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CARING FOR WORKERS

Martha T. McCluskey

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CARING FOR WORKERS

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I. INTRODUCTION

This essay examines the question of conflict between market work and family care from the angle of family caretaking labor for workers rather than for dependents. Feminist legal scholars and activists have been concerned for generations about the effect of women's unpaid caretaking work on women's participation and success in the wage labor market. Better public support for this gendered family care work is crucial to many leading visions of feminist legal and economic change. For example, Martha Fineman argues that the state and market should take on a greater share of the responsibility for the caretaking work now delegated primarily to unpaid, or underpaid, women in the "private" family. Joan Williams advocates revising workplace norms and employment laws to support women (and men) whose normal life includes substantial responsibility for child care. Recent welfare reforms, however, have increased the extent to which public policy treats caretaking instead as a personal responsibility (or a sign of personal irresponsibility) for some women and families, particularly single women in poverty and mothers of color. Prevailing politics have been somewhat more favorable to the idea that "working mothers" deserve at least some public support for their efforts to balance family care with paid labor.

1. Professor of Law, State University of New York at Buffalo (email mcclusk@buffalo.edu). For helpful discussion of these issues, I thank Vicki Schultz and participants at the Law and Society Association 2002 Annual Meeting, as well as participants in the Law, Labor, and Gender Conference at the University of Maine School of Law.

2. See, e.g., Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It (2000) (arguing for a change in the organization of market and family work to end the marginalization of mothers); Alice Kessler-Harris, In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th Century America (2001) (exploring historical debates over the ways in which various economic rights and institutions treat women as workers and as family caretakers).


4. Williams, supra note 2, at 54-63.


6. See McClain, supra note 5, at 1677 (acknowledging that policy makers and experts have appropriately recognized the need for increased support for child care for low-income mothers engaged in market work, but challenging the idea that support for care should be a means toward more market participation by mothers); see generally Lisa D. Brush, Changing the Subject, Gender and Welfare Regime Studies, 9 Soc. Pol'y. 2 (2002) (analyzing feminist scholars' focus on "working mothers" as a politically expedient strategy that challenges androcentrism without addressing more threatening issues of masculine privilege or violence). For one example of a conservative policy organization that supports "welfare reform" but promotes its concern for "working mothers," see the National Center for Policy Analysis, Women in the Economy (2002), at http://www.womenintheeconomy.org (last visited Nov. 8, 2002) (arguing that working mothers will benefit from "free market" policies such as income tax cuts and privatized social security).
Some critics, however, have questioned whether better public support for unpaid family caretaking is indeed a goal consistent with feminist ideals. Their challenges revive and expand longstanding debates about the problems of a feminist strategy focused on women workers' maternal responsibilities. Recent debates over legal feminists' focus on family care work raise three interrelated concerns.

First, the home/market dilemma: Will directing public support to women as unpaid caretakers discourage or disadvantage women as paid workers? To what extent should feminist efforts be directed at supporting those—primarily women—who decide to substitute "uncommodified" family work for the "commodified" work assumed in law to result from an arms-length "market" exchange of money for labor?

Second, the maternal/nonmaternal dilemma: Will directing public support to women as mothers victimize or marginalize women who are not mothers or caretakers? Will caretaking support reinforce "repronormativity," restricting or penalizing women's choices to be nonparents, single individuals, or nonprocreating lesbians, for example?

Third, the pleasure/dependency dilemma: Will directing public resources to women's family care for others diminish attention or support for women's freedom to seek their own pleasure? In particular, as Katherine Franke asks, has feminist legal attention to women's dependency burdens detracted from feminist legal attention to women's identity as powerful sexual agents?


8. See Lisa D. Brush, Love, Toil, and Trouble: Motherhood and Feminist Politics, 21 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 429, 454 (1996) (reviewing feminist scholarship on historical debates over the relationship between motherhood, feminism, and welfare state policies). Brush concludes that "maternalism is feminism for hard times," a strategy that has often been unsuccessful in its attempt to circumvent attacks on women's citizenship by making children's well-being the basis for justifying women's claims to public rights and benefits. Id. at 431, 454.

9. See Schultz, supra note 7, at 14-20 (arguing that feminists should improve and increase women's commodified market work as the foundation of citizenship); Deborah L. Rhode, Balanced Lives, 102 COLUM. L. REV. 834 (2002) (arguing for support for a balance between paid work and unpaid pursuits as the route to meaningful lives and societal well-being); Martha M. Ertman, Love and Work: A Response to Vicki Schultz's Life's Work, 102 COLUM. L. REV. 848 (2002) (arguing that compensation for family homemaking labor can help redefine dominant norms governing gender, sexuality, and class).


11. See Franke, supra note 7, at 183-86 (criticizing feminist attention to motherhood for a failure to sufficiently question repronormativity).

12. See id. at 182-83, 186, 204 (arguing that subsidies for reproduction encourage women to use their bodies for goals other than their own pleasure).
My thesis is that feminists can better respond to these conundrums not by turning away from a focus on gendered family care work, but by paying more attention to the work/family question. A number of feminists, particularly Martha Fineman, have framed the issue of family caretaking labor broadly as a matter of the pervasiveness and inevitability of human dependency not just in childhood but also, for example, in old age, sickness, and disability. However, many supporters and critics of feminist family care advocacy have focused their debate more narrowly on the question of child care. I hope to develop further a broader notion of dependency by focusing particularly on how unwaged, gendered caretaking work is critical not just to maintaining those outside of the labor market—those typically labeled dependents—but also to maintaining and supporting ostensibly independent workers.

Even when successfully raised from infants to adults, and even when not retired or incapacitated from wage earning, workers (and their employers) depend on substantial caretaking services to obtain food, shelter, clothing, health care, emotional support, social capital, job training, and transportation, among other things. The historical legal reorientation of work from domestic servitude (master/servant or master/slave relationships) to free wage labor theoretically involved redirecting responsibility and control of this care from masters to workers. But the reconstruction of employment from a domestic status to a market contract has also depended on reinforcing domestic status relationships by which some wage workers and their employers can shift the costs of this care to families, communities, and their own hired domestic servants.

