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## A Woman's World

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# A Woman's World

*What if care work were socialized  
and police & fire protection left to individual families?*

RICHARD MICHAEL FISCHL†

## I. LOST IN TRANSLATION

A couple of summers ago, I was living in London and teaching a course on comparative labor and employment law to visiting American students. I was also in the final stages of co-editing a collection of essays on labor law and globalization<sup>1</sup> and decided to take the 'nigh-completed manuscript for a test run, assigning it as a principal reading for the course. Judging from the quality of the final examinations, the students gained much from the collection, and the experience of teaching my way through it benefited the editing process enormously. But my effort to mix scholarship and pedagogy had a rocky start.

A number of essays in the book-in-progress addressed one of the central problems of contemporary labor regulation: the division of work into the dichotomous realms of unpaid labor (intrafamilial "care work" such as raising children, caring for elders, nursing the sick, and maintaining a household) and paid labor (pretty much everything else, in-

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† Professor, University of Miami School of Law; Visiting Professor (Fall 2004), University of Connecticut School of Law. Earlier versions of this essay were presented at the sixth conference of the International Network on Transformative Employment and Labour Law (Intell) (Catania 2002) and at the Annual Meeting of the Law & Society Association (Chicago 2004). Many thanks to the participants in those sessions for their thoughtful reactions; to Rachel Arnow-Richman, Tom Baker, Mario Barnes, Susan Bisom-Rapp, Karl Klare, Tom Morawetz, Jeremy Paul, Susan Silbey, and Bert Westbrook for particularly insightful criticisms; to Joanne Conaghan, Pam Fischl, and Kerry Rittich for encouragement and inspiration; and of course to my students from whose engagement and skepticism the ideas presented here have benefited enormously.

1. LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES (Joanne Conaghan et al. eds., 2002).

cluding care work done for families other than one's own); the role of law in creating and maintaining those dichotomous realms; and the untoward consequences for the increasing number of women (and not a few men) who struggle to straddle the divide and thus to square the demands of life in the paid labor market with the responsibilities of care work.<sup>2</sup>

As we explored the essays, a growing undercurrent of hostility emerged in class discussion. At the time, the reaction surprised me. In my experience, contemporary American law students are for the most part quite receptive to discrimination claims and to gender equity claims in particular. I might therefore have expected the care-work material—focusing, as much of it did, on barriers to labor-market participation faced primarily by women—to be uncontroversial among all but the most conservative participants.

In retrospect, however, perhaps I ought to have anticipated the disquiet the material in fact produced. Like many contemporary Americans, my students seem to value individual autonomy and free “choice”—from the bedroom to the marketplace—at least as much as they oppose discrimination.<sup>3</sup> And when discussion turned to the problems faced by working women, true to form many students in the summer class saw “choice”—exercised in *both* the bedroom and the marketplace—as the simple and straightforward solution.

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2. See Joanne Conaghan, *Women Work and Family: A British Revolution?*, in *id.* at 53; Margriet Kraamwinkel, *The Imagined European Community: Are Housewives European Citizens?*, in *id.* at 321; Kerry Rittich, *Feminization and Contingency: Regulating the Stakes of Work for Women*, in *id.* at 117; Lucy A. Williams, *Beyond Labour Law's Parochialism: A Re-envisioning of the Discourse of Redistribution*, in *id.* at 93.

3. Despite the obvious tension between a celebration of choice and opposition to discrimination, see, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1995), it's my sense that many Americans see antidiscrimination law as facilitating the market and lifestyle choices of would-be victims—rather than as restricting the choices of would-be discriminators—and accordingly experience their positions as quite consistent with one another. This would certainly help explain the way we embrace antidiscrimination norms even as we domesticate and commodify them. See generally THOMAS FRANK, *THE CONQUEST OF COOL* (1997). But the underlying tension may also create opportunities for critical insight, a point to which I will briefly return at the close of the essay.

Of course labor market participation and care work pull Americans in different directions, they acknowledged, but what's wrong with simply leaving it to individual couples to work out a division of paid and unpaid labor to suit their particular needs, talents, and preferences? The possibilities, the argument continued, are endless: A couple can choose to have (or not to have) children (as well as when to have them, how many, etc.); they can "contract out" care work (to nannies, housekeepers, etc.) so that they can focus on their paid work careers—indeed, with the help of new reproductive technologies, they can even contract out gestation and birthing; alternatively, they can sacrifice a second income in order to secure the benefits of stay-at-home childcare; or they can "have it all," with both partners participating in the paid labor market and adjusting outside work, child care, and housework duties and schedules as they see fit.

