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LOVE AND WORK: A RESPONSE TO VICKI SCHULTZ'S *LIFE'S WORK*

Martha M. Ertman*

Professor Ertman engages Vicki Schultz's critique of proposals to remunerate homemaking labor on two fronts. First she questions the way Professor Schultz seems to assume a rigid barrier between love and work, suggesting instead that legal feminists need not choose between work for love and work for wages as the cornerstone of feminist legal reform. Second she challenges Schultz's suggestion that proposals to remunerate homemaking labor are backward thinking. Since wage labor is not the only route to citizenship, Professor Ertman contends, proposals to remunerate homemaking labor can buttress many women's citizenship claims. In particular, she explains, they have the potential to effect both positive change by getting cash to many economically marginalized women and normative change by reconstructing gender and sexual orientation.

INTRODUCTION

Vicki Schultz's important essay, *Life's Work*, suggests that paid work "is the platform on which equal citizenship should be built,"¹ identifying regressive dangers in the efforts of some legal feminists to remunerate homemaking labor.² While her essay provides many points that further feminist legal discourse, it also, I think, missteps in two ways. It first assumes a rigid barrier between home labor and wage labor and then posits a false choice between love and work as the cornerstone of feminist legal reform. Rather than divide home from work, and then choose one arena as more important, I suspect that a liberational, transformative agenda, like a healthy personality, would recognize the often fuzzy boundary between the two and value both.³

Part I of this Essay begins by suggesting that a good life incorporates both work and love. I contend that if a full life includes both work and love, work for love could provide a basis for citizenship just as work for wages does. Thus, legal feminist reforms that support remunerating homemaking labor offer the promise of buttressing many women's citizenship claims. Part II cites doctrine to support my normative claim that

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1. Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1928 (2000).

2. *Id.* at 1899-1919.

3. For a canonical description of the components of a healthy personality, see Erik H. Erikson, *Growth and Crisis of the Healthy Personality*, in *Identity and the Life Cycle* 51, 51-107 (1959). For further discussion of the importance of using other epistemological systems, such as psychology, in crafting legal reforms, see Renée Römken, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 *Yale J.L. & Feminism* (forthcoming 2001) (on file with the *Columbia Law Review*).

paid labor is not the only route to citizenship by identifying a few important civil rights victories outside the paid labor realm, victories that seem as important to citizenship as the employment related ones Schultz discusses. Part III then questions Schultz's critique of the identity politics invoked by proposals to remunerate homemaking labor, exploring the possibility that identity politics are necessary for positive reforms, while post-identity politics advance more utopian/normative transformations. Because progressive reform needs both to account for current inequality and to anticipate the alleviation of that inequality, I argue, proposals should be both positive and normative, both liberational and transformative.⁴ In conclusion, I tell a different story about homemaking labor proposals (including my own) than Schultz does, arguing that they are both liberating and transformative, both positive and normative.

This analysis requires a definition of work.⁵ Schultz defines it as paid labor outside of the family.⁶ In contrast, the proposals for remunerating housework that she critiques⁷ include as work at least some (but not all) labor done for one's family.⁸ The definition is crucial, because those of

4. For further elaboration of how liberal and radical elements can be braided into proposals that have the power both to alleviate existing inequalities and fundamentally transform conditions of inequality, see Lisa Duggan, *Queering the State*, in *Sex Wars: Sexual Dissent and Political Culture* 179, 193 (Lisa Duggan & Nan D. Hunter eds., 1995) (writing that "we need . . . to be both transformative *and* effective" by deploying "liberal rhetoric in the interests ultimately of going beyond liberal categories and solutions").

5. Despite the difficulty of defining love across disciplines and experiences, all participants in the current debate seem to agree to define it as intimate affiliation.

6. Schultz, *supra* note 1, at 1886 n.3. While Schultz acknowledges that unpaid housework and childcare are work, she emphasizes the value of paid labor in securing a "more robust conception of equal citizenship generally." *Id.* Schultz's definition of work differs considerably from conventional wisdom as articulated in the popular bumper sticker reading, "I Owe, I Owe, It's Off to Work I Go." She imbues work with all the good qualities of citizenship and personhood such as independence, identity, self-sufficiency, productivity, and community involvement, which seems more like catch-all flourishing than work as many people understand it.

7. Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It* 124-27 (2000); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 *Tex. L. Rev.* 17, 41-46 (1998) [hereinafter Ertman, *Commercializing*]; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U. L. Rev.* 65, 67 (1998) [hereinafter Silbaugh, *Marital Contracts*]; Katharine B. Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 *Nw. U. L. Rev.* 1, 6-7 (1996); see also Linda R. Hirshman & Jane E. Larson, *Hard Bargains: The Politics of Sex* 280-83 (1998) (proposing a statutory concubinage contract to reimburse nonmarital partners for contributions to the relationship). For another important contribution to this literature, see Nancy C. Staudt, *Taxing Housework*, 84 *Geo. L.J.* 1571, 1574-75 (1996) (contending that taxing household labor would recognize the value of women's work to society and the economy).

8. The distinction between these two definitions of work, like most distinctions, frays at the edges: Working for the family business, for example, is on the line between work for one's family and market work. The distinction is further eroded if one considers that both homemaking and wage labor have significant emotional, as well as productive, components. See, e.g., Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 *Yale J.L. & Feminism* 81, 81-82 (1997) (describing some difficulties in

us who support remunerating primary homemakers for the work they do for their families (and the opportunities foregone in that process) seek to change the cultural meaning of work so that it includes both homemaking for intimates and wage labor. Schultz seems to fear that if we see washing the family floors as work, women and others who labor in their homes without pay will never get out of the kitchen, and thus never attain full citizenship. This Essay acknowledges the blurriness of the lines dividing love and work and then argues for the equal importance of work for intimates and for strangers.

Much labor is the same whether it is done for wages or for intimates; it is hard to see why wages alone should bring full citizenship. Work that is done both for money and for love includes childcare, counseling, home healthcare, housecleaning, and teaching. Indeed, many of the providers of these services do them for pay during the day and for love during the evening. Moreover, much of this labor (in particular daycare, housecleaning and home healthcare) is done by politically marginalized people (poor women, often women of color) for more affluent families, and the poor remuneration and low social status of their occupations perpetuate their marginal status.⁹ Thus it is hard to see how one can make across-the-board arguments about a causal relationship between paid labor and citizenship. By recognizing the sometimes fuzzy line between love and work and arguing for feminist reforms that incorporate both, I mean to argue for a feminist theory that champions improved conditions both for those who work for intimates and for those who work for strangers. This approach, which could be called “both/and,” is in marked contrast to Schultz’s seeming assertion that feminists should focus primarily on either paid labor or home labor reforms.

Joan Williams reminds us not to fight with friends.¹⁰ In that spirit, this Essay seeks to supplement Schultz’s powerful message, not to contradict it. This task is not difficult, as my normative agenda looks very much like Schultz’s in many ways: Each person ideally would have one foot in the domestic realm and the other in the market realm. Where we differ is that I believe remunerating homemaking labor furthers that goal, and she apparently does not.¹¹

I. THE PSYCHOLOGICAL IMPORTANCE OF BOTH LOVE AND WORK

Schultz rightly points out that “[i]n the United States . . . work has been fundamental to our conception of the good life. It has been consti-

distinguishing between market and nonmarket housework) [hereinafter Silbaugh, *Commodification*]; Staudt, *supra* note 7, at 1620 (describing household work both as an expression of love and commitment and as economically productive).

9. Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *Yale J.L. & Feminism* 51, 51 (1997).

10. Williams, *supra* note 7, at 241.

11. See Ertman, *Commercializing*, *supra* note 7, at 75–76, 93; Schultz, *supra* note 1, at 1901–03.

tutive of citizenship, community, and even personal identity.”¹² While she recognizes that both work and intimate affiliation contribute to a full life,¹³ she also seems to position wage labor as the most important element of the equation: “In my vision, paid work should serve as a foundation that secures to women and men from all walks of life a source of equal citizenship, economic wherewithal, social ties, and personal identity.”¹⁴ It could be, in pulling these sentences out of a long Essay, that I miss Schultz’s point.¹⁵ Rather than asserting that work is the most important piece of the puzzle, her strong language might reflect her efforts to justify a place for wage labor in feminist discourse, strong language being necessary to displace what she perceives as an entrenched focus on family among some legal feminists.