Many feminists have argued that employment and labor laws assume an ideal worker free from direct responsibility for child care—an ideal based on a mascu-
line norm. But the ideal worker assumed by the law is also unencumbered by direct personal care service—because that ideal market wage earner comes packaged with an unpaid servant, historically institutionalized in law as a wife—in particular, a white heterosexual wife. Workers’ ability to succeed in the labor market depends not just on how much this market labor conflicts with the family care they give to others, but also on how much family care they can receive from others. Feminists have discussed how prevailing labor market structures penalize some mothers’ caretaking labor with lower wages and reduced job opportunities—the mommy track problem. But prevailing labor market structures also privilege some husbands with higher wages and better opportunities—the husbands’ premium. The family services traditionally associated with—and legally required of—wives’ labor for husbands deserve closer attention in analyzing the relationship between women’s commodified and uncommodified labor.

II. NONDEPENDENT CARE AS PRODUCTIVE LABOR

Many feminists and scholars have criticized how household labor was redefined from economic production to personal consumption or leisure during the nineteenth century. Dependent care is often included within this analysis of

19. See, e.g., Williams, supra note 2, at 1-6.
20. See Stanley, supra note 18, at 182, 187-92 (discussing how the late nineteenth century’s dominant ideology recognized wives’ unwaged service to wage-earning husbands as an important economic value, but that African American women were expected to sell their labor to white employers rather than to specialize in serving their own families). See also Elizabeth Wilson, Women and the Welfare State 176-77 (1977) (the housewife’s unwaged domestic work to provide food, laundry, and good housing “helps to keep costs down for the employer by making it possible for the worker to be cared for much more cheaply”); Lisa Leghorn & Katherine Parker, Woman’s Worth: Sexual Economics and the World of Women 121 (1981) (explaining that women are coerced into heterosexuality in part to support “a worldwide institution whereby women service men for free within and outside the home”).
22. See, e.g., Kermit Daniel, The Marriage Premium, in The New Economics of Human Behavior 113, 113-25 (Mariano Tommasi & Kathryn Jerulli eds., 1995) (concluding that empirical evidence supports the theory that men earn more when married because their wives’ household work and care services enhance husbands’ productivity). Although the economic literature typically describes this as a “marriage” premium, in fact the evidence suggests it is a premium based on gender as well as on race and class. For white women, for example, marriage does not correlate with higher wages, and white husbands earn a higher premium than black husbands. Id. at 123.
23. See Reva B. Siegel, The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930, 82 Geo. L.J. 2127, 2198-210 (1994) (describing how coverture continued after nineteenth century marriage law reforms because the law continued to require unwaged domestic service by wives to husbands); Katharine Silbaugh, Turning Labor into Love: Housework and the Law, 91 Nw. U. L. Rev. 1, 32-36 (1996) (stating that wives still have a legal obligation to provide unpaid household services to husbands). See also Williams, supra note 2, at 153-57 (discussing the “family wage” ideal as a white and middle- or upper-class privilege).
24. See Boydston, supra note 18, at 158 (discussing the “pastoralization” of wives’ services as distinct from economic “work”); Nancy Folbre, The Unproductive Housewife, 16 Signs: J. of Women in Culture and Soc’y 463 (1991) (discussing changing ideas about how to count women’s household labor in census and statistical data). See also Ann Crittenden, The Price of Motherhood: Why the Most Important Job in the World is Still the Least Valued 45-64 (2001) (summarizing research on “the invention of the unproductive housewife”).
household labor, but for most families child care historically was not as substantial a part of this labor as it has become recently, especially among affluent households. For example, Joan Williams observes that a popular mid-twentieth century storybook portrayed mothers' duties as primarily centered on the needs of their husbands and homes rather than on entertaining or educating their children. I want to distinguish nondependent caretaking work—caring for those who participate in paid labor—as an important part of the gendered household labor crucial to maintaining and developing capable human beings.

In her comprehensive and groundbreaking analysis of housework and the law, legal scholar Katharine Silbaugh uses the term “housework” to include nondependent care together with dependent care, and defines it as unpaid work that meets the material needs of the family, as opposed to leisure. Silbaugh notes that taking childcare hours out of the calculation of aggregate housework does not have as dramatic an effect as might be expected. For example, she cites 1986 data about women’s average combined home and family work that shows child care counts for only about 200 hours a year of women’s work on average out of an annual total of 2416 hours, and about 58 hours of the average man’s home and family work a year out of an annual total of 2328 work hours. Even though such aggregate data obscures the importance of dependent care for individual families with children, or for society as a whole, it nonetheless suggests that the question of household labor should not be simply conflated with the question of childcare, or even dependent care broadly defined to include care of frail elders or adults with disabilities. Another study from the mid-1980s of families with children found that, excluding child care, mothers with paid labor force participation of more than thirty hours per week performed thirty-two to thirty-seven hours a week of housework tasks; mothers not in the paid labor force performed forty-five to fifty-two hours a week of unpaid housework. For all fathers, this nonchildcare work ranged from ten to fifteen hours a week.

Data on nondependent family care labor is necessarily elusive and contestable. The line between dependent and nondependent care work is inevitably fuzzy: for example, an hour spent doing the family grocery shopping with a child in tow is likely to involve overlapping time and effort devoted to serving the care needs of both the dependent child and adult earner(s). In addition, the line between productive nondependent care labor and personal consumption or leisure always reflects subjective and ideological judgments. A worker who takes the time to prepare and eat a nutritious dinner with friends, for example, may be inextricably engaged in both personal consumption and enhancement of her capacity for productive market labor.

