

HELPING OUT IN THE FAMILY FIRM:  
THE LEGAL TREATMENT OF UNPAID MARKET LABOR

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This article investigates the work of individuals who help out informally with a family member's job, often without pay. Examples include the relative who works in the back room of the family business, the executive spouse who hosts corporate functions, the political wife who campaigns with her husband, or the child who does chores on the family farm. The term "unpaid market labor" (UML) is used here to describe these and other ways that family members collaborate directly in paid activities that are legally and socially attributed to others. The article calls for a feminist legal analysis of UML as a specific form of gendered economic activity, distinct in important ways from both unpaid care giving work and paid market work.

Part I illustrates some of the practical legal problems associated with UML. It reviews Canadian and United States tax cases in which the courts struggle to characterize such activities as either related to business or personal in nature. It also briefly canvasses some other areas of law and policy that affect unpaid family helpers and those who rely on their services.

To ground a feminist analysis of these problems, Part II turns to empirical evidence about the nature and extent of UML undertaken in industrialized economies. Definitive answers prove elusive, as quantitative research methods have largely obscured this form of work. However, qualitative sources indicate that UML pervades a wide range of different professions and socio-economic classes. It is also gendered, especially when it involves the development and maintenance of commercial relationships. Though the evidence clearly shows that UML is done by men, women and children alike, I argue it is nonetheless a

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gendered form of economic activity based on the nature, conditions, and dominant providers of such work. The empirical studies also refute any notion that UML is becoming obsolete with high levels of urbanization and female participation in labor markets. In fact, some suggest the opposite: that family collaboration in breadwinning may be growing in response to the pressures of economic globalization, technological change, and labor market restructuring. Reviewing a range of empirical studies, the article concludes that this work forms a significant and often overlooked dimension of how many people participate in markets.

In Part III, the article grapples with the implications of my doctrinal and empirical analyses of UML for feminist legal theory, particularly in the context of contract and property law. I argue that unpaid market workers need to be incorporated more explicitly into feminist critiques of the market/family dichotomy, including the portrayal of market actors as self-sufficient individuals. The potential analytical benefits and challenges of this expanded critique of the market/family dichotomy are illustrated in the context of feminist scholarship on contract and property law. I respond to possible concerns about commodifying family relations, if informal assistance is recognized as a direct contribution to income earning. I also address the risk that singling out UML for specific theoretical or legal reform attention might implicitly devalue unpaid care giving, arguing that it need not do so and could, in fact, help to demonstrate the economic value of unpaid work more generally. Part III goes on to consider the normative values that should influence a feminist agenda for law and policy reforms in this area. Commentators in other disciplines have been sharply divided over whether women are fundamentally oppressed or potentially liberated as unpaid market workers. I point out flaws in both of these positions and argue that UML may reflect both solidarity and conflicts of interest within families. I propose, as a general principle, that laws should be designed not to stamp out family co-production, but rather to empower individuals who make unpaid contributions to another's job or business. Legal rules and public policies should encourage direct compensation or support of unpaid market workers, with a view toward increasing their bargaining power within the family, as well as their financial independence and security as individuals. The specific legal and policy reforms that might flow from these principles would need to be worked out carefully in particular regulatory contexts. The objective of this article is to develop a theoretical framework to guide future feminist analysis of particular laws that affect unpaid market workers. The specific legal and policy reforms that might flow from these general principles would need to be addressed in particular regulatory contexts. While detailed policy prescriptions are beyond the scope of this paper, I conclude Part III by applying my theoretical analysis to one specific doctrinal issue as an illustration.

### I. LEGAL STRUGGLES OVER UNPAID MARKET LABOR

This Part offers specific examples to show that, in a variety of legal and public policy contexts, UML raises issues distinct from those of unpaid care

giving and domestic work. Taxation law serves as the primary field to illustrate this point and to critique the characterization of this work as a personal and non-productive activity by some courts in both Canada and the United States. I go on to identify some other areas of law and policy that impact unpaid market workers, and that should be re-examined from their perspective. The cross-jurisdictional and multi-disciplinary scope of these examples suggests that beyond particularized issues, there is a more fundamental need to re-examine the legal construction and treatment of UML.

#### A. *Taxation Law and Unpaid Market Workers*

The unpaid work of a family helper can potentially give rise to a number of different tax issues in both Canada and the United States. The common theme of the cases reviewed here is that the official taxpayer claims some form of concession on the basis that a family member helped to earn the income in question, though she or he was not paid for doing so. Revenue authorities concerned with preventing tax avoidance may counter that the family member was engaged purely in care giving, recreation, or other personal activities unrelated to the production of income. This characterization issue has made it difficult for courts to treat UML consistently and equitably, within families and vis-à-vis the larger taxpaying population. Though the technical issues vary, the cases addressing this issue essentially grapple with two underlying questions. The first and most important is whether the family member's activities fall inside or outside the sphere of market activity. To use the language of some other disciplines, this is the problem of locating the production boundary.<sup>1</sup> If the activities are characterized as market work, a second question may arise about the value of such activities.

In resolving these questions, the structure of tax law encourages judges to conceptualize commercial and family life as mutually exclusive categories. I argue that because this dichotomy can never adequately reflect the hybrid character of UML, the reasoning is often unconvincing and hard to reconcile with other decisions on similar facts. On a policy level, the law appears caught in an impossible bind between intra-familial and broader societal equity.

### 1. Tax Treatment of Social Hosting and Networking Activities

#### a. *Canadian Cases on Social Hosting and Networking*

When family members are involved in business socializing or other goodwill activities, reimbursement of their expenses can give rise to a number of tax issues. Often these cases arise when an employee brings a spouse on work-related travel. In Canada, if the employer pays the spouse's travel

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1. David M. Brennan, *Defending the Indefensible? Culture's Role in the Productive/Unproductive Dichotomy*, 12 FEMINIST ECON. 403, 404 (2006).

expenses, the employee may have this amount included in his or her income as a taxable fringe benefit.<sup>2</sup> The administrative policy of the Canada Revenue Agency (CRA) is to assess a taxable benefit to the employee “unless the spouse was, in fact, engaged primarily in business activities on behalf of the employer during the trip.”<sup>3</sup> The question then becomes what qualifies as a business activity for this purpose. Virtually all of the cases discussed in this section involve a management level, male employee, accompanied by his wife.<sup>4</sup> The wives in these cases were generally involved in social hosting, networking, or similar activities focused on nurturing and mediating relationships. The trend has been toward greater recognition of the commercial nature of these activities and the real pressure that wives are under to support their partners’ careers in this manner.<sup>5</sup> Perhaps not surprisingly, however, the business purpose of such travel was still not recognized in the one case involving a male spouse.<sup>6</sup>

In several early decisions, Canadian judges gave short shrift to the notion that wives could play a commercial role on business trips.<sup>7</sup> A good example is *Paton v. Minister of National Revenue*, where a bank executive argued that his wife was needed at regional meetings to evaluate the contributions made by the wives of local branch managers to “business development and servicing . . . .”<sup>8</sup> Rejecting the business executive’s argument and upholding the government’s assessment of a taxable benefit, the court questioned the skills that Mrs. Paton could bring to this role:

There is no evidence that Mrs. Paton spent any time in the head office of the bank to learn the details and intricacies of banking practice; neither was there any evidence that she had any special fitness or training to enable her to pass judgment on the abilities and

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2. Income Tax Act, R.S.C., ch. 1 § 6(1)(a) (5th Supp. 1985) (requiring an employee to include in his or her income “the value of board, lodging or other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment . . .”).

3. CANADA REVENUE AGENCY, INCOME TAX INTERPRETATION BULLETIN IT-470R, EMPLOYEES’ FRINGE BENEFITS ¶ 15, <http://www.cra-arc.gc.ca/E/pub/tp/it470r-consolid/README.html> (last visited Jan. 6, 2008). Note that interpretation bulletins are statements of administrative policy only and are not legally binding on CRA or the Courts.

4. See discussion *infra*.

5. See *Romeril v. The Queen*, [1998] 1 C.T.C. 2535, 2537 (Can. Tax Ct.) (Can.); *Lowe v. The Queen*, [1996] 2 C.T.C. 33, 44 (Can. Tax Ct.) (Can.); *Hleck, Kanuka, Thuringer v. The Queen*, [1994] 94 D.T.C. 1698, 1702 (Can. Tax Ct.) (Can.); *Funnell v. M.N.R.*, [1991] 1 C.T.C. 2498 (Can. Tax Ct.) (Can.); and discussion of these cases *infra*, Part 1.a.

6. See *McMillan v. Can.*, [1993] 2 C.T.C. 2489 (Can. Tax Ct.) (Can.), discussed *infra* Part I.A.1.a.

7. See *Gancher v. M.N.R.*, [1977] C.T.C. 2596 (Can. Tax Ct.) (Can.); *Paton v. M.N.R.*, [1968] Tax A.B.C. 200, 205 (Can. Tax Ct.) (Can.); *Shambrook v. M.N.R.*, [1965] 40 Tax A.B.C. 28 (Can. Tax Ct.) (Can.); *M.N.R. v. Rousseau*, [1960] C.T.C. 336 (Can. Tax Ct.) (Can.); *No. 105 v. M.N.R.*, [1953] 8 Tax A.B.C. 290, 293 (Can. Tax Ct.) (Can.).

8. *Paton*, [1968] Tax A.B.C. at 200.

qualities of the various people she would meet fleetingly at the social functions . . . .<sup>9</sup>

The court went on to invoke a valid policy rationale expressed by both revenue authorities and courts, which have articulated concern for tax avoidance by high-income earners in these cases, as suggested by the following passage:

Mr. Paton's tax return shows him to be in receipt of a highly substantial salary as one would expect of a senior executive in one of the chartered banks in Canada. Nevertheless he seeks to be relieved of taxation in respect of the . . . expenses incurred on behalf of his wife when she accompanied him to Western Canada . . . .<sup>10</sup>

The need to ensure equitable distribution of the overall tax burden is thus used to justify the refusal to recognize the spouses' direct involvement in the income producing activities of both employee and employer.

In contrast, other courts have been prepared to recognize that wives are recruited into corporate socializing to advance business objectives.<sup>11</sup> The most vivid example is *Hleck, Kanuka, Thuringer v. The Queen* in which a law firm paid for one of its partners and his wife to attend a conference of three transport lawyer associations in Florida.<sup>12</sup> This was a Goods and Services Tax (GST) case in which the firm claimed an input tax credit as a deduction from its GST owed to the government for the cost of the airplane tickets because they were bought "in the course of commercial activities."<sup>13</sup> The CRA allowed the credit for the partner's ticket, but denied credit for the wife's ticket on the basis that she "was not a lawyer, was not trained for business . . . was not involved in the commercial enterprise of the firm and had no knowledge in that area,"<sup>14</sup> and that her attendance was not "in any way related to the commercial activities of the law firm."<sup>15</sup>

In allowing the taxpayer's appeal, the court observed that "[i]n today's business climate this is an expected and accepted method of developing one's

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9. *Id.* at 205.

10. *Id.*

11. *See Romeril v. The Queen*, [1998] 1 C.T.C. 2535, 2538-39 (Can. Tax Ct.) (Can.); *Lowe v. The Queen*, [1996] 2 C.T.C. 33, 43 (Can. Tax Ct.) (Can.); *Hleck, Kanuka, Thuringer v. The Queen*, [1994] 94 D.T.C. 1698, 1701-02 (Can. Tax Ct.) (Can.); *Funnell v. M.N.R.*, [1991] 1 C.T.C. 2498, 2498, 2500 (Can. Tax Ct.) (Can.); *Philp v. Can.*, [1970] C.T.C. 330, 330, 336 (Can. Tax Ct.) (Can.); *Hale v. Can.*, [1968] C.T.C. 477, 477-80 (Can. Tax Ct.) (Can.).

12. *Kanuka*, 94 D.T.C. at 1698.

13. *Id.* at 1699-1700; Excise Tax Act, R.S.C. 1985, ch. E-15, § 169(1)(B)(c), amended by S.C., ch. 27 § 169(1)(B)(c) (Can.).

14. *Kanuka*, 94 D.T.C. at 1700.

15. *Id.* at 1699.

business.”<sup>16</sup> Tax Court of Canada Justice Bell accepted Mr. Kanuka’s testimony that, while his wife attended no business sessions, she had “the same role” as he did in networking and business development.<sup>17</sup> The couple attended several receptions and two dinner dances together and hosted many people in their suite.<sup>18</sup> During the business sessions, she went on shopping trips and tours.<sup>19</sup> The court accepted Mr. Kanuka’s argument that his wife “complemented his stature” because it “projected the fact that they were a team and that she was helpful to the cause of promoting the . . . firm, establishing new professional and business contacts and re-establishing and reinforcing existing business contacts.”<sup>20</sup>

In order to generate future business referrals, Mr. Kanuka successfully argued, “it was necessary for his wife . . . to meet and mingle with the wives of others . . . and accordingly to promote an atmosphere of friendship and goodwill.”<sup>21</sup> In general, the language of this ruling portrays Mrs. Kanuka as using her social skills to purposefully advance the firm’s business interests.<sup>22</sup> This language distinguishes the decision from other recent cases in which the wife is described as playing a more passive role that primarily involves keeping busy with other wives, or improving her husband’s image with senior managers simply by “undergoing their scrutiny.”<sup>23</sup> Nonetheless, these other recent cases were also decided in favor of the taxpayers because the wife’s attendance was practically obligatory and helped to create goodwill.<sup>24</sup>

The *Kanuka* decision and others that accept the business function of spousal networking are more convincing than the earlier cases which tended to portray the wives as unproductive ladies of leisure. They are progressive in that they give some recognition to the economic value of spousal services to both the husband and to the firm. However, it is important to understand that this recognition is purely symbolic for the wives. While validating the wives as market actors, the material impact of the courts’ decisions is to reduce the husbands’ tax burden.<sup>25</sup> This solution provides no incentives for either the husband or the employer to compensate spouses directly for their services. The current Canadian jurisprudence, therefore, does not meaningfully enhance gender equality.

Furthermore, the ongoing potential for tax avoidance is not addressed, because the courts have failed to articulate a clear standard for the kinds of

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16. *Id.* at 1702.

17. *Id.* at 1699.

18. *Id.* at 1698-99.

19. *Id.* at 1699.

20. *Id.*

21. *Id.* at 1702.

22. *Id.* at 1699, 1701-02.

23. *Romeril v. The Queen*, [1998] 1 C.T.C. 2535, 2538 (Can. Tax Ct.) (Can.); *see also* *Funnell v. M.N.R.*, [1991] 1 C.T.C. 2498, 2500 (Can. Tax Ct.) (Can.).

24. *See Romeril*, [1999] 1 C.T.C. at 2538-39; *Funnell*, [1991] 1 C.T.C. at 2500.

