 80, at 7.

85. *See Parris*, 460 S.E.2d. at 572.

86. *See* Young v. Hector, No. 96-2847, 1998 WL 329401 (Fla.App.3d Dist. July 14, 1999).

87. *See id.* at *6.

88. *See id.* at *3.

89. *Id.* at *5.

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danger that you could lose your kids," said the lawyer for Ms. Hector.[90]

These cases enforce domesticity's norm of selfless motherhood, the sense that "mothers should have all the time in the world to give."[91] The ideal of selfless motherhood is in sharp contrast to the (equally widespread) view that adults are entitled to full self-development. Although adults may be entitled to self-development, mothers are not. What we really have is a society that mandates self-interest for others but selflessness for mothers: domesticity stands in counterpoint to the pursuit of self-interest enshrined in mainstream liberalism.[92]

Note that mothers have to be selfless for the simple reason that workplaces are structured in ways that exclude primary caregivers from the accepted paths to authority and responsibility. Mothers' "selflessness" is one way of coding the fact that we provide for children's care by marginalizing their caregivers.

The theme of the sacrificial mother persists up to the present day, documented extensively by Carol Gilligan and again in the recent advice book, *The Sacrificial Mother*.[93] The notion that "career women" are selfish penalizes even women who choose not to be mothers, as when women seeking abortions are attacked as callous and self-centered.[94]

Where courts order joint custody (as opposed to where parents agree to it), such orders often perpetuate enforced "selflessness." This occurs where a court orders joint custody where the mother has physical custody and the father has joint legal custody, which means that he retains joint decisionmaking authority over the child's upbringing. "Most joint custody arrangements—and virtually all court-imposed joint custody decrees—fall into [this pattern]."[95] Joint custody in this context perpetuates the situation that existed during the marriage, where fathers with "equal" decision making power in effect have the right to direct how mothers will do the large bulk of the caregiving work. In this context, mothers' "selflessness" often serves as a polite coding for their lack of marital power.

This situation, although traditional, is unfair: rights concerning children should reflect who does the daily work of raising them. As Elizabeth Scott has argued, custody awards should mirror the allocation of caregiving

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90. Melody Petersen, *The Short End of Long Hours*, N.Y. TIMES, July 18, 1998, at D1. *See also* Jacobs, *supra* note 81, at B1.

91. DEBORAH FALLOWS, A MOTHER'S WORK 13 (1985).

92. *See* Joan Williams, *Domesticity as the Dangerous Supplement of Liberalism*, J. WOMEN'S HIST., Winter 1991, at 69.

93. CAROL RUBENSTEIN, THE SACRIFICIAL MOTHER (1998).

94. *See* Williams, *supra* note 31, at 1570.

95. Jana B. Singer & Williams L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 502 (1988).

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during the marriage.[96] This makes sense from the mother's point of view, for she has invested in the child, often at considerable personal sacrifice. Even more important, it serves the best interests of the child. Divorce is always hard on children; in a context where the basic tenets of their existence are threatened, they need as much continuity as we can muster. The parent who has done the bulk of the caregiving knows the child's friends and social strengths and vulnerabilities; has sought help before and has established relationships with the child's teachers, tutors, counselors, psychological professionals; has established relationships with the child's friends and their parents; knows the child's pediatrician and medical history, teachers and school history, camps and camp history, child care providers and child care history. Once family work is conceptualized as *work*, we can readily see that the person in charge of it has developed specialized knowledge and relationships in order to do it successfully. One would not think of denying that a manager develops expertise; it should be equally obvious that the adult who has been in charge of locating resources and carrying out the arrangements regarding the life of a child has specialized knowledge and relationships that ensure continuity and quality control. It makes no sense to hand over to a parent who has been relatively uninvolved duties the primary caregiver has been doing for years. Children are under enough stress at the time of divorce so that it is important to stick with tried and true routines and caregivers rather than experimenting with new and inexperienced personnel.

It is important to note that Elizabeth Scott's proposal protects all caregivers, including fathers who have actually contributed to family work: it is tied to gender, to the caregiving role, but not to sex or body shape. Once custody as well as economic entitlements flow from family work, mothers won't have to be so selfless for a simple reason: They will have more rights.

D. *Deconstructing Domesticity in Family Entitlements: The Joint Property Theory as a New Rationale for Income Sharing and Wives' Property Claims*

The joint property theory begins from the principle that ideal workers who are parents are supported by a flow of family work from the primary caregiver of their children. If the ideal worker's performance depends on a flow of family work from his wife, then "his" wage is the product of two adults: his market work, and her family work. If an asset is produced by two family members, it makes no sense to award ownership to only one of them. We should abandon the "he who earns it, owns it" rule as an out-

96. *See* Elizabeth S. Scott, *Pluralism, Parental Preference and Child Custody*, 80 CAL. L. REV. 615, 617 (1992); *see also* Karen Syma Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 963-64 (1999).