In her analysis of the empirical data, Silbaugh follows a leading economic convention, the third-party test, to distinguish unpaid care work from leisure. If

25. See Williams, supra note 2, at 35-37 (discussing how child-rearing norms have changed over time and with social class to emphasize more maternal labor for children).
26. Id. at 36 (discussing the Mrs. Piggle-Wiggle books of the late 1940s and early 1950s).
27. Silbaugh, supra note 23, at 10-11.
28. Id. at 11.
29. Id. at 11 n.37 (citing Victor R. Fuchs, Women's Quest for Economic Equality 78 (1988)).
30. Id. at 9-10 nn.27, 29 (citing analysis of a 1987 data set by David H. Demo & Alan C. Acock) (citation omitted).
31. Id.
32. Id. at 11 (citing Ann Chadeau, What is Households' Non-Market Production Worth? 18 OECD Econ. Stud. 85 (1992)).
the goods or services performed in the family could be provided by a third-party seller—commodified in an arms-length market exchange—they count as work. For example, cooking a meal is housework, eating it is leisure. Silbaugh gives a typical list from sociological literature: preparing meals, washing dishes, house cleaning, washing and ironing clothes, shopping, paying bills, yard work, driving, and automobile maintenance.33 This list leaves out other less quantifiable tasks that may be nonetheless quite valuable and are often quite commodifiable—emotional support, managing social and community relationships, financial planning, monitoring health and arranging for health care, providing entertainment, and sexual satisfaction.34

Another large and historically important category of common unpaid household care services includes informal and unpaid direct participation in family members' paid work and capital earnings. For example, unpaid family members of workers or entrepreneurs often provide emotional support and motivation, practical advice, assistance with job searching, problem solving, and networking; they may unofficially staff a family business or enhance the value of the family home and other capital assets. Unpaid family members have commonly helped earners with typing, research and editing, bookkeeping, errand running, entertaining, and phone answering, for example. Obviously this list varies enormously by class and nature of occupation: a Wall Street Journal article, for example, describes one stay-at-home wife who hires nannies to take care of the kids so that she can use her (unwaged) management skills for things like organizing a 150-person golf party for her stockbroker husband's business associates.35

Depending on class and other factors, many families commodify some of these worker-care services.36 Upper-class workers often receive many of these services as job perks: high-status workers typically have executive secretaries who take on many of the duties of the traditional wife,37 and many high-income workers can take advantage of employer-paid business meals, concierge services, home deco-

33. Id.
34. See, e.g., SUSAN MAUSHART, WIFEWORK: WHAT MARRIAGE REALLY MEANS FOR WOMEN 144-55 (2001) (listing and criticizing the "job description" of wife and discussing "emotional caretaking" of the husband as a central wifely duty).
36. BOYDSTON, supra note 18, at 136-37 (explaining that even though many middle-class men in the nineteenth century enjoyed sufficient incomes to purchase their own maintenance services like room, board, clothing, and medical care, their ability to accumulate capital often depended on substituting unpaid wives' labor for these commodified services); NONA Y. GLAZER, WOMEN'S PAID AND UNPAID LABOR: THE WORK TRANSFER IN HEALTH CARE AND RETAILING (1993) (arguing that capital owners have shifted some of the costs of production to unpaid family labor by "decommodifying" some market services once provided for customers of retail and health industries); Eleena de Lisser, How to Get an Airline to Wait for Your Plumber, WALL ST. J., July 2, 2002, at D1 (describing a business trend whereby electronics and airline companies woo elite customers by providing personal care services like shopping or even planning a wedding along with their standard products).
37. LEIGHORN & PARKER, supra note 20, at 121, 178-79 (discussing secretarial jobs as traditionally including tasks analogous to a wife's duties, including keeping the boss's social appointments, remembering the boss's family birthdays, giving emotional support, making coffee, and perhaps even providing sexual service).
rating, recreation facilities—or even Porsches.\textsuperscript{38} In many affluent families, commodified domestic labor may not decrease unpaid family care but instead may allow families to redirect unpaid domestic services to new worker-care tasks. The upper-class wife, for example, may spend substantial time managing household help, shopping for high status household goods, and maintaining high status social networks—all of which may be important to cultivating the breadwinner’s market success.\textsuperscript{39}

On the other hand, many less economically privileged families may skimp on both unpaid family care work and commodified substitutions, and instead manage with reduced or low quality nondependent care. For these lower-income workers, doing without family or market care services may have long term costs: for example, eating at McDonald’s regularly, delaying home and auto maintenance, or failing to shop carefully can contribute to future economic and personal crises.\textsuperscript{40}

A worker’s access to domestic care services has been central not just to gender and class status but also to white racial privilege in the United States. Amy Dru Stanley explains that, for many in the post-Civil War south “the exchange of a husband’s support for a wife’s service at home symbolized white supremacy.”\textsuperscript{41} The idea that access to wives’ domestic services is important to maintaining white men’s social status has continued to ground twentieth century welfare policy, including social security.\textsuperscript{42}

\section*{III. Worker Care as a Public or Private Value}

Feminists have criticized conventional calculations of economic growth and

\begin{itemize}
  \item \textsuperscript{39} See Boydston, supra note 18, at 137 (explaining how nineteenth century middle-class wives’ skill at making status-enhancing market purchases enhanced husbands’ earning power and social standing).
  \item \textsuperscript{40} In her stint as a low-waged worker, journalist Barbara Ehrenreich gives examples of the costs of inadequate time and money for basic personal care, such as a coworker who was faint from skipped meals, and her own missed opportunity for a higher-paying job due to lack of sleep. \textit{Barbara Ehrenreich, Nickeled and Dimed: On (Not) Getting By in America} 77-78, 148-49 (2001).
  \item \textsuperscript{41} Stanley, supra note 18, at 189.
  \item \textsuperscript{42} Historian Alice Kessler-Harris explains how the drafters of the family benefits provisions for the Social Security retirement program made a policy choice to prioritize maintaining the superior social status and personal satisfaction of already covered workers (mostly white, male, and relatively well-off). The drafters elected to expand benefits by adding support for non-working wives of these covered workers instead of expanding benefits to reach lower-income workers and workers of color in excluded occupations. See Kessler-Harris, supra note 2, at 117-69.
\end{itemize}
income for ignoring the substantial economic value of unpaid family labor. But even if this labor is recognized as productive, the question remains who should be responsible for bearing or avoiding the costs of creating this economic gain? As the conventional economic wisdom asks, why should people with a proclivity for the high-cost project of raising children deserve public support any more than those with a personal penchant for driving fancy cars?

Many feminists have responded to this standard “Porsche Preference” argument, as Martha Fineman terms it, by distinguishing child care as a source of public economic benefit—regardless of the personal consumption value children also may have to their parents or other caretakers. Some argue that child care is a “public good” deserving of public support, rather than a private asset or liability, because the productive benefits of child care spill over to society as a whole. For example, well-raised children are likely to grow up to be workers who will pay social security taxes that fund both nonparents’ and parents’ retirement benefits. In this view, the public should share in the costs as well as the gains of the child care that will produce future workers.