25. *See* discussion *supra* Part I.A.1.a.

services that will qualify as business-related, and why. In some cases, the courts seemed to accept that the wife's mere presence was sufficient proof of value to the business.<sup>26</sup> If this is so, tax equity in a larger sense is placed at risk. In addition, the failure to specify the nature of qualifying services invites doctrinal inconsistency, as demonstrated by the decision of *McMillan v. Canada*, the first case involving a man who served as corporate spouse on a business trip.<sup>27</sup>

Ms. McMillan, a manager with a telecommunications company, was asked to accompany sales staff on a reward tour hosted by a supplier in Japan.<sup>28</sup> The company also requested that she take her husband and paid for both of their travel costs.<sup>29</sup> Ms. McMillan testified that she agreed reluctantly to the trip only because the company indicated it would be embarrassing not to send a full contingent.<sup>30</sup> Her concern about taking her husband was that he would lose holiday time and income from his own job.<sup>31</sup> The couple spent their time at a mix of business and business-social events, not described in detail in the judgment.<sup>32</sup> Without discussing exactly what the husband did, the court held his presence had no "direct impact on the business benefits" of the trip.<sup>33</sup> It acknowledged the trip was "more *mandated* than *voluntary*" for Ms. McMillan and that she may have been disinclined if she refused to bring her husband.<sup>34</sup> Despite this pressure from the employer, the court held that the cost of the husband's travel should be added to Ms. McMillan's income as a taxable benefit, reasoning that, ultimately, she made a "conscious decision" to go on the trip and take him along.<sup>35</sup>

It is notable that the court dismisses the husband's contribution to the business, whereas other decisions from the same time period have no difficulty recognizing the business development role of wives, even in a case such as *Romeril v. The Queen*, where the wife had no hosting responsibilities but merely attended social events and "got to know" others in the company.<sup>36</sup> The rhetoric of employee choice in *McMillan* distinguishes this case from others in which the obligatory nature of wives' attendance at certain events has been increasingly accepted by the courts.<sup>37</sup> Both the facts and the reasoning in *McMillan* raise concerns that women may be disadvantaged in the competition

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26. See, e.g., *Romeril*, [1999] 1 C.T.C. 2535, 2538.

27. *McMillan v. Can.*, [1993] 2 C.T.C. 2489, 2490 (Can. Tax Ct.) (Can.).

28. *Id.* at 2490.

29. *Id.*

30. *Id.*

31. *Id.* at 2491.

32. *Id.* at 2490.

33. *Id.* at 2493.

34. *Id.*

35. *Id.*

36. *Romeril v. The Queen*, [1998] 1 C.T.C. 2535, 2537 (Can. Tax Ct.) (Can.).

37. See discussion *supra* Part I.A.1.a, notes 12-26 and associated text.

for career opportunities if they have less access to the networking services and other informal assistance of a spouse because of the tax consequences.

*b. United States Cases on Social Hosting and Networking*

United States tax law gives rise to parallel issues with respect to the business-social activities of family members, despite some important differences in how the two countries assess income taxes. A fundamental distinction between the two systems is that Canada assesses income tax on an individual basis, whereas the United States allows for joint filing by married couples.<sup>38</sup> While joint filing may seem intuitively more consistent with the idea that spouses work together to generate the household income, several United States cases show it does not eliminate the problems associated with characterizing and valuing UML contributed by a spouse or other relative. In particular, where an employer corporation covers expenses for a family member to accompany an employee on a business trip, the issue is whether these are deductible as “ordinary and necessary expenses . . . in carrying on any trade or business . . . .”<sup>39</sup> Regulations under the Internal Revenue Code provide specifically that:

Where a taxpayer’s wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife’s presence on the trip has a bona fide business purpose. The wife’s performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer’s family who accompany him on such a trip.<sup>40</sup>

In applying this regulation, courts have held that “if the spouse’s *primary* function was merely to be ‘socially gracious,’ the taxpayer may not deduct his or her expenses . . . .”<sup>41</sup> In *Danville Plywood Corp. v. United States*, the court denied deductibility where spouses ran a hospitality desk, shepherded people on and off tour buses, and “‘just kind of made it natural’” to engage in business

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38. For a concise discussion of the choice of tax unit in Canadian and United States income tax law, see DAVID G. DUFF, BENJAMIN ALARIE, KIM BROOKS AND LISA PHILIPPS, *CANADIAN INCOME TAX LAW* 22-27 (2d ed.) (LexisNexis Butterworths, 2006). See also Louise Dulude, *Taxation of the Spouses: A Comparison of Canadian, American, British, French, and Swedish Law*, 23 *OSGOODE HALL L. J.* 67 (1985).

39. I.R.C. § 162(a) (1994). Alternatively, the issue may be whether to include the reimbursement in the employee’s income, and, if so, whether to allow the employee to deduct it under § 162. Where the taxpayer is a shareholder the reimbursement may instead be taxed as a constructive dividend. See, e.g., *Frazier & Frazier v. Comm’r*, 68 T.C.M. (CCH) 253 (1994).

40. Treas. Reg. § 1.162-2(c) (2007).

41. *Danville Plywood Corp. v. United States*, 89-1 T.C. ¶ 9248, 87,559 (1989) (citing *Weatherford v. United States*, 418 F.2d 895, 897 (9th Cir. 1969)).

socializing with customers and their spouses.<sup>42</sup> Judge Gibson commented that “such frivolous and primarily social gestures do not give rise to a substantial professional business function.”<sup>43</sup> Similarly, in *Meridian Wood Products Co. v. United States*, travel expenses for the company president’s wife were not deductible, though the corporation had a policy of encouraging wives to go along on business travel to socialize at conventions and gatherings, especially with the wives of other business associates who would be present.<sup>44</sup> Finally, in *Sheldon v. Commissioner*, the wife’s social hosting at conventions was characterized as “merely helpful” rather than necessary to the husband’s business, and, therefore, non-deductible.<sup>45</sup>

Exceptions do exist and where a spouse has provided organizational or other administrative support in addition to networking and socializing, the United States courts are more likely to accept her travel as having a bona fide business purpose.<sup>46</sup> One of the more favorable cases for taxpayers was *United States v. Disney*, where the court accepted that travel by the corporate president’s wife was a deductible expense based on her extensive socializing and goodwill visits with business associates and their wives, as well as public and media appearances in which she helped to project the corporation’s image as a purveyor of wholesome family entertainment.<sup>47</sup> The fact that she spent much of her time on trips taking care of domestic tasks such as laundry and shopping did not detract from the primary business purpose of her presence.<sup>48</sup>

By contrast in *Pascarelli v. Commissioner*, the court held that amounts paid to a common law wife who had extensive responsibilities for business entertaining at home and abroad were subject to gift tax.<sup>49</sup> Though the legal issue was different, it is interesting to compare the court’s characterization of Pascarelli’s activities to the language in *Disney*:

petitioner did not perform services . . . for the purpose of obtaining compensation, but rather with the same spirit of cooperation that would motivate a wife to strive to help her husband advance in his business. Although it is true, as the respondent contends, that the petitioner’s acting as “hostess” to . . . business associates and their wives was very valuable to his business, we think it would be

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42. *Id.*

43. *Id.*

44. *Meridian Wood Prod. Co. v. United States* 84-1 T.C. ¶ 9222, 83,417 (1984).

45. *Sheldon v. Comm’r*, 20 T.C.M. (CCH) 241, 243 (1961), *aff’d*, 299 F.2d 48 (7th Cir. 1962).

46. *See, e.g., Acacia Mut. Life Ins. Co. v. United States*, 67-2 T.C. ¶ 9608 (1967).

47. *United States v. Disney*, 69-2 T.C. ¶ 9494, 85,241 (1969).

48. *Id.* at 85,244.

49. *Pascarelli v. Comm’r*, 55 T.C. 1082 (1971).

artificial and incorrect to conclude that such acts were primarily motivated by a desire to be paid . . . .<sup>50</sup>

Finally, the recent decision in *E.J. Harrison & Sons, Inc. v. Commissioner of Inland Revenue* shows these characterization issues remain very much alive in United States tax jurisprudence.<sup>51</sup> The issue in this case was whether compensation paid to the company's founding matriarch was "reasonable" and therefore deductible in computing its income.<sup>52</sup> Though the case dealt with a highly paid employee rather than an unpaid market worker, it addresses parallel issues about the value of public relations and networking activities.

Mrs. Harrison was heavily involved in the business from its earliest years on.<sup>53</sup> By the time of the audit she was seventy nine years old and her sons had largely taken over management of the corporation, though she still worked 40 or more hours each week.<sup>54</sup> Much of this time was spent in public relations work, attending civic functions and fundraisers.<sup>55</sup> One son testified that his mother was the company's "'ambassador of goodwill', known and appreciated by 'everybody' including city councilors, mayors, and county supervisors for the jurisdictions in which [the company] conducted business."<sup>56</sup> Another son "speculated that her lifetime spent in Ventura County and her involvement in that community led to business."<sup>57</sup> Likewise, a public relations consultant to the taxpayer testified to the importance of Mrs. Harrison's reputation and community involvement to the success of the business and its ability to win contracts.<sup>58</sup> During the audit years, Mrs. Harrison served as president of the corporation.<sup>59</sup> She continued to approve contracts negotiated by her sons, guarantee bank loans, meet with bankers, and preside as 'chairman' at weekly board meetings.<sup>60</sup> Among the company's four officers, her compensation was consistently the highest.<sup>61</sup>

At trial, the Tax Court dramatically reduced the amount of salary deductible by the corporation from an average of \$759,600 down to \$101,667 over three audit years.<sup>62</sup> The court largely accepted the position of tax authorities that her role was akin to that of an outside chair of the board of

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50. *Id.* at 1091.

51. *E.J. Harrison & Sons, Inc. v. Comm'r*, 86 T.C.M. (CCH) 239 (2003), *aff'd in part, rev'd in part*, 138 F. App'x 994 (9th Cir. 2005).

52. *Id.*; I.R.C. § 162(a)(1) (2003).

53. *E.J. Harrison & Sons, Inc.*, 86 T.C.M. at 241-42.

54. *Id.* at 242.

55. *Id.*

56. *Id.* at 249.

57. *Id.*

58. *Id.*

59. *Id.* at 241.

60. *Id.* at 241-42, 248-49.

61. *Id.* at 243, 247.

62. *Id.* at 245.

directors.<sup>63</sup> Judge Halpern held that the corporation's contracts were obtained "based upon performance, not reputation for community involvement. Thus, although petitioner has shown that Mrs. Harrison was instrumental in helping petitioner project a positive corporate image in the communities it served, petitioner has not shown that Mrs. Harrison's public relations activities contributed directly to its sales and profits."<sup>64</sup>

The Tax Court also discounted her titles as president and board chairman as "titular and not reflective of her actual status within the company."<sup>65</sup> Most interesting is the conclusion that her sons sought her consent to all major business decisions, not because her formal position required it, but "out of filial respect for their mother" or "out of respect for Mrs. Harrison's conservative approach to proposals for major expenditures."<sup>66</sup> Thus much of her role was discounted as familial, rather than market oriented.

In 2005, the United States Court of Appeals issued a brief, unpublished opinion rejecting this portrayal of Mrs. Harrison's activities and instead characterizing them as key to the ongoing success of the business.<sup>67</sup> It held that her loan guarantees were more valuable than her sons' "because she possessed greater wealth . . . and the lender viewed her as the decision-maker."<sup>68</sup> The court described her participation in community events as "public relations activities to market the business."<sup>69</sup> It also found that the sons "had to discuss all major business decisions with Mrs. Harrison, persuade her that the decision was a correct one, and obtain her final approval—which means her role was not 'secondary' to the other officers, it was equal or greater."<sup>70</sup> The case was remanded back to the Tax Court to determine reasonable compensation with the direction that "[a]t the very least, . . . [it] should not have been dropped below that of her sons . . . ."<sup>71</sup>

Thus, in both Canada and the United States, judges have struggled to characterize and value, for tax purposes, the kinds of business socializing and networking that family members, especially wives, often engage in to facilitate the market success of a breadwinner or a family enterprise. In neither jurisdiction is the law clear on when unpaid business socializing will be considered productive versus personal, nor does it create any incentives for firms or employees to formalize their legal relationship with spouses or to pay them for their work.

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63. *Id.* at 251.

64. *Id.* at 249.

65. *Id.*

66. *Id.* at 248.

67. *E.J. Harrison & Sons, Inc.*, 138 F. App'x 994, 996 (9th Cir. 2005).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

## 2. Tax Treatment of Family Partnerships

Where individuals operate a business in partnership, they can generally split income and losses between them for tax purposes, and this is often advantageous as a means of reducing income tax liability under progressive rate schedules.<sup>72</sup> However, tax authorities may contest whether a relative who participates informally is really a partner. This is the problem presented by the cases in this section. Here again, disputes may arise about whether a family member's UML is best characterized as a contribution to income production, or as a function of their non-commercial role within the family. Where married couples are concerned, there are important differences in United States and Canadian tax law on this issue.

### *a. United States Treatment of Family Partnerships*

The United States Supreme Court held in *Commissioner v. Tower* that spousal partnerships could exist in principle, but would be reviewed skeptically to ensure the parties' true intention was to be partners, not simply to avoid tax liability:

There can be no question that a wife and a husband may, under certain circumstances, become partners for tax, as for other, purposes. If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things she may be a partner . . . .<sup>73</sup>

This doctrine created a tax incentive for husbands to declare their wives as legal partners so that income tax liability on any profits could be shared between them, often reducing the effective rate of tax.<sup>74</sup>

This incentive for married couples disappeared in 1948 with the introduction of joint filing, under which the income of married persons is aggregated on one return regardless of who earned or has legal ownership of it.<sup>75</sup> However, the issue of whether informal assistance can give rise to a partnership interest remains relevant for family members other than spouses.<sup>76</sup>

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72. See PETER W. HOGG ET AL., PRINCIPLES OF CANADIAN INCOME TAX LAW ch. 16 (6th ed. 2007) for a basic explanation of the taxation of partners in Canada.

73. *Comm'r v. Tower* 327 U.S. 280, 290 (1946).

74. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 345-46 (1994) for a historical analysis and critique of the United States joint filing rules.

75. *Id.* at 346.

76. See, e.g., *Comm'r v. Culbertson*, 337 U.S. 733 (1948) (applying the *Tower* principles in the context of a business operated by a father and his sons).

*b. Canadian Treatment of Family Partnerships*

In Canada, by contrast, the ability to form spousal partnerships for tax purposes was severely limited until 1979 when the Income Tax Act was amended to eliminate a provision that gave revenue authorities discretion to ignore such partnerships and assess all the income to one spouse.<sup>77</sup> As discussed below, the courts have, on many occasions, considered the requirements for establishing that spouses are operating a business as partners and many cases revolve around the characterization of a wife's unpaid labor. I argue that the conflicting jurisprudence on this issue clearly shows the difficulties that courts face in fitting UML into the conceptual dichotomy of market versus family.