The questionable assumptions undergirding this tidy little matrix did not go unremarked. In response to objections from a handful of students—and to a bit of Socratic prompting from the front of the room—the class considered some of the more salient choice-resistant constraints that might come into play in the course of parenting: biology (despite precautions, babies have an uncanny knack for showing up on their own schedule and whether you want them or not); religious beliefs and philosophical commitments (the choice to terminate a pregnancy may be no choice at all for many couples); single parenthood (which is sometimes a "chosen" condition but is frequently instead the product of death, divorce, or abandonment); reliable child care (a constant challenge even in the best of circumstances); and, of course, financial wherewithal (with the decline of the "family wage," an increasing number of middle-class families find that two incomes are a necessity, not a luxury, to say nothing of the plight of families living near or below poverty-level).

But I could tell from the tenor of the discussion that I was preaching mostly to the faithful and getting nowhere fast with the majority of the class. A number of students expressed the view that we were subjecting an arena of personal choice and intimate relations to wholly inappropriate political analysis, and the prevailing reaction to my efforts to explore the various limits on parental choice was bluntly summed up by a particularly outspoken skeptic: "Well, those constraints aren't likely to constrain *me*."

"Just wait until you have kids of your own" is a line I long ago promised I would never use in public, lest my gradual transformation into the image and likeness of my parents be complete. Obviously I needed a more convincing way to make the point and briefly considered a frontal attack on the ideology of choice itself.<sup>4</sup> But that seemed unwise in light of a second discomfiting development in the class dynamic. By this point, my students were provoked enough that they were actually reading the assigned material in advance of class discussion—a positive development indeed, especially given the distractions of study abroad. But in doing so they encountered material they liked even less than they did all the talk about care work and unpaid labor.

In the best tradition of American critical legal studies, a number of the essays in the collection I was editing forthrightly take what Duncan Kennedy has described as a "distributive" approach to the study of law and legal institutions,<sup>5</sup> and it may well be that the principal ideological

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4. A substantial body of critical scholarship challenges that ideology by revealing that what we think of as "choice" is the product of a complex interplay between freedom and coercion (see, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive Society*, 38 POL. SCI. Q. 470 (1923)); is frequently "determined" rather than autonomous (see, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 126-41 (1988)); and is sometimes just plain bad for you (see, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982)). Some of the most trenchant recent critiques—focusing on a wide variety of ways in which real-world "choosing" departs from our idealized images—have been developed by behavioral and second-generation law-and-economics scholars. See, e.g., Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205 (2001) (collecting sources and discussing the literature). The ideology of choice has a more ambiguous relationship with contemporary American feminism. On the one hand, political activists have frequently cast their arguments favoring such causes as reproductive rights and labor market participation in the rhetoric of "freedom of choice." At the same time, this strategy has been subjected to critical scrutiny by feminist scholars who have explored the role of choice discourse in replicating and reinforcing patriarchy. See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

5. For examples of the offending materials, see Karl Klare, *The Horizons of Transformative Labour and Employment Law*, in LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 1, at 3; Lucy A. Williams, *Beyond Labour Law's Parochialism: A Re-Envisioning of the Discourse of Redistribution*, in *id.* at 93. On the "distributive" approach to the study of law more generally, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 65-69 (1997).

success of the Reagan-Gingrich-Bush rightward lurch in U.S. politics has been to move any talk of "distribution"—and particularly talk of *re*-distribution—outside the boundaries of legitimate discourse. Judging from my own classroom experience, deploying the D-word (let alone the R-word) seems naively "retro" (a mortal sin among students who are just plain tired of hearing about the good old days) and in any event flies in the face of the current conventional wisdom that redistribution kills the goose that lays the golden egg of economic prosperity.