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dated expression of coverture, and give the wife half the accumulated family wealth *based on her family work, without which that wealth would not have been created.*[97]

This is true whether or not the children are in child care. In the vast majority of families, the primary caregiver provides much of the child care even when the children are cared for by relatives, a nanny, or a day care center. Recent studies show that mothers spend three times as much time as fathers interacting with children; studies from the late 1980s reported that at that time the average father spent from twelve to twenty-four minutes a day in solo child care.[98] Even when mothers' caregiving consists in part of finding child care and training and supervising child care workers, this, too, is work: managerial work. Studies show that women still do roughly 80 % of the management work, even in families where men contribute substantially to the actual caretaking.[99] We do not refuse to pay managers because their employees "really do all the work"; the same principle should apply to mothers.

The joint property theory has implications both for property division and for alimony. In the context of property division, it explains why wives should jointly own the family wealth, eliminating the unexplained jump in human capital theory between joint ownership and an enumeration of the specific contributions of the wife. It also provides the basis for arguing that the household of the custodial parent, often composed of three people, should have a greater share of family wealth than the household of the noncustodial parent, composed of only one. Certainly, in this context, a 50/50 split should be the floor, not the ceiling. In assessing how to split the family assets of a middle class family, the court should take into consideration how such families use their assets: to buy housing that offers a secure home environment and access to good schools, and to send children to college. Children should not lose these entitlements simply because their parents divorce and fathers prefer to found a new family rather than support the old one. In dividing family property, courts should begin from the principle that parents have the duty to share their wealth with their chil-

97. Always? No, not always. Joint ownership is an expression of the symbiosis of the ideal worker and the primary caregiver under domesticity. The dynamic in families without children may well be quite different; such families may well vary more than do the patterns in families with children, and so may have to be treated on a case by case basis.

98. *See* BETH ANNE SHELTON, WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE 147 (1992) ("[E]ven in dual-earner households, women spend significantly more time on childcare than do men."); Diane Ehrensaft, *When Women and Men Mother*, *in* MOTHERING: ESSAYS IN FEMINIST THEORY 41 (Joyce Trebilcot, ed. 1983) (12 minutes); Michael Lamb, *et al.*, *A Biosocial Perspective on Paternal Behavior and Involvement in* PARENTING ACROSS THE LIFESPAN: BIOSOCIAL DIMENSIONS 111, 127 (Jane B. Lancaster et al. eds. 1987) (mothers spend three times as much time interacting with children); Graeme Russell & Norma Radin, *Increased Paternal Participation*, *in* FATHERHOOD AND FAMILY POLICY 139, 142 (Michael Lamb & Abraham Sagi eds. 1983) (12 to 24 minutes).

99. *See* DOWD, *supra* note 80, at 57.

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dren. They should award more than 50% of family assets if that is necessary to ensure that the life chances of the family's children, to the extent possible, are unaffected by divorce.

In the context of very large estates consisting of more assets than are required to preserve the expectations of the family's children to decent housing and a good education, the joint property theory mandates a 50/50 split.

In most divorces, the key issue is not property division but human capital. This is true because no rule concerning property division makes much difference in most divorces: in our cash flow society, most families have accumulated few assets. Therefore, the key issue is income sharing: who owns the family wage after divorce.[100] The joint property theory offers a new rationale for income sharing that begins from the observation that—*after as well as before the divorce*—the father can perform as an ideal worker only because the mother's family work allows him to do so. In an economy where ideal workers need to be supported by a flow of family work, *a divorced father can continue to perform as an ideal worker only because his ex-wife continues to support his ability to be one* by continuing as the primary caregiver of his children. Evidence of this is that divorced fathers with custody often cannot perform as ideal workers because they lack the flow of family work that supports fathers without custody.[101] The joint property theory mandates not a 50/50 split but an equalization of the standard of living in the post-divorce two households.[102]

Because the joint property theory mandates post-divorce sharing on the basis of its analysis of dependence in the modern family, it avoids the language of partnership and other commercial metaphors that courts have resisted in Connecticut as elsewhere. For example, the *Wendt* court resisted the partnership theory on the grounds that it had no basis in Connecticut law, and made marriage sound too much like a business proposition.[103]

The joint property theory also is quite different from the established theory that wives deserve half because of their *contributions*, particularly when lawyers focus on wives' direct contributions to husbands' businesses (as when a wife helps decorate the company offices). The joint property theory shifts the focus away from *market work* onto *family work*. The point is not that the wife helped the husband in business development, but that the husband could not have performed as an ideal worker without the

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100. *See* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L. J. 2227, 2251 (1994).

101. *See* Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, *in* ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE 45, 48-49 (1988) (citing Glenn Collins, *Single-Father Survey Finds Adjustment a Problem*, N.Y. TIMES, Nov. 21, 1983, at B17).

102. *See* Williams, *supra* note 100, at 2258.

103. *See* Wendt v. Wendt, No. FA96 0149562 S, 1998 WL 161165, at *111-16 (Conn. Super. Mar. 31, 1998).

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marginalization of his wife.

For attorneys litigating executive divorce cases, the key is to document just how much support these executive men enjoyed in comparison to the average husband (or the average judge). "[A] lot of men pay lip service to the idea of the modern woman, but they personally want someone who will be available to them. They like the idea that their wife doesn't work, that they can call up and say, 'Pack the bags, we're going on a trip.'"[104] Many high-level executives may enjoy this level of personal service, but one suspects most judges do not; its worth should be readily visible to them.

