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Maxine Eichner

University of North Carolina School of Law, meichner@email.unc.edu

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The Family and the Market — Redux

*Maxine Eichner**

The relationship between the family and the market has long been an issue of contention in Western societies. Since the 1970s, that relationship has required renegotiation as women, who had performed the great majority of caretaking work, have entered the workforce in increasing numbers. At the same time, women's movement into the workplace and the changes in public policy that have accompanied it have spurred significant scholarly commentary over how the family-market relationship should be reconstructed. This Article argues against one possible approach to this reconstruction, in which the state withdraws barriers between the family and the market that support families' caretaking and human development activities. Under this approach, which by and large has been adopted in public policy in the United States, women's movement into the role of breadwinner has been accompanied by decreased state support for caretaking and human development, in the belief that market forces should properly determine how these activities are conducted. This Article argues that the market is the wrong tool to use to "distribute" these activities. Doing so is not only resulting in an unjust distribution of these activities among and within families, it is causing serious harm, not only to society's most vulnerable citizens, but also to the polity as a whole. The proper role of the state, this Article argues, is to buffer caretaking and human development activities from market forces in order to ensure the wellbeing of individuals, families, and society.

* Reef C. Ivey II Professor of Law, University of North Carolina School of Law. I thank Sarah Arena, Patrick Hunter, and Jessica Thaller for excellent research assistance.

INTRODUCTION

The relationship between the family and the market has long been an issue of contention in Western societies. Beginning in the 1970s, this issue became a pressing matter for public policy across Western countries as women moved into the paid workplace in large numbers. The problem, of course, was that the women entering the labor market had been responsible for the great bulk of families' caretaking needs; yet paid jobs were structured in a manner that made them incompatible with significant caretaking responsibilities. In response, different countries have adopted different strategies to negotiate the entry of women into the world of paid work. These strategies range from the adoption of comprehensive policies to reconcile work and family in some European countries, to the adoption of a far narrower range of reforms in the United States.

This period of market-family renegotiation has spurred not only changes in public policy, but also a voluminous amount of scholarly commentary. Much of this commentary has come from feminists concerned with the consequences of the family-market relationship for sex equality. Feminists have forcefully pointed out that the family-market demarcation is not a natural or inevitable feature of the world, but instead a conceptual distinction that is relatively recent, and which was founded on a particular set of political and economic assumptions.¹ They have also persuasively argued that the way in which the two realms have been defined *vis-à-vis* one another has unfairly burdened women with caretaking responsibilities, making their attaining an equal place in the world of paid work impossible. Most feminist proposals to redress this situation have centered on ensuring that the work world and the domestic world, together with other societal institutions, are organized in a manner that enables citizens to accomplish both paid work and caretaking responsibilities. Some feminist work, however, calls for more thoroughly eradicating the boundaries between the two realms. In the words of Frances Olsen, who in 1983 published one of the classic works in this genre, "transcending" the family-market dichotomy gives us the "greatest possibility for bringing about changes that would significantly improve our individual and collective lives."²

1 See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

2 *Id.* at 1499. Olsen was vague about what she meant by "transcending" the market-family demarcation. However, she clearly intended a more radical renegotiation of the work-family boundary than measures that would allow citizens to move more easily between the family and the paid labor market. For example, she sought to respond to those "who support the market/family dichotomy [who]

In recent years, a different critique of the family-market demarcation has been made by other scholars writing against what they refer to as “family law exceptionalism” (FLE). As a descriptive matter, scholars writing under the “anti-FLE” banner seek to map the way that conceptualizing the family as a distinct realm produces a range of disciplinary effects, including masking the economic character of the family and conflicts of interest among family members.³ Some have pointed out that this conceptualization has fostered inequality by depriving marginalized workers who perform paid carework in private homes from receiving adequate labor protections.⁴ As a normative matter, this project questions the notion that “family law (or marriage, or ‘the family’) should be different because of the unique, special, crucial, affective, altruistic, social-ordering, and/or sacred nature of the relationships that it houses.”⁵ Critics of family law exceptionalism have argued against applying different policies to families than to other spheres of the social world on the ground that doing so straitens citizens’ freedom and contributes to certain forms of domination.

In this Article, I want to resist the idea that the state should seek the type of wholesale dismantling of the family-market demarcation that some advocates seek. I have no quarrel with feminist arguments in favor of public policies ensuring that those who have caretaking responsibilities can still perform work in the paid market without being penalized; indeed, in my view, such policies are essential for a just society. Broader calls for eradicating the family-market demarcation, however, should be treated with more caution: Insofar as these proposals would eradicate protections for families’ caretaking and human development activities from market forces, I argue in this Article, they should

argue that life will be impoverished if all of it falls under a single set of terms.”
Id. According to Olsen,

we do not need inhuman environments in order to enjoy human ones, nor do we need unproductive or impractical associations in order to enjoy productive or practical ones. Polarizing the family and the market does not increase the possibilities available to individuals and to the human personality. Instead it reifies the abstractions of “the market” and “the family” and renders us powerless.

Id. at 1567.

- 3 See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 758-60 (2010).
- 4 See Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 BERKELEY J. EMP. & LAB. L. 404 (2009).
- 5 Halley & Rittich, *supra* note 3, at 754.

be rejected. The logic that it is appropriate to subject families to “free-market” forces when it comes to these activities has grounded public policies that accompanied women’s movement into the workforce during these past few decades, particularly in the United States, although in other countries to a lesser extent.⁶ Based on the notion that the goods associated with caretaking and human development are better distributed by the “invisible hand of the market” (in other words, based on the uncoordinated acts of private individuals without deliberate action of the government), these policies have withdrawn from families longstanding government protection against market forces when it comes to how families function, how caretaking is accomplished, and the distribution of market versus nonmarket labor that has resulted. This increasing subjection of families to market forces, or, as I sometimes call it in this Article, the “marketization” of families, has resulted in a large-scale transfer of hours from the domestic realm to the market realm, has negatively affected the pace and texture of citizens’ family and personal lives, and has taken a significant toll on the wellbeing of individuals (particularly the most vulnerable), families, and society.

This is not to say that market forces have not long affected the conduct of the domestic realm, particularly in the United States, given the weakness of its welfare state. In recent years, however, even the relatively weak barriers that once buffered families from market forces in the United States when it came to conducting caretaking and human development activities have to a significant extent been eliminated through policies that sought to move women into the labor market. Public policy did not have to move this way as women assumed paid jobs: A number of European countries have adopted policies that allowed women to move into the work world while still shielding families from market forces in order to support the goods fostered by families, even if they have not conceived of their actions in this light. For example, paid parental leave, paid vacations, and maximum limits on the hours employees can be required to work all serve these functions.⁷ By contrast, the United States’ failure to constrain the effects of market institutions on families, I contend, is an

6 As a number of commentators have pointed out, the term “free market” is a misnomer, as it required and continues to require a considerable amount of state action to keep it “free.” *See, e.g.*, DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM 2* (2005):

The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defense, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist . . . then they must be created, by state action, if necessary.

7 *See infra* Section I.A.

abdication of the liberal democratic state's appropriate responsibilities, and is taking a significant toll on our individual and collective wellbeing.⁸

Readers familiar with political theory, particularly older readers, may recognize that my argument draws in part on Michael Walzer's *Spheres of Justice*,⁹ and his follow-up article, *Liberalism and the Art of Separation*.¹⁰ In these works, Walzer argued that social justice cannot be accomplished through the distribution of all goods in society based on a single measure, such as money, or even equality. Instead, the just distribution of social goods must take into account the meaning of that particular good and its place in society. For example, because voting for elected representatives is critical to our understanding of what democracy means, and fundamental to our commitment to equality, we would not want votes to be distributed by free-market principles; instead, justice would require they be distributed on an equal basis. In contrast, we might think that the distribution of healthcare should be far more likely influenced by need given its central role in human wellbeing. And compared to either votes or healthcare, we might be more comfortable allowing luxury goods to be distributed based on the market, on the ground that these goods are not essential to basic wellbeing, and that people should be able to choose whether they want to work more hours to afford such goods. I do not want to press any firm argument for how each of these goods should appropriately be distributed. However, I do want to support Walzer's point that whatever the principles of distribution decided on, they should not be one-size-fits-all for every important good in society. Furthermore, when it comes to caretaking and human development in the domestic sphere, I argue, allowing market forces to direct their "production"

8 I use the terms *liberal*, *liberal theory*, and *liberalism* throughout this Article to refer to the Anglo-American tradition of political thought stretching from John Locke through recent thinkers such as John Rawls that focuses on the importance of liberty, self-government, and the equal worth of citizens. My use of these terms is therefore broader than the use of the term *liberal* in common parlance to refer to those who hold political beliefs at the opposite end of the political spectrum from conservatives. Further, my use of it is related, but not identical to, its use in political economy literature to describe welfare states that are characterized by their reliance on the market rather than the state for provision of welfare services and goods, which this Article refers to as *neoliberalism*. In my use of the term, a *liberal* state is not limited to the market for provision of welfare goods; in fact, there are good reasons to limit the effects of the market in distributing these goods, as this Article argues.