Ironically, the provocation for what I now think of as "the July rebellion"—oh, the perils of exposing Americans to British rule during the summer months—was an essay that offered a thoughtful defense of free trade while arguing forcefully for a trade regime that would reduce the incentives for individual nations to seek comparative advantage by lowering domestic labor standards.<sup>6</sup> The essay unabashedly favored a modest redistribution of wealth from developed to developing countries, but the students who could no longer contain their rage at the Red Flag of Redistribution may have missed the point that this was offered by the author as a potential benefit of trade *deregulation*, not as a policy to be pursued via the visible hand of some utopian global government. Yet it was too late for such nuances, and the class would suffer in surly silence no longer. "All this talk about redistribution," one student angrily proclaimed. "Are you and all your labor law friends communists or what?"

I was eventually able to clarify the point about the supposed virtues of free trade for developing nations, but the outburst left me on perilous ground in my efforts to challenge the role of "choice" as we continued our discussion of the problem of unpaid labor. So I reached into my pedagogical bag of tricks in search of that handy rhetorical device that, when properly deployed, can at once change the subject and make a point effectively: the analogy. What I wanted was an illustration that could reframe the debate to bring into view the decidedly *unchosen* dimension of care work; to highlight the public/social (as opposed to merely private/individual) costs and benefits of such work; and to shift the debate back to the safer terrain of antidiscrimina-

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6. See Brian A. Langille, *Seeking Post-Seattle Clarity—and Inspiration*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION*, *supra* note 1, at 137.

tion norms by exploring the distributive implications of the fact that care work is gendered as well as unpaid.

Nice work if you can get it—paid or not, I suppose—but my first effort along those lines was not exactly a success. Long ago, I learned that there is nothing more dangerous in the classroom context than an analogy you haven't thought through carefully, and for me that means writing it out (or at least outlining it) in order to figure out whether and how well it works. No analogy is perfect, of course, and half the fun is poking holes, but I prefer going into class already knowing where to find most of the holes, and I'd rather not find myself surprised by a complete unraveling mid-presentation. I should therefore have thought long and hard about the analogy I selected, especially given that open warfare had quite nearly broken out in my class.

Instead, I shot from the hip and cited the first analogy that came to mind: national defense. To highlight the social benefits of care work, I wanted an example of a "public good"—some uncontroversially important public service that the usual market mechanisms are unlikely to provide—and national defense is a tried and true classic of the genre. As I began to spin out a point I'd made many times in other contexts (if you protect your house from nuclear attack, chances are the house next door will be protected too etc.), it occurred to me that the question of how to pay for the *labor* costs of national defense offered an intriguing parallel to the care-work problem. I played with that notion a bit, exploring the distributive implications of providing military labor via the draft (where the human and financial costs are spread throughout society via universal conscription) vs. the volunteer army (where financial costs are shared by society as a whole but the human costs are paid largely by the working class and the poor). I was about to draw some explicit contrasts and comparisons with care work when I realized that most of the class had stopped listening, utterly outraged by my seemingly casual support for conscription over voluntary service and now convinced that their worst suspicions about my politics had been confirmed. My effort to change the subject had thus fueled the fires of controversy rather than providing critical distance; indeed, for this audience, my analogy hadn't changed the subject at all.<sup>7</sup>

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7. As it happens, the July rebellion took place two months before September



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Rioting students do have a way of concentrating the professorial mind, and that night I sought refuge in the Last Resort of Desperate Legal Academics: a hypothetical ("when reality just won't do the job"). A soul-searching and enormously enlightening conversation with my wife Pam produced the thought experiment—a world in which care work is socialized and protective services (police, fire, etc.) are not—that comprises the remainder of this essay.

I call it "A Woman's World," and the title refers to the eponymous television advertising campaign mounted a while back by a world-famous athletic shoe manufacturer and featuring a series of vignettes that present ostensibly humorous gender-role reversals. In one spot, a group of apparently close female friends are gathered in a living room watching a sporting event on television, utterly oblivious to both the noise and the mess they are making as a beleaguered house-husband replenishes their drinks and cleans up after them. In another—this one set in a bar, the prominently displayed name of which is an obvious phallic reference—rowdy female patrons leer and grope at scantily clad male waiters. In yet another, extremely fit women doing strenuous workouts in a health club strike poses of amused superiority as a lone male arrives and clumsily drops his water bottle, falls off a treadmill, etc.