If the joint property regime were put into effect, the next question is when it should end. I have proposed that joint property in wages should equalize the standard of living of the two post-divorce households for the period of the children's dependence, followed by a period of years designed to allow the wife to regain her ability to recover her earning potential (if she is young enough) or save for her future (if she is not). This additional period should be set at one additional year of income sharing for each two years of the marriage. I spell out the implications of this proposal in a prior article; I will not repeat them here.[105] Yet I want to note in passing that this formula is designed to give the father an incentive to support his former wife's return to nonmarginalized market work: the more she earns, the less income he needs to provide her. The formula also gives the mother herself the incentive to develop a career. Because income sharing does not last for life, mothers who are young enough to do so will have to prepare themselves for a time when income sharing has ended.[106]

Wives' attorneys need to point out that court decisions awarding ownership of family assets unilaterally to husbands serve not only to impoverish children but also to destabilize the marriages of very successful men. Such marriages already are threatened by other social forces over which family court judges have little control. A new and rapidly growing literature that examines the family through the lens of game theory reports that men's bargaining position within marriage is enhanced by their position in both the labor market and the marriage market.[107]

If men's economic power outside the marriage affects their bargaining power within it, this means that very successful men probably do not have the level of authority in a long-established marriage (contracted when they and their wives were economic equals) that they could expect in a new marriage contracted after the men have become extremely rich. This is the

104. DUSKY, *supra* note 68, at 317.

105. *See* Williams, *supra* note 100, at 2257.

106. *See id.* at 2260.

107. For recent economic modeling, see RHONA MAHONY, KIDDING OURSELVES: BREADWINNING, BABIES AND BARGAINING POWER (1995); Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998).

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first social force destabilizing the marriages of very successful men.

The second is our custom of eroticizing youth and looks in women and success and gravitas in men. To quote Lloyd Cohen, "women in general are of relatively higher value as wives at younger ages and depreciate much more rapidly than do men"[108] because "physical beauty and sexual attractiveness of women, while subjective in nature, is a sharply inverse function of age."[109] A society that measures masculinity by the size of a paycheck[110] but measures femininity in terms of beauty increases the desirability of successful, older men in the marriage market at the same time that it decreases the desirability of their wives.

While divorce courts do not create husbands' power in the labor and marriage markets, they do create the legal rules that make divorce relatively costless for very successful men: the "he who earns it, owns it" rule that allows men to walk away from a long-term marriage carrying with them an asset—the family wage—that reflects not only their market work but also their wives' family work. Today, that rule works in conjunction with men's power in the labor and marriage markets to undermine the stability of the marriages of very successful men.

By shifting to a joint property approach, courts could exert a pull in the opposite direction. Courts do not have the authority to end men's comparative market advantage but they do have the authority—and the responsibility—not to add to the social forces that encourage highly successful men to walk away from long-established marriages, by allowing them to take with them assets their wives helped create.

Court decisions awarding ownership of family assets unilaterally to husbands have undesirable effects not only upon divorce but during marriage. I have counseled women who have given up thoughts of divorcing an unfaithful husband after learning that, if they were to divorce, their children would have to leave their house, neighborhood, and schools. When such women decide to remain in the relationship, they have received a sobering message about their relative bargaining position within it.

Note, again, that the "he who earns it, owns it" rule did not eliminate marital bargaining; it just strengthened the hand of the husband to insist on a marriage where his infidelity carries few consequences. Ending the father's ability to walk with his wallet would place husbands and wives on a more equal footing by making the costs of exit from marriage more equal. In the terminology of game theory, a consistent use by courts of the joint property theory would increase the wife's BATNA, her best alternative to a

108. Lloyd Cohen, *Marriage, Divorce and Quasi Rents; or, I Gave Him the Best Years of My Life*, 41 J. LEGAL STUD. 267, 278 (1987).

109. *Id.* at 286.

110. *See* Robert E. Gould, *Measuring Masculinity by the Size of a Paycheck*, MEN AND MASCULINITY 96 (Joseph H. Pleck & Jack Sawyer eds., 1974).

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negotiated agreement.[111] So long as courts continue to treat the chief marital property—the ideal worker's wage—as the sole property of the husband, the costs to the husband of walking away from a marriage typically will be much lower than the costs to his wife, a situation that both decreases wives' power within intact marriages and impoverishes them upon divorce.

In conclusion, eliminating the "he who earns it" rule is an important step in ending a regime of legal rules heavily biased in favor of the husband. It will begin the process of deconstructing domesticity's structuring of market work and family work. It is an important first step but, as the next section will show, it is not enough.

E. *Deconstructing Domesticity in Market Work: Mothers' Choice or Discrimination Against Women?*

The most basic shift required to deconstruct domesticity is to change the way we structure market work. Proposals to do so typically founder on the assumption that mothers' marginalization is an expression of their own personal priorities. Indeed, mothers themselves often talk about their decisions to marginalize as their "choice." But the rhetoric of choice deflects attention from the constraints within which women's choices are made. Mothers may choose to drop out if they are faced with the "choice" of economic marginalization or an environment that means they feel uninvolved with their children's lives, but they did not choose the system that gives them only those two unacceptable alternatives.