This point can be nicely illustrated by comparing two cases, *Cullen v. Canada* and *Wessell v. Canada*, which were both decided in 1985 by the Tax Court of Canada.<sup>78</sup> Both involved small businesses where the husband initially reported all the income as a sole proprietor and later filed as a partnership on the advice of professional accountants.<sup>79</sup> In each case there was clear evidence that the enterprise was managed and operated jointly by the parties, but also evidence that the husband held title to most assets and the wife received no formal wages for her labor.<sup>80</sup>

Partnership is defined by provincial legislation in Ontario simply to mean "the relation that subsists between persons carrying on a business in common with a view to profit."<sup>81</sup> As the court acknowledged in both cases, the absence of a written agreement is not fatal if the parties' conduct indicates there was an oral or implied contract of partnership.<sup>82</sup> In fact, the Supreme Court of Canada had confirmed only the previous year that an implied partnership can exist between spouses based purely on their conduct in relation to a business, particularly their mutual contribution "either in money or property, or by . . . work . . ." and their sharing of profits and losses, "usually by the use of

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77. Income Tax Act § 74(5), repealed by S.C. 1980-81-82-83, c.48, s.40(1), effective for fiscal years after Dec. 11, 1979; *contra* Gray v. M.N.R., [1969] Tax A.B.C. 240 (Can. Tax Ct.) (Can.) (holding the exercise of discretion to be invalid on the basis that the taxpayer had entered a bona fide partnership with his wife, based on evidence of both her capital contributions and her active work in the business).

78. *Cullen v. M.N.R.*, [1985] 2 C.T.C. 2059 (Can. Tax Ct.) (Can.); *Wessell v. M.N.R.*, [1985] 1 C.T.C. 2192 (Can. Tax Ct.) (Can.).

79. *Cullen*, [1985] 2 C.T.C. at 2065; *Wessell*, [1985] 1 C.T.C. at 2193.

80. *Cullen*, [1985] 2 C.T.C. at 2061-62; *Wessell*, [1985] 1 C.T.C. at 2193.

81. *Partnerships Act*, R.S.O. 1990, c. P.5, as am., s.2. Canada has a federal system of government in which legislative authority is divided between the federal (i.e. national) and provincial governments, which are analogous to state governments in the United States. Other provinces use identical or very similar definitions, as does the CRA in its administrative policy concerning the meaning of "partnership." CANADA REVENUE AGENCY, INTERPRETATION BULLETIN IT-90, INCOME TAX ACT: WHAT IS A PARTNERSHIP? ¶¶ 2, 5, 7 (Feb. 9, 1973).

82. *Cullen*, [1985] 2 C.T.C. at 2063-64; *Wessell*, [1985] 1 C.T.C. at 2194.

earnings for the support of the partners.”<sup>83</sup> This broad definition of partnership leaves ample scope for the courts to determine “the true contract and intention of the parties” based on the facts of each case.<sup>84</sup>

In analyzing these two cases, strong factual parallels are apparent. The Wessells operated three separate enterprises: a trailer park, a farm and a construction business.<sup>85</sup> The court found that Mrs. Wessell contributed to the “physical requirements” of all three, as well as the negotiation of contracts, and that she “was recognized and accepted by the public as an active and authoritative person in the operation.”<sup>86</sup> About half the land used in the businesses was held in joint tenancy by the couple, with Mr. Wessell having sole title to the other half.<sup>87</sup> Banking documents tended to suggest he was a sole proprietor, though Mrs. Wessell usually signed loan documents as a guarantor.<sup>88</sup> None of the evidence reviewed in the judgment suggested Mrs. Wessell received formal payment for her work. Despite the mixed documentary evidence, the court held that based on their conduct, the Wessells had a valid partnership which was affirmed by their decision to file tax returns as partners, each reporting a share of the profits from each business.<sup>89</sup>

The Cullens also had three businesses: an oil distributorship, a farm and a racehorse operation.<sup>90</sup> With respect to the farm, the judge found that both spouses were “equally involved in all aspects of the operation.”<sup>91</sup> In addition to a wide range of manual and marketing tasks, “Caroline was fully involved in all decisions . . . and it was her particular responsibility to maintain the necessary books and records.”<sup>92</sup> The judge found that she was also heavily involved in the oil agency:

The nature of the business was such that at certain times . . . Cullen would be required to spend all of his time away from the agency office . . . As a result Caroline was the person responsible for the day-to-day management of the agency. This included everything from answering the telephone to the preparing and rendering of accounts to customers. She did all of the banking, kept all the books of account, and in recent years has had the responsibility for the operation of the computer . . . It was her evidence that . . . she customarily worked five days a week from 8:30 in the morning to

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83. *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, 15 (Can.).

84. *Cont'l Bank Leasing Corp. v. The Queen*, [1998] 2 S.C.R. 298, 317-18 (Can.), quoting *LINDLEY & BANKS ON PARTNERSHIP* 73 (17th ed., 1995).

85. *Wessell*, [1985] 1 C.T.C. at 2192.

86. *Id.* at 2193.

87. *Id.*

88. *Id.*

89. *Id.* at 2196.

90. *Cullen v. M.N.R.*, [1985] 2 C.T.C. 2059, 2060 (Can. Tax Ct.) (Can.).

91. *Id.* at 2061.

92. *Id.*

5:00 in the afternoon (and often longer during busy seasons). She has never been paid a salary.<sup>93</sup>

Likewise, both spouses were involved in all decisions relating to the racehorse operation and Mrs. Cullen maintained “all of the racing documents, breeding records and the books of account.”<sup>94</sup>

In the Cullen’s case, however, the court found there was no legal partnership, stressing that most assets, as well as loans and advertisements, were held in Mr. Cullen’s name alone, although Caroline had an interest in farmland pledged as security for a loan and had signing authority on bank accounts.<sup>95</sup> With respect to the oil distributorship, the couple testified that Imperial Oil would not allow Mrs. Cullen to sign the purchase documents as a partner but insisted on dealing with Mr. Cullen alone.<sup>96</sup> Justice Sarchuk gave little credence to this testimony, questioning why Mrs. Cullen did not speak to her lawyer or accountant about challenging this policy if partnership status was truly important to her.<sup>97</sup> The court concluded that although the couple pooled their assets upon marriage, “this was incidental to the formation of the family unit.”<sup>98</sup> In contrast to *Wessell*, Mrs. Cullen’s contribution of unpaid labor was construed ultimately as a function of the family relationship and not as evidence of a business relationship.

Most tax cases on spousal partnership have leaned toward the restrictive interpretation in *Cullen*, with some courts being especially adamant that work done for a spouse’s business should be understood as a familial rather than commercial activity. For example, in *Estate of Sedelnick v. M.N.R.*, the court found the wife had worked “hand in glove” with her late husband to operate their jointly owned farm.<sup>99</sup> However, Associate Chief Justice Christie held that, “a partnership should not be inferred from the conduct of the parties if that conduct is equally consistent with conduct arising out of the community of interests created by the marriage.”<sup>100</sup>

In doing so, the court relied on a previous decision, *Cornforth v. The Queen*, where the court had concluded that “the unstinting efforts and devotion of all Mrs. Cornforth’s available time to the success of the business is better explainable by the relationship of husband and wife rather than as crass business partners.”<sup>101</sup> The wife in *Cornforth* was a fully qualified physiotherapist who gave up her own job upon marriage to work without a

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93. *Id.* at 2061-62.

94. *Id.* at 2062.

95. *Id.* at 2061, 2064-65.

96. *Id.* at 2061.

97. *Id.* at 2065.

98. *Id.* at 2066.

99. *Estate of John Sedelnick v. M.N.R.*, [1986] 2 C.T.C. 2102, 2105 (Can. Tax Ct.) (Can.).

100. *Id.* at 2102-03.

101. *Cornforth v. The Queen*, [1982] C.T.C. 45, 55 (Can. Tax Ct.) (Can.).

separate salary in her husband's physiotherapy business, where she spent 2-3 full days every week treating patients and doing office administration, including billing and ordering of equipment and supplies, as well as evening hours spent reading or discussing business decisions.<sup>102</sup> Similarly in *Kuchirka v. The Queen* the court found evidence of joint labor, partial joint ownership, and shared enjoyment of profits from the farm, but held this was "equally consistent with normal family relationships."<sup>103</sup>

A few courts have followed the less restrictive view exemplified by *Wessell*, including two more recent decisions. In *Reale v. The Queen*, the court found the spouses had an implied partnership because they held joint title to a Florida property they purchased for resale and Mrs. Reale periodically supervised renovations to the property in the absence of her husband, a builder.<sup>104</sup> In *Makaruk & Makaruk v. The Queen*, the husband claimed merely to be helping out in his wife's sole proprietorship, so that all the profits should be allocated to her for tax purposes.<sup>105</sup> The court accepted CRA's argument that the Makaruks were in fact partners, since they ran the business out of their shared home, transacted personal and business finances out of one joint bank account, and Mr. Makaruk had superior knowledge of the business and often concluded contracts on his own.<sup>106</sup>

These cases are difficult to reconcile with *Cullen* and the other cases discussed above that found no partnership despite extensive spousal involvement and elements of joint ownership. The lack of clear factual distinctions suggests that other deciding factors were at play in the spousal partnership cases, including concerns about tax avoidance and equitable distribution of the overall tax burden.

I suggest the case law also reflects differing judicial sensibilities about the relationship between family and market and where unpaid family workers should be located in that dichotomy. Those judges who rejected the existence of a legal partnership were, in effect, drawing a firm boundary between the two spheres, with wives' involvement in the business to be understood as a function of natural bonds or altruism, and husbands treated as individual market actors.

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102. *Id.* at 46-47.

103. *Kuchirka v. The Queen*, [1991] 1 C.T.C. 339, 342-43 (Can. Tax Ct.) (Can.); *Travica v. M.N.R.*, [1988] 1 C.T.C. 2359 (Can. Tax Ct.) (Can.); *Kopp v. M.N.R.*, [1986] 1 C.T.C. 2227 (Can. Tax Ct.) (Can.); *Bédard v. M.N.R.*, [1984] C.T.C. 2239 (Can. Tax Ct.) (Can.); *Lohe v. M.N.R.*, [1979] C.T.C. 3107 (Can. Tax Ct.) (Can.); *accord Marinis v. M.N.R.*, [1978] C.T.C. 2821 (Can. Tax Ct.) (Can.).

104. *Reale v. The Queen*, [2004] 2 C.T.C. 2512, 2518 (Can. Tax Ct.) (Can.).

105. *Makaruk v. The Queen*, [2003] 4 C.T.C. 2949, 2952 (Can. Tax Ct.) (Can.) See *Berg v. M.N.R.*, [1982] C.T.C. 2558 (Can. Tax Ct.) (Can.) for an older case upholding the validity of a spousal partnership.

106. *Makaruk*, [2003] 4 C.T.C. 2954-55. See *Flicke v. M.N.R.*, [1980] C.T.C. 2538 (Can. Tax Ct.) (Can.); *Graves v. Canada*, [1990] 1 C.T.C. 357 (Can. Tax Ct.) (Can.), *rev'g in part*, *Graves v. M.N.R.*, [1983] C.T.C. 2594 (Can. Tax Ct.) (Can.) for other tax decisions confirming a spousal partnership.

A few judges were, however, prepared to recognize that individualistic legal structures may mask situations where couples in substance are engaged in joint production of income.<sup>107</sup> By declaring such couples to be partners, these courts granted tax relief to the higher earner, by allowing the wife to be taxed for some of the business profits. Unlike the corporate travel cases, however, this relief went beyond purely symbolic recognition to extend all the legal rights and obligations of partnership to the spouse.

*B. Beyond Tax Law: Other Legal and Policy Issues Raised By UML*

Beyond tax law, there are a host of other regulatory fields that could be analyzed from the perspective of unpaid market workers. One area of obvious relevance is family law. The evolution of Canadian rules regarding property division at divorce shows that the valuation and compensation of UML may present a difficult question upon the dissolution of the marriage. The issue is whether it should be treated any differently than contributions of unpaid domestic labor for this purpose.

Provincial legislative reforms since the 1980s have generally mandated equal sharing of all wealth accumulated during marriage, without regard to how the spouses shared market and family labor.<sup>108</sup> Interestingly, these reforms were spurred in part by public outrage over cases such as *Murdoch v. Murdoch*,<sup>109</sup> in which a former wife failed to win a share of ranching lands after many years of doing ranch chores in addition to domestic labor.<sup>110</sup> The majority decision of the Supreme Court of Canada found no grounds for relief based on property or trust law principles, as Mrs. Murdoch had merely provided “the work done by any ranch wife.”<sup>111</sup>

Just as provincial legislatures began enacting post-divorce property sharing regimes, the Supreme Court of Canada also revised its approach in a famous trilogy of cases that established doctrines of resulting trust, unjust enrichment, and constructive trust that delivered property rights more readily to unpaid spouses at the end of a relationship.<sup>112</sup> And, unlike the new provincial legislative remedies, which were available only to legally married couples, these equitable doctrines extended to common law cohabitants. The plaintiffs in all three groundbreaking cases were women who had done copious UML for

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107. See generally *Wessell v. M.N.R.*, [1985] 1 C.T.C. 2192 (Can. Tax Ct.) (Can) and discussion, *supra* Part I.A.2.b.

108. See JULIEN D. PAYNE & MARILYN A. PAYNE, CANADIAN FAMILY LAW 444-46 (Irwin Law, Inc. 2d ed. 2006) for a basic description of Canadian matrimonial property law.

109. *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 (Can.).

110. *Id.*; also see Mary Jane Mossman, “Running Hard to Stand Still”: *The Paradox of Family Law Reform*, 17 DALHOUSIE L.J. 5, 13-15 (1994) for a discussion of the impact of the *Murdoch* case on legislative reforms in the area of matrimonial property.

111. *Murdoch*, [1975] 1 S.C.R. at 425.

112. See generally *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (Can.); *Pettkus v. Becker*, [1980] 2 S.C.R. 834 (Can.); *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (Can.).

their ex-common law partner's business or farm, in addition to unpaid domestic work.<sup>113</sup> These cases are all the more significant because it was initially unclear that such claims could even be based on housework alone.<sup>114</sup>

The court articulated three requirements to establish unjust enrichment, the central doctrine that emerged from the trilogy: (1) an enrichment; (2) a corresponding deprivation; and (3) no juristic reason for the enrichment and deprivation.<sup>115</sup> In *Sorochan v. Sorochan*, the Court reasoned that "the full-time devotion of one's labour and earnings without compensation..." met the first two of these requirements.<sup>116</sup> The third was also met because Mary Sorochan was under no contractual or other legal obligation to perform farm work.<sup>117</sup> In addition, she had a reasonable expectation of being compensated in the future for her labor, and her former common law partner knew, or reasonably should have known, of this expectation.<sup>118</sup> By way of remedy, the Court declared that a portion of the lands were held in a constructive trust for the plaintiff, because there was "a clear link" between her labor and the maintenance of the farm property, and because her contribution was "sufficiently substantial and direct" to justify an award *in rem*.<sup>119</sup> In cases with a less clear relationship to specific property, the Court indicated that a monetary award would be the more appropriate remedy.<sup>120</sup> These cases suggested an emerging distinction between UML and unpaid domestic work, with the former seeming to provide better evidence of unjust enrichment, and a clearer property linkage for purposes of the (potentially more lucrative) constructive trust remedy.<sup>121</sup>

After this trilogy of cases was decided, the distinction was highlighted when some lower courts refused to grant remedies based on unpaid domestic work alone.<sup>122</sup> In *Peter v. Beblow*, however, the Supreme Court of Canada clarified this issue by holding that domestic services by themselves could form the basis of a claim in unjust enrichment, along with a remedy of constructive trust in the home maintained through these services.<sup>123</sup> This 1993 case appeared to eliminate the distinction between UML and unpaid domestic work, bringing

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113. *Sorochan*, [1986] 2 S.C.R. 38; *Pettkus*, [1980] 2 S.C.R. 834; *Rathwell*, [1978] 2 S.C.R. 436.