Not to put too fine a point on it, the vignettes were more plausibly understood as apology than as critique. Although the parodied male practices were not exactly glorified, the suggestion that "a woman's world" would look an awful lot like the present one was difficult to ignore. Indeed, that message reflects an understanding of American feminism—i.e., as interest-group pleading in the context of a zero-sum

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11, in the aftermath of which the funding of national defense and the prospect of a revived draft have become more familiar topics in American politics. Although it is possible that the "war on terrorism" has made those of a certain age more receptive to the possibility of a draft, at the time of this writing it seems far more likely that the multiplying disasters associated with the second Iraq war have produced the opposite effect. Indeed, the unwillingness of either major-party candidate in the 2004 U.S. presidential campaign to acknowledge even the possibility that a renewed draft might be necessary to satisfy existing (let alone potential) military commitments—particularly with both candidates eager to portray themselves as unwavering proponents of U.S. military strength—would seem to confirm that the political "third rail" I touched in the summer class retains its charge.

contest between genders—that is evident in many popular treatments and not a few scholarly ones. I appreciate that I run the risk of reinforcing that understanding by my use of the quoted title, but I trust it will be clear from the rest of the essay that the target of this critique is the game itself and not merely its current distributive consequences.

## II. A WOMAN'S WORLD

What if life in the U.S. were reversed in the following way: What if "care work" (child care, elder care, care of the infirm, etc.) were provided by the state, and individuals and families were left to fend for themselves with respect to police and fire protection? Here is one version of what life in such a world might be like.

### A. *Caring Centers: The Nanny State Reconceived*

In the place of police and fire stations, picture "caring centers" in every town—and, in larger cities, in every neighborhood—where working parents leave their pre-school children and their aging and/or infirm relatives for state-funded care during the course of the workday. The caring centers are a source of long-term, relatively stable employment; staffing them is "blue collar" work, but high-status blue collar work and decently paid as well. Indeed, in most jurisdictions, carestaff are unionized and also enjoy civil service protection.

Naturally, there is a long tradition of gender segregation in these jobs; even today, most caring center workers are women, a tradition reinforced by a common practice of daughters following their mothers into this occupation, sometimes dutifully but often with a fierce sense of family pride. Historically, men didn't even apply for these positions; indeed, in the world of our thought experiment, historically men didn't do most kinds of paid work *at all*, but more on that in a moment.

As part of a gender equity revolution that began in the 1960s, men did begin seeking carestaff positions, but they were typically turned away by managers who held firm to the view that men were just "not suited" to this line of work. Referring in particular to child care, a frequently heard joke was that "men have a role to play in reproduction, but it's not *this*."

The brave few men who gained early entry into caring center work were commonly subjected to a variety of forms of harassment at the hands of their female colleagues. Thus, male workers would find dirty pampers in their lockers; they would find themselves relegated to the most difficult and distasteful tasks (like pushing strollers and staffing changing tables); and they were frequently the target of crude and suggestive comments from co-workers—as well as anonymous notes and postings on center bulletin boards—slyly referring to or even graphically depicting their “proper” role in reproduction.

What's more, women workers in caring centers—like other female civil servants—enjoy a “pregnancy preference,” enabling those who have lost time in the workforce due to childbearing to jump the seniority queue and bump the childless from their jobs in the event of reductions in force. Between baby booms, men—even those who have served on carestaff for some time—have almost invariably been the first to go with each round of layoffs. An infamous Supreme Court decision from the late 1970s upheld this practice against a sex-discrimination claim on the ground that the challenged preference was “by its very terms based on pregnancy, not sex.”<sup>8</sup>

### *B. Men's Work*

Quite apart from suffering the indignity of the occasional “clueless” judicial decision, men in the world of our thought experiment live lives largely consumed by providing protective services for their families—the modern equivalent of John Wayne leading the wagon train through the Wild West. For men of virtually every class and station, much of the day is spent ensuring the safety of their families and homes.

Informal networks of men form neighborhood watch groups that protect against burglaries and home invasions, and fires are frequently fought by men working bucket brigades. As part of their daily routine, most men escort their spouses to the office and their children to school or caring centers. Typically, their presence is enough to deter attacks, but occasionally men are called upon to repel would-be attackers with physical force. Although the beneficiaries make a fuss on Father's Day or after a particularly difficult

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8. *Cf. Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

encounter, this work is for the most part taken for granted by family members in a hurry to get on with their daily activities. Political consultants in the 1990s paid homage to the electoral importance of these mostly upper-middle-class suburban men when they coined the term "sock-him dads" to describe the demographic and the all-too-frequent occasions in which fisticuffs (or worse) were required to secure safe passage.