At the core of this way of structuring market work is the ideal worker norm, which defines the ideal worker as someone who takes no time off for childbearing or childrearing. This norm means that market work is designed around the bodies and traditional life patterns of men, a practice that favors workers with a flow of family work most men have but most women lack. In short, this way of designing work discriminates against women.

Courts are beginning to find discrimination, not mothers' choice, in contexts where mothers experience pervasive disadvantage. An example is the case of *Trezza v. The Hartford Inc.*[112] Trezza, a lawyer in the legal department of The Hartford Inc. and the married mother of two young children, was passed over for a position overseeing an out-of-town office in favor of a woman lawyer without children.[113] When Trezza asked why, she was told she had not been considered for the job because it was assumed that because she was a mother she would not be interested.[114] The company's honesty showed clearly that it did not conceptualize its habit of treating mothers differently as discrimination.

111. *See* MAHONY, *supra* note 107, at 43.

112. 78 Fair Empl. Prac. Cas. (BNA) 1826 (S.D.N.Y. 1998).

113. *See id.* at 1827.

114. *See id.*

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Trezza was again up for promotion in 1993; again she was passed over, this time in favor of a man and a woman without children.[115] She contacted a senior vice president and told him she believed that the failure to promote her reflected sex discrimination. Two months later she received a promotion.[116]

Finally, in 1997, she was not considered for the position of senior managing attorney despite the fact that she had consistently received excellent job evaluations and had asked to be considered.[117] The company asked two fathers if they were interested in the job; then it offered the job to a woman without children who had less experience than Trezza.[118]

Trezza sued, and a federal district court held that she had stated a cause of action for sex discrimination under the Title VII disparate treatment doctrine *despite the fact that the person ultimately promoted was a woman.*[119] The court's decision was based on the principle first articulated in 1971 in *Phillips v. Martin Marietta*[120] which forbids discrimination against mothers even if equal opportunity is offered to nonmothers. In *Martin Marietta,* the employer refused to allow the mothers of school-age children to apply for jobs that were open to the fathers of school-age children.[121] The *Martin Marietta* court, like the court in *Trezza,* held that the fact that women without children were treated the same as men did not excuse discrimination against mothers.[122] The *Trezza* court explicitly rejected Hartford's contention that no sex discrimination existed because the job in question had been awarded to a woman.[123] Trezza pointed out that only seven of the 46 managing attorneys at Hartford were women and none were mothers with school-age children. In contrast, many of the male managing attorneys were fathers.[124]

Trezza may signal a change in the line of existing cases that deny mothers recovery.[125] The future of employment discrimination law will bring increasing challenges to the now pervasive discrimination against mothers.[126] "I had a baby, not a lobotomy," noted one New York lawyer

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115. *See id.*
116. *See id.*
117. *See id.* at 1828.
118. *See id.*
119. *See id.* at 1830.
120. 400 U.S. 542 (1971).
121. *See id.* at 543.
122. *See id.* at 544.
123. *See Trezza,* 78 Fair Empl. Prac. Cas. (BNA) at 1830.
124. *See id.* at 1828.
125. *See, e.g.,* Piantanida v. Wyman Ctr., Inc., 927 F. Supp. 1226 (E.D. Mo. 1996), aff'd, 116 F. 3d 340 (8th Cir. 1997). *See also* Martha Chamallas, *Motherhood and Disparate Treatment,* 44 VILL. L. REV. 201 (1999) (forthcoming) (citing other cases).
126. *See* SUZANNE NOSSEL & ELIZABETH WESTFALL, PRESUMED EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS (1998); DEBORAH J. SWISS & JUDITH P. WALKER, WOMEN AND THE WORK/FAMILY DILEMMA 5 (1993); Cynthia Fuchs Epstein et al., *Glass*

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dissatisfied with the less interesting and challenging work she was given after her return from maternity leave.[127] These "lobotomy" suits are only one source of potential liability for employers who continue to design work around the assumption that their workers have a woman available to provide the flow of family work that traditionally has supported ideal worker men.

Employers' potential liability could prove expensive, as it was in the case of *Knussman v. Maryland*,[128] a case that shows how the ideal worker norm also disadvantages conscientious fathers. In *Knussman*, a jury awarded a Maryland state trooper $375,000 for his supervisor's failure to allow him to take off the time provided under the Family and Medical Leave Act.[129] Despite the fact that Trooper Knussman's wife was bedridden due to complications stemming from the birth of their second child, his supervisor told Knussman that he would not be entitled to take a month off "until God makes men to have babies."[130]

Employers may face potential liability under other federal antidiscrimination statutes as well. For example, a common law firm policy provides that part-time workers work 80% of the hours at 60% of the pay. Assuming that the part-time lawyers are women (and virtually all are), this means that in some workplaces men and women are doing substantially similar work but are paid at different rates. This seems to state a cause of action under the Equal Pay Act (EPA), assuming that part-time work is not a "factor other than sex."[131]

A strong argument exists that it is not a factor other than sex, based on the leading Supreme Court case of *Corning Glass v. Brennan*.[132] *Corning Glass* held an EPA violation when men working the night shift were paid at a higher rate than women who worked the day shift.[133] The *Corning Glass* Court rejected the employer's argument that no EPA violation existed because the shift differential was a factor other than sex.[134] If the

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Ceilings and Open Doors: Women's Advancement in the Legal Profession, 64 FORDHAM L. REV. 291 (1995); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (1996); Sue Shellenbarger, *Lessons from the Workplace: How Corporate Policies and Attitudes Lag Behind Worker's Changing Needs*, HUM. RESOURCE MGMT., Fall 1992, at 157; Betty Holcomb, Unequal Opportunity, WORKING MOTHER, July/August 1998, at 40; Jennifer A. Kingson, *Women in the Law Say Path Is Limited by 'Mommy Track*,' N.Y. TIMES, Aug. 8, 1988, at A1.