114. See discussion *infra* Part I.B.

115. *Sorochan*, [1986] 2 S.C.R. at 43.

116. *Id.* at 45.

117. *Id.* at 46.

118. *Id.*

119. *Id.* at 48.

120. *Id.* at 50.

121. Mossman, *supra* note 110, at 15-16.

122. See Mary Jane Mossman, *Equity and "Family" Relationships: Cohabitation and Constructive Trusts*, in *The Law of Trusts: A Contextual Approach* (Mark R. Gillen & Faye Woodman eds.) (forthcoming 2006) (manuscript at 13-14, on file with author); Marcia Neave, *Living Together - The Legal Effects of the Sexual Division of Labour in Four Common Law Countries*, 17 *MONASH U. L. REV.* 45, 46-50 (1991).

123. *Peter v. Beblow*, [1993] 1 S.C.R. 980 (Can.).

the property division rules for common law couples into closer alignment with the legislative presumption of equal wealth sharing that applied to married couples.

Yet the issue has resurfaced since 2002, when the Supreme Court of Canada rejected a constitutional challenge to the exclusion of common law couples from the property division schemes under provincial family law legislation.<sup>124</sup> In *Nova Scotia Attorney General v. Walsh*, the Court held that these schemes did not violate constitutional rights to equality because common law cohabitants had made a choice not to enter legal marriage, and because they could still utilize trust principles to obtain a share of property in appropriate cases.<sup>125</sup> Following this decision, the courts seem to have retreated from unjust enrichment principles, with some courts requiring more evidence of an extraordinary contribution beyond normal domestic responsibilities, or preferring monetary awards over constructive trusts.<sup>126</sup> These recent developments again raise the question of whether an ex-partner who has done UML has, or should have, a stronger claim to property at separation than one who has done unpaid domestic work alone.

This question is most relevant to common law couples in Canada but can also affect those leaving a marriage.<sup>127</sup> A recent example in *Fox v. Fox*, where the court granted the plaintiff a constructive trust in an estate recovered from her ex-husband's mother.<sup>128</sup> The plaintiff was a legal secretary who worked without pay in her husband's law firm, and dedicated many hours to helping with the estate litigation against her mother-in-law.<sup>129</sup> This UML established the necessary direct link to the asset in dispute, which was otherwise excluded from property division under provincial family law legislation.<sup>130</sup>

In addition to family law, various aspects of employment and corporate law should also be scrutinized with regard to their impact on unpaid market workers. For example, how should contributions of UML affect the distribution of governance and ownership rights in family-controlled corporations? What, if any, protections should the law afford to those who participate actively in a business but have no legal status as directors, officers, employees or shareholders? One empirical study of the role of women in family businesses in the U.S. concluded:

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124. *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 328 (Can.).

125. *Id.* at 326-27.

126. Mossman, *supra* note 122, at 8-10.

127. Those ending a legal marriage are entitled under provincial family law legislation to a division of property accumulated during the marriage. However, some claimants have sought to augment their statutory rights with an additional claim in constructive trust.

128. *Fox v. Fox*, No. 02-FP-274489FIS, [2006] O.J. No. 2524 ¶2 (Can.), available at [http://www.ucc.ie/law/restitution/archive/canacases/fox\\_v\\_fox.htm](http://www.ucc.ie/law/restitution/archive/canacases/fox_v_fox.htm).

129. *Id.* at ¶¶ 17-19.

130. *Id.* at ¶¶ 31-33.

One of the implications for practice is the need for family business professionals to encourage their clients to compensate wives adequately and recognize their contributions to family businesses. The lack of compensation, or pay at below-market wages, limits wives in business-owning families in the amount they can contribute to Social Security and to privately owned retirement funds . . . [o]ver the long term, this practice can jeopardize the financial security of these women . . . . Although women are a prominent force in family firms, they are not always included in the business's decision-making process. Professionals working with business-owning families need to encourage women to participate as equal partners and support those who do.<sup>131</sup>

For lawyers, this passage raises questions about professional responsibilities involved in joint representation of family members involved in a business enterprise. When do such obligations arise toward individuals who are not perceived as the lawyer's client, because of their unpaid or otherwise informal status?<sup>132</sup>

Further issues could be identified in the areas of employment, labor and human rights law. Should an employer have any legal duties toward a spouse who participates in business travel and socializing, for example to provide a working environment free of harassment and discrimination? Do women, gay men, or singles encounter glass ceilings, pay differentials, or other employment inequities because they do not have, or are assumed not to have, partners who will provide UML to advance an employer's interests? Policies related to the growing ranks of the self-employed should also be analyzed from the perspective of unpaid market workers. Are patterns of gender and racial inequality in self-employment fuelled in part by unequal access to UML? Are the lending policies of financial institutions or micro-credit organizations fair towards unpaid family members who are involved in a business? Should government self-employment programs include more training and supports for those who will assist the 'entrepreneur,' including advice about their legal status and rights? For example, Marian Binkley observed that income security and retraining programs designed to assist those impacted by the economic collapse of fisheries on the Canadian east coast were delivered only to licensed fishers, overwhelmingly men.<sup>133</sup> They provided nothing to the wives who had been intimately involved in operating the family fishing business as shore crew

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131. Barbara R. Rowe & Gong-Soog Hong, *The Role of Wives in Family Businesses: The Paid and Unpaid Work of Women*, 13 FAM. BUS. REV. 1, 11 (2000).

132. See Alysia C. Rollock, *Professional Responsibility and the Organization of the Family Business: The Lawyer as Intermediary*, 73 IND. L.J. 567 (1998).

133. MARIAN BINKLEY, SET ADRIFT: FISHING FAMILIES 10-11 (University of Toronto Press 2002).

or managers, failing to recognize the contributions and the economic losses of unpaid family members.<sup>134</sup>

Asking these and similar questions, and developing answers to them, will require both empirical knowledge and normative judgments about the relationship between UML and gendered economic inequalities.

## II. EMPIRICAL QUESTIONS

The general lack of attention to UML in both feminist and mainstream legal scholarship may be explained in part by the assumption that this form of economic activity is largely obsolete in industrialized countries.<sup>135</sup> Among political economists, household or kin-based production is associated with earlier periods of Western history, before industrial capitalism split waged work in the market from unwaged work in the household.<sup>136</sup> In modern times, it has been studied mainly in the context of poorer countries with large informal and subsistence economies, for example in the gender and development literature.<sup>137</sup> In the industrialized world, such practices are perceived as a relic that survives only in particular sectors such as agriculture or high-level professional politics. Other researchers may see UML as a vestige of the family wage ideal, of declining relevance as women increasingly take on waged work or self-employment of their own, with some gaining access to the higher tiers of the labor market.<sup>138</sup> For example, two decades ago, Hillary Callan observed that employers could no longer “unreflectingly count on a wife’s willingness to provide unpaid and unrecognized services . . . “ in the United Kingdom.<sup>139</sup>

134. *Id.*

135. See Susan Baines, *New Technologies and Old Ways of Working in the Home of the Self-Employed Teleworker*, 17 *NEW TECH. WORK AND EMP.* 89, 91 (2002) for a similar observation (“Home and work as separate spheres . . . underpin most accounts of productive work and the household in capitalist societies . . . For the most part empirical facts which did not correspond to the model of differentiation (e.g. household based production, family firms) were overlooked or seen as part of the past and due to disappear . . .”); see also SARAH WHATMORE, *FARMING WOMEN: GENDER, WORK AND FAMILY ENTERPRISE* 1-4 (MacMillan 1991) (arguing that both Marxist and feminist analyses of family enterprise in advanced capitalist economies have rendered women’s informal contributions invisible because they “cannot readily be understood through the orthodox categories of either housewife or wage labourer . . .”).

136. See generally ANTONELLA PICCHIO, *SOCIAL REPRODUCTION: THE POLITICAL ECONOMY OF THE LABOUR MARKET* (Cambridge University Press 1992).

137. See, e.g., Lourdes Benería, *Accounting for Women’s Work*, in *WOMEN AND DEVELOPMENT: THE SEXUAL DIVISION OF LABOR IN RURAL SOCIETIES* 119, 131-32 (Lourdes Benería ed., Praeger Publishers 1982); LOURDES BENERÍA, *GENDER, DEV., AND GLOBALIZATION: ECON. AS IF ALL PEOPLE MATTERED* 108-16, 134-36 (Routledge 2003).

138. See Benería (2003) *supra* note 137 at 121-24; see generally KAREN D. HUGHES, *FEMALE ENTERPRISE IN THE NEW ECON.* (University of Toronto Press 2005); Sylvia Walby, *The Restructuring of the Gendered Political Economy: Transformations in Women’s Employment*, in *TOWARDS GENDERED POL. ECON.* 165-70 (Joanne Cook, et al., eds., 2000).

139. *THE INCORPORATED WIFE* 4 (Hilary Callan & Shirley Ardener eds., Croom Helm 1984).

Empirical assumptions about UML should be scrutinized. The common practice of assuming this issue out of existence may simply reflect a conceptual blind spot, an erasure of social practices that do not map neatly onto the market/family dichotomies that structure modern legal and policy analysis. This Part reviews a range of empirical sources with the aim of constructing a more complete picture of the role of UML in economies such as that of Canada, the United States, and Britain. Although I find that quantitative data from Canada is of limited use because the research methodologies have been informed by the very assumptions just mentioned, a close analysis of published and unpublished statistics suggests some notable patterns and trends. Qualitative studies prove even more fruitful, and present a strong challenge to the assumption that UML is marginal or disappearing.<sup>140</sup>

#### A. How Much Unpaid Market Work?

Canadian statistics provide a good example of how UML is rendered largely invisible by existing taxonomies of social research. Statistics Canada (“Stats Can”) has a strong record as a progressive innovator in the collection of data on unpaid work.<sup>141</sup> However, these efforts have focused largely on caregiving, housekeeping, and other traditional forms of domestic work. Stats Can has not articulated a discrete category of labor force participation that corresponds to UML as defined in this paper. I argue that as a result, UML is significantly underreported or absent within statistics on either unpaid domestic or paid market activities.

Canadian labor force surveys do capture some of the more stereotypical instances of UML through the category of “unpaid family workers”, defined as individuals who do “unpaid work contributing directly to the operation of a farm, business or professional practice owned and operated by a related member of the same household.”<sup>142</sup> The decision to include these individuals as members of the working class for purposes of labor force statistics is significant because other forms of unpaid labor, namely unpaid housework and volunteer work, are specifically excluded. Singling out unpaid family workers implies that their activities are conceptually distinct from domestic and volunteer work, and are affiliated more closely with the labor market.

Despite their inclusion for data collection purposes, little can be learned about unpaid family workers from published reports. These tend either to exclude data on unpaid family workers entirely or to aggregate it with other

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140. See discussion *infra* Section II.B.

141. See Chris Jackson, *The Valuation of Unpaid Work at Statistics Can.*, 2 FEMINIST ECON. 145, 146-47 (1996); Meg Luxton & Leah Vosko, *Where Women’s Efforts Count: The 1996 Census Campaign and “Family Politics” in Can.*, 56 STUDIES IN POL. ECON. 49, 53-66 (1998).

142. STATISTICS CANADA, *GUIDE TO THE LABOUR FORCE SURVEY 5* (2004), <http://www.statcan.ca/english/freepub/71-543-GIE/71-543-GIE2007001.pdf>.

groups. For example, monthly reports do not provide separate data for unpaid family workers but instead include them as part of the “self-employed” class.<sup>143</sup>

Conversely, a study of self-employment patterns among recent graduates explains that unpaid family workers were excluded because they have “only very marginal attachment to the labour force.”<sup>144</sup> This ambivalence is echoed in an Organisation for Economic Co-operation and Development (OECD) study on self-employment which argues that, by international standards, unpaid family workers “are not entrepreneurs, but rather the assistants of entrepreneurs.”<sup>145</sup> The study acknowledges that this omission likely results in underreporting of women’s entrepreneurship as some unpaid family workers “might better be treated as equal partners with the self-employed person who is in formal charge of the business . . . .”<sup>146</sup> Their exclusion is nonetheless rationalized on the basis that outside the agricultural sector the number of unpaid family workers is very small.<sup>147</sup> However, I argue below that the low numbers discovered through statistical methods must be viewed skeptically given that survey instruments are not yet well designed to capture this role across different economic sectors.

Despite these caveats, the data on unpaid family workers is worth a closer look as one of the only sources of direct information about UML in Canada. The total number of unpaid family workers (as defined by Stats Can) has always been relatively small and has declined steadily over the last few decades. They comprised 1.4% of total employment in 1976, dropping to .77% by 1987 and to .23% by 2003.<sup>148</sup> Historically, unpaid family workers have been concentrated heavily in agriculture where they represented a full 30% of the labor force in 1946, but only about 7% by 1997.<sup>149</sup> Over the same period, paid workers increased their share of agricultural employment from 12% to 42%.<sup>150</sup>

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143. STATISTICS CANADA, LABOUR FORCE INFORMATION 14, Table 2, n.2 (2004), <http://www.statcan.ca/english/freepub/71-001-XIE/0110471-001-XIE.pdf>.

144. ROSS FINNIE, CHRISTINE LAPORTE, & MAUD-CATHERINE RIVARD, SETTING UP SHOP: SELF-EMPLOYMENT AMONGST CANADIAN COLLEGE AND UNIVERSITY GRADUATES 4 (2002) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=316842](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=316842) (follow “Download the document from: Social Science Research Network” hyperlink).

145. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), EMPLOYMENT OUTLOOK 156, <http://www.oecd.org/dataoecd/10/44/2079593.pdf> (last visited Mar. 27, 2008).

146. *Id.*

147. *Id.*

148. JUDY FUDGE, ERIC TUCKER, & LEAH F. VOSKO, THE LEGAL CONCEPT OF EMPLOYMENT: MARGINALIZING WORKERS, REPORT FOR THE LAW COMMISSION OF CANADA 15 (2002), [http://www.atkinson.yorku.ca/ace/publications/Law\\_Commission\\_of\\_Canada.pdf](http://www.atkinson.yorku.ca/ace/publications/Law_Commission_of_Canada.pdf); STATISTICS CANADA, LABOUR FORCE SURVEY (2003) (custom tabulation).

149. Sylvain Cloutier, *Working Time: How Do Farmers Juggle With It and How Has It Impacted Their Family Total Income* 3 (Statistics Can., Agriculture Division, Agriculture and Rural Working Paper Series, Paper No. 51, 2001), available at <http://ageconsearch.umn.edu/bitstream/123456789/7409/1/wp010051.pdf>.