Historically, of course, this work was so consuming that it was immensely difficult for men to venture into the market for paid work, and women were accordingly the primary breadwinners for many families. To be sure, working class and poor families who needed a second income to make ends meet didn't have the luxury of a full-time "stay-at-home dad," but decently paid jobs for men were scarce, and substitutes for the protective care of absent fathers could be awfully hard to come by.

The plight of the urban poor was especially dire. Facing the dual challenge of gender and racial discrimination in the paid labor market, the best that many inner-city men of color could do was to find work providing full-time protective services for middle- and upper-class white families, earning marginal pay and virtually no benefits. On the other hand, certain cultural practices gave extended African-American and Hispanic families and other close-knit inner city communities some advantages in dealing with their plight; in some cases, for example, grandfathers were able to take on the protective role for their children's families, and in some neighborhoods enterprising fathers would charge for taking other families under their protective wing even as they took care of their own. But in poor families of all ethnicities, wives and children all too frequently had to fend for themselves.

### *C. A Brief History of the Gender Equity Revolution*

In a now-familiar story, the barriers that rich and poor men alike faced in entering the market for paid work broke down in three stages in the latter half of the 20th century.

*Stage One: Confronting Overt and Intentional  
Gender Discrimination*

In the 1950s and 1960s, for a host of economic and social reasons, men increasingly sought entry into the paid workforce but found themselves confronted by gender stereotypes that made employers reluctant to hire them for many jobs, especially those on the professional or managerial track. The prevailing view among employers—largely a reflection of the dominant views in society as a whole—was that men were simply “designed,” by nature or by Providence, for the protection of their families and not for employment outside the home. Indeed, the very characteristics that made men successful in performing their protective duties—their physical strength, their fierce protective “instincts” and quick temper—rendered them unsuitable for most paid work. All those fights just made them too competitive and aggressive for most employment settings, the dominant view went, and they wouldn’t perform well in contexts where teamwork and a high value on relationships were the keys to success.

The equality revolution of the 1960s and 1970s eventually broke down the formal barriers, and in this the men were unwitting beneficiaries of a last-minute effort to defeat the Civil Rights Act of 1964 by adding “sex” to the list of prohibited bases for discrimination, a gambit that opponents of racial equality wrongly thought would be utterly unpalatable (“surely they’ll draw the line at being forced to work shoulder-to-shoulder with *men*”).

*Stage Two: Structural barriers and wealth disparities*

Armed with the legal right to equal opportunity in the workplace, men entered the paid workforce in unprecedented numbers in the 1970s and 1980s but faced many obstacles that were all but invisible to their female colleagues. Because it still fell mostly to men to keep their homes secure and to get children and spouses safely to and from their daily destinations, men frequently arrived late to work and departed early, prompting employers to conclude that they were “just not serious about their jobs” and engendering hostility in female colleagues on whom it fell to handle the neglected tasks. Likewise, men would be called away from the office unexpectedly during the day to tend to

various emergencies, and more than occasionally they would show up for work in the morning utterly exhausted from a night of fighting a hostile gang or a nearby fire.

Predictably, these burdens fell more heavily on men from families of more modest means because wealthier families were able to "contract out" their protective needs and relieve men of those responsibilities—usually, as suggested earlier, by hiring men of color from inner cities. In a related development, many families in wealthy suburbs and tony urban neighborhoods recruited handsome young European men to provide protective services, sowing the seeds of marital discord when some wives suddenly began to demonstrate an intense but previously undisclosed interest in what was going on at home.

As more men undertook paid work, the market responded to the resulting need for protective services, and private protection firms began popping up, particularly in large urban areas. Long queues to engage the services of such firms were not unusual, nor were exorbitant prices for those who succeeded in retaining them. A series of scandals involving protection firm employees with criminal histories—as well as firms too understaffed to respond effectively to calls for assistance—produced a public outcry for regulation, resulting in a flood of legislation (and not a few criminal prosecutions) in the late 1980s and early 1990s.