127. Rhode, *supra* note 126, at 588 (quoting HARVARD WOMEN'S LAW ASSOCIATION, PRESUMED EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS 72 (Suzanne Nossel & Lisa Westfall, eds., 1995)..

128. No. CIV.B. 95-1255, 1999 WL 689307 (D. Md. Sept. 3, 1999).

129. *See id.* at *1.

130. *Fighting The Force: Denied Leave to Care for his Wife and Baby, a State Trooper Sues Maryland and Wins*, PEOPLE WKLY., Mar. 1, 1999, at 58.

131. Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d)(1) (1994).

132. 417 U.S. 188 (1974).

133. *See id.* at 190-91.

134. *See id.* at 205-05.

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difference between night work and day work is not a factor other than sex, then the difference between working forty hours a week ("part"-time) and sixty (full-time) would seem not to be—for the differential between night and day work seems more significant than the difference between part-time and full-time.

Finally, if 93% of mothers of childbearing age do not work substantial amounts of overtime, it seems highly likely that workplaces exist where plaintiffs could prove that a promotion track that requires large amounts of overtime has a disparate impact on women. Law firms seem one likely candidate, given that 87% of the partners in law firms with two or more people still are men.[135]

Employers no doubt will insist they have a business necessity to structure work in the ways that are driving women out of the ranks. However, twenty years of experience by work/life consultants working with corporate clients shows that family-friendly policies often save employers money, for several reasons.[136] First, employers currently incur large costs due to attrition when mothers drop out: Deloitte & Touche, one of the Big Six accounting firms, found that it costs about 150% of a professional employee's salary to replace her.[137] Family-friendly policies also save employers money on recruiting costs; Deloitte as well as law firms with flexible policies have found employees leaving their competitors to come work for them.[138] In fact, in a recent survey, two-thirds of human resource managers said family-supportive benefits and flexible hours will be the two most important tools for retaining and recruiting workers in the years to come.[139] Finally, many employers have found that family-friendly policies increase work productivity, both because employees work a higher percentage of hours when they are fresh, and because workers become more efficient so they can get done what needs to be done in the limited time available to them.[140]

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135. *See* A.B.A. COMM'N ON WOMEN IN THE PROF., BASIC FACTS FROM WOMEN IN THE LAW: A LOOK AT THE NUMBERS 2-3 (1995).

136. *See* SALLY COBERLY & GAIL G. HUNT, WASHINGTON BUSINESS GROUP ON HEALTH, THE METLIFE STUDY OF EMPLOYER COSTS FOR WORKING CAREGIVERS 6-8 (1995); WORK & FAMILY CONNECTION, INC., WORK & FAMILY: A RETROSPECTIVE 130 (1996); Phyllis H. Raabe, *The Organizational Effects of Workplace Family Policies: Past Weaknesses and Recent Progress Toward Improved Research*, 11 J. FAM. ISSUES 477, (1990); Susan Seitel, *Update on Job-Sharing* (visited Oct. 31, 1997) <http//www.workfamily.com/online/JobShare.htm>.

137. *See* Peter Short, Remarks at the D.C. Mid-Winter Bar Convention (Mar. 2, 1999).

138. *See id.*; Michael Nannes, Remarks at the D.C. Mid-Winter Bar Convention (Mar. 2, 1999).

139. *See The Work-Family Equation: More Companies Are Finding It's Good Business to Consider the Family Needs of Their Employees*, ST. PAUL PIONEER PRESS DISPATCH, Nov. 26, 1990, at 1F (containing a survey of 200 human resources managers).

140. *See* ELLEN GALINSKY, ET AL, THE CHANGING WORKFORCE HIGHLIGHTS OF THE NATIONAL STUDY OF THE CHANGING WORKFORCE 83-84 (1993); SIMCHA RONEN, ALTERNATIVE WORK SCHEDULES: SELECTING, IMPLEMENTING, AND EVALUATING (1984). *See also* WORK & FAM. CONNECTION, INC., *supra* note 136, at 114, 126; Seitel, *supra* note 136.

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Finally, even if an employer is able to prove a business necessity to resist some kinds of family-friendly policies, it seems likely that plaintiffs will often be able to propose a less discriminatory alternative (LDA) to the kind of mandatory overtime environments that drive out virtually all mothers—and therefore virtually all women.[141] The point is not that every women is a mother or should be, but that women will not achieve equality until mothers do, given that nearly 90% of women become mothers during their working lives.[142]

Deconstructing domesticity requires not only eliminating the "he who earns it, owns it" rule governing entitlements within the family; it also requires restructuring market work. Employers who fail to do so may encounter increasing legal liability if what has traditionally been considered "mothers' choice" begins to be seen as discrimination against women.