9 MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

10 Michael Walzer, *Liberalism and the Art of Separation*, 12 *POL. THEORY* 315 (1984).

and “distribution” (to adopt economic terms) undermines their central role in human wellbeing, and is creating consequences that are both unjust and harmful to individuals, families, and society.

In arguing that the state should support families’ caretaking and human development functions, I draw not only from Walzer, but also from earlier versions of liberalism that recognized the important role that societal institutions play in citizens’ lives and in their wellbeing. Recent versions of liberalism, as well as the economic ideology sometimes referred to as “neoliberalism,” have focused on individuals largely removed from societal institutions, with the exception of the market. Yet “classical” liberalism, at least in many of its iterations, recognized citizens’ wellbeing as integrally related to the institutions in which they lived their lives.¹¹ While these earlier liberals paid less attention to the family than they should have, their recognition of the way that human institutions shape citizens’ lives properly calls attention to the important role that families play in meeting the dependency needs that are a permanent feature of the human condition. In turn, this recognition should focus public policy on ensuring that families have the conditions they need to flourish.

Because families have been such a battleground in the culture wars, there is the danger that any argument for their support will be written off as a nostalgic screed. So let me start by clearing some theoretical underbrush: I am not calling for the resurrection and protection of the traditional, patriarchal family.¹² Because the relationships that sustain us and in which caretaking and human development activities occur come in many forms, in my view, a broad range of relationships should be supported as “families.”¹³ By the same token, my call for supporting families should not be taken to mean that I think that the family should be the only site of caretaking and human development; indeed, later in the Article, I call for some redistribution of

11 See, e.g., JOHN STUART MILL, *Considerations on Representative Government* (1861), in *ON LIBERTY AND OTHER ESSAYS* 203 (John Gray ed., Oxford U. Press 1991) (1926); see also JOHN GRAY, *ENLIGHTENMENT’S WAKE: POLITICS AND CULTURE AT THE CLOSE OF THE MODERN AGE* 2 (1995).

12 Today, fewer than a quarter of U.S. households consist of a husband, wife, and children, down from forty-four percent in 1960. See Liana C. Sayer, Philip N. Cohen & Lynne M. Casper, *Women, Men, and Work*, in *THE AMERICAN PEOPLE: CENSUS 2000*, at 76, 88 (Reynolds Farley & John Haaga eds., 2005). That number drops to fewer than ten percent for households in which both parents live with their biological children and the wife does not work outside the home. *Id.*

13 I have elsewhere proposed such a broad definition of the groupings that I argue should receive state support. See MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 104-05 (2010).

this responsibility away from families.¹⁴ I nevertheless assume that families will still bear at least significant responsibility for these activities, and must be given the tools to execute them well.¹⁵ Last but not least, my support for cushioning families from unconstrained market forces should not be taken as support for the injustices and inequalities long associated with them. In my view, the central role that families play in human and societal wellbeing means that we must both reform and support them, rather than attempt to eradicate them because of their shortcomings.

Part I of this Article seeks to retell from a slightly different perspective the well-known story about women's large-scale entry into the labor force beginning in the 1970s. Specifically, it focuses on how the combination of women's entry into the workforce and changes in U.S. public policy have together created a situation in which market forces increasingly dictate how individual families conduct their caretaking and human development activities. This Part argues that government's failure to cushion families from the effects of market forces is having enormously harmful effects, not only on citizens individually (particularly our youngest and most vulnerable) and families at large, but on our collective wellbeing. Part II develops the argument that how caretaking and human development activities are conducted and distributed should have far less to do with the invisible hand and far more to do with the important purposes they serve in a healthy society. Part III turns to considering the issue of what an appropriate demarcation between families and the market should look like, how caregiving and human development would be better distributed, and the measures that should be taken to buffer families from market forces.

I. THE MARKETIZATION OF FAMILIES

A. The Shift from “Maternalism” to the “Free Market”

Across the world, women have long performed the vast bulk of the dependency work for children, the sick, and aging adults that societies need to flourish, as well as the cooking, housekeeping, and other tasks necessary to maintain a household. For most of the twentieth century, rich, developed democracies,

14 *See infra* Section III.B.

15 As Justice McReynolds said of Plato's idea that children should be removed from their parents and raised communally, “[a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest.” *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

including the United States and those in Western Europe, had welfare systems in place that were based on a “family-wage” model, in which the expectation was that households would contain both a male breadwinner and a female caregiver. In the United States, family-wage supports were relatively weak compared with other countries. But, as in other countries, they were supplemented by “maternalist” policies, which supported women’s role in homemaking and caregiving when there was no functioning breadwinner.¹⁶

Maternalist policies in the United States included mothers’ pension programs, which were passed by most states in the early part of the twentieth century to provide cash benefits to poor single mothers and widows with children,¹⁷ as well as later programs such as Social Security Survivors Insurance and Aid to Families with Dependent Children (AFDC).¹⁸ These public subsidies ensured that mothers could perform their critical caretaking and homemaking functions even in the absence of private support. Maternalist logic also motivated the protective labor laws passed by most states early in the twentieth century, which were eventually struck down on sex-discrimination grounds toward the end of the century.¹⁹ This legislation, which was passed with the support of women’s organizations, limited working hours and established a minimum wage for women workers. In doing so, it sought to buffer women workers from the full effect of market forces because of their important role in bearing and rearing the next generation of citizens.²⁰ The reformers who sought these measures saw the state as a critical buffer in protecting citizens from the most pernicious effects of the market. In Jane Addams’ words, “the very existence of the State depends upon the character

16 See Seth Koven & Sonya Michel, *Introduction: “Mother Worlds,”* in *MOTHERS OF A NEW WORLD, MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES* 1, 4 (Seth Koven & Sonya Michel eds., 1993) (defining “maternalism” as “ideologies and discourses which exalted women’s capacity to mother and applied to society as a whole the values they attached to that role: care, nurturance and morality”); see also THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN UNITED STATES* (1992) (tracing the factors that aided passage of maternalist policies in the United States).

17 See generally SKOCPOL, *supra* note 16, at 424-79; Mark H. Leff, *Consensus for Reform: The Mothers’-Pension Movement in the Progressive Era*, 47 *SOC. SERVICES REV.* 397 (1973).

18 Both Social Security Survivors Insurance and Aid to Families with Dependent Children (originally passed as “Aid to Dependent Children”) were initiated by the Social Security Act, ch. 531, 49 Stat. 620 (1935).

19 On protective labor legislation for women workers, see generally SKOCPOL, *supra* note 16, at 373-423.

20 *Id.*

of its citizens, therefore if certain industrial conditions are forcing the workers below the standard of decency, it becomes possible to deduce the right of State regulation.”²¹

As second-wave feminists have pointed out, there is much that was problematic about these maternalist policies. Certainly, as Alice Kessler-Harris counseled, the maternalist model was limited by its “gendered imagination,” which separated the sexes, and then consigned women to the private realm, and to inequality.²² Yet there was also something valuable about these policies that should not be overlooked: They reflected recognition of the importance of caretaking and human development, the domestic realm, and families, and constructed a buffer that shielded this realm and its activities to some extent from market forces.