Somewhat surprisingly, working class men—whose families were almost invariably priced out of the private protection firm market—were at first unable to persuade their labor unions to take their plight seriously. Female union officials patiently explained that "the size of the paycheck is what our members care the most about" (as if "our members" referred exclusively to people who didn't have families to protect) and that unions couldn't afford to take on "luxury" issues like the provision of family-protective services for working men (as if protecting a family from fire and other physical danger were a "luxury"). Likewise, unions and employers alike were slow to see the need for health insurance policies that covered injuries sustained by employees in the course of their protective endeavors. "The employees who receive these injuries do so on their own time, and—as much as we sympathize with their plight—there is simply no connection to their work for us," went the conventional wisdom; analogies to pregnancy benefits for

women, long covered by virtually all employers, went unheeded.

By the latter part of this period, though, the demographics of organized labor in the U.S. had changed in significant ways. A sharp decline in both employment and union density in traditionally female occupations was accompanied by a substantial increase in union representation among men in various pink-collar and lower-level blue collar jobs. Accordingly, the politics of organized labor began to change as well, and by the early 1990s "protective services for working families" was high on the list of demands at every bargaining table.

*Stage Three: The decline of career employment  
and changing social mores*

In the late 1990s, men continued their accelerating entry into the paid labor market, but the decline of "career" employment and the emergence of "new work forms" created special problems for them. "Flexibility"—the rage among corporate consultants and human resource management specialists—was fine for many women (especially younger ones without families) who could move easily from job to job, focusing like a laser beam on "upgrading their human capital." But high-velocity labor markets provided enormous practical challenges for men who had substantial protective responsibilities and for whom predictability and stability in the paid workplace were thus at a premium.

At the same time, sociologists began to note the sizeable (albeit mostly middle- and upper-class) population of men who chose to "stay at home" rather than entering the paid labor market. When surveyed, many of the men reported that they found protective work extremely fulfilling and had little interest in the "rat race" of paid employment. Others stated the belief that there was no higher calling than "protecting one's family" and were content to put off paid careers, at least until the children were grown and able to attend to such matters on their own.

Indeed, many men were proud of the sacrifices they made and deeply resented the suggestion that protecting one's family was somehow less important than an office job. It was an all-too-common experience for such men to encounter a raised eyebrow or a thoughtless remark when they revealed to others—and especially to ambitious young

professionals of either gender—that they were staying at home. More than one highly educated man—who might easily have succeeded in a well-paying career but who chose instead to focus on his family's protection—was heard to respond, "But I thought that choice was what the whole gender equity movement was about! Why aren't *my* choices valued?" The social slights and resulting defensiveness were a two-way street, of course, and men who worked outside the home—either by choice or by force of circumstance—frequently found themselves the target of insensitive and even snide remarks about the peril their absence created for their families.

Nontraditional families—single parents, gay and lesbian couples, communes of various sizes and configurations—were usually ignored (when they were lucky) or demonized (when they weren't) during family-protection debates, just as they were ignored or demonized during arguments about other "family" issues. Yet in the wake of the Supreme Court decision famously striking down American anti-sodomy laws, the movement in support of same-sex marriage gained a great deal of attention and some legal ground as well. News stories about the lives of and challenges faced by same-sex couples abounded, and a survey reported by the *New York Times* in early 2004 revealed that lesbian couples with children were more likely than their heterosexual and gay male counterparts to have "traditional" parenting relationships, with one parent serving in the "breadwinner" role and the other providing stay-at-home protection.<sup>9</sup> There was a lively debate about whether that trend was the result of choices born of economic advantage (even by this time, women still earned considerably more than their male counterparts in the paid workforce), of the fact that lesbian couples were already more accustomed to living lives outside the boundaries established by traditional gender stereotypes, or of some combination of those and other factors.

But in most families, gay or straight—and in virtually all working class and poor families—two incomes were rapidly becoming a necessity, not a luxury, and accordingly in a substantial majority of families two spouses did paid work, with the result that protective work was handled by

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9. Cf. Ginia Bellafante, *Two Fathers, With One Happy to Stay at Home*, N.Y. TIMES, Jan. 12, 2004, at A1.



some combination of "contracting out" and making do. And in most families, it was the man who did the making do.