But switching the focus from care for children to care for workers complicates the feminist “public goods” argument. “Nondependent” care work consists of tasks commonly identified as highly private and personal—devoting resources to caring for the bodily needs of food, clothing, and hygiene is at the heart of conventional ideas of private consumption. In addition, the consumption and production gains from worker care services are more likely to overlap in time and space, blurring the line between public spillovers and private returns. If family members’ costly care enhances current workers’ productive value, then (in theory) family caretakers, and not taxpayers or employers, might be the ones who reap the rewards of workers’ increased economic value from good caretaking services. With care for workers, it is difficult to determine which care services enhancing the workers’ productive capacity should count as benefits for employers or society in general and which services count as leisure benefitting the worker (or family) alone. Shopping for groceries and maintaining the car for transportation to work may be ser-


44. Fineman, supra note 3, at 21 n.15.

45. See, e.g., Amy Wax, Is There a Caring Crisis?, 16 YALE J. ON REG. 327, 340, 340 n.41 (1999) (book review) (discussing the economic concept of “public goods” as positive externalities, or transactions that produce benefits to those who are non-paying strangers to the transaction); see also Nancy Folbre, Children as Public Goods, 84 AEA PAPERS & PROCEEDINGS 86, 86 (1994) (arguing that those who do not contribute to child-rearing are “free-riding on parental labor”).


vices necessary for a worker to do her job well, but what about shopping for and maintaining the Porsche that helps the upscale worker gain the respect of colleagues and clients? 

The question whether the unpaid work of nondependent care deserves public support raises more fundamental questions about how to draw the line between production and consumption. Katherine Franke aims to complicate this line by reversing the picture of public versus private gain represented by the self-sacrificing mother on the one hand and the self-satisfied Porsche owner on the other. Franke suggests that the Porsche consumer may produce positive public spillovers that equal or exceed the value of raising children to be future social security funders. She notes that demand for expensive cars may help boost manufacturing jobs, and that acts of conspicuous consumption may promote national pride and loyalty or social status. Franke cites recent niche marketing—gay-targeted vodka ads and the Rainbow Credit Card—as examples of private consumption that can contribute to public value. Mothers, in contrast, may reap large personal and private rewards from their children and may indeed direct their child-raising activity toward undermining and resisting public values.

But this countervision of selfish moms draining public resources versus selfless yuppie Porsche buyers strengthening social welfare reinforces a division between production and consumption that constructs many women—and men—as undeserving of public support. The privileging of upscale consumption as society-preserving productive work—the image of the selfless Porsche owner—is a (well-marketed) product of prevailing “free market” ideology. The dominant American economic and political vision often celebrates personal shopping choices as a central path to civic virtue, individual freedom, and overall economic well-being. The idea that private accumulation is the route to broader public benefits has helped rationalize the U.S.-led neoliberal policies through which the World

48. See Elliot Spagat, EDS Ex-Colleagues Duel Over Who was the Heartier Partier, WALL ST. J., Oct. 21, 2002, at A2 (reporting executives’ arguments that perks like corporate-funded flights to personal vacation homes and a lavish birthday party for an executive’s wife—complete with string quartet, magician, tarot-card reader, full bar and ten dessert selections—were justified on business grounds because clients were among the guests). Although parties for executives' wives are often portrayed as particularly personal events, they might represent compensation (however inadequate) and inducement for wives’ valuable unpaid services in support of the company.

49. Franke, supra note 7, at 188.

50. Id. at 189. Whether these results are public benefits or public harms, however, depends on one’s political position and value judgments about what constitutes societal well-being.

51. Id. at 188-90. For criticisms of such “diversity marketing” that turns social and political movements into “a giant shopping spree,” see NAOMI KLEIN, NO LOGO: MONEY, MARKETING AND THE GROWING ANTI-CORPORATE MOVEMENT 110-17 (1999) (rejecting nonetheless any nostalgia for previous practices of anti-gay or heteronormative marketing).

52. Franke, supra note 7, at 191.

53. One example is the theory that Americans should express their patriotism in response to the attacks of September 11, 2001 by going shopping. See, e.g., Stuart Elliott, Madison Ave. Grapples with Post-Sept. 11 Era, N.Y. TIMES, Dec. 11, 2001; see also KLEIN, supra note 51, at 89-93 (giving example of marketing strategies linking corporate advertising for athletic gear and fast food to enhanced funding for public education). Naomi Klein observed that in the neoliberal world, “citizens [are] rebranded as empowered consumers who are nothing more than a collection of their shopping habits.” Susanna Lobez, Selling Ourselves Short, SUNDAY HERALD SUN, Feb. 10, 2002, at 73.
Bank, IMF, and national governments have redistributed resources around the world from impoverished children, their mothers, and most workers to wealthy capital owners. In the prevailing economic theory, the global public gains most from enhancing the richest peoples’ freedom to spend as they choose—whether in Porsches or political contributions to oppressive governments or in speculative stock market schemes—by cutting taxes on the rich and by redirecting responsibility for basic human life-sustaining care services like health, education, water, and fuel from the state to the private family.

In my view, the problem with this neoliberal theory of basic care as an expendable private consumption choice goes well beyond the failure to recognize that even childfree Porsche owners might enjoy a few extra dollars from the social security benefits that trickle up from devoting more resources to helping children become future good workers. Instead, the problem is that the neoliberal definition of publicly valuable production rests on value judgments that invoke and reinforce a societal and moral order centered on class, gender, sexual, and race stratification.

Arguments about whose personal choices count as public costs and whose as public benefits inevitably assume rather than answer the question of who counts as a responsible member of the public. The prevailing neoliberal ideology asserts that the self-interested choices of the world’s most affluent investors and consumers best represent overall public value and therefore deserve the most public support through policies emphasizing inflation protection, tax relief, enhanced policing of property rights, currency stabilization, capital mobility, and labor restraint. Feminist arguments for public support for family care should depend not on denying or minimizing the personal choices and private gains involved in many women’s caretaking labor—for children or for workers—but instead should define the personal rewards and self-interested choices of mothers and other family caretakers (paid and unpaid) as important measures of the public good deserving of public support.