I do not want to overstate the U.S. commitment here: The U.S. welfare state has historically been less robust than the welfare systems in other countries. And even within this system, maternalist provisions served only as a backup to family wage provisions. Nevertheless, these provisions were still an integral part of the U.S. welfare system, and through them, the system recognized at least to some extent the importance of shielding caretaking and human development from the vagaries of market forces.²³

Toward the close of the twentieth century, the assumptions underlying maternalist policies were weakened as women in the developed world began to enter the paid workplace in increasing numbers. The factors prompting their movement into the market were complex, including changing views of women’s role prompted by feminism; in some countries, the stagnation and fall of real wages for middle- and low-income workers, which required mothers’ entry into the workforce to maintain families’ standard of living;²⁴ and, in some countries, lower rates of birth, which prompted a push beyond the traditional labor force in order to replace retiring workers and meet pension

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- 21 JANE ADDAMS, *TWENTY YEARS AT HULL HOUSE: WITH AUTOBIOGRAPHICAL NOTES* 151 (1998); see also Arianne Renan Barzilay, *Women at Work: Towards an Inclusive Narration of the Regulatory State*, 31 *HARV. J.L. & Gender* 169 (2008).
 - 22 ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2003).
 - 23 SKOCPOL, *supra* note 16; see also Ann Shola Orloff, *From Maternalism to “Employment for All”: State Policies to Promote Women’s Employment Across the Affluent Democracies*, in *THE STATE AFTER STATISM: NEW STATE ACTIVITIES IN THE AGE OF LIBERALIZATION* 230, 238 (Jonah Levi ed., 2006).
 - 24 See, e.g., LAWRENCE MISHEL, JARED BERNSTEIN & HEIDI SCHIERHOLZ, *THE STATE OF WORKING AMERICA: 2008/2009*, at 93 (2009) (describing U.S. stagnation of wages).

obligations.²⁵ Ultimately, governments across the developed world adapted to and often encouraged women's movement into the labor force by changing their models of the welfare state.

As comparative scholars of welfare policy have noted, however, the character of the policies that replaced the outmoded family-wage model varied considerably among countries.²⁶ A number of wealthy, Western European democracies have moved toward a welfare model that admits women into the market while still protecting and supporting (usually regardless of the sex of the citizen performing them) the caretaking and household activities that women had once conducted at home on a full-time basis. These countries have provided paid family leaves on the birth or adoption of a child,²⁷ and parity of wages and benefits for part-time work.²⁸ Further, many countries have reduced the standard workweek for all workers, set maximum hours on required work either for all employees or for parents, and set a minimum standard of paid vacation that ensures that citizens have a reasonable amount of time to spend with their families and in other areas of life outside work.²⁹

These policies, in contrast to the old maternalist policies, allow both women and men to cross between the realms of family and market more easily, and ensure that those with caretaking responsibilities can participate in paid work (and vice versa). Yet at the same time, they help ensure that the activities that women had once performed — caretaking, human development, household management — can still be conducted by family members, and not simply those who have the market power individually to negotiate the labor market to accommodate these activities or who have the economic wherewithal to subsidize (or pay for) someone to stay at home to perform these activities. These policies also enable citizens to have some access to the leisure time that had been possible under the family-wage model, in which a full-time caretaker had the entire week to accomplish necessary household tasks.

25 See Orloff, *supra* note 23, at 242.

26 See *id.* at 232; see also JULIA S. O'CONNOR ET AL., *STATES, MARKETS, FAMILIES: GENDER, LIBERALISM AND SOCIAL POLICY IN AUSTRALIA, CANADA, GREAT BRITAIN, AND THE UNITED STATES* (1999).

27 For an excellent summary of parental-leave policies in a range of wealthy, Western democracies, see JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* (2003) 124-27 tbl. 5.1.

28 For an excellent summary of policies regarding part-time work in a range of wealthy, Western democracies, see *id.* at 166-70 tbl. 6.2.

29 For an excellent summary of reduced workweek policies in a range of wealthy, Western democracies, see *id.* at 158-60 tbl. 6.1. For an excellent summary of these countries' paid-vacation policies, see *id.* at 180-81, tbl. 6.4.

In addition, in a group often overlapping with the first group, many countries have also developed quality early childcare and education options to which either all families or a broad range of families have access.³⁰ In some of these countries, early childhood education is publicly provided; in others, it is privately provided but government regulated and subsidized. As with earlier maternalist provisions, these more recent programs continue to support the caretaking and human development activities that families had traditionally accomplished, but have now moved the site for these activities outside of the home and family.

The United States, in contrast, has adopted a welfare model that moves women into the market precisely by withdrawing state protection of family activities from market forces. In contrast to the now-defunct family-wage model, the new U.S. model is premised on what Nancy Fraser appropriately calls a “universal breadwinner” model, which presumes that every adult should be part of the paid labor market. This model then seeks to make this presumption a reality by removing state support for families and their caretaking activities so that adults will be required to enter the labor market in order to put food on the dinner table.³¹ This approach is typified by the welfare reform that was accomplished in the 1990s. In it, AFDC was converted to Temporary Assistance for Needy Families (TANF), in which having children who need caretaking in combination with economic need are no longer sufficient grounds for state assistance. Instead, parents who receive compensation are required to engage in paid work.³² In addition to the TANF “stick” to induce women to work, the United State also adopted a “carrot” in the form of the expansion of the Earned Income Tax Credit (EITC), which greatly increased the returns to paid employment at the low end of the labor market.³³

In contrast to other countries, the United States has adopted few measures to shield caretaking and human development activities from market forces, or to protect families’ time to perform these important activities. The only statutory protection explicitly granted by federal law to protect caretaking when it conflicts with work is the Family and Medical Leave Act of 1993

30 For an excellent summary of early childhood education policies in a range of wealthy, Western countries, see *id.* at 197-232.

31 See NANCY FRASER, *After the Family Wage, A Postindustrial Thought Experiment*, in JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE POSTSOCIALIST CONDITION 41, 41-43 (1997).

32 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended primarily in scattered sections of 42 U.S.C. § 617) (Title I replaced AFDC with TANF).

33 Earned Income Tax Credit, 26 U.S.C. § 32 (2010).

(FMLA).³⁴ Even for the half of the workforce covered by these protections,³⁵ however, the twelve weeks of leave that the FMLA guarantees for the birth or adoption of a child or for the serious illness of a family member is unpaid. This means that economic forces drive whether family members can take leaves and the extent of these leaves.³⁶ The vast majority of covered employees — by one count, seventy-eight percent³⁷ — cannot afford to make full use of the available leave. The decision to subject these leaves to market forces makes the United States an outlier in world policy: In a recent comparison of parental leave policies in 173 countries, the United States came in dead last, tied with Liberia, Papua New Guinea, and Swaziland, the only other countries that provided no paid leave.³⁸

Further, again in contrast to many other wealthy democracies, the United States provides no protection against requiring employees to work long hours, no parity of wages or benefits for workers who work part-time in order to accommodate caretaking, and no paid vacation.³⁹ A number of European countries during the last few decades have, either through workweek regulation or strong labor unions, funneled increases in productivity into dramatically reduced work hours. In contrast, the United States has reduced employee work hours only slightly,⁴⁰ and has funneled its increases in productivity largely

34 Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2008).

35 WAGE & HOUR DIV., U.S. DEP'T OF LAB., FAMILY AND MEDICAL LEAVE ACT REGULATIONS: A REPORT ON THE DEPARTMENT OF LABOR'S REQUEST FOR INFORMATION 128 (2007), available at <http://www.dol.gov/whd/FMLA2007Report/2007FinalReport.pdf>.

36 29 U.S.C. § 2614(a).

37 U.S. Dep't of Lab., *Foreword to* DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, at viii, x (2001), available at <http://www.dol.gov/whd/fmla/foreword.pdf>.

38 See JODY HEYMANN, ALISON EARLE & JEFFREY HAYES, THE WORK, FAMILY, AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP? 1, 2 (2007), available at <http://www.mcgill.ca/files/ihsp/WFEI2007.pdf> (indicating that paid maternity leave is guaranteed in 169 countries, with over half these countries providing fourteen or more weeks of paid leave, and that over a third of the countries studied also ensure that fathers receive paid parental or paternity leave).