F. *Towards a New Family Morality*

Professor Carl Schneider has noted that family law has moved away from talking about relations between family members in moral terms.[143] The proposal that we should return to moral discourse has often been met with alarm;[144] unnecessarily, in my view. Postmodern theory tells us that even a bare statement of fact entails value judgments. If value judgments are inevitable, any version of family law will embed value-laden assumptions about family life. As Professor Naomi Cahn has astutely pointed out, the question is not whether we will have moral discourse about the family, but whether traditional versions of morality, or new ones, will prevail.[145] She quotes a proposal of Martha Minow:

> [I]f someone claims family membership and the benefits that go along with it, this person may also be said to consent to and accept the obligations that attach to family roles. In other words, let us be welcoming toward those who are willing to take on family obligations, but serious in enforcing the expectation that those obligations will in fact be fulfilled.[146]

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141. 42 U.S.C. § 2000e(2)(k)(1) (1994).

142. *See* Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209, 215 (1997).

143. *See* Carl E. Schneider, *Marriage, Morals and the Law*, 1994 UTAH L. REV. 503; Carl E. Schneider, *Rethinking Alimony: Maritals Decision and Moral Discourse*, 1991 BYU L. REV. 197; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985). For another call for a return to moral discourse, in a pragmatic vein, see IN THE FACE OF THE FACTS: MORAL INQUIRY IN AMERICAN SCHOLARSHIP (Richard Wightman Fox & Robert B. Westbrook eds., 1998).

144. *See, e.g.*, Linda J. Lacey, *Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1 (1993).

145. *See* Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 226 (1997).

146. *Id.* at 246 (citing Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 307 (1993)).

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The new approach to family morality, Cahn argues, "remains focused on moral values such as caretaking, caregiving, equality, and commitment."[147] It does not assume a traditional marital family, and "sees responsibility for children as a more general societal commitment in which caretaking is appropriately valued and gender equality is assured."[148] A key debate, Cahn notes, is about "the meaning and structure of responsible parenthood [and] . . . about whether the interests of all family members can, and will, be respected."[149]

Professors Cahn and Minow offer a new vision of family morality that takes seriously parents' obligations to children; Professors Linda Hirshman and Jane Larson describe the sexual ideology that has often served to undermine parents' responsibilities to children.[150] Hirshman and Larson reread sexual history, revising the current image of a repressive Victorianism in the nineteenth century followed by sexual liberation in the twentieth.[151]

Hirshman and Larson point out that the Victorian ideology of passionless enhanced women's bargaining power by giving women increased control over sexual access and associating manliness with sexual self-control.[152] The ideology that replaced it, which they call libertinism, decreased women's bargaining power in a number of ways. It first defined the sexual urge as natural and nigh-uncontrollable,[153] leading to charges that women who refused to have sex with men were frigid, and that male sexuality was natural, and not something men could be expected to control.[154] They cite as examples the famous sexual researcher Alfred Kinsey, who "casts as tragic and pointless anything that might limit the number of orgasms an individual enjoys in a lifetime;"[155] Morris Ploscowe, whose well-repected work greatly influenced the Model Penal Code, which recommended making rape "harder to charge and harder to prove;"[156] and note that the homosocial bars, saloons, and "female world of love and ritual"[157] were under libertinism replaced with a new social life that linked consumerism and heterosexual bonding. Sex not only became the center of social life, it also took on many of the roles formerly played by religion.

147. Cahn, *supra* note 145, at 240.

148. *Id.*

149. *Id.* at 270.

150. *See* LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX (1998).

151. *See id.*

152. *See id.* at 128. *See also* Nancy F. Cott, *Passionless: An Interpretation of Victorian Sexual Ideology*, 1790-1850, *in* A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN 162-81 (1979).

153. *See* HIRSHMAN & LARSON, *supra* note 150, at 173.

154. *See id.* at 140.

155. *Id.* at 183.

156. *Id.* at 188.

157. CAROL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 53-76 (1985).

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The "spiritualization of the erotic"[158] sent the message that "sex is such a value that it preempts all criticism of its delivery system."[159]

For Hirshman and Larson, the libertine regime creates not freedom for all but a sexual system that gives stronger actors free rein to effect their will. For example, the elimination of penalties for infidelity means that unfaithfulness has few legal or social consequences in a society where men are much more likely to be unfaithful than women;[160] weakening rape laws creates a regime where men are free to use their greater strength to gain sexual access to women without their consent.[161] Libertinism in effect leave wives and children subject to the social power of men in a society that shapes men's aspirations in an unhealthy way, encouraging sexual questing regardless of the consequences on other family members.

A key expression of the libertarian sexual regime is the principle of the "clean break," which holds that marriage partners should be able to end a marriage in a way that balances children's needs with the desire not to "burden unduly the noncustodial parent's ability to remarry."[162] The "clean break" principle is questionable from an ethical standpoint. In effect, it requires limiting the claims of existing children in deference to a societal commitment to preserving a father's right to have new children and share his wealth with them instead.