Martha Fineman’s recent work directly confronts the prevailing neoliberal value system by arguing that feminist attention to family care raises much broader questions about whose labor and whose private consumption choices get rewarded as

54. See Martha T. McCluskey, Subsidized Lives and the Ideology of Efficiency, 8 AM. U. J. GENDER SOC. POL’Y & L. 115, 128-38 (2000) (arguing that neoliberal policies promoting “economic growth,” measured in terms of the interests of wealthy capital owners, have led to devastating economic harm for much of the world’s women and families).
57. See McCluskey, Rhetoric of Risk and the Redistribution of Social Insurance, supra note 55, at 158-64 (contrasting policies promoting risk-spreading and accepting “moral hazard” for wealthy financiers with policies promoting personal responsibility and risk-bearing for most workers and families).
contributions to society as a whole.\footnote{58} Why should feminists rely on an ideology that measures public gain in terms of diverse brand identities,\footnote{59} short-term shareholder profits, or even the stability of the existing social security system,\footnote{60} rather than in terms of, say, the immediate health, happiness, and political freedom of the vast majority of women (and men) on this planet who do not have the remotest possibility of choosing to buy a Porsche? Fineman rejects the claim that the current distribution of societal resources reflects a natural or socially optimal market, either for caretakers or for most workers.\footnote{61} Fineman concludes that while caretakers of children have particular claims for a greater share of public resources, other forms of care work deserve greater support and reward too—including care by workers for themselves.\footnote{62}

Women’s labor directed at developing and maintaining productive workers—future or current—is unlikely to gain substantial public status if workers’ value as members of the deserving public depends on their contributions to the aggregate Gross Domestic Product. Though a society that values workers’ worth as human beings rather than profit generators may be a necessary condition for valuing family care work, it is not sufficient, as feminist critics of Marxism and socialism have long argued.\footnote{63} However, policies valuing women’s reproductive labor (biological and social) have not necessarily promoted women’s value, as critics of feminist maternalism often worry.\footnote{64}

Franke warns that enhanced public support for child care can reinforce a “hetero/repro norm” that fits the antifeminist tradition of making women’s worth depend on heterosexual and maternal service.\footnote{65} But to subvert that norm, it is necessary to understand how white supremacy and class hierarchy are thoroughly entangled with problematic historical and contemporary policies penalizing women

\footnote{59} See Klein, supra note 51, at 110-18.
\footnote{60} Here I am following Mary Anne Case’s lead in reasoning that if feminists are going to take the politically outlying step of challenging current market structures dealing with child care, then it is not clear why we would need to accept the current structure of social security. Case, supra note 10, at 1776.
\footnote{61} See Fineman, supra note 58, at 1439 (noting that most workers have difficulty caring for themselves in an increasingly workaholic economy).
\footnote{62} Id. at 1439-40.
\footnote{63} The Swedish welfare state, for example, goes far to support workers and to promote class equality, but retains gender segregation and subordination in occupations, politics, and family work. See generally Brush, supra note 6 (discussing Yvonne Hirdman, Women—From Possibility to Problem? Gender Conflict in the Welfare State—The Swedish Model, Research Report 3, Swedish Center for Working Life (1994)); see also Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence, 8 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 635 (1983) (asserting a ground-breaking feminist critique of socialism and Marxism).
\footnote{64} See, e.g., MOLLY LADD-TAYLOR, MOTHER-WORK: WOMEN, CHILD WELFARE AND THE STATE, 1890-1930 (1994) (analyzing the problems of maternalism as the basis for welfare advocacy and policy). “Privileging working mothers as the political subject of gendered welfare state studies condemns us to women as logic—women as workers, women as mothers, women as carers.” See Brush, supra note 6. Brush argues instead that just as there is no single masculine political subject, “the proper political subjects of feminist political sociology are women, in all our contradictory diversity.” Id.
\footnote{65} See Franke, supra note 7, at 196.
who resist heterosexual motherhood, or privileging those who embrace it. To build on Franke’s terms, repronormativity is interdependent with “whitenormativity” and “yuppienormativity.” Dorothy Roberts describes how law condemns and constrains black mothering, targeting black women’s freedom both to bear and to raise children. These racialized antirepronormative policies are not simply relics of past enslavement and Jim Crow but have gained strength in recent years. Changes in child welfare policies, for example, have resulted in the widespread, racially disparate redistribution of children from the control of black mothers to state custody—and in the redistribution of black women’s labor from care for their children to wage work. Similarly, Rickie Solinger traces how recent welfare policy changes have increased the extent to which U.S. policies make motherhood a class privilege. The welfare reform legislation of the 1990s, for example, reflects a norm that women outside of middle- or upper-class marriage should forgo reproduction and motherhood for wage work. Tax and welfare policies in recent decades have similarly entwined class privilege with the dominant heteropatriarchal reproductive norm by penalizing marriage for low-income mothers (or for other single persons with dependents).

If heteronormativity and repronormativity is a product (and producer) of race, class, and marital status, then public policies aimed at making child care a personal responsibility of private families can in fact reinforce rather than resist the dominant heteroreproductive norm. The more that “normal” mothering is a special privilege reserved for white women legally attached to high-earning husbands, the more the norm of women as mothers gains symbolic power to mark privileged

66. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (explaining contemporary policies as a systematic effort to break up black families).
67. Id. at 180-200.
69. See id. at 216-17 (contrasting Congressional glorification of nonworking middle-class mothers with Congressional castigation of welfare mothers’ interest in staying at home to care for their children); GWENDOLYN MINK, WELFARE’S END 23-25 (1998) (explaining that welfare reform policies reflected a race- and class-based ideology that poor single mothers and black mothers should serve others rather than care for their own children).
70. See Adam Carasso & C. Eugene Steurle, How Marriage Penalties Change Under the 2001 Tax Bill, THE URBAN INSTITUTE 3, 5-6, at http://www.urban.org/uploadedPDF/410491.pdf (last visited May 30, 2002) (explaining that federal welfare and income tax benefits have been designed to penalize marriage by single earners with dependent children); McCAFFERY, infra note 73, at 81-84 (explaining how the Earned Income Tax Credit and income tax disadvantage low-income marital families compared to low-income unmarried persons). Tax law changes enacted in 2001 reduce some of these marriage penalties for low-income taxpayers. See Carasso & Steurle, supra.
71. See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 106-18 (1995) (linking recent welfare reforms restricting public support for caretaking to efforts to reinforce a norm of a heterosexual, patriarchal family). Franke notes that repronormativity applies to white, middle-class women and that, in contrast, reproduction has been treated as deviant for other women. Franke, supra note 7, at 195-96. But she argues against a goal of assimilating all women to a white middle-class and heterosexual reproductive norm. Id. at 196. In my view, the dominant reproductive norm cannot be successfully challenged apart from a challenge to the race and class privilege with which it is thoroughly enmeshed.
social status. On the other hand, Franke and other critics of feminist maternalism are right to caution that policies that promote public support for women's family care work may not necessarily support feminist goals of freeing women to pursue identities beyond heterosexual reproducers.