39 See generally GORNICK & MEYERS, *supra* note 27 (an excellent discussion of U.S. public policy on the work-family conflict compared with peer countries).

40 See MISHEL, BERNSTEIN & SHIERHOLZ, *supra* note 24, at 57-95 (charting to which households the gains in productivity since the 1970s have gone); *id.* at 366-67:

[A]n important portion of the higher per capita income in the United States comes not from working more efficiently than its peer countries, nor from being more successful in providing jobs to potential workers, but rather from each worker simply working longer hours on average. Many peer

into the pockets of the wealthiest one percent of its population.⁴¹

Further, in contrast to its peers, the United States has developed no comprehensive system for providing or subsidizing early childcare education.⁴² It further provides no federal standards for safety, staffing, or teaching curricula for privately-provided early childhood care or education.⁴³ To the extent that private childcare is regulated at all, it is generally regulated only through state licensing standards, which address issues of health and safety, but do not otherwise usually cover quality of care.⁴⁴ Neither does the state generally subsidize paid caretaking for children, even for families who could not otherwise afford it.⁴⁵

In sum, the last few decades have seen what Ann Orloff calls a “farewell to maternalism,” as Western democracies have jettisoned their old public policies

nations, on the other hand, have taken a sizeable chunk of their productivity in the form of reduced hours.

See also JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS (2010) (charting redistribution of American wealth since the 1970s).

41 See MISHEL, BERNSTEIN & SHIERHOLZ, *supra* note 24, at 57-95; HACKER & PIERSON, *supra* note 40, at 24-27.

42 See LINDA GIANNARELLI, SARAH ADELMAN & STEFANIE SCHMIDT, GETTING HELP WITH CHILD CARE EXPENSES 17 (2003), available at http://www.urban.org/UploadedPDF/310615_OP62.pdf. The main exception is the federal Head Start program, which provides means-tested education for three- and four-year-olds. See *id.* at 1. Roughly half of the states provide additional funding for Head Start or run equivalent state programs. *Id.* at 26. Yet Head Start only serves an estimated thirty-six percent of income-eligible four-year-olds, and far fewer younger children. *Id.* Even when assistance for Head Start is aggregated with other financial assistance, government aid for childcare still reaches only roughly twenty-one percent of low-income families (defined as those earning below 200% of the poverty line) needing assistance. *Id.*

43 *Id.*

44 GORNICK & MEYERS, *supra* note 27, at 195. For example, state licensing standards often deal with ensuring that children in such centers are properly immunized and that playground equipment is safe. See, e.g., 10 N.C. ADMIN. CODE 09.0605 (2008) (regulating outdoor equipment at childcare centers); 10 A. N.C. ADMIN. CODE 09.1721 (2008) (requiring that childcare centers obtain copies of immunization records). They far less often ensure that teachers have a high school education. GORNICK & MEYERS, *supra* note 27, at 195.

45 Government programs to assist low-income families do not come close to satisfying the available need; many have extensive waiting lists. By one estimate, only roughly twenty-one percent of low-income families receive any financial assistance for childcare. See GIANNARELLI, ADELMAN & SCHMIDT, *supra* note 42, at 26.

in response to women's movement into the workforce.⁴⁶ Along with this, in some countries, most notably the United States, the activities of caretaking and human development have lost their claim on the state for resources and recognition. The new model, which pushes citizens of both sexes into the workforce by removing past protections for families and caregiving, has had the virtue of producing high levels of women's employment compared to other developed countries.⁴⁷ Yet it has done so at significant cost to caretaking and human development activities, family time, and personal time, and has impinged on such goods as children's welfare, families' wellbeing, sex equality, and civic involvement.

B. The Costs of Marketizing Families

The United States' model of subjecting families to unconstrained market pressures as women have entered the labor market has created a vast shift of hours from family and personal time to hours spent in the paid labor force. Women entered a workforce that works the highest number of hours in the developed world. The 1,966 hours on average that American workers work annually amount to roughly ten more weeks a year of work than Swedish workers (1,552 hours), and significantly more hours than France (1,656), Germany (1,560), Canada (1,732 hours), and the United Kingdom (1,731). This means that even in the countries at the higher end of the scale, Canada and the United Kingdom, full-time employees work roughly the equivalent of six fewer weeks a year than their American counterparts. Although women with children do not, on average, work as many hours at paid work as the average U.S. worker, their hours in the paid workplace have risen considerably. In 1965, married mothers with children worked an average of six paid hours per week; by 2000, they worked 23.8 hours a week.⁴⁸ As a consequence, the total average paid workload of families has increased significantly.⁴⁹ In all

46 See Orloff, *supra* note 23, at 230.

47 GIANNARELLI, ADELMAN & SCHMIDT, *supra* note 42, at 25.

48 *Id.* at 55. While work hours for married fathers have slightly declined in that same period, from 47.8 to 42.5 hours, this decrease does not begin to offset the increase in mothers' hours. See Jerry A. Jacobs & Kathleen Gerson, *Overworked Individuals or Overworked Families?*, 28 WORK & OCCUPATIONS 40, 44-45 (2001).

49 See SUZANNE BIANCHI ET AL., CHANGING RHYTHMS OF THE AMERICAN FAMILY LIFE 48-53 (2006); Michael Hout & Caroline Hanley, *The Overworked American Family: Trends and Nontrends in Working Hours 1968-2001*, at 11 (U.C. Berkeley, Surv. Res. Ctr. Working Paper, 2002), available at http://ucdata.berkeley.edu/rfscensus/papers/Working_Hours_HoutHanley.pdf.

two-parent families it has risen from 53.8 hours to 66.3 hours.⁵⁰

When both parents work full-time, the United States' lack of regulation has meant that they work long hours in the workplace, and substantially longer than parents in countries generally considered peers. In the United States, two-earner families in which both parents work full-time on average spend a total of eighty hours a week at their jobs. By contrast, dual-earner couples in the United Kingdom work seventy-one hours per week; in Sweden, they work sixty-nine hours per week.⁵¹ Particularly remarkable is the high percentage of American couples working very long hours. Almost two-thirds of American couples with children in which both parents work full time report total work hours each week of eighty hours or more.⁵² In comparison, a study of eleven other wealthy countries revealed that except for Canada, "no more than one-third of couples in [the eleven] comparison countries spent this much time at the workplace."⁵³ What is more, in the United States, thirteen percent of dual-earner couples with children work more than one hundred hours a week.⁵⁴

The lack of support for caretaking puts considerable stress on those families who have young children, or whose members have other significant caretaking needs. Recent time-analysis studies show that, despite their busy work schedules, parents go to great lengths to spend time with their children.⁵⁵ The result is that in middle-class families where both parents work full-time, the combined total workload of paid and unpaid work is 135 hours a week, with women working sixty-eight hours combined paid and unpaid work and men working sixty-seven hours. That is, incredibly, a workload that is close

50 See BIANCHI ET AL., *supra* note 49, at 55.

51 See GORNICK & MEYERS, *supra* note 27, at 61.

52 *Id.* at 60-61. Note that this figure considers married couples in which both parents work full-time. By contrast, the 66.3 hour per week workweek for two-parent families discussed earlier considers the paid workload of all two-parent families, including those in which one spouse works part-time or not at all for pay. *Id.*

53 *Id.* The comparison countries were Belgium, Canada, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.

54 *Id.* at 33 (citing Jacobs & Gerson, *supra* note 48, at 57, 59).