To be sure, this development was offset somewhat by the assistance that some men were beginning to receive at home from their spouses. Although the trend—the subject of frequent human-interest stories in various lifestyle publications—always looked better on paper than it did in practice, survey data confirmed that women were indeed beginning to take on a share of protective work. Corporate America took notice of the trend as well, from elite companies that began developing "family-friendly" workplace policies (such as subsidizing the costs of hiring private protection firms and providing time off for women as well as men with protective work responsibilities) to national fast-food chains that began installing gun-cleaning "stations" in women's restrooms. The extent of the share was always a bone of contention, though, and nothing would send a gathering of men into paroxysms of laughter more quickly than someone's spot-on imitation of a clueless wife: "Honey, where do we keep that fire hose again?"

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In the world of our thought experiment, it isn't difficult to imagine the eventual emergence of a political movement among men (and of course some women) in support of turning a significant share of protective services over to the state; or of subsidizing such services via a system of employer or publicly funded insurance; or of reorganizing paid work in ways that eased the burdens on protective-care providers; or of proceeding on multiple fronts at once.

Nor is it difficult to imagine the arguments that would likely emerge in opposition to such measures: It isn't fair to saddle either employers or the state (i.e., taxpayers) with the cost of providing a public subsidy for those whose needs are entirely a product of their own private and personal choices; indeed, no one forces men to have families and, if they have them, no one forces them to take on the resulting protective work by themselves. Nor is the fact that so many parents choose to provide their own protection a reason for regret, for no one can do so better than a caring father—or, with increasing frequency, a caring couple—and the notion that police and fire protection might be effectively provided by the faceless bureaucratic state is fanciful at best.

## III. AFTERWORD

Back to the real world for a moment, where the notion of socialized police and fire services doesn't seem so fanciful at all. To be sure, in the U.S. and elsewhere a host of troubles attends the state provision of police services, among them the same sort of wealth-disparities in the quality of available services imagined in the thought experiment. Although fire services fare somewhat better in this respect, I don't for a moment mean to suggest (as some readers of an earlier draft surmised) that we ought to follow the police/fire model for care work and thus immediately begin the construction of state-run "caring centers" in every neighborhood; indeed, my point is not to suggest any particular solution to the problem of unpaid care work at all. A growing body of thoughtful and promising scholarship is already taking on that task, as recent symposia on the topic appearing in U.S. law journals will confirm.<sup>10</sup> By contrast, the point of this essay is not so much to solve the problem of unpaid care work as it is to help us to see it as a problem in the first place.

If the thought experiment succeeds in this quest, it does so by bringing to the foreground the social and structural dimensions of work that we tend to think of as either natural (we'll call that "the traditionalist view") or personal and chosen (we'll call that "the modernist view"). As the thought experiment reminds us, providing protective services through the state—and care work through individuals and families—is no more the "natural" product of a world in which women alone have the physical capacity to gestate than the reversal of fortunes imagined in our thought experiment would be the "natural" product of a world in which men may have a greater physical capacity than women to do some of the more familiar kinds of protective work. The current provision of care work, like the current provision of police and fire protection, is a matter of social convention—a product of history, politics, and culture rather than biology.

To be sure, that doesn't make it easy to change; deeply rooted social structures may be quite nearly as immutable

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10. See, e.g., Symposium, *Law, Labor and Gender*, 55 ME. L. REV. 1-333 (2003); Symposium on the Structures of Care Work, 76 CHI.-KENT L. REV. 1389-1992 (2001).

as "natural" ones. Nor does that mean that our current social practices are wrong. One cannot study American law, even *labor* law, and fail to develop a healthy appreciation for the "collective wisdom and experience" sometimes embodied in social structures and institutions. But it does mean that we can't pin our current predicament on nature, and—in the face of gender and economic inequities of the sort highlighted by the thought experiment—we ought therefore to take the call for re-examination and critique quite seriously.