To challenge heterosexual and reproductive norms, feminists must look more carefully at the upper-class and white racial bias that shapes dominant ideology about whose family care work and whose market work deserves public support and whose remains a personal responsibility or expendable choice. At least with regard to some important national economic benefits, public policy privileges not simply heterosexuality or reproduction, but high-income earners married to an unpaid family care worker—a group that is distinguished by class, gender, sexuality, and race as much as or more than by dependent care needs. Upper income (and mostly male) married "breadwinners" with homemaking spouses typically receive not only “private” unpaid family labor but also major transfers of taxpayer dollars to support the domestic services that help sustain their market value and social status. In particular, the federal income tax “marriage bonus” should be understood as a support system for the care of affluent husbands because it provides a substantial special tax break to high-earning spouses (typically husbands) of nonearning or low-earning homemakers (typically wives). Similarly, the federal social security system's spousal benefits provisions also have targeted special, generous benefits to relatively high-income workers married to homemaking spouses, at the expense of unmarried workers and dual-earning married couples.

In short, turning attention to care for workers reveals that American public policy has a long and lavish history of treating some individuals’ needs for per-

72. Mary Romero, *Unraveling Privilege: Workers' Children and the Hidden Costs of Paid Childcare*, 76 Chi.-Kent L. Rev. 1651, 1668 (2001) (giving example of a child who recognized, upon seeing the demands of a child in his mother's paid care, that access to his mother's care was a privilege of race and class from which he was excluded).

73. The so-called “marriage bonus” results from the effect of joint taxation of married couples combined with progressive tax rates scaled differently for married and single taxpayers. In effect, high-earning breadwinners with nonearning or relatively low-earning spouses can shelter some of their earnings in a more progressive rate bracket by treating their earnings as if they were earned by the low-bracket spouse. For description and history of the marriage bonus, see Edward J. McCaffery, *Taxing Women* 16-19, 54-56 (1997). See also Dorothy A. Brown, *The Marriage Penalty/Bonus in Black and White*, 16 N.Y.L. Sch. J. Hum. Rts. 168, 168-81 (1999) (analyzing the marriage bonus as a racially disparate subsidy favoring white families, who are more likely to conform to the homemaker/breadwinner model—especially at upper income levels). I develop this analysis more fully in Martha T. McCluskey, *From Worker Care to Husband Care: Rethinking Support for Family Caretaking Labor* (unpublished manuscript on file with author).

74. In essence, social security's old age program provides extra, noncontributory benefits to married workers with nonearning or relatively low-earning spouses; equal-earning married couples with comparable household earnings pay more in taxes and get fewer benefits and unmarried earners get fewer benefits for comparable tax contributions. See Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 Wis. L. Rev. 1, 11, 12-21 (explaining and criticizing this spousal benefit system). For a discussion of the spousal benefit scheme and the distributive effects of social security, see C. Eugene Steuerle & Jon M. Bakija, *Retooling Social Security for the 21st Century: Right & Wrong Approaches to Reform* 80-81, 111 (1994). See also McCluskey, *supra* note 73 (further developing this critique of social security’s spousal benefits as an “affluent husband care subsidy”).
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Personal care services as not just an expendable personal consumption choice but as valuable and necessary to public well-being. From this vantage point, expanding public support for care to those excluded from the current system does not require special treatment for mothers and children or for low-income working families. It does, however, require challenging ideologies of gender, sexuality, class, and race that have long made public care support a marker of superior citizenship status. Contrary to some critics of enhanced support for child caregiving, the people most likely to burden the public with their family caretaking costs are not parents in general (as popular author Elinor Burkett claims) or single mothers in poverty (as legal scholar Amy Wax suggests) but well-off male breadwinners in traditional marriages to homemaking wives.

The problem with existing worker care policies, in my view, is not that workers’ personal consumption of care services gets public support, but that public support for worker care is directed primarily at workers who can most afford to pay for their own basic care services and who are most likely to rely on an unpaid spouse for that labor. In effect, by targeting higher-income families and homemaker/breadwinner marriages for caretaking support, these current policies promote (sometimes luxurious) care services for workers who do not pay their care provider. Instead, I advocate revising the system of public support for workers’ care so that public support is redirected to the basic care needs of low- and moderate-income workers and to paid care work—as well as to unpaid care work performed by workers for themselves or by relatively equal-earning spouses. This could be accomplished by revising family tax and social security support to tie benefits to individual low and modest earnings rather than to high earnings, marital status, and to unequal marital earnings.

IV. BRIDGING FEMINIST CARETAKING DIVIDES

Reframing the question of public support for family care work to examine support for worker care could shed new light on the three areas of feminist conflict over family caretaking discussed at the beginning of this essay. First, more equitable support for caretaking for workers would help mitigate the home/market tradeoff between supporting women as family caretakers or as market earners. Most workers depend on substantial noncommodified domestic labor and substantial commodified care services in order to maintain their market earnings and personal well-being. Policies that better support care services for workers could encourage and reward both market earnings and family labor (whether or not commodified) at the same time.