55 BIANCHI ET AL., *supra* note 49, at 1-2, 13, 16, 115-17, 137, 169-70, 175-78 (finding that between 1965 and 2000, the weekly hours that married mothers spent with their children actually rose, despite their increased paid-work hours, from an average of 10.6 hours to 12.9 hours. During that same period, married fathers' hours with their children more than doubled, to 6.5 hours a week from 2.6 hours. Single mothers, too, reported an increase in childcare hours to 11.8 hours a week, up from 7.5 hours in 1965.).

to ten hours a day, seven days a week for each parent.⁵⁶ The workload is even heavier for single-parent families.⁵⁷

The long hours required in U.S. full-time jobs means that most dual-earner couples place their children in some form of paid caretaking, often for many hours a day. More than three-quarters of preschool-age children with working mothers are cared for by someone other than their parents; roughly half of these children are in non-parental care settings for more than thirty-five hours a week.⁵⁸ Although children who attend good quality day care generally fare as well as those who are cared for by a parent, most day care in the United States is not good quality. It turns out that leaving issues of quality to the market is a poor way to deliver quality child care: More than half of daycares provide care that experts deem “poor” to “mediocre.”⁵⁹ Only roughly one in seven provides care that has been deemed developmentally enriching.⁶⁰

Moreover, the United States’ leaving provision of after-school care for older children to the market means that many children get no supervision when they return from school. Five percent of six- to nine-year-olds are latch-key kids with no parent at home for some time each week, as are twenty-three percent of ten- to eleven-year-olds, and almost fifty percent of twelve-year-olds and older children.⁶¹ Even older children left home alone are at risk: Studies suggest that juvenile crime, drugs, sex, and other risky behavior increase dramatically during unsupervised afternoon hours.⁶² Furthermore,

56 *See id.*

57 *Id.*

58 GORNICK & MEYERS, *supra* note 27, at 43-44 (citing JEFFREY CAPIZANNO ET AL., CHILD CARE ARRANGEMENTS FOR CHILDREN UNDER FIVE: VARIATION ACROSS STATES 2 (2000), available at <http://www.urban.org/publications/309438.html>).

59 SUZANNE HELBURN ET AL., COST, QUALITY, AND CHILD OUTCOMES IN CHILD CARE CENTERS: PUBLIC REPORT 26 (1995).

60 *Id.* A later study reached a somewhat more optimistic conclusion about the percentage of childcare that is developmentally enriching. *See* Nat’l Inst. of Child Health and Hum. Dev. Early Child Care Res. Network, *Characteristics and Quality of Child Care for Toddlers and Preschoolers*, 4 APPLIED DEVELOPMENTAL SCI. 116, 130 tbl. 5 (2000) (finding that positive caregiving experiences were characteristic for twenty-eight percent of infants and twenty-two percent of toddlers in center-based care).

61 *See* JEFFREY CAPIZANNO ET AL., CHILD CARE PATTERNS OF SCHOOL-AGE CHILDREN WITH EMPLOYED MOTHERS 6 tbl. 1 (2000), available at <http://www.urban.org/publications/310283.htm>.

62 Mary B. Lamer et al., *When School Is Out: Analysis and Recommendations*, 9 FUTURE OF CHILD. 4 (1999), available at <http://futureofchildren.org/futureofchildren/publications/journals/article/index.xml?journalid=48&articleid=230>.

many parents do not even make it home from work by dinner time. A recent UNICEF report ranked the United States twenty-third out of twenty-five OECD countries⁶³ in terms of the percentage of teens who eat dinner with their parents several times a week, an indicator of parent-child interaction that the report found to be an important determinant in children's wellbeing.⁶⁴

The United States' failure to buffer families from the effects of the market that I have discussed thus far has consequences that extend to families across the income spectrum. But as would be expected, it most profoundly affects lower-income families.⁶⁵ Although, considered as a group, mothers' attachment to the workplace has remained relatively stable during the past fifteen years, within that group significant stratification is now occurring based on wealth. In fact, workplace attachment of married mothers of very young children has actually fallen during the last decade and a half, probably because they can use their husbands' salaries to support their caretaking.⁶⁶ During the same period, unmarried mothers with children have increased their attachment to the workplace, likely because of decreased income supports and heightened TANF work requirements.⁶⁷

63 The Organisation for Economic Co-Operation and Development (OECD) is an organization of thirty countries, most of which are regarded as having high-income economies; the United States is a member. See OECD, <http://www.oecd.org> (last visited Feb. 6, 2011).

64 UNICEF, CHILD POVERTY IN PERSPECTIVE: AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES 22, 24 fig. 4.2(a) (2007), available at <http://www.unicef.org/media/files/ChildPovertyReport.pdf> (putting the United States behind Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, and the United Kingdom; only Finland and New Zealand had lower rankings).

65 See Saul Hoffman, *Women and Work: The Changing Impact of Marriage and Children on Women's Labor Force Participation*, MONTHLY LAB. REV., Feb. 2009, at 3; see also Hanming Fang & Michael Keane, *Assessing the Impact of Welfare Reform on Single Mothers*, 1 BROOKING PAPERS ECON. ACTIVITY 1, 9 (2004), available at <http://www.econ.upenn.edu/~hfang/publication/brookings/BPEA-Fang.pdf>.

66 Hoffman, *supra* note 65.

67 *Id.*; see also Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-139, §§ 101-116, 110 Stat. 1996 (1996); Fang & Keane, *supra* note 65 (concluding that the implementation of the Earned Income Tax Credit, 26 U.S.C. § 32 (2006), 26 U.S.C.A. § 32 (2011), and time limits on government benefits also played a role in the increased labor-market participation of single mothers, although less than did the work requirements imposed by Temporary

Likewise, the quality of care that children receive when their parents work is significantly stratified by income. Good-quality child care, in general, costs more than poor-quality child care; for many families, it is out of their economic reach.⁶⁸ According to one study,

[i]n every region of the United States, average child care fees for an infant were higher than the average amount that families spent on food. Furthermore, monthly child care fees for two children at any age exceeded the median rent cost, and were nearly as high as, or even higher than, the average monthly mortgage payment.⁶⁹

The cost of child care centers combined with the lack of government subsidies means that many poor families are limited to family care or relative care arrangements, in which they generally receive inadequate to mediocre care.⁷⁰ By one count, only nine percent of family child care homes were considered “good,” and thirty-five percent were considered “inadequate.”⁷¹ Yet the quality of care has a profound effect on children’s future. Children from low-income families who attend good-quality early childhood education have higher IQs, do better in school, and become more productive citizens than those in poor-quality programs.⁷²

Leaving childcare to be dictated by market forces has problematic effects on poor families not only by virtue of their children receiving inadequate care, but also because of the many poor mothers who hold jobs as caretakers. Paid caretakers who work in private homes are generally paid low wages and are

Assistance for Needy Families (TANF), 42 U.S.C. §§ 601-619 (2009), under welfare reform).

68 NATIONAL ASS’N OF CHILD CARE RES. & REFERRAL AGENCIES, PARENTS AND THE HIGH COST OF CHILDCARE: 2010 UPDATE (2010), available at http://www.naccrra.org/docs/Cost_Report_073010-final.pdf.

69 *Id.*

70 NICHD Early Child Care Research Network, *Early Child Care Research Network, Poverty and Patterns of Care*, in CONSEQUENCES OF GROWING UP POOR 100, 127-28 (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1999). Part of this is a consequence of the fact that between thirty-three percent and forty-six percent of home caregivers have not completed high school; only six percent to fifteen percent have a college diploma. See GORNICK & MEYERS, *supra* note 27, at 226.

71 ELLEN GALINKSY ET AL., THE STUDY OF CHILDREN IN FAMILY CHILD CARE AND RELATIVE CARE, HIGHLIGHTS OF FINDINGS 81 (1994).

72 See W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, 5 FUTURE OF CHILD. 25, 44-45 (1995), available at http://www.futureofchildren.org/futureofchildren/publications/docs/05_03_01.pdf.

excluded from the legal protections granted employees in the primary labor market.⁷³ Furthermore, those legal protections that do apply are often violated with this economically-vulnerable group of employees.⁷⁴ While the employers of these workers enjoy the benefits of relatively inexpensive and flexible care services that allow them to engage in demanding primary labor market jobs, this system perpetuates the inequality of these workers and their families.⁷⁵

Even regular day care workers in the primary labor market, however, do not fare much better in the United States' free-market system. It is true that these employees, unlike domestic workers, are protected by workplace regulations. With that said, as Janet Gornick and Marcia Meyers note, "the average earnings of workers in child-care centers are about the same as — and those of family child-care providers are barely half of — the wages earned by parking lot attendants."⁷⁶ Thus, in addition to the harms this privatized system causes to children because of inadequate caretaking, it creates the impoverishment of a large group of workers who are doing important work, and, in doing so, further stratifies the already large economic differences between families.