The issue here is not who will move on, but who will move on with what. Courts' commitment to the "clean break" has made them solicitous of preserving men's predivorce standard of living. One study noted in courts "a judicial reluctance to require a financially independent spouse to reduce his or her lifestyle to support a financially dependent spouse."[163] In another study, most respondents agreed that "a wife's alimony is based on how much the husband can give without diminishing his current lifestyle."[164] While child support levels have generally increased in recent years, children still are excluded from sharing in their father's wealth, for example, by caps that eliminate children's claims on the income of their father in excess of (in Minnesota) $60,000.[165] Child support guidelines eliminate children's claims to fathers' wealth in other, subtler ways as

158. *See* HIRSHMAN & LARSON, *supra* note 150, at 122.

159. *Id.* at 216.

160. *See id.* at 285.

161. *See id.* at 268-72.

162. J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1125 (1992).

163. *See* MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 61 (May 1989).

164. *See id.* at 62.

165. *See* BARTLETT & HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 430 (2d ed., Aspen Law & Business 1998). Other states have higher caps. *See also* ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY & STATE 269-70 (3d ed. 1995) (describing a majority of states' models.).

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well.[166]

The effect of rules excluding a man's family from sharing in his wealth emerges clearly when one considers what middle-class families use wealth for: college educations and housing. A family's housing is tied to its ability to create an environment suitable for raising children in several ways. First, in an increasingly divided society, a "good neighborhood" can be important for physical safety. Second, because the quality of public schools is tied to the price of housing, cutting the children off from their father's wealth may affect their ability to get a good education in a society where education is the accepted proxy for class status.

Cutting children off from funds for college has an even more direct impact on their future. The child of divorce, in some studies, begins to look much like the old-fashioned bastard, claiming a blood tie to the father but cut off from the share of paternal affluence that falls to the child of the intact family unit. Like modern day Oliver Twists, the children of divorce often suffer a discrepancy between their own and their noncustodial parent's economic circumstances, "growing up with their noses pressed against the glass, looking at a way of life that by all rights should have been theirs."[167] The children of divorce are less likely to equal or surpass their parents' social and economic status or obtain a college education; they are more likely to suffer downward mobility than children whose parents stay married.[168] Given mothers' marginalization, family income did not recover unless the mothers remarried.[169]

Though some commentators cite the impoverishment of children as a reason to limit access to divorce, it is not divorce itself that impoverishes the children of divorced families; it is the allocation of post-divorce entitlements. Divorce impoverishes children not because of the lack of a male *parent* but the lack of a male *income*.[170] According to one study, roughly

166. *See* Nancy D. Polikoff, *Looking for the Policy Choices Within An Economic Methodology*, *in* 1986 WOMEN'S LEGAL DEF. FUND'S NAT'L CONF. ON THE DEV. OF CHILD SUPPORT GUIDELINES 27, 32-33 (Most states' child support guidelines are based on studies that include only day-to-day expenses associated with child rearing, and explicitly exclude from consideration any growth in family wealth.).

167. Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 268-69 (1990) (quoting J. WALLERSTEIN & S. BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 298 (1989)).

168. *See* BARBARA EHRENREICH, FEAR OF FALLING (1989) ("fear of falling"); MARY A. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 94 (1981) (children move to cheaper housing; JONATHAN KOZOL, SAVAGE INEQUALITIES 54-55 (1991) (quality of schools linked with housing); WEITZMAN, *supra* note 69, at 30-31 (most homes sold); Marsha Garrison, *The Economics of Divorce, Changing Rules, Changing Results*, *in* DIVORCE REFORM AT THE CROSSROADS 75, 82, 88 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (children move to cheaper housing); Starnes, *supra* note 21, at 80 n.52 (children move to cheaper housing); Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 268-70 (1990) (dissolution of household is detrimental to dependents' lives).

169. *See* Woodhouse, *supra* note 167, at 267-68.

170. *See* Marion Crain, "Where Have All The Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society (unpublished manuscript on file with author).

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half of the deleterious effects of divorce on children stem from their families' lack of adequate income.[171]

By cutting children off from the wealth of their fathers, U.S. divorce courts are a key engine of our society's massive disinvestment in children.[172] The practice of limiting children's claims to fathers' wealth in the name of protecting fathers' sexual freedom violates our ethical obligations to children. Mothers have always recognized that having children limits future freedom; fathers need to learn this basic truth. A new family morality would change the rules allocating economic entitlements upon divorce, replacing the "he who earns it" rule with a joint property regime, not only on the grounds that it is unethical to award unilateral ownership of a wage that is the joint product of the ideal worker's labor and that of his children's primary caretaker, but also on the grounds that parents should be expected to share their wealth with their children. The claims of existing children should not be limited on the grounds that a parent might prefer to bestow his wealth on new children as yet unborn.

The principle that parents are obligated to share their wealth is particularly important in the U.S., which provides less public support for childrearing than virtually any other industrialized society.[173] This situation combines with a system that allocates men's entitlements (based on market work) to the nondiscretionary realm of property law, while it allocates women's claims (based on family work) to the discretionary realm of family law. This system, where men own and women need, means that the fate of mothers and children rest on judges' willingness to redistribute what they see wealth that "naturally" belongs to men. Any group in the U.S. that relies on redistribution for its livelihood tends to encounter both poverty and dignitary affronts. Domesticity places many women—and the children who rely upon them—in this position: 80% of poor Americans are

171. *See* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 88-91 (1994) (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). *See also* Naomi Cahn, *Pragmatic Questions about Parental Liability Statutes*, 1996 WIS. L. REV. 399, 423-24 (arguing that poverty, not necessarily a father's absence, correlates with delinquency).