Whether labor is more liberating and meaningful, or less oppressive and alienating, when it is formally exchanged as a market commodity or when it is given as uncommodified family care has been a perennial feminist question. The answer inevitably depends on the social and historical context in which a particular worker

75. See generally Burkett, supra note 10 (claiming that parents in general are most likely to burden the public with family caretaking costs).
76. Wax, supra note 47, at 276-79 (contrasting single mothers, whom she claims risk imposing public costs, with parents in breadwinner/homemaker marriages, whom she assumes are economically self-sufficient).
77. I will expand on the possibilities for reforms in a future article. See McCluskey, supra note 73.
and her work are situated. Both market labor and nonmarket home work have functioned to maintain and resist gender subordination. Rather than deciding which of these forms of labor deserves primary public support, perhaps feminist efforts should be directed at easing the tough tradeoffs between these two kinds of work. Policies that more equitably support care for workers could help reduce the potential costs of both market earning and unpaid home care for most women and men.

The current tax and social security system’s support for worker care both penalizes and privileges commodified market earnings by targeting family support to breadwinner/homemaker marriages. In effect, those who specialize in market earnings get special support for their family care services (regardless of dependents), but only if they have a spouse without substantial market earnings who is therefore likely to be available for unpaid domestic care service. Workers who specialize in market earnings are essentially excluded from family care benefits (or even penalized through higher taxes) if they rely on either commodified domestic services or on their own uncommodified self-care in place of the services of a nonearning or unequal-earning spouse.

Correspondingly, this system also encourages some noncommodified family labor: that of spouses (regardless of dependents) who specialize in nonmarket labor and who are married to workers with relatively high market earnings. On the other hand, this current family support system disfavors noncommodified family labor provided by those with their own substantial market earnings in families without a nonearning or low-earning spouse. Unmarried persons, and married couples without a one homemaker/one breadwinner division of labor, miss out on this system of public support for their care needs regardless of whether they pursue market earning or unpaid family care.

The supposed tradeoff for feminists between supporting women as homemakers or as market earners rests in part on an assumption that current policies favoring breadwinner/homemaker marriages further the goal of supporting women’s noncommodified family labor (even if only for some women). In this view, eliminating special benefits for breadwinner/homemaker marriages might further the alternative goal of increasing women’s commodified labor, but at the expense of women’s noncommodified family labor.
of women who prefer noncommodified family care. In my view, however, policies directing special benefits to breadwinner/homemaker marriages can instead be understood as a support system for worker care—a subsidy for domestic services for certain breadwinners. From that perspective, a policy change directed at redistributing that family support from well-off workers in certain kinds of marriages to low- and moderate-income market earners could in fact increase support for uncommodified family service and for many unpaid women family caretakers.

If low- and moderate-income workers (regardless of marital status) shared in the family tax benefits available to well-off breadwinner/homemaker marriages, for example, this income boost might enable them to work fewer hours for pay (forgoing overtime or a second or third job) and to instead spend more time on uncommodified care for themselves or for family members. Over the last several decades, many American families have relied on increased substitution of wives’ commodified work for unpaid family care or leisure to maintain their middle-class status in the face of falling real wages. By doing so, these families, along with many unmarried workers, have lost not only leisure or quality of care (or both), but also additional income because of the prevailing policies that privilege breadwinner/homemaker families for family care support. Redirecting family support to dual-earner marriages and unmarried earners will help support those most likely to have to sacrifice uncommodified work for market earnings. Although homemaking wives of upper-income breadwinning husbands do often benefit under the current system from the extra support to their households, this support is structured to make uncommodified caring a high-risk option even for these wives. The current system of bonuses for breadwinner/homemaker marriages conditions caretaker support on continued marriage to a breadwinner with continuing high earnings and on the caretaker’s continued abstention from substantial market earnings. If family care support were redirected from breadwinner/homemaker marriages to individual workers with low and moderate earnings, it could better support many women who sacrifice some market earnings for uncommodified family care.

On the other hand, if moderate- and low-income individual workers had similar tax relief for their family care as the current system provides to well-off breadwinner/homemaker marriages, then most women also would receive more support as market earners. Care benefits for workers scaled progressively to individual earnings would increase incentives for equal distribution of market earnings within marriages. Both unmarried and married women who prefer market labor to family care could receive the extra breadwinner tax relief (and extra household social security benefits) now limited to the few breadwinning women who have both high earnings and nonearning or low-earning husbands. That extra earnings support could enable women workers to receive more and better care services in the

82. Id. at 2016-23, 2059-64 (arguing that the current marriage-based income tax and social security policies pose an inevitable tradeoff between supporting women as market earners or as unpaid family caretakers).

market—hiring housecleaners or eating out, for instance, in place of their own unpaid self-care. And a system that redirected family support from unpaid homemaking spouses to all low- and moderate-income workers would better support caretakers who sell their domestic services in the market as commodified labor (typically low-earning or moderate-earning women without well-off husbands and often immigrants or women of color).84

Even some homemaking wives in well-off marriages might benefit from policies redirecting family support from the current system’s “affluent husband care” to equitable worker care. The current system, as critics have argued, penalizes wives of affluent breadwinning husbands who wish to increase their market work.85 If these family support benefits were redirected to support the care needs of individual earners, then homemaking wives could receive a tax break to offset the increased pecuniary costs of increasing their market earnings. Although affluent breadwinners married to homemakers would lose from a policy change redirecting their special support to low- and moderate-income workers regardless of marital status, high-earning workers with homemaking spouses are the group that needs the least support for their care services. High-earning breadwinners not only have more ability to pay for commodified care than lower-earning breadwinners, but also have more spendable income than similarly-earning breadwinners in dual-earning marriages or than two unmarried persons with similar combined household income. Households with noncommodified workers can avoid some of the extra costs of market earnings and of market purchases of commodified care (taxes, commuting, and work clothes, for instance).86 Tying family support to individual workers' earnings levels rather than to marital status and spousal division of labor would eliminate the current economic disadvantages for breadwinners at all income levels who prefer to be single or to be in relationships outside of heterosexual marriage, or who prefer marriage to an equal-earning spouse.

Second, focusing on care for workers helps disentangle the feminist dilemma of whether supporting women as mothers disadvantages women as individuals with nonmaternal interests. More equitable public support for workers’ personal care could help mothers and other earners with dependent care responsibilities by freeing up more of their family’s income or uncommodified time for diverse forms of family care work, for dependents or others. But more equitable public support for workers’ personal care needs could also help other women and men who eschew family labor and instead want to devote more time or money to pursue their preferred ways of enriching mind, body, and spirit. If workers as well as dependents are care receivers, public care support can become a means of enhancing not just the well being of children or parents but of adult workers in all kinds of family situations.