Requiring families to deal with unbuffered labor market forces when it comes to caretaking, even as it forces more women into the labor market, also stymies the goal of sex equality. A considerable body of evidence suggests that the reduction in women's pay caused by child rearing is the primary factor in women's continued economic inequality with men in the United States.⁷⁷ Those women who are childless, by one calculation, earn ninety percent as much

73 According to the U.S. Department of Labor, Bureau of Labor Statistics, approximately nineteen percent of the 1.3 million childcare workers in the nation reported working in "private households" (about 247,000 people). See *Occupational Outlook Handbook 2010-11*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oco/ocos170.htm> (last visited July 10, 2011); see also HUMAN RIGHTS WATCH, *HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES* (2001) (documenting cases of abuse and noting that workers have little recourse in the legal system); Peggie Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1837 (2007).

74 See Debra Cohen-Whelan, *Protecting the Hand That Rocks the Cradle: Ensuring the Delivery of Work Related Benefits to Child Care Workers*, 32 IND. L. REV. 1187, 1193 (1999); Shamir, *supra* note 4, at 453.

75 Shamir, *supra* note 4, at 453.

76 GORNICK & MEYERS, *supra* note 27, at 53-54.

77 See, e.g., ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 88 (2001); see also GORNICK & MEYERS, *supra* note 27, at 46.

as men do; mothers, however, earn only seventy percent as much as men.⁷⁸ This wage gap does not appear to be diminishing over time.⁷⁹ The failure to constrain market forces creates inequality through allowing disproportionate rewards to those willing to work long hours; those who shoulder the bulk of care-work responsibilities are forced to accept less well-paying jobs. Further, the incompatibility of many well-paying jobs with caretaking precludes the many husbands who would like to take a more active role in child-rearing from sharing these responsibilities more equally with their wives.⁸⁰

Finally, the state's failure to cushion families from the effects of the market negatively affects the health of civil society. In order to retain parenting time with their children as the work hours of families have risen during the past decades, parents now spend significantly fewer hours socializing with friends and engaging in community activities than they once did.⁸¹ This has caused their social circles to narrow dramatically, and the broader social networks in neighborhoods and communities to shrink.⁸² Not only does this affect the quality of lives of those whose social circles have narrowed, it also affects the well-being of communities, which lack the benefits of engaged citizens and the social trust that accompanies such involvement.

78 GORNICK & MEYERS, *supra* note 27, at 47 (citing Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 145 (1998)).

79 Sarah Avellar & Pamela J. Smock, *Has the Price of Motherhood Declined Over Time? A Cross-Cohort Comparison of the Motherhood Wage Penalty*, 65 J. MARRIAGE & FAM. 597, 604 (2003).

80 See BIANCHI ET AL., *supra* note 49, at 133 (finding that a full sixty percent of fathers reported that they did not have enough time to spend with their oldest child).

81 *Id.* at 107, 111. Married mothers experienced a decline in civic activities from four to 1.5 hours per week, and from twenty-seven percent reporting such activities to about eleven percent. Single mothers had approximately a half-hour decline (from 1.8 to 1.3 hours per week), and a drop from seventeen percent to nine percent reporting civic pursuits.

82 See, e.g., Miller McPherson et al., *Social Isolation in America: Changes in Core Discussion Networks over Two Decades*, 71 AM. SOC. REV. 353, 357-58 (2006) (finding that the mean number of people with whom Americans can discuss matters important to them dropped by nearly one-third between 1985 and 2004, from 2.94 people in 1985 to 2.08 people).

II. “SEPARATE SPHERES” AND THE MARKET-FAMILY DEMARCATION

The hallmark of liberal democracy, Michael Walzer contends, is a commitment to ensuring that no human dominates any other.⁸³ In the feudal world that preceded it, the social world was seen as an organic whole, in which politics, religion, family, economy, were all seen as properly interpenetrating. In this world, the king led by divine right; church and state were closely interlinked; the aristocracy reigned over the families of peasants; civil society and the political community were closely bound; and market power merged with political power. Walzer argues that liberals sought to eradicate the entrenched hierarchies of feudalism by preaching the art of separation. Thus liberals sought to separate church from state; government and church from university; the market from politics; the public from private; and so forth.

Walzer contends that this strategy of “separate spheres” could be usefully employed to further the ends of justice today. The most serious form of injustice, he counsels, comes about not when the distribution of goods within a particular social sphere is unequal, but rather when a disproportionate share of a good from one sphere is used to appropriate a disproportionate share of goods in other spheres. For example, who one’s parents are might be an appropriate criterion to govern the distribution of goods such as affection in the realm of family; it would be unjust, however, if it came to dictate what jobs citizens will receive in the workplace, and their likelihood of winning the presidency in the political realm. Likewise, how much money one has may be appropriate to dictate what brand of furniture one can buy; it would be oppressive, however, if it was the mechanism for distributing educational opportunities for one’s children or political influence. Finally, and most relevant for my purposes, whether one makes a lot of money in the workplace or stock market, and one’s relative advantage in negotiating with an employer, should not determine whether and how citizens can perform caretaking for family members.

A society that opposes domination, in Walzer’s view, will therefore raise barriers to the translation of goods between realms. In this account, the principles by which goods are distributed should be plural, tailored to their own social meaning and function, rather than based on some metric common to the distribution of all goods.⁸⁴ Thus, those who achieve power in the church should not be able to translate this power into political power. Likewise, those who become wealthy in the market should not, by virtue of this wealth, achieve an advantage in educating their children. Taken in this way, Walzer’s

83 WALZER, *supra* note 9, at xii-xiii.

84 *Id.* at xiii.

approach offers a helpful means of thinking about the appropriate limits of market forces when it comes to families. The fact of the matter is that families are a critical institution in our society for dealing with the dependency needs that all humans have, and that must be met in any flourishing society. Although families have certainly been subjected to economic forces throughout the course of time, the idea that they are appropriately subjected to unconstrained market forces is one of relatively recent invention, and has changed the ways that families deal with caretaking and human development in profound ways. Whether the marketization of families is a positive development should be an issue for democratic debate, rather than simply accepted as the only proper course, as it has been proclaimed by the “market fundamentalist” views that prevail in the United States.⁸⁵

Walzer’s theory also offers an alternative approach to the problem of the injustices and inequalities created by the large disparities in wealth in the contemporary United States. While the standard leftist strategy treats the problem of inequality as the problem of monopoly of wealth, Walzer’s approach treats the problem as one of the dominance of wealth beyond its proper sphere.⁸⁶ In this approach, a range of important social goods — for example, healthcare, education, welfare, and caretaking — should be distributed based on criteria that are unrelated to wealth.

Although Walzer did not spell out the consequences of his principles for the goods of caretaking and human development, he recognized that

85 To take a recent example of such “market fundamentalist” views, the decision by the Internal Revenue Service to allow tax deductions for breast pumps based on their health benefits for children, has provoked recent jibes of “nanny state.” Representative Michele Bachmann commented: “I’ve given birth to five babies and I breastfed every single one To think that government has to go out and buy my breast pump. You want to talk about nanny state, I think we just got a new definition.” Ed Pilkington, *Michelle Obama’s Breastfeed Plan Attacked by Tea Party’s Leading Ladies*, GUARDIAN, Feb. 18, 2011, <http://www.guardian.co.uk/world/2011/feb/18/michelle-obama-sarah-palin-breastfeeding-attack>; Kate Zernike, *A Breast-Feeding Plan Mixes Partisan Reactions*, N.Y. TIMES, Feb. 17, 2011, <http://www.nytimes.com/2011/02/18/us/politics/18breastfeed.html>. Sandy Rios, a Fox News contributor, joined in, criticizing the requirement in the newly-passed healthcare law that employers must give working mothers (unpaid) time and a place to nurse or pump their breast milk. See *Fox’s Rios Attacks Regulations Promoting Breastfeeding*, MEDIA MATTERS FOR AMERICA (Feb. 15, 2011), <http://mediamatters.org/mmtv/201102150031>. In these views, market restrictions on breastfeeding are normal and appropriate; state support for breastfeeding is an aberration.