150. *Id.*

At the same time, as the total number of unpaid family workers has shrunk, they have also shifted from agriculture to service industries. In 1987, 66% of unpaid family workers were agricultural and only 26% were in service industries.<sup>151</sup> By 2003, the proportions were almost equal at 47% agricultural and 45% service jobs.<sup>152</sup>

The reasons for this trend toward a smaller and more services-oriented pool of unpaid family workers likely relate to broader economic shifts, including women's growing participation in paid work including self-employment. Cloutier notes that the dramatic decline in agricultural unpaid family workers occurred in a period when the total agricultural labor force shrunk by about two-thirds, when farming families declined in size, and when family members, including women, had an increasing propensity to seek opportunities off of the farm.<sup>153</sup> The same report also speculates that "both children and spouses may now be paid a wage whereas they were truly 'unpaid family workers' decades ago."<sup>154</sup> It is also possible (though difficult to verify) that family members are more often obtaining formal status as co-owners or partners in business enterprises, in light of rising awareness of women's legal status, as well as professional advice about how to split income for tax purposes. The growing ranks of the self-employed may also include some individuals who previously were classified as unpaid family workers. Once an individual becomes formally employed or self-employed, they are far less likely to be classified for statistical purposes as an "unpaid family worker."<sup>155</sup> However, as discussed below, it should not be assumed that such individuals cease to help out in the family farm or other business as a second (or third) shift of unpaid work.

The stereotypical assumption is that unpaid family workers are predominantly married women helping out their husbands, and indeed close to 2/3 were women in 2003.<sup>156</sup> However, this global figure hides a very different gender dynamic among younger workers. Men comprised 2/3 (65.9%) of unpaid family workers 15-24 years old, the youngest group surveyed.<sup>157</sup> Equally striking is that more than 1/3 (34.6%) of all unpaid family workers were in this age group, though they made up only 15.6% of the total employed population in 2003.<sup>158</sup> The overrepresentation of 15-24 year olds highlights the

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151. STATISTICS CANADA, LABOUR FORCE SURVEY (1987) (custom tabulation).

152. STATISTICS CANADA, LABOUR FORCE SURVEY (2003) (custom tabulation)

153. Cloutier, *supra* note 149, at 3-4.

154. *Id.* at 4.

155. See *infra* text accompanying notes 161-63 for discussion of how data collection focuses on an individual's "main job" criterion.

156. STATISTICS CANADA, LABOUR FORCE SURVEY (2003) (custom tabulation) More precisely, 62.6% of all unpaid family workers were women.

157. *Id.*

158. *Id.*; STATISTICS CANADA, SUMMARY TABLES: FULL-TIME AND PART-TIME EMPLOYMENT BY SEX AND AGE GROUP,

need for data on UML by younger teenagers and children. Among workers 25 years and older, about 78% were women.<sup>159</sup> This hints at a pattern whereby young men are more likely than young women to serve as unpaid family workers in parentally owned businesses, but then move into paid work by their mid-twenties, whereas after age twenty four more women are taking up unpaid family work, possibly to assist a spouse. Finally, because almost 3/4 (73.7%) of unpaid family workers had a spouse, the other 1/4 must be helping out in businesses owned by parents or other relatives.<sup>160</sup>

While this data may be demographically interesting, it should not be misinterpreted as establishing that unpaid family workers are a dying breed, and by implication that UML is an outmoded practice, restricted to a few traditional family farms and mom and pop service providers. Instead, there is good reason to believe that most of the UML being provided to market enterprises remains invisible in the labor force statistics. The definition of "unpaid family worker" refers to those who help out in a business, farm or professional practice owned by a relative with whom they live.<sup>161</sup> Thus, it addresses self-employment situations only and excludes work done to assist a family member with employment duties (e.g. a corporate manager, a member of the clergy, a teacher). Furthermore, the definition is restricted to members of the same household, excluding relatives who live separately but assist in the family business, which biases the data against those who participate in extended family networks. In addition, the data includes only those aged 15 and over, excluding UML provided by younger teenagers and children.<sup>162</sup> Most importantly, the category includes only those who identify being an unpaid family worker as their "main job", meaning the job or business at which they work the greatest number of hours in a typical week.<sup>163</sup>

The "main job" criterion tends to exclude those who help out in the family business on top of their own employment, or intermittently with particular tasks or busy periods (e.g. the annual trade convention, harvest or holiday season rush, or sporadic business entertaining). Given the breakdown of standard employment relationships and the family wage, it is not surprising to find that the number of main-job unpaid family workers has declined rapidly over the last three decades.<sup>164</sup> Yet it cannot be assumed that upon entering the paid workforce individuals are thereby relieved of doing unpaid work in a family

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<http://www40.statcan.ca/l01/cst01/labor12.htm?sdi=full%20time%20part%20time%20employment%20sex%20age%20group> (last visited Mar. 27, 2008).

159. STATISTICS CANADA, LABOUR FORCE SURVEY (2003) (custom tabulation).

160. Class of Worker By Family Variables, PE LFS P-19, Gender and Work Database, York University, available at <http://www.genderwork.ca> (last visited Mar. 26, 2007) (using data from STATISTICS CANADA, LABOUR FORCE SURVEY (1997-2001)).

161. See *supra* note 148 and accompanying text.

162. STATISTICS CANADA, GUIDE TO THE LABOUR FORCE SURVEY 18 (2004), <http://www.statcan.ca/english/freepub/71-543-GIE/71-543-GIE2004001.pdf>.

163. *Id.* at 11.

164. See *supra* note 154 and accompanying text.

business. Despite their increased participation in paid labor women still carry the bulk of responsibility for housework and caregiving, and there is no reason to believe UML is any different.<sup>165</sup> However, getting a paid job does affect how a person manages and understands their unpaid responsibilities. Individuals earning a market wage, even part-time, may be reluctant to identify their “main job” as providing unpaid assistance to the family business, though they may be contributing significant hours and skills to the business either regularly or at certain busy times. Just as a survey of full-time “housewives” would not capture the full picture of women’s unpaid domestic work, so the data on unpaid family workers is a less and less meaningful indicator of the UML that is contributed to production processes.<sup>166</sup>

The International Labour Organization has attempted to address the issue of part-time UML in its classification scheme for collecting labor force data. In 1994 it changed the category of “unpaid family worker” to “contributing family worker” to capture those who assist in the business but do not have the same *degree of commitment* (e.g. in terms of working hours) to it as the head of the establishment, and expanded the category “own account worker” to include those unpaid family members whose commitment parallels that of the head of household.<sup>167</sup> These classifications more accurately recognize variable degrees of involvement in family enterprise, though they may not capture relations of power and control that are reflected in legal ownership structures.

Returning to Canada’s labor force data, a final concern is that it likely underestimates the number of unpaid family workers in Canada due to self-reporting errors by respondents and weaknesses in the interview questionnaire. These weaknesses are easy to identify but harder to fix as they go to the heart of the conceptual ambivalence surrounding UML. Despite the public policy arguments that can be made for investigating UML as a distinct class of labor, at the level of particular tasks it can be difficult to define. Tasks done to assist the business may be of a similar kind to everyday household work, such as preparing and serving a meal to which business associates are invited, taking telephone messages at home that relate to the business, or cleaning and organizing a home office. Where the paid worker operates out of or close to the family’s residential space, it will be especially hard for other family members

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165. For example, Canadian time use data gathered in 2005 indicate that women on average spent 4.2 hours per day on unpaid work including housework and child care, compared to an average of 2.7 hours per day for men. STATISTICS CANADA, OVERVIEW OF THE TIME USE OF CANADIANS 5 (2006), <http://www.statcan.ca/english/freepub/12F0080XIE/12F0080XIE2006001.pdf>.

166. One economist has made similar criticisms of the United States data relating to unpaid agricultural labor of farm wives because it tended to exclude part-time and seasonal work, and counted only the job where individuals worked the most hours, often their paid job. See Wallace E. Huffman, *The Value of Productive Time of Farm Wives: Iowa, North Carolina, and Oklahoma*, 58 AM. J. AGRIC. ECON. 836, 837 (1976).

167. INT’L LABOUR ORGANIZATION, INT’L CLASSIFICATION OF STATUS IN EMPLOYMENT 3 ¶¶ 10, 12 (2004), <http://www.ilo.org/public/english/bureau/stat/class/icse.htm>.

to avoid being incorporated into the business process, and to separate that work from unpaid domestic chores.<sup>168</sup> Characterization is also difficult for social and emotional support tasks such as attending work related social functions, informal networking or advertising, and acting as a ‘sounding board’ and informal advisor. These sorts of activities are prone to being discounted as purely leisure or personal time by survey respondents.<sup>169</sup> In developing its census questions on unpaid work, Stats Can found that “many people could not associate the word ‘work’ with some of their child care, volunteer or other caregiving activities where they found these activities to be intrinsically pleasurable.”<sup>170</sup> Especially if the respondent has a paid job, it seems unlikely that the social and emotional labor required to support a family entrepreneur will be counted as hours devoted to another job as an unpaid family worker. Certainly the interview questions used to collect labor force information do nothing to encourage respondents to consider their unpaid activities in this light.

The interview questionnaire does not actually refer to “unpaid family workers”, but rather requires the interviewer to infer that a particular individual fits this category based on the respondent’s answers to a series of questions. The interview begins by asking each family member being surveyed whether she or he “work[ed] at a job or business” in the reference week.<sup>171</sup> For persons who did work at a job or business, the interviewer then asks whether they were “employed or self-employed”.<sup>172</sup> Significantly, the option of being an unpaid family worker is not explicitly presented to the respondent. Thus, in order to be categorized as an unpaid family worker with this survey, the respondent must have an extraordinarily high consciousness about the productive value of UML to the business, and must also be prepared to characterize it as a form of employment or self-employment, which, legally, it is not. Only if a household member has been identified as working during the reference week in employment or self-employment is the interviewer prompted to inquire about the number of hours worked either with or without pay.<sup>173</sup> These questions seem ill designed to identify all unpaid family workers, even as defined narrowly by Stats Can.

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168. JANET FINCH, *MARRIED TO THE JOB: WIVES’ INCORPORATION IN MEN’S WORK* 53-67 (George Allen & Unwin, 1983).

169. Nancy Zukewich, *Using Time Use Data to Measure and Value Unpaid Caregiving Work* (November 18, 2002) (unpublished M.A. thesis, Carleton University) (on file with author).

170. IAN MACREDIE & DALE SEWELL, *STATISTICS CANADA’S MEASUREMENT AND VALUATION OF UNPAID WORK* 8 (1998), <http://www.statcan.ca/english/research/71F0023XIE/71F0023XIE1999001.pdf>.

171. STATISTICS CANADA, *GUIDE TO THE LABOUR FORCE SURVEY 32* (2004), Question 100, <http://www.statcan.ca/english/freepub/71-543-GIE/71-543-GIE2004001.pdf>.

172. *Id.* at Question 110.

173. *Id.* at 32-33, Questions 150-156.

Time use surveys are another source of quantitative data that could potentially overcome some of the deficits in labor force data. The questionnaire used by Stats Can for this purpose allows respondents to report any time spent on one type of UML, “unpaid work in a family business or farm”, whether it is done full or part-time, as a main job or as a second shift.<sup>174</sup> Only 1.3% of participants reported time spent on this activity, but this is noticeably higher than the number captured by the labor force surveys (.23%, as noted above).<sup>175</sup> Intriguingly, the figures were higher overall for men (1.5%) than for women (1.1%), suggesting that while women are more likely to do UML as their main job, men may be more likely to do it part-time.<sup>176</sup> Finally, the time use survey confirms that UML is often done part-time, as 92% of those doing unpaid work in a family business or farm also engaged in paid work.<sup>177</sup>

This time use data slightly enriches the empirical picture, but it likely still understates the quantity of UML contributed to the Canadian economy. Like the labor force data, it does not count anyone under the age of 15.<sup>178</sup> Perhaps most importantly, it excludes assistance provided to employees who comprise the vast bulk of market workers. A subsequent study of this data found that some respondents used a catch all category called “other help and care” to report a wide variety of miscellaneous tasks, including, for example, “helping husband grade his student’s exam papers.”<sup>179</sup> At least some of these deficits could be addressed in the survey by listing more categories of UML for respondents to include in their self-reported time use diaries. In addition, the interview that is done to supplement self-reporting could include some questions designed to elicit information about UML.<sup>180</sup>

### *B. What Kinds of Work and Who Does It?*

Whereas statistical sources tend to minimize the presence of UML, case studies of business and employment practices in countries such as the U.S., Canada, Australia and England paint a different picture. The qualitative literature discussed in this section has documented a great variety of ways in which breadwinners do incorporate family members into their jobs, across

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174. STATISTICS CANADA, GENERAL SOCIAL SURVEY: TIME USE SURVEY USER’S GUIDE H-3 (1998).

175. Participation in Unpaid Work 1998, UPW GSS12 A-1, Gender and Work Database, York University, available at, <http://www.genderwork.ca> (last visited Dec. 17, 2007). (using data from STATISTICS CANADA, GENERAL SOCIAL SURVEY (1998). The average time spent on this activity was 3.4 hours per day. Note, however, that the time use survey is based on a much smaller sample than the labor force. surveys.

176. *Id.*

177. STATISTICS CANADA, GENERAL SOCIAL SURVEY, 1998 (custom tabulation).

178. STATISTICS CANADA, OVERVIEW OF THE TIME USE OF CANADIANS IN 1998, 4 (1999), <http://www.statcan.ca/english/freepub/12F0080XIE/12F0080XIE1999001.pdf>.

179. Zukewich, *supra* note 169, 47-48.

180. STATISTICS CANADA, GENERAL SOCIAL SURVEY: TIME USE SURVEY USER’S GUIDE App. B (1998).

socio-economic classes. Because the studies have been done in diverse occupational and geographic contexts, they do not provide a basis for broad generalizations. However, I argue that together they suggest that informal work has a significant place even in the most advanced capitalist economies. Interestingly, recent studies hint that far from going out of fashion, some forms of family co-production have become more important as a consequence of changes associated with global economic integration.<sup>181</sup>

Several different strands of sociological literature are relevant. One examines the role played by wives of corporate and public sector managers. For example, Kanter identified four types of direct job support performed by American corporate wives in the 1970s: (i) “[d]irect substitution”, in which she does work that could be done by a paid employee (e.g. clerical work, deliveries); (ii) “[i]ndirect support”, including social hosting, that deploys relationship building skills; (iii) “[c]onsulting”, that is listening, advising, and helping the employee with judgment calls and decisions; and (iv) “[e]motional aid”, providing encouragement and moral support related to job challenges.<sup>182</sup> Kanter also found that in hiring decisions corporate employers considered what a candidate’s wife could bring to the organization.<sup>183</sup> Her description of this role underlines the commercial value of what feminist economist Nancy Folbre has termed “emotional labor”, that is the work of nurturing and mediating human relationships that is often construed simply as part of women’s care giving function in the family.<sup>184</sup> What Kanter’s work highlights is that some of this “emotional labor” is more closely associated with the market, assisting employees directly with job duties and helping firms to advance business objectives. Accordingly, one sociologist described the job of a middle class manager as a “two-person career”, because of its implicit requirement for a wife’s active involvement.<sup>185</sup>

The value of wives’ relationship skills to an organization can also be captured by the more recently developed concept of “social capital”, that is “the idea that markets are interlinked with social networks that facilitate business transactions.”<sup>186</sup> Social capital has been defined more formally as “resources embedded in social relations and social structure, which can be mobilized when an actor wishes to increase the likelihood of success in a purposive action.”<sup>187</sup>

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181. See *infra* notes 198-201, 208-16 and accompanying text.