172. *See* MCLANAHAN & SANDEFUR, *supra* note 171.

173. *See* BARBARA BERGMANN, SAVING OUR CHILDREN FROM POVERTY: WHAT THE UNITED STATES CAN LEARN FROM FRANCE (1996) (data on France and Belgium); Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE. W. RES. L. REV. 457 (1995) (less governmental support in U.S.); Marguerite G. Rosenthal, *Sweden: Promise and Paradox*, *in* THE FEMINIZATION OF POVERTY: ONLY IN AMERICA? (Gertrude Schaffuel Goldberg & Eleanor Kremen eds., 1990) 129, 137, 144, 147-49 (Sweden); *see also* Joan C. Williams, *Privitization as a Gender Issue*, *in* A FOURTH WAY? PRIVITIZATION, PROPERTY, AND THE EMERGENCE OF THE NEW MARKET ECONOMIES 215 (Gregory S. Alexander & Grazyna Skapka eds., 1994) (Russian and East-Central Europe); Marlise Simons, *Child Care Sacred as France Cuts Back the Welfare State*, N.Y. TIMES, Dec. 31, 1997, at A1 (French government cuts certain services but subsidies for child care continue to grow).

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women and their children.[174]

This striking statistic contains sobering news about the morality of our social and legal arrangements concerning family life. The accepted truth is that children benefit when mothers stay home. In fact, our system of providing for children's care by marginalizing their caregivers—when combined with our aversion to public spending—have created a rich society with poor children.[175] The U.S. has the highest rate of childhood poverty of any industrialized nation in the world.[176]

Abandoning the "he who earns it" rule in favor of a joint property regime will help, but will not reach the root of the problem: our habit of organizing work in ways that are inconsistent with our expectation that children need parental care. To attack the problem of childhood poverty at its root, we need to deconstruct domesticity's organization of market work and family work, and restructure workplaces around family values.

Although most of the focus has been on the impoverishment of children upon divorce, this is not the only context in which children suffer from the marginalization of their caregivers. The most dramatic example is when a mother feels unable to leave a partner who batters her and/or her children because she cannot support either herself or them.[177] Children suffer in subtler ways as well. Thirty years of studies show that market power creates power in the family: to the extent that mothers are most familiar with, and most invested in, children's needs, their economic marginalization makes them less able to stand up for children in the family context.[178]

All these considerations argue in favor of deconstructing not only domesticity's "he who earns it" rule but also its organization of market work. The only viable alternative is Martha Fineman's proposal to preserve domesticity's marginalization of mothers, but provide all primary caretakers the opportunity to stay home with children through a government program

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174. *See* Joan Williams, *Notes of a Jewish Episcopalian: Gender as a Language of Class, Religion as a Dialect of Liberalism*, *in* DEBATING DEMOCRACY'S DISCONTENT (Anita Allen & Milton Regan eds., 1998).

175. *See* Peter A. Morrison, *Congress and the Year 2000: Peering into the Demographic Future*, BUS. HORIZONS, Nov-Dec. 1993.

176. *See* Keith Bradsher, *Gap in Wealth in U.S. Called Widest in the West*, N.Y. TIMES, Apr. 17 1995, at A1.

177. *See* Amina Mama, *Sheroes and Villains: Conceptualizing Colonial and Contemporary Violence Against Women in Africa*, *in* FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES 53 (M. Jacqui Alexander & Chandra Tulpade Mohanty eds., 1997).

178. *See* ROBERT O. BLOOD & DONALD M. WOLFE, HUSBANDS AND WIVES: THE DYNAMICS OF MARRIED LIVING (1960); MAHONY, *supra* note 107 (for recent economic modeling); Paula England & Barbara Stanek Kilbourne, *Markets, Marriages, and Other Mates: The Problem of Power*, *in* BEYOND THE MARKET PLACE: RETHINKING ECONOMY AND SOCIETY (Roger Friedland & A.F. Robertson eds., 1990); Phyllis Hallenbeck, *An Analysis of Power Dynamic in Marriage*, 28 J. MARR. & FAM. 200 (1966); Gerald W. MacDonald, *Family Power: The Assessment of a Decade of Theory and Research, 1970-1979*, 42 J. MARR. & FAM. 841 (1980); Wax, *supra* note 107, at 509.

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modeled on Social Security.[179]

We need either to deconstruct domesticity or democratize it. Both alternatives would be better than what we have today: a refusal to provide public funds for childrearing combined with a system that first marginalizes mothers from market work, and then cuts them off from entitlements based on work performed within the family. Ending this system, and the childhood poverty and vulnerability that result, should be a strong imperative of the new family morality.

179. *See* MARTHA FINEMAN, THE NEUTERED MOTHER AND THE SEXUAL FAMILY 230-32 (1995).

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