86 WALZER, *supra* note 9, at 12-20.

the domestic sphere is a realm in which important goods are distributed.⁸⁷ He also recognized the vulnerability of families' boundaries to "tyrannical intrusions" from other spheres.⁸⁸ Walzer presents Engels's account of factory workers in Manchester, England in 1844 to illustrate the pernicious effects that result when market forces control the distribution of caretaking and human development activities:

[Engels] told a story not only of misery but also of moral catastrophe: men, women, and children working from dawn to dusk; infants left behind, locked up in tiny unheated rooms; a radical failure of socialization; a breakdown of the structures of love and mutuality; a loss of kinship feeling under conditions that allowed those feelings no room and no realization.⁸⁹

In this account, distributing caretaking and human development by means of the market incur heavy costs for children, families, and society.

Walzer recognized not only the danger that other spheres will come to dominate distributions in the domestic sphere, but also that domestic forces may leach into other spheres of life. In a section at the end of his chapter, "Kinship and Love," Walzer specifically raised the issue of whether women's inequality in society was tied in part to their position in families.⁹⁰ However, he was too quick to conclude that the problem has "less to do with their familial place than with their exclusion from all other places."⁹¹ Walzer, of all scholars, should have recognized that the problem of women's inequality cannot be so readily blamed on exclusion from other spheres: The inequality is produced precisely from the relationship *among* realms, and the carry-over from one sphere to another. Recognition of the ways that women's domestic responsibilities inhibit their accomplishments in other spheres is essential to any adequate theory of the family-market relationship.

A few other modifications and a clarification of Walzer's basic account are necessary for my purposes. The clarification first: Walzer recognized (as do I) that the metaphor of separate spheres is just that — a metaphor, meant to convey the idea that different social goods should be distributed according to different criteria.⁹² There is no pre-determined sphere of "the domestic" or "the

87 *Id.* at 227.

88 *Id.*

89 *Id.* at 233.

90 *Id.* at 239-40.

91 *Id.* at 240; *see also* SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 114 (1991).

92 *See* Michael Walzer, *Response*, in *PLURALISM, JUSTICE, AND EQUALITY* 281 (David Miller & Michael Walzer eds., 1995).

family”); describing these concepts as spheres is useful only insofar as these metaphors help us focus on the principles that should be used to distribute the important goods at stake. Accordingly, the way in which we demarcate various spheres as well as the size of these spheres are not set firmly by nature; instead they are issues subject to contestation. Now the modifications, which follow from the previous point: While Walzer sometimes seems to treat the meanings of social goods as settled as a matter of social understanding, the fact of the matter is that social understandings about families, and the role that they should play in caretaking and human development, are fundamentally contested. These controversies can be settled only provisionally, based on argument about the principles that properly govern in such cases. Furthermore, although Walzer sometimes tacitly acknowledges it, he does not explicitly recognize that the principles that properly govern the distribution of a particular good such as caretaking will not always be only those specific to the sphere in question.⁹³ Certainly more general moral principles, such as sex equality or personal responsibility, which can apply across spheres, should sometimes appropriately affect how goods are distributed.⁹⁴ Yet in the main, Walzer is certainly right: Important societal goods should not be distributed based on a one-principle-fits-all basis, unrelated to the individual good at stake. Instead, distributional principles must consider the meaning of specific goods and the function they serve. It is to these issues I now turn, when it comes to caretaking and human development.

III. TREATING FAMILIES' CARETAKING AND HUMAN DEVELOPMENT AS A "SEPARATE SPHERE" FROM THE MARKET

What would government do to buffer families, and their caretaking and human development activities, from market forces if we took the principle of separate spheres seriously? Doing so would not deny that families have an economic character, or that family members will sometimes act with pecuniary motives. But it would seek to ensure that the way in which families function and conduct their caretaking and human development activities is less influenced by market forces and more influenced by the importance of caretaking and human development to the wellbeing of individuals and society. In determining

93 See WALZER, *supra* note 9, at 19 (arguing that the distributive principles that apply to particular goods must be determined exclusively based on the sphere at issue).

94 See Amy Gutmann, *Justice Across the Spheres*, in PLURALISM, JUSTICE, AND EQUALITY, *supra* note 92, at 99.

the principles that should guide these issues, deliberation should properly focus not only on what bases these goods should be distributed to those who *receive* them, but also how the tasks of caretaking and human development should fairly be distributed among those who *perform* them. In addition, deliberation should properly consider whether other institutions in addition to families should assume some responsibility for caretaking and human development activities.

A. Caretaking and Human Development in the Domestic Sphere

Given the importance of caretaking and human development to human wellbeing, it is hard to fathom why their distribution should be given over to market forces, at least when it comes to some basic level of these goods. Instead, the close connection between these goods and human dignity, which is at the heart of the liberal democratic project, requires that all citizens be provided with an adequate amount of these goods to lead a decent life, regardless of their financial status or that of their families. The amount of caretaking and human development that individuals need to meet this level may vary. For example, a child or older person who has a particular medical condition may need more caretaking than others. But whether and how much they should receive, at least up until whatever this threshold level of adequacy is determined to be, should be based on a combination of equality and need, rather than determined by the play of free-market forces on individual families.

This means that the state must structure public policies in a way that allows families to care for their members' dependency needs, while still being able to provide a decent life for themselves. At first blush, the state might accomplish these twin goals by directly subsidizing family members who leave the market to perform caretaking, rather than by reforming job structures to adapt them to caretaking responsibilities. Simply subsidizing caretaking without reforming the labor market, however, fails the "separate spheres" test from the market side: Those who assume caretaking burdens in families may not be penalized in the work world by having to withdraw from the sphere of paid labor. Accordingly, as a number of feminists have argued, the cause of justice is better promoted by ensuring that the labor market does not penalize workers who have significant caretaking responsibilities, rather than by the state, as a routine matter, subsidizing caretakers to leave paid jobs.

The goal of reinforcing the boundaries between family and market should not simply be to ensure that the domestic realm continues in some shape or form, but that it continues in a form that supports families in sanely and humanely meeting the caretaking needs of their members. This means that the state must set up societal institutions in a manner that allows families, through

the exercise of diligent but not Herculean efforts, to meet the basic physical, mental, and emotional needs of children and other dependents and promote human development while avoiding impoverishment or immiseration. To do so, the labor market needs to be regulated in a manner that allows workers to work, but still ensures parents enough time with their children so that the children are well parented and supervised, and their parents not so pressed for time or frazzled by time pressures that it interferes with adequate caretaking. In this view, the state shirks its responsibility when it subjects parents to market forces that require them to choose between working to put food in their children's mouths and ensuring that their children receive adequate caretaking.

Ensuring that the distribution of jobs in the labor market does not turn on whether workers have caretaking responsibilities in the domestic realm also comports with Walzer's discussion of the separate spheres principle when it comes to "hard work." Allowing those with paid jobs to accomplish caretaking makes it more likely that women will hold paid work and more likely that men who work can perform more of the caretaking at home. The work of caretaking within families, although often accompanied by love and affection, can be hard emotionally, wearing physically, and sometimes experienced as drudgery. In addition, it is conducted at a significant opportunity cost and loss of societal status to the caretaker.⁹⁵ In these ways, caretaking by family members bears many characteristics of the kind of labor that Walzer calls "hard work," although he uses the term only to refer to paid labor.⁹⁶ As Walzer points out, such labor is appropriately shared in order to equalize its burdens.

The state's responsibility to structure institutions to facilitate families' opportunities to engage in caretaking does not require it to spend limitless resources. It simply requires that children and other dependents be afforded decent conditions and sufficient caretaking to meet their basic dependency needs and to promote a minimally adequate level of human development. A relatively wealthy polity should be able to do far better than simply clear this minimum threshold. With that said, millions of children in the United States are now being raised in conditions that do not meet this standard.