182. ROSABETH MOSS KANTER, *MEN & WOMEN OF THE CORPORATION* 110-11 (Basic Books, Inc. 1977).

183. *Id.* at 116.

184. NANCY FOLBRE, *WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT* 37 (Routledge 1994).

185. Hanna Papanek, *Men, women and work: reflections on the two-person career*, 78 *AM. J. OF SOC.* 852 (1973).

186. ANURADHA BASU AND ESER ALTINAY, *FAMILY AND WORK IN MINORITY ETHNIC BUSINESSES* 7 (The Policy Press 2003).

187. NAN LIN, *SOCIAL CAPITAL: A THEORY OF SOCIAL STRUCTURE AND ACTION* 24 (Cambridge University Press 2001).

The benefits of social capital to a private enterprise or public institution include the ability to get information about potential markets, employees, or financing, to promote loyalty and commitment among staff and customers, and generally to transact business on a basis of trust and mutual understanding.<sup>188</sup> This description of social capital resonates with another 1970s study in which corporate wives were presented as part of the moral infrastructure of corporate capitalism, signaling who could be trusted to exercise management authority.<sup>189</sup> One concrete indicator of the value of a firm's social capital is the amount attributed to "goodwill" on its balance sheet, reflecting intangible assets such as reputation and customer loyalty.<sup>190</sup> To the extent that spouses provide emotional labor that enhances these assets, they contribute directly to the bottom line of a market enterprise.

Two English books published in the 1980s demonstrated that the informal work of wives was not limited to the executive suite of large organizations, but was at play in many types and levels of employment, including, for example, diplomatic careers, self-employed professionals, mining engineers, members of the military, academics, and clergy.<sup>191</sup> One book identified five occupational factors that made it more likely for wives to become actively involved in their husbands' jobs:<sup>192</sup>

1. home based work
2. work that entails being a public figure

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188. *Id.* at 19-20; ANN C. SVENDSEN ET AL., STAKEHOLDER RELATIONSHIPS, SOCIAL CAPITAL AND BUSINESS VALUE CREATION (Canadian Institute of Chartered Accountants 2003); David A. Griffith et al., *The Influence of Individual and Firm Level Social Capital of Marketing Managers in a Firm's Global Network*, 39 J. WORLD BUS. 244-45 (2004); Peter Maskell, *Social Capital, Innovation, and Competitiveness*, in SOCIAL CAPITAL: CRITICAL PERSPECTIVES 111-12 (Baron et al. eds., Oxford University Press 2000); Wengpin Tsai & Sumantra Ghoshal, *Social Capital and Value Creation: The Role of Intrafirm Networks*, 41 ACAD. MGMT. J. 464, 464, 473 (1998).

189. Dorothy Smith, *Women, the Family and Corporate Capitalism*, 20 BERKELEY J. SOC. 55 (1975-76).

190. See, for example, JERRY J. WEYGANDT ET AL., FINANCIAL ACCOUNTING 440 (6th ed. 2005) where "goodwill" is defined as follows: "the value of all favorable attributes that relate to a business enterprise. These include exceptional management, desirable location, good customer relations, skilled employees, high-quality products, and harmonious relations with labor unions."

191. See generally THE INCORPORATED WIFE (Hillary Callan & Shirley Ardener eds., Croom Helm 1984); JANET FINCH, MARRIED TO THE JOB: WIVES' INCORPORATION IN MEN'S WORK (George Allen & Unwin 1983). See also Hillary Callan, *The Premiss of Dedication: Notes Towards an Ethnography of Diplomats' Wives*, in PERCEIVING WOMEN 87 (Shirley Ardener ed., Malaby Press 1975).

192. Finch, *supra* note 191, at 88.

3. work in which it is possible for a wife to accompany her husband at some times (e.g. that involves business travel and social functions)
4. work that involves tasks that look like “women’s work” (this could be interpreted narrowly to mean cooking, physical care, etc., or broadly to include any service industry that requires nurturing of clients or customers)
5. work that is facilitated by having someone that can be contacted in the worker’s absence (e.g. trades and other jobs that require booking of appointments and on-site work)

Some of these factors are likely more prevalent in today’s economy than they were in the 1980s because of the way technology now facilitates home-based work and global economic integration requires more travel by certain types of employees.<sup>193</sup>

More recent studies indicate that the role of full-time or part-time corporate ‘wife’ has not disappeared, despite women’s increasing entry into careers of their own.<sup>194</sup> Indeed, as businesses expand internationally and certain employees are called upon to travel and relocate frequently, it may become even harder to sustain two careers within one family. Some corporate wives assert their role is becoming more, not less, intensive as expectations rise about women’s business knowledge, and as work becomes more geographically mobile.<sup>195</sup>

Family business studies provide another important source of evidence about informal work, covering a wide socio-economic span from large firms to the most marginal micro-enterprises.<sup>196</sup> A common theme across these contexts is the prevalence of family participation. Especially for smaller businesses, access to a flexible supply of both paid and unpaid family labor has been identified as both a typical feature and a key comparative advantage.<sup>197</sup> As in

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193. See Baines, *supra* note 135; Iain Black & Suzanne Jamieson, *Up, Up and Fading Away: The Work and Family Life of Executive International Travellers*, 5:2 POLICY & PRACTICE IN HEALTH & SAFETY 63 (2007).

194. See ANNE KINGSTON, *THE MEANING OF WIFE* (HarperCollins Publishers Ltd. 2004) (Harper Collins Publishers Inc., 2004), at 245-266; Linda Rhodes, *Partners on the Periphery: Personal Ambiguity and Unpaid Labour in the Australian Mining Industry*, 76 J. AUSTL. STUD. 149 (2003); Konrad Yakabuski, *A Beautiful Machine*, REPORT ON BUSINESS 50 (September 2003).

195. Betsy Morris, *It’s Her Job Too*, FORTUNE, Feb. 2, 1998, at 64.

196. The studies reviewed in the balance of this section are drawn from several literatures, including work on family business practices in particular ethnic and immigrant communities and farming families.

197. See, e.g., BASU & ALTINAY, *supra* note 186, at 6; PETER LEACH ET AL., *GUIDE TO THE FAMILY BUSINESS* 6-7, (Thomson Canada 2003); Kwang Chung Kim & Won Moo Hurh, *The Burden of Double Roles: Korean Wives in the USA*, 11 ETHNIC & RACIAL STUD. 151,

the case of corporate wives, this literature often points to women's emotional labor or social capital as a central element of their contribution to the business. For example, one study identified wives as the "touchstone of emotional intelligence" and the "ambassador[s] of goodwill" in such firms, even where they lacked formal ownership or employment status.<sup>198</sup> They are called upon frequently to mediate inter-generational conflicts relating to the business, facilitate communication, and engage in customer relations work.<sup>199</sup> Such activities are prone to being overlooked as business contributions, and viewed instead as part of a wife's traditional role in the family as confidante, caring listener, good judge of character, and being active in the community.<sup>200</sup> One study concluded that "[t]his unofficial role of women needs to be recognized for the management skill that it is."<sup>201</sup>

Another factor influencing UML is that many industrialized countries have seen rising rates of self-employment since the 1980s.<sup>202</sup> This trend has generally been explained as a product of less secure labor markets, as well as the active efforts that governments have made to promote self-reliance through entrepreneurship.<sup>203</sup> Whatever the causes, the shift away from standard employment relationships to more independent contracting ensures that the home remains an important site of market work: "There was a time when it appeared to many that home-based market-orientated work would inevitably decline in the process of industrialisation. But it is now clear that home-based paid work is being recreated as part of the process of 'delaying' and 'contracting-out' from farms, factories and offices."<sup>204</sup>

This dynamic may also be increasing the demand for UML, as family members are more readily incorporated into home-based work.<sup>205</sup>

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151, 154-55 (1988); Seena B. Kohl, *Women's Participation in the North American Family Farm*, 1 WOMEN'S STUD. INT'L Q. 47, 47, 52-53 (1977); Thomas A. Lyson, *Husband and Wife Work Roles and the Organization and Operation of Family Farms*, J. MARRIAGE & FAM. 759, 759-60 (1985); Monder Ram & Trevor Jones, *Exploring the Connection: Ethnic Minority Business and the Family Enterprise*, in UNDERSTANDING THE SMALL FAMILY BUSINESS 157 (Denise E. Fletcher ed., Routledge 2002).

198. Ernesto J. Poza & Tracey Messer, *Spousal Leadership and Continuity in the Family Firm*, FAM. BUS. REV. 25, 25, 30 (2001).

199. *Id.*; Leach et al, *supra* note 197, at 39-40.

200. Joanne Gillis-Donovan & Carolyn Moynihan-Bradt, *The Power of Invisible Women in the Family Business*, 3 FAM. BUS. REV. 153, 156 (1990).

201. See Matilde Salganicoff, *Women in Family Business: Challenges and Opportunities*, 3 FAM. BUS. REV. 125, 132 (1990). See also Patricia M. Cole, *Women in Family Business*, 10 FAM. BUS. REV. 353 (1997) (finding that women did not always perform the nurturing role stereotypically ascribed to them in family enterprises, but also confirming that when they did do this work it was often invisible or devalued).

202. See KAREN D. HUGHES, *FEMALE ENTERPRISE IN THE NEW ECONOMY* 4-22 (University of Toronto Press 2005); OECD, *supra* note 145 at 155-57.

203. OECD, *supra* note 145 at 155.

204. Diane Elson, *The Economic, the Political and the Domestic: Businesses, States and Households in the Organisation of Production*, 3 NEW POL. ECON. 189, 192 (1998).

205. See *supra* note 198 and accompanying text.

This intuition is substantiated by studies of micro-businesses, which have emphatically noted the importance of informal family support, especially from wives.<sup>206</sup> For example, a review of recent United Kingdom research confirmed that in both urban and rural settings, “husbands and wives characteristically participate together, whether or not they are co-owners or formally employed.”<sup>207</sup> The study emphasized the gendered dynamics of this trend, with women positioned as subordinate participants who often received no formal wage for their labor, or construing the business as ‘his’ even when the spouses were legal co-owners.<sup>208</sup> Likewise, a study of small United Kingdom firms with diverse ethnic minority ownership found that wives were not usually paid for their work.<sup>209</sup> The same pattern emerged in a larger United States study of family business-owning couples, with only 47% of the wives who worked in the business receiving any formal payment.<sup>210</sup> The literature confirms that some women work in the family business as a third shift, on top of their own paid jobs and domestic responsibilities.<sup>211</sup> Alternatively, women may suffer a loss of financial independence when the demands of the family business require them to abandon or seriously compromise their own individual careers.<sup>212</sup> The question also arises whether the growing class of women business owners can draw on this same supply of flexible family labor.<sup>213</sup>

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206. See, e.g., TONY EARDLEY & ANNE CORDON, *LOW INCOME SELF-EMPLOYMENT* 111 (Avebury 1996); RICHARD SCASE & ROBERT GOFFEE, *THE REAL WORLD OF THE SMALL BUSINESS OWNER* 90-96 (Croom Helm 1980).

207. Susan Baines, et al., *A Household-Based Approach to the Small Business Family*, in UNDERSTANDING THE SMALL FAMILY BUSINESS 168, 174 (Denise E. Fletcher ed., Routledge 2002). See also Susan Baines & Jane Wheelock, *Reinventing Traditional Solutions: Job Creation, Gender and the Micro-Business Household*, 12 WORK, EMP. & SOC’Y 579 (1998); Mark Granovetter, *The Economic Sociology of Firms and Entrepreneurs*, in THE ECONOMIC SOCIOLOGY OF IMMIGRATION: ESSAYS ON NETWORKS, ETHNICITY, AND ENTREPRENEURSHIP 128 (Alejandro Portes ed., Russell Sage Foundation 1995); Jane Wheelock & Susan Baines, *Dependency or Self-reliance? The Contradictory Case of Work in UK Small Business Families*, 19 J. FAM. ECON. ISSUES 53 (1998).

208. Baines et al., *supra* note 207. See also Spinder Dhaliwal, *Silent Contributors: Asian Female Entrepreneurs and Women in Business*, 21 WOMEN’S STUD. INT’L F. 463 (1998).

209. Basu & Altinay, *supra* note 186 at 23.

210. Sharon M. Danes & Patricia D. Olson, *Women’s Role Involvement in Family Businesses, Business Tensions, and Business Success*, 16 FAM. BUS. REV. 53, 60 (2003). Another United States study concluded that “wives who were employed by family firms received less than market wages for the number of hours they worked.” Rowe & Hong, *supra* note 131, at 10.

211. Basu & Altinay, *supra* note 186, at 16, 23-24. See also Baines, et al., *supra* note 207; BINKLEY, *supra* note 133, at 33-35; Danes & Olson, *supra* note 210; Rowe & Hong, *supra* note 131.

212. Baines et al., *supra* note 207; SCASE AND GOFFEE, *supra* note 206.

213. MONICA BELCOURT, ET AL., *THE GLASS BOX: WOMEN BUSINESS OWNERS IN CAN.* (Canadian Advisory Council on the Status of Women 1991) (finding that women entrepreneurs identified a lack of support from husbands with their own careers to be a disadvantage). Similarly, an Asian business woman in Britain reported that unlike a typical

Relatives other than spouses appear to have more varied involvement in small firms. A United Kingdom study found that children often provided casual labor in rural businesses, but in contrast to spouses, they were typically paid for their work.<sup>214</sup> Literature on ethnic minority and immigrant-owned businesses points to frequent involvement of children, siblings, cousins and other extended family members.<sup>215</sup> One example is home-based workers in the garment industry, mainly immigrant women, who may incorporate both children and husbands into the production process in an attempt to secure a living wage for the household.<sup>216</sup>

More than the statistical data, these varied sociological studies tend to support this article's call for more explicit analysis of the legal and policy implications of UML. However, they also confirm the need for more empirical research on the different forms and economic value of this work in the context of industrialized countries.

### III. INSIGHTS FOR FEMINIST LEGAL THEORY

#### A. *Incorporating UML into Feminist Legal Analysis: Advantages and Challenges*

Feminist legal theory should have something to say about UML, a gendered economic activity that raises distinctive issues of law and policy. At a general level, any research that examines connections between law and gendered economic inequality may be helpful in understanding the situation of unpaid market workers. For example, scholarship on labor market barriers and discrimination faced by women may help to explain by implication why some end up devoting their energies to a family enterprise.<sup>217</sup> Likewise, scholarship on primary caregivers' right to support under welfare or family laws may also reveal something about the vulnerabilities of unpaid market workers.<sup>218</sup>

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male entrepreneur from her community, she did not have access to resources such as family labor or capital. Parvati Raghuram & Irene Hardill, *Negotiating a Market: A Case Study of an Asian Woman in Business*, 21 *WOMEN'S STUD. INT'L F.* 475, 479 (1998).

214. Baines et al., *supra* note 207, at 175. *But cf.* Basu & Altinay, *supra* note 186, at 23 (finding that spouses and children were both more likely to work for no pay, compared to siblings and other extended family members).

215. *See e.g.*, Dhaliwal, *supra* note 208; In-Sook Lim, *Korean Immigrant Women's Challenge To Gender Inequality At Home: The Interplay of Economic Resources, Gender, and Family*, 11 *GENDER & SOC'Y* 31 (1997); Margaret Walton-Roberts & Daniel Hiebert, *Immigration, Entrepreneurship, and the Family: Indo-Canadian Enterprise in the Construction Industry of Greater Vancouver*, *CAN. J. REG. SCI.* 1, 1 (1997).