85. Edward McCaffery criticizes these policies for creating a “secondary earner bias.” See McCaffery, supra note 73, at 19-20, 95-97.
86. See JULIE A. NELSON, FEMINISM, OBJECTIVITY, AND ECONOMICS 100-04 (1996) (explaining that two-earner couples have less leisure and more need for money to pay for market goods to replace household labor). Nelson ties the policy choice to favor homemaker/breadwinner marriages to a gender ideology that discounts the economic value of home production. Id. at 104.
Existing tax policy directs substantial resources to the family care needs of affluent breadwinners regardless of dependents, though mothers and children in these families often share in these benefits. If public care support for earners were redirected to offer more support to workers of modest- and low-income, regardless of marital or parental status, then most mothers would also benefit—because most mothers are either modest- or low-income earners themselves or share a household with one. Unmarried mothers and mothers in dual-earning marriages are left out of the current family benefit scheme, which privileges affluent breadwinner care over dependent care. But nonmothering women who are unmarried or who are in equal-earning (or low-earning) marriages are also disadvantaged under the current scheme.

The current scheme’s emphasis on supporting spousal care (typically by wives) for high-earning breadwinners (typically husbands) reflects and reinforces a normative preference for white, heterosexual, male-headed, and upper-class or upper-middle-class marital families. Challenging this scheme privileging affluent breadwinner/homemaker families would not only benefit the mothers it excludes but also might help undermine heteronormativity and repronormativity. “Family values” advocates often single out these families as the norm for both reproductive and productive labor, constructing them as the ideal of personal responsibility in both home and market. The public virtue of the well-off breadwinner/homemaker marital family, however, is in part grounded in its false status as self-sufficient compared to “dependent” single mothers in poverty. By recognizing the lavish current tax support for family care going exclusively to these households, we can help reconstruct both single mothers and nonmaternal workers as deserving of comparable public support for their labor.

Third, bringing care for workers into the foreground of caretaking discussions offers a way out of the pleasure/dependency dilemma that Franke identifies as a problem for feminists. By expanding the idea of family care work to include personal care for nondependents, feminist caretaking advocacy can support not just self-sacrificing labor for others but also self-satisfying pleasure and recreation. Family law has traditionally supported men’s heterosexual care desires by requiring sexual services as a central part of wives’ domestic duties to their husbands.

87. For example, Amy Wax contrasts the supposed self-sufficiency of the breadwinner/homemaker family with the “dependent” single mother in poverty in developing her theory that public support should go to those who make efforts to help themselves and to minimize public costs. Wax, supra note 47, at 276-77.


89. See Hendrik Hartog, Man & Wife in America: A History 306-07 (2000) (attributing the failure to criminalize rape in marriage until the late twentieth century to the persistent idea that sexual intercourse is a legal right of husbands in marriage). See also, e.g., Susan Maushart, Wifework: What Marriage Really Means for Women 176 (2001) (arguing that “for many married women, sex is simply another form of wifework—another way in which women routinely service the physical and emotional needs of their male partners at the expense of their own”). Jean Duncombe & Dennis Marsden, Whose Orgasm is this Anyway? ‘Sex Work’ in Long-term Heterosexual Couple Relationships, in Sexual Cultures: Communities, Values and...
Existing policies giving public support to affluent breadwinners married to homemakers have similarly helped maintain some married men’s access to pleasure-enhancing personal care services. A feminist revisioning of nondependent care should not deny the value of care services aimed at enhancing individual earners’ physical and emotional happiness. Instead, feminists should challenge the historical practice of providing public support for such services on the basis of gender, sexuality, race, and class status. If access to basic personal nondependent care services—including leisure—were given more support as a right of all workers rather as a duty of wives or as a right of husbands (or other affluent breadwinning spouses), this care support could foster women’s pursuit of self-interested attention to their own desires rather than women’s service to others. As Martha Fineman concludes, “we have responsibilities to ourselves—to regenerate our energies and resources, to participate in the artistic, nonmaterial, spiritual, or other inner-directed aspects of life upon which we are all dependent for our individual well-being.”

Franke argues that legal feminists have concentrated on sexual harm and dependent care as the two primary concerns facing women. She wonders whether feminist law could affirm women’s freedom to pursue pleasure and desire instead of simply protecting women from dependency and danger. As one step toward responding to Franke’s challenge, changing existing laws to support worker-care more equitably might provide the material support that would better enable more women to shift their time from service to others—in home or market—to self-satisfaction.

The current legal system structures a political economy that requires many women to sacrifice not just leisure but basic needs like sleep and health for long hours of work putting others’ needs first in both home and market in order to survive. Different tax, benefit, and labor laws could better give more workers the material capacity to devote more time, money, and energy to satisfying their own desires for pleasure. Lillian Rubin’s study of working-class families in the late twentieth century found that the demands of long work hours at low pay made finding time and energy for sex, or even for going to the toilet, a major challenge. If law treated all laboring women’s personal care needs as a central public value—as important as their contributions to future corporate profits, social security funds, or Porsche production—we might be one step closer to a world that better supported women’s power to satisfy their own sexual and other desires.
IV. CONCLUSION

My focus on care work for nondependent workers raises questions about the intersection of economic class, race, marital status, and gender in feminist legal analysis of family caretaking. Feminists have gone far toward the important goal of raising public awareness of the critical economic and social value of dependent care work performed predominantly by women. But perhaps the care work that is necessary to sustain workers is difficult to make visible as a public concern because the needs of low- and moderate-income workers, like the needs of most children and child caretakers, are marginal to dominant class-biased and racialized ideas of the public well-being. Advocates of neoliberal "free market" economic theory have pushed the idea that private families must take more personal responsibility for providing (or doing without) the resources necessary to support most market earners' basic needs and desires, like the resources needed to support most women's reproduction or most children's productive development. Nonetheless, recent pro-marriage tax law changes increase the extent to which well-off married breadwinner/homemaker families (regardless of dependents) get public support for their personal care needs. Feminists can better support most women's home and market labor—as well as their particular personal pleasures—by working toward a system of public support for caretaking of workers that is not restricted to the limited number of families who conform to the class, race, sexual, and gender norms of the traditional affluent breadwinner/homemaker marriage.