Above the threshold level necessary to ensure that citizens lead decent lives, the principles that should govern the distribution of caretaking and human development are more contestable. Certainly there is a strong argument to be made that the state should shield families' caretaking activities from market forces beyond this minimum threshold, choosing to devote more of its

95 See generally Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEORETICAL INQUIRIES L. 179 (2012).

96 See WALZER, *supra* note 9, at 165-83; see also OKIN, *supra* note 91, at 114-15.

resources to caretaking than, for example, cultural activities. In doing so, the state might continue to distribute the resources for caretaking based on some combination of equality and need or move more toward one or another of these factors. Yet plausible arguments could also be made in favor of allowing the market some distributive role above this threshold. Beyond this point, for example, one could make the case that individual families should be able to choose between more caretaking for their kids and, say, having more freedom to buy a bigger house that will give each family member more privacy. Yet even above this threshold, the market is one of many distributive principles that plausibly apply. Rather than the market being taken as the accepted mode of distribution as a matter of fact, it should be considered as one of many contenders in the course of democratic deliberation.

B. Caretaking and Human Development Between the Spheres

I have argued that the state should shield families from the market when it comes to their caretaking and human development activities for their members. Yet while it is clear that citizens need caretaking and human development during the course of their lives, it is less clear how much of these activities need to be accomplished by families rather than other institutions such as daycares, elder care centers or schools. The separate spheres approach gives us no firm answer to this question. It provides that the principles of distribution should be separate from sphere to sphere, but does not tell us in which sphere caretaking should occur. Neither does human nature: For several generations, sound children were raised far more communally on Israeli kibbutzim than they are in the United States.⁹⁷

Given current cultural understandings and patterns, it certainly makes sense to facilitate families conducting at least some significant portion of these activities when it comes to children. Bearing or rearing a child is not a guarantee that parents will love their children and look out after their interests; in most instances, however, it works out that way.⁹⁸ This should not mean, however, that families are the only institutions in which the state supports caretaking, or that the state should support full-time caretaking within families

97 See, e.g., Shapone L. Maital & Marc H. Bornstein, *The Ecology of Collaborative Child Rearing: A Systems Approach to Child Care on the Kibbutz*, 31 *ETHOS* 274 (2003). While much childcare on kibbutzim still proceeds communally, there has been a shift toward children sleeping with their families since the Gulf War in 1990. *Id.*

98 See John Eekelaar, *Self-Restraint: Social Norms, Individualism and the Family*, 13 *THEORETICAL INQUIRIES L.* 75 (2011).

in the normal course of events. The current pattern of private caretaking in private homes is not only a tremendously labor-intensive model; it is also, as feminists have long pointed out, a model that reinforces sex subordination by keeping those with caretaking responsibilities — largely women — out of the paid workplace. To enable citizens to integrate both paid work and caretaking into their lives requires that there be other institutional alternatives for providing caretaking and human development than solely families.

Even when these activities are conducted outside families, the logic of separate spheres requires buffering these activities from market forces. To the extent that caretaking and human development are necessary for children to become flourishing adults, it is difficult to justify distributing these goods based on free-market patterns outside of families, as well as inside them. A system in which the state requires at least adequacy in childcare, and which provides subsidies for poor children to attend developmentally-enriching daycares, would be an improvement over the current system. A still better choice, however, would be government-provided universal early childcare education, on the model of the current Head Start program,⁹⁹ which would ensure that all families receive high-quality early childcare education regardless of income.

A system of public early childcare education not only furthers the principle of separate spheres with respect to how childcare is distributed, it does so with respect to how paid childcare is provided. A system in which paid care work is provided in the primary labor market rather than private homes helps ensure that the work of child-rearing is justly remunerated rather than a cause of economic domination. It would therefore reduce the likelihood that upper-middle class American families will solve their problems with caretaking on the backs of undocumented immigrants and other vulnerable employees. For the same reasons, the public provision of after-school programs to take some of the load off families accords well with the principle of separate spheres.¹⁰⁰

In this regard, particular note should be paid to the Dutch system of work-family relations. In contrast to systems such as Sweden, the Dutch system challenges the view that ending maternalist policies requires extensive “defamilialization” of caretaking. In the Netherlands’s “combination model,” the Dutch are trying to forge a balance between limiting employment to allow family care and constructing an alternative system of public caretaking.

99 See GIANNARELLI, ADELMAN & SCHMIDT, *supra* note 42.

100 See Paul Krugman, *French Family Values*, N.Y. TIMES, July 29, 2005, at A23; Oliver Blanchard, *Explaining European Unemployment*, THE NATIONAL BUREAU OF ECONOMIC RESEARCH (Summer 2004), <http://www.nber.org/reporter/summer04/blanchard.html>.

Janneke Plantenga described the model in these terms:

The point of departure of the combination model is a balanced combination of paid and unpaid care work, where unpaid care work is equally shared between men and women. The core concept here is that both paid and unpaid work are equally valued. Depending on the lifecycle phase, both men and women should be able to choose a personal mix of paid labour in long part-time (or short full-time) jobs, part-time household production of care and part-time outsourcing of care. With some adjustments — and with many concrete measures still to be developed — the combination model has been adopted by the Dutch government as the main guideline for policies in the field of labour and care. . . . Part-time employment is . . . a core element of the combination model; flexible, non-full-time working hours for both men and women are deemed indispensable to reach gender equality.¹⁰¹

When it comes to adults who need caretaking, there are also good reasons to support both caretaking by families and caretaking outside them. Families do a significant portion of the care work for aging seniors and other adults who need caretaking.¹⁰² Yet not all such adults can or will choose to live in families. Many are separated from them geographically. Others prefer to maintain their independence.¹⁰³ In addition, the societal norm of family caretaking is less strong when it comes to adult family members than it used to be.¹⁰⁴ Given these considerations, although the state should support caretaking of the elderly

101 Janneke Plantenga, *Combining Work and Care in the Polder Model: An Assessment of the Dutch Part-Time Strategy*, 22 *CRITICAL SOC. POL'Y* 53, 54-55 (2002) (citation omitted).

102 See NATIONAL ALLIANCE FOR CAREGIVING & AARP, CAREGIVING IN THE U.S. 7, 8 (2004), available at <http://www.caregiving.org/data/04finalreport.pdf> (estimating that there are 44.4 million American caregivers (twenty-one percent of the adult population) who provide unpaid care to an adult age eighteen or older. The great majority of caregivers (eighty-three percent) are helping relatives.).

103 Ninety percent of adults (age sixty and older) report that they want to stay in their home or community rather than uproot themselves late in life. See Press Release, AARP, 9 in 10 Adults Age 60+ Prefer to Stay in Their Home and Community Rather Than Move (Oct. 27, 2006), available at http://www.aarp.org/about-aarp/press-center/info-2006/9_in_10_adults_age_60_prefer_to_stay_in_their_home.html.

104 See, e.g., Winnie Hu, *Ties That Bind, Ties That Break*, N.Y. TIMES, Aug. 2, 1998, at 141, available at <http://query.nytimes.com/gst/fullpage.html?res=9506EED81F38F931A3575BC0A96E958260> (describing movement of norms of Asian immigrants to the United States away from personally caring for parents).

and other adults with dependency needs by family members, it should also seek to construct networks of care that are not dependent on delivery through families. Here again, the state should seek to ensure that such caretaking is distributed based on factors such as need rather than wealth. In doing so, the state should seek to ensure the availability of a range of alternatives that allow adult citizens to meet their caretaking needs with dignity.

CONCLUSION

The domestic realm is, in Michael Walzer's words, "closely connected to other distributive spheres, highly vulnerable to their interventions, and itself pervasively influential."¹⁰⁵ During the last two generations, the boundary between families and the market, although always permeable, has become still more porous when it comes to caretaking and human development activities. The consequence has been that market forces increasingly drive the ways in which these activities are conducted. I have argued that the state should properly shore up this boundary by adopting public policies to shield these activities from the market's sway. Doing so recognizes the centrality of caretaking and human development to human wellbeing, the vital role that families play in these activities, and the important role of the state in ensuring that the logic of market institutions does not dictate their course.

105 WALZER, *supra* note 9, at 227.