216. *See* EILEEN BORIS, *HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES* (Cambridge University Press 1994).

217. *See infra* notes 226-27 and accompanying text.

218. *See, e.g.*, Mary Jane Mossman & Morag MacLean, *Family Law and Social Welfare: Toward a New Equality*, 5 *CAN. J. FAM. L.* 79 (1986); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227 (1994).

Nonetheless, I argue here that a more explicit analysis of UML would sharpen some of the most important feminist critiques of legal ideology. These include feminist challenges to the market/family dichotomy, to the ideological construction of market workers as autonomous and rational individuals, and to the neutrality of doctrinal rules in fields such as contract and property law. While a full treatment of these issues is more than one article can achieve, what follows is a brief discussion of how each of these critiques could be enhanced by giving UML more visibility in the analysis. I also anticipate and respond to some possible objections to my arguments, including concerns about commodifying family life, and about implying a hierarchy of value among different types of unpaid labor.

A key contribution of feminist legal scholarship has been to show how substantive gender inequality is maintained through the dichotomization of market and family in various legal rules.<sup>219</sup> That work has contested both the location and the integrity of the boundary that law constructs between these realms, exposing it as transient and malleable depending on historically contingent ideas about appropriate gender roles.<sup>220</sup> Thus, caregiving and domestic work is recognized as productive when done for pay, yet becomes economically invisible when unpaid.<sup>221</sup> The result is that much of women's work is devalued for purposes of determining their legal entitlements.<sup>222</sup> Feminist work in a range of disciplines has explored how the so-called spheres are, in fact, cross-subsidizing and interpenetrating: domestic work generates essential inputs for market production, which, in turn, requires market workers to delegate caregiving responsibilities.<sup>223</sup> The separation of these activities and devaluation of the domestic side is accomplished in part through various legal regimes. This is done, for example, through employment laws that privilege

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

220. See, e.g., KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 184 (2002) ("there is no natural, necessary, non-normative or pre-political division between productive and reproductive tasks. . . [S]uch claims should be understood not so much as facts about particular activities but rather as decisions concerning how the various aspects of economic life should be organized."); see also, Susan B. Boyd, *Challenging the Public/Private Divide: An Overview*, in CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY 3 (Susan B. Boyd ed., 1997); PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES (Margaret Thornton ed., 1995).

221. See MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (Harper Collins 1988).

222. See, e.g., Katharine B. Silbaugh, *Commodification and Women's Household Labor*, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 338 (Martha Albertson Fineman & Terence Dougherty eds., Cornell University Press 2005).

223. See, e.g., Elson, *supra* note 204; NANCY FOLBRE, THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES (The New Press 2001); Antonella Picchio, *Wages as a Reflection of Socially Embedded Production and Reproduction Processes*, in THE DYNAMICS OF WAGE RELATIONS IN THE NEW EUROPE 195 (Linda Clarke et al. eds., Kluwer Academic Publishers 2000).

male-pattern jobs that leave little time for any caregiving, and social security regimes that give inadequate and stigmatized support to unpaid caregivers.<sup>224</sup> The failure of labor and anti-discrimination laws to secure meaningful workplace accommodation for caregiving responsibilities has been singled out as a major cause of women's ongoing labor market inequality.<sup>225</sup>

The market/family dichotomy is characterized by opposing images of how humans relate to one another in each realm, with markets construed as the zone of self-interested action by autonomous, rational agents, and the family is held up as a haven of affective relations, connection, and altruism.<sup>226</sup> I agree with law professor Joan Williams and others that one way to break down this dichotomy's hold on the legal imagination is to demonstrate its descriptive inaccuracy on both sides:

The idea of a wall separating market from nonmarket transactions is comforting. But if the goal is to contain the alienating effects of the market, a far more effective strategy is to identify both the nonmarket elements of market transactions and the economic elements of marriage and other non-market relationships. This strategy also

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224. See MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (The New Press 2004); JOAN WILLIAMS, *UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT* (Oxford University Press, Inc. 2000).

225. See, e.g., Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. & SOC. SCI. 397 (2007) (arguing that legal reforms to improve workplace accommodation of caregiving responsibilities have had limited impact in the U.S. in the face of entrenched practices and cultural norms with respect to work, family and gender); Judy Fudge & Leah F. Vosko, *By Whose Standards? Reregulating the Canadian Labour Market*, 22 ECON. & INDUS. DEMOCRACY 327 (2001) (calling for law and policy reforms in Canada to provide all employees with more flexibility to combine paid work and caregiving, and arguing that such reforms could simultaneously enhance gender equity, social solidarity and productivity); and Laura T. Kessler, *Is There Agency in Dependency? Expanding the Feminist Justifications for Restructuring Wage Work*, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 373, 373-74 (Martha Albertson Fineman & Terence Dougherty eds., Cornell University Press 2005) (arguing that U.S. employment and anti-discrimination law offers only minimal protection related to the most physical aspects of pregnancy and childbirth, and fails entirely to accommodate broader "cultural caregiving" responsibilities); Lisa Philipps, *There's Only One Worker: Toward the Legal Integration of Paid Employment and Unpaid Caregiving*, in NEW PERSPECTIVES ON THE PUBLIC-PRIVATE DIVIDE 3 (Law Commission of Canada ed., UBC Press 2003) (proposing principles to guide reform across a range of laws to encourage more equitable sharing of caregiving and of market income).

226. See Paula England, *Separative and Soluble Selves: Dichotomous Thinking in Economics*, in FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN 33 (Marianne Ferber & Julie Nelson eds., The University of Chicago Press 2003).

avoids a key impact of the wall separating market from nonmarket domains: a reinforcement of traditional gender relations.<sup>227</sup>

I suggest that studying UML and its legal treatment presents a prime opportunity for just this sort of deconstructive exercise.

Feminist arguments about the artificial and gendered nature of the market/family divide could be rendered more potent by highlighting the place of UML as a hybrid form of work that is rooted simultaneously in both realms. Such an analysis pushes the theoretical envelope because it unseats the very assumption that *unpaid* means *nonmarket*. It calls into question the extent to which production has ever really left the household, despite the rise of waged labor and the decline of subsistence agriculture in industrialized countries. When an employer recruits one employee for a job that is tacitly understood to be a “two-person career”, or when a micro-business survives only because the owner’s relatives pitch in, these are examples of familial cooperation within a market context.<sup>228</sup> Production is joint, although only one individual may obtain legal status as the official market agent. Sociological studies have also stressed the difficulty of untangling business from family dynamics in the context of small enterprise.<sup>229</sup> Moreover, one factor that has been offered to explain the persistence of UML in modern times is the desire or need to manage earning and caring activities in close physical proximity.<sup>230</sup>

More empirical research is needed to determine the nature and extent of UML undertaken in industrialized countries. However, I argue the existing evidence is sufficient to dislodge the assumption that reliance on unpaid market workers is merely marginal, exceptional, or dying out. To the contrary, it suggests that our default presumption should be that breadwinners rely to some degree on informal help from family members to perform their jobs. Adopting this perspective would profoundly challenge the image of market workers as self-sufficient and autonomous. Market workers would begin to look more like dependents, and vice versa.

The cases and studies reviewed above also suggest that a great deal of the UML undertaken by women has an affective character, involving the nurturing

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227. Williams, *supra* note 218, at 2281. See also, Jenny Cameron & J.K. Gibson-Graham, *Feminising the Economy: Metaphors, Strategies, Politics*, 10 GENDER, PLACE & CULTURE 145 (2003).

228. See Papanek, *supra* note 185; Baines et al., *supra* note 207; EARDLEY & CORDEN, *supra* note 206.

229. See, e.g., Wheelock & Baines, *supra* note 207 at 55 (“it is the business family, and not just the business individual, that should be examined if the sources of competitiveness and flexibility for these smallest businesses are to be understood”). Compare, in the United States context, Patricia D. Olson et al., *The Impact of the Family and the Business on Family Business Sustainability*, 18 J. BUS. VENTURING 639 (2003).

230. See Min-Jung Kwak, *Work in Family Businesses and Gender Relations: A Case Study of Recent Korean Immigrant Women* (August 2002) (unpublished MA thesis, York University, on file with author) at 83-84.

of people and relationships.<sup>231</sup> Clarifying the value of these activities in a commercial context may lend support to feminist arguments that these activities also have economic value when done domestically. If informal communication and relationship maintenance were fully credited as having value in the market, it would be harder to rule unpaid domestic work off the continuum of production. For example, socialization of children involves nurturing the development of these very same relationship skills for use in their future lives as paid workers.<sup>232</sup> In other words, analysis of UML can help to make the broader point that nurturing activities play a critical role in production processes, as well as in families.

This type of analysis is likely to raise anxieties about commodifying, and therefore degrading, the non-instrumental relationships associated with family. However, I agree with those who have argued that some element of at least rhetorical commodification is likely necessary to establish entitlement by caregivers to independent financial resources.<sup>233</sup> In law professor Katharine Silbaugh's words, we should question the "tendency to leave women without cash in the name of noncommodification."<sup>234</sup> To this I would add that valuing social hosting or other relationship building work as UML may do as much to *decommodify* market relations as it does to commodify caregiving. Informal networking by an employee's wife is considered helpful in facilitating commerce precisely because it moderates the competitive and instrumental feel of a market transaction, thereby fostering cooperation, trust, and the formation of personal loyalties.<sup>235</sup> While the same tasks can be, and often are, done for pay by human resources managers, event organizers, public relations consultants, or front-counter staff, I doubt these professionalized versions have the same effect since they are part of the alienating market dynamic they seek to defuse. Highlighting the emotional content of what goes on in the ostensibly rational sphere of commerce helps to erode the justifications for differential treatment of market and family labor.

Working from general theoretical insights such as these, analysis of UML could also enrich more specific feminist critiques of the role of contract and

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231. See *supra* notes 188-96, 204-07 and accompanying text.

232. See Elson, *supra* note 204, at 195 ("without an underpinning of ethical norms and the participation of people with some sense of ethics and some willingness to trust, no well functioning market system is possible. The primary site of production of these key social assets is the process of bringing up children in the home and the neighbourhood, a process which rests upon unpaid domestic labour.").

233. See Silbaugh, *supra* note 222; Williams, *supra* note 227, at 2279-82.

234. Silbaugh, *supra* note 222, at 348.

235. Lin, *supra* note 187, at 39 (arguing that sentiment and shared emotion are critical to the interactions which create social capital). See also DON COHEN & LAURENCE PRUSAK, IN GOOD COMPANY: HOW SOCIAL CAPITAL MAKES ORGANIZATIONS WORK 58 (Harvard Business School Press 2001) ("being part of a network must to some extent be an end in itself rather than solely the means to an end. . . . [T]he perhaps paradoxical fact that networks are more valuable and robust if you are in them not only for the value you get out of them.").

property law in distributing resources. To take just one example, recent labor law scholarship has challenged the use of classical contract principles to define both the scope and the content of labor protections in the current era.<sup>236</sup> Restructuring of labor markets has excluded many workers from protective regulation because their jobs do not match the standard definition of employment as “a bounded relationship: a contract between a single employer and an employee.”<sup>237</sup> This is due to both the casual and insecure nature of many jobs, especially for women, but increasingly for men, as well as the fragmentation of corporate structures that make it difficult to identify a single entity as employer.<sup>238</sup> It would be interesting to apply this to unpaid family helpers whose work arrangements are not defined by any formal contract for service or services. Could the persistence of demand for UML be understood partly as another way for firms to externalize the risks and costs of hiring standard employees? A large organization that hires a self-employed freelancer may be accessing the services of another family member who operates outside the contract, and whose participation is implicitly needed in order to meet the demands of an insecure, contingent job. From this perspective, it may be important to consider when and how unpaid market workers should be brought within the scope of various labor protections.

A different critique of contract principles challenges the classical view of employment as a bargain entered by two autonomous parties with terms that are reasonably certain from the outset.<sup>239</sup> Instead, some argue that modern employment is better understood as a relational contract in which the parties agree to cooperate over time, a concept that could promote the kind of workplace accommodations that many feminist scholars have advocated:

If courts could be persuaded to apply relational contract theory in an even-handed manner to employment relationships, there may indeed be more scope for finding that employers bear an obligation to deal flexibly with reasonable requests for variations in working time and conditions to accommodate employees' need to balance work with family commitments. At present, employers will owe *contractual* duties to consider and cooperate with employees' reasonable requests to work from home or to vary working hours only if they have given express commitments to consider those requests.<sup>240</sup>

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236. Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L.J. 609 (2006).

237. *Id.* at 612.

238. Fudge, *supra* note 236.

239. ROSEMARY OWENS AND JOELLEN RILEY, *THE LAW OF WORK* 185-95 (Oxford University Press 2007).

240. *Id.* at 195.

It seems worth exploring whether this proposed shift toward relational contact principles might also have implications for unpaid market workers, possibly making it easier to show that an employment or other contractual relationship exists despite the relatively undefined, fluid and perhaps intermittent nature of the services provided.

Likewise, highlighting the contribution of UML to earning processes could add a new and helpful layer to feminist revisions of property law doctrine. Legal scholar Joan Williams' proposal for a new regime of post-divorce income equalization provides a nice example.<sup>241</sup> Williams has argued that because primary caregivers facilitate the market success of others, they should have a property right in the income of an ex-spouse: "[t]he ideal-worker's salary . . . reflects the work of two adults: the ideal-worker's market labor and the marginalized-caregiver's unpaid labor."<sup>242</sup> The reason for grounding this right in property law is to counter the presumption that breadwinners own their wages, or the common sense notion that "he who earns it, owns it."<sup>243</sup> Using the legal concept of alimony to protect women institutionalizes a comparative disadvantage: "to place men's claims in the realm of entitlement, while relegating women's and children's claims to family law's discretionary redistribution of 'the man's income.'"<sup>244</sup>

I think that incorporating UML into this analysis would render Williams' argument even more compelling because it draws a more direct link between the provision of unpaid services and the realization of income by the employee or proprietor. That is, if we adopted a default presumption that caregivers not only support but also actively *participate in* the earner's job, the inequity of denying them a share of the resulting income becomes even easier to see, as do the distributive politics of the property law doctrine that creates this result.

One concern that needs to be addressed here is whether distinguishing different kinds of unpaid contribution might imply a hierarchy between them such that market-oriented tasks are accorded more value than purely personal or domestic ones. In other words, does an emphasis on UML tend to reinforce the ideologically dominant view that things done in the market are more worthy of compensation than things done in the family? This certainly would be problematic. I have written elsewhere that "unpaid caregiving is an economic activity, a work process that generates human capacities without which markets could not function," and have called for redistributive measures on the basis that "profits derived from market activity have embedded within them a quantity of uncompensated reproductive labour."<sup>245</sup> Thus, I agree that it is important to avoid placing UML on some sort of higher ground than unpaid caregiving. This is a crucial caveat, as it may be tempting to adopt such a

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241. Williams, *supra* note 227.

242. *Id.* at 2229.

243. *Id.* at 2250.