But if the traditionalist view seems unfashionably essentialist, the modernist view clearly has some force: Care work *is* intensely personal and frequently "chosen." Yet, as the thought experiment suggests, our choices are shaped and constrained in countless ways by social, political, and economic structures that we take utterly for granted—structures that are, in day-to-day life, virtually invisible—and those structures are all but impervious to individual choice. At the same time, care work provides a "public good"—one no less vital than police and fire protection—on which not only immediate family members but also employers, communities, and society as a whole "free ride." The question therefore isn't whether care work ought to be "subsidized"; like the protective work in the thought experiment, it is already subsidized by the unpaid labor of those who provide it. The question, rather, is *how* it ought to be subsidized, and accordingly questions of gender as well as economic equity—questions put into stark relief by the thought experiment—are fair game for consideration and inquiry.

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The power of the thought experiment, of course, depends in no small measure on whether the reversal of protective work and care work seems plausible, and not for the first time a law professor can summon a bit of reality to support a classroom hypothetical. In a world of "gated communities," for-profit prisons, private security guards, and—to cite the latest contribution of U.S. foreign policy to world peace and humane governance—for-hire interrogation services, it isn't difficult to imagine a privatization of protective work along the lines sketched out in the thought experiment. Likewise, in the U.S. we already socialize care

work for children aged five and above—and are doing so increasingly for younger children as well—through our system of public education. (That schools are both learning *and* caring centers will be clear to any over-committed parent who has forgotten until late Sunday night that Monday is a school holiday; facing that predicament, a parent's first thought is decidedly not, "Oh, my, what can we do to make sure that Molly learns something tomorrow?") Semi-socialized care for the elderly and infirm—in the form of state or church-supported convalescent homes and, more recently, "day care" centers—is not uncommon either. In other words, then, the world of privatized protection and socialized care work described in the thought experiment is not unimaginably different from the world in which we already find ourselves.

Less plausible, perhaps, is the notion that a reversal of traditional gender roles would lead to "a woman's world" rather than simply a different sort of patriarchy. A world in which men stayed home to do protective work might, after all, be a world in which protective work rather than paid labor was treated as the centerpiece of civil society. This point is chillingly suggested in a short story by Margaret Atwood in which men have taken over the kitchen, banishing women to the office and factory.<sup>11</sup> As Atwood observes of her imagined world: "A man's status in the community was now displayed by the length of his carving knives, by how many of them he had and how sharp he kept them, and by whether they were plain or ornamented with gold and precious jewels."<sup>12</sup>

Substitute "hunting" for "carving" and it isn't difficult to fathom the relevance of that passage to the world of our thought experiment as well. Perhaps we should not be so quick to dismiss the traditionalist view that nature has a not-so-invisible hand in all of this, although before succumbing to the temptations of that sort of essentialism we ought to recall the sharp retort offered by Katherine Hepburn's Rose Thayer to Humphrey Bogart's Charlie Allnut in *The African Queen*: "Nature, Mr. Allnut, is what

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11. Margaret Atwood, *Simmering*, in *WILD WOMEN: CONTEMPORARY SHORT STORIES BY WOMEN CELEBRATING WOMEN* 59-61 (Sue Thomas ed., 1994). I am extremely grateful to Rachel Arnow-Richman for bringing this story to my attention.

12. *Id.* at 60.

we are put in this world to rise above.”<sup>13</sup> Indeed, the possibility that patriarchy runs deeper than the social, economic, and cultural structures of care work seems to me to confirm rather than undermine the pressing need to change the way we think about work and gender alike.

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Which brings us back to the classroom where our story began and where the thought experiment received its first public hearing. Truth be told, I don't think it had much effect on the leaders of the July rebellion, though they liked the funny parts and seemed impressed that I had gone to so much trouble to address their arguments. (For the record, I was likewise impressed by their efforts to engage mine and am happy to report that they received some of the highest marks that summer on the anonymously graded final.) At the other end of the spectrum, the handful of students who were already receptive to the critique of unpaid care work responded enthusiastically—some of them literally bouncing in their seats as I spun out the thought experiment—though I'm not sure I opened any minds there either.

But for the rest of the class—a substantial group in the middle—the thought experiment seemed from the ensuing discussions to have had its intended effect. The strategy of “putting the shoe on the other foot” enabled many to see a problem of gender equity where they had previously seen only an arena of personal and individual choice, confirming for me the utility of deploying one widely shared contemporary norm against another in an effort to prompt our students to think more critically about both.

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13. *THE AFRICAN QUEEN* (United Artists 1951).