244. *Id.* at 2229.

245. Philipps, *supra* note 225, at 3, 10.

strategy to advance women's interests in particular cases. This danger is hinted at by some of the Canadian family law cases discussed in Part I, which appeared to grant richer remedies to women who showed they performed farm or business-related chores as well as domestic labor.<sup>246</sup>

While it would not be helpful for feminist legal theory to set up hierarchies of value between different forms of unpaid work, it does not seem adequate simply to exclude UML from the analysis or to conflate it with unpaid care giving, which is closer to the current reality. For one thing, it may be important to differentiate the two in dealing with specific legal or policy questions. For instance if the question is whether a couple is "carrying on business in common" such that they are legal partners, a focus on what each spouse did in the business is likely appropriate, as is careful thought about how some work that is dismissed as affective may actually be quite instrumental and market-oriented.<sup>247</sup> The alternative would be to propose that all conjugal relationships constitute commercial partnerships, because all unpaid work has economic value and contributes to family earning power.

A significant advantage of distinguishing the two types of unpaid work may be to sharpen our thinking about when private actors, as opposed to the state, should bear responsibility for compensation or support. A great deal of feminist scholarship has rightly focused attention on the need for reform of public programs to provide an equitable safety net for unpaid caregivers, and a meaningful alternative to financial dependence on a male breadwinner.<sup>248</sup> While such redistributive measures are essential, it is also critical to engage with the rules that establish initial ownership or other entitlement to market income and wealth. Given that unpaid market workers participate directly in generating such returns, there may be a strong feminist case for recognizing their contributions through private rights grounded in various aspects of commercial and corporate law. A similar point can be made with respect to state programs that are not presented as welfare or income security programs, but instead as support for private enterprise. These should also be scrutinized with respect to whether and how they incorporate unpaid market workers in their model of economic development and entrepreneurship. Here again, it would be useful to tease out unpaid work oriented to the market, from unpaid care giving more generally.

However, discussion of UML should not be restricted to the precincts of commercial law or industrial policy. It should also be brought into analyses of the social and economic value of unpaid caregiving. In challenging the

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246. See *supra* notes 111-35 and accompanying text.

247. See *supra* note 84 and accompanying text.

248. See, e.g., FINEMAN, *supra* note 224; Mary Jane Mossman & Morag MacLean, *Family Law and Social Assistance Programs: Rethinking Equality*, in *WOMEN AND THE CANADIAN WELFARE STATE: CHALLENGES AND CHANGE* 117 (Patricia Evans & Gerda Wekerle eds., University of Toronto Press 1997); Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58 *AM. SOC. REV.* 303 (1993).

market/family dichotomy that devalues care, it could be helpful to show that work does not fall neatly into two spheres, but rather occupies a continuum from more family-centered to more market-centered activities, any of which may be unpaid. In particular, the concept of UML could be useful in highlighting the importance of emotional intelligence and relationship skills across the entire continuum of family and market. Making the commercial face of these activities more visible should foster a more gender inclusive image of the production process itself, in which unpaid workers play a key role. In other words, rather than singling out UML for special treatment, I am proposing that it be incorporated into what Williams has termed “the dominant family ecology” consisting of “an ideal-worker husband supported by a flow of domestic services from his wife.”<sup>249</sup> I suggest the ideal-worker typically receives a flow of direct job support as well, in the form of emotional, social or operational assistance. While further empirical study would be valuable to clarify the nature and extent of this support, and how it is shared between men and women in different demographic groups, I argue that existing evidence is sufficient proof of the need for a feminist legal analysis of UML.

*B. Developing a Law Reform Agenda: Bridging the Oppression/Liberation Divide*

In moving from theoretical insights to concrete policy recommendations, a key question will be whether UML should be discouraged as an exploitive practice or accepted and even celebrated as a pragmatic route to economic security and reduced work/family conflict. Here I explore different views on this normative question and argue we should avoid polarized understandings of such work as either essentially oppressive or essentially liberating. Instead, we should design reforms that acknowledge the social reality and potential benefits of cooperative family enterprise for some individuals, while also addressing the problem of intra-household inequalities.

Some sociological and popular treatments of UML address the normative question directly and they cover a wide spectrum of opinion. The most positive view is that even when women have unpaid or otherwise subordinate roles, participating in a family enterprise offers advantages such as greater influence over economic decisions, as well as more fulfilling and balanced work lives, than gender and other cultural norms might otherwise permit.<sup>250</sup> For analytical purposes I will refer to this position as the “liberation thesis”, though it includes a range of perspectives with slightly more and less positive nuances. A study of farm wives, for instance, concluded that despite women’s heavy workloads, conformity to fairly rigid gender roles, and occasional experiences of discrimination by outsiders, “at the same time they exercise important control

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249. Williams, *supra* note 227, at 2229.

250. In England, *see, e.g.*, Dhaliwal, *supra* note 208, at 471-72. In the United States, *see* Patricia A. Frishkoff & Bonnie M. Brown, *Women on the Move in the Family Business*, 36 BUS. HORIZONS 66 (1993).

over their lives and the lives of their family members.”<sup>251</sup> The author observed that combining the farm and household in one physical location “precludes the isolation of women in the private sphere of the household.”<sup>252</sup> Similarly, a study of Korean immigrant-owned enterprises in the United States found that even if women did not receive a paycheck their long hours of labor were recognized as a contribution to family economic survival, and this translated into greater political power within the household.<sup>253</sup> Another study noted that immigrant wives of convenience store owners in Toronto were able to integrate childcare and other domestic labor with store work throughout the day.<sup>254</sup>

At the opposite pole are those who see UML as overwhelmingly negative for gender equality because it sidetracks women’s own career development and financial independence.<sup>255</sup> For simplicity these studies can be grouped together under the rubric of an “oppression thesis”, though some present a more nuanced view of women’s political position than this term suggests. In one assessment, the role of corporate wife is a means of keeping educated women out of direct labor market competition with men by giving them a subordinate outlet for their skills and ambition.<sup>256</sup> Similarly, a journalist writing on Canadian political wives argued that such women are “an embarrassment and disgrace to us all . . . they embody a patriarchal notion of female virtue which involves trading off personal power for reflected glory.”<sup>257</sup> A similarly negative view is reflected in a study of Asian women working in small family businesses in the United Kingdom, which concluded that for most participants, [t]heir labour is a necessity for the business and their time is not valued, only assumed. The business does not open them to networking opportunities but instead denies them the time to go out and socialise. They have had to make many sacrifices for the business.<sup>258</sup>

These disparate views track larger debates within feminist theory about whether equality struggles should focus on improving women’s independent labor market access, or on seeking recognition of unpaid work as a valuable contribution in its own right.<sup>259</sup> In their most extreme versions, both of the positions described above are flawed and should be rejected as a basis for policy making. The “oppression thesis” does not take into account recent shifts

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251. Seena B. Kohl, *Women’s Participation in the North American Family Farm*, 1 *WOMEN’S STUD. INT’L. Q.* 47, 53 (1977).

252. *Id.* at 48.

253. In-Sook Lim, *Korean Immigrant Women’s Challenge to Gender Inequality at Home: The Interplay of Economic Resources, Gender, and Family*, 11 *GENDER & SOC’Y* 31 (1997). See also Kwak, *supra* note 230, at 116.

254. Kwak, *supra* note 230, at 83-84.

255. See e.g., Baines et al., *supra* note 207.

256. Papanek, *supra* note 185.

257. SUSAN RILEY, *POLITICAL WIVES: THE LIVES OF THE SAINTS* xiii (Deneua, 1987).

258. Dhaliwal, *supra* note 208, at 470.

259. See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE ‘POST-SOCIALIST’ CONDITION* 41-66 (Routledge 1997).

in Western feminist scholarship and activism, away from a single-minded focus on labor market advancement and towards a greater emphasis on valuing care and improving employment accommodation for caregiving responsibilities.<sup>260</sup> The sociological accounts reviewed in this paper identify joint family enterprise as a useful strategy in some households for securing a living and balancing market and family obligations, and one that sidesteps at least some of the problems of gender biased labor markets.<sup>261</sup> Yet proponents of the liberation thesis may romanticize families as sites of altruism and solidarity, ignoring the potential for hierarchy and exploitation of unpaid market workers.<sup>262</sup> Many studies have concluded that women's bargaining power and control over spending and saving decisions is negatively affected during marriage if they do not have separate financial resources.<sup>263</sup> Further, such women are vulnerable to impoverishment at the end of the relationship.<sup>264</sup>

A more productive intervention would recognize the possibility of both cooperation and conflicts of interest among individual family members engaged in joint production. That is, the family should be understood as a potential site of both caring and altruism, on the one hand, and self-interested behavior by individuals with unequal power on the other.<sup>265</sup> On this basis, I suggest that legal rules and public policies should not ignore or attempt to eradicate UML, but should seek to promote the economic independence and security of individuals who undertake it. Such rules and policies should more readily acknowledge the prevalence and value of unpaid contributions to market activity, but should also be designed to encourage direct compensation of family members for such work. Depending on the context, this might be accomplished through payment of wages, transfer of property rights, extending shareholder rights, granting access to a government subsidy or service, or by some other mechanism. Conferring legal control over income does not, of course, guarantee that de facto control will follow.<sup>266</sup> However, social science research indicates that when women have their own wage or other stream of

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260. See Fraser, *supra* note 259; Lourdes Benería, *The Enduring Debate Over Unpaid Labour*, 138 INT'L LABOUR REV. 287 (1999); Meg Luxton & Leah F. Vosko, *Where Women's Efforts Count: The 1996 Census Campaign and 'Family Politics' in Canada*, 56 STUD. IN POL. ECON. 49 (1998).

261. See *supra* notes 203-23 and accompanying text.

262. *Id.*

263. A recent Canadian study that provides new evidence as well as an excellent review of the literature is PETER BURTON ET AL., *Inequality Within the Household Reconsidered*, in INEQUALITY AND POVERTY RE-EXAMINED (Stephen P. Jenkins and John Micklewright, eds., Oxford University Press 2007).

264. See e.g., Mossman & McLean, *supra* note 248; Neave, *supra* note 122, at 15-19.

265. See generally JULIE A. NELSON, *FEMINISM, OBJECTIVITY & ECONOMICS* (Routledge 1996).

266. See e.g., EARDLEY & CORDEN, *supra* note 206, at 140 (finding that even where women were formally employed in their husbands' businesses for tax and accounting purposes, almost none received any actual payments over which they had personal control).

income it does make a measurable difference on how household spending decisions are made.<sup>267</sup>

Further careful study of specific legal and policy regimes that affect unpaid market workers is necessary to determine what reforms would best promote their economic independence and security. Earlier in the article I identified several areas of regulation that should be re-evaluated from their perspective.<sup>268</sup> While detailed law reform prescriptions are beyond the scope of this article, a brief illustration is called for to demonstrate where my suggested approach might lead. For this purpose I return to the tax treatment of corporate spouses (or other family members) who travel on business, a doctrinal issue analyzed above.<sup>269</sup> Based on my analysis in Part III, I suggest these tax rules should be changed both to broaden the definition of what counts as business-related activity, and to deny tax benefits where family assistants are not paid for their work. In terms of expansion, relationship-building work done by spouses should be characterized far more easily as a contribution to the business objectives of the trip. The enhancement of business networks and social capital is usually the core objective of such travel, and the commercial value of this work is seldom questioned when it is done by men with formal employment status. However, the law should require, as a condition of favorable tax treatment, that the family member receive some direct payment for these services, whether from the employer or the employee. The payment must obviously be reasonable in relation to the quantity of services rendered, and would be taxable to the spouse. These reforms would result in denial of tax deductions for services that remain unpaid, not because they are personal in nature, but because they fail to provide incentive for direct compensation for informal contributions.

This proposal might raise recurring anxieties about commodifying personal relations. Some might protest that formalizing commercial transactions in such a manner within the family would signal the end of truly collaborative forms of enterprise within households. But commodification of activities that are already market-oriented should not be of great concern. Indeed, it is more concerning that such labor is de-commodified and sentimentalized when done by women, contributing to their economic marginalization even as they engage in a market activity.<sup>270</sup> Further, the approach I am suggesting does not attempt to discourage or delegitimize family co-production as an economic practice, for example, by ruling family participation in business to be personal by definition, and therefore taxable in every case. Instead, it aims to give fuller recognition to the value of what unpaid market workers contribute directly to production, while also increasing their power within the household.

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267. See BURTON ET AL., *supra* note 263.

268. See *supra* Part I.B.

269. See *supra* Part I.A.1

270. Silbaugh, *supra* note 222.

## IV. CONCLUSION

This article has pulled out one dimension of unpaid work, that which contributes directly to the market activities of a family breadwinner, and has considered its specific empirical features and implications for feminist legal analysis. It began by examining debates within tax law about how to characterize this work, whether as a contribution to income production or an aspect of personal relations within the family.<sup>271</sup> This issue surfaced through a variety of technical tax problems in which women's work was sometimes sentimentalized and devalued, and presented as an issue of tax avoidance. Even where UML was recognized as contributing to production, this did not necessarily translate into any form of direct compensation for the unpaid worker. This analysis was extrapolated to identify other areas of law and policy that should be analyzed to assess their impact on unpaid market workers.<sup>272</sup>

The article also reviewed empirical evidence that, while incomplete, did challenge common assumptions that this form of unpaid labor is only exceptionally practiced in modern industrialized economies, or is no longer relevant as more women enter job markets independently.<sup>273</sup> Though the picture is sketchy and demographically complex, a pattern emerged of ongoing gendered provision of UML, and its particular importance in certain types of jobs and to the self-employed and small business sector.<sup>274</sup> Finally, in Part III this article considered how focusing on this type of unpaid labor, as distinct from its domestic counterpart, could enrich feminist legal theory. The main advantage would be to sharpen feminist critiques of the market/family dichotomy in law. In challenging the fairness and neutrality of this dichotomy, it will be helpful for feminist theory itself to avoid oversimplifying the organization of economic life and to consider UML as a hybrid form of work that defies easy classification. In addition, focusing on UML can help to emphasize the responsibility of private market actors to redress gendered economic inequalities, as well as the need for review of public programs that support both firms and households.<sup>275</sup> Similarly, it can reveal additional openings for feminist critique and reconstruction of those aspects of law most closely associated with the market. This article reviewed social scientific debates about the normative politics of UML, and whether it reflects gender oppression or a form of agency and liberation within the solidarity of family.<sup>276</sup>

There are problems with the extreme versions of both these positions. I suggested that a feminist law reform agenda should seek both to validate UML as a potential alternative to conventional labor market participation, and to

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271. *See supra* Part I.A.1

272. *See supra* Part I.B.

273. *See supra* Part II.

274. *See supra* Part II.B.

275. *See supra* notes 244-58 and accompanying text.

276. *See supra* Part III.B.

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improve the economic independence and security of its providers.<sup>277</sup> This article has attempted to lay some of the empirical and theoretical groundwork for such a project. In order to develop it further, many aspects of law and policy will need to be examined anew and in detail regarding assumptions about UML and how those impact unpaid market workers. These could include areas as diverse as tax policy, small business supports, corporate governance rules, family law, employment standards, retirement security programs, and much more.

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277. *See supra* notes 274-78 and accompanying text.