But the central role of the debate over legal feminist approaches to carework suggests that *Life’s Work* could be a catalyst for legal feminists to debate crucial points about the optimal place for wage labor and home-making labor reforms in a progressive agenda.¹⁶ The debate is likely to be fruitful if not conclusive, since feminists have argued for over a century about whether feminism frees women *to* be female, or *from* being female.¹⁷

My contribution to this debate is a contention that just as we cannot choose between eating and breathing, we cannot and should not choose between work for wages and work for love. If we are to focus on a vision of a good life rather than mere survival, and also respond to Schultz’s call

12. Schultz, *supra* note 1, at 1886 (citations omitted). She further explains: Work is important not simply because it gives people a vehicle for serving society and for earning their own keep, but also because it allows diverse groups of people to come together with others to pursue common goals, under conditions that are at least partly of their own choosing and which allow for some measure of self-realization.

Id. at 1948.

13. See, e.g., *id.* at 1936 (“To even imagine a society that enables everyone to participate equally in working life, we will have to think seriously about how to structure work and the workweek so that everyone can combine a genuine commitment to work with an active involvement in family and civic life.”); *id.* at 1955 (“We need a new model that envisions the deep connections between work and other realms of life, without conflating them. We need an anti-productionist, beyond-accommodationist vision that treats work as a cornerstone—but not a substitute—for family, politics, and civic life.”).

14. *Id.* at 1939. In a similar vein, she also asserts: “In addition to life, liberty, and the pursuit of happiness, it is time to insist: We have the right to pursue a life’s work.” *Id.* at 1938.

15. She certainly recognizes the importance of intimate life for feminists, both beginning and ending her Essay with narratives about her own family. *Id.* at 1882–83, 1963–64.

16. See Symposium on the Structures of Care Work, 76 *Chi.-Kent L. Rev.* 1389 (2001).

17. Ann Snitow, *Pages from a Gender Diary*, *Dissent*, Spring 1989, at 205, 205 (“This tension—between needing to act as women and needing an identity not overdetermined by our gender—is as old as Western feminism.”); see also Jane Flax, *Thinking Fragments: Psychoanalysis, Feminism, and Postmodernism in the Contemporary West* 167–68 (1990) (summarizing main themes in feminist thought).

to rethink the relationships among the state, the market, and intimate affiliations, the template should include both paid labor and work for intimates, treating both as equally important. If one predominates at a particular point (for movement agendas necessarily adapt to cultural climates),¹⁸ we should understand that the predominance is temporary.

Prominent theories of psychological development support the view that work and love are equally important. Freud, when asked what he thought a person should be able to do well, answered “to love and to work.”¹⁹ Erik Erikson similarly accounted for both work and love in his eight stage view of the life cycle.²⁰ If psychological theory stresses the

18. Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 *Wm. & Mary J. Women & L.* 5, 8–9 (2000).

19. Erikson, *supra* note 3, at 102 (quoting Freud).

20. Erikson presents these stages as tensions between alternatives:

- (1) trust versus mistrust (about the first year);
- (2) autonomy versus shame and doubt (about the second and third years);
- (3) initiative versus guilt (about the fourth and fifth years);
- (4) industry versus inadequacy and inferiority (about the grade school years);
- (5) identity versus identity diffusion (about puberty and adolescence);
- (6) intimacy versus self absorption (about young adulthood);
- (7) generativity versus stagnation (about middle adulthood); and
- (8) integrity versus despair and disgust (about late adulthood).

Id. at 54, 86, 88, 95, 97, 98, 100–05. Erikson regards the sixth stage, intimacy versus self absorption, as the beginning of adult life: “work or study for a specified career, sociability with the other sex, and in time, marriage and a family of one’s own.” *Id.* at 95. Both career and intimacy are crucial. This focus on heterosexuality and marriage is inconsistent with changing patterns of intimacy that include same-sex affiliations, nonmarital affiliations, and affiliations of more than two adults. I have written elsewhere about the importance of updating legal doctrine to account for these affiliations. Ertman, *Commercializing*, *supra* note 7, at 94–95, 108–09; Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 *Denv. U. L. Rev.* 1107, 1135–54 (1996) [hereinafter Ertman, *Contractual Purgatory*]; Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 *Harv. C.R.-C.L. L. Rev.* 79, 99–131 (2001) [hereinafter Ertman, *Bridging*]; Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 *Denv. U. L. Rev.* 1215, 1228–53 (1998) [hereinafter Ertman, *Reconstructing*]. Erikson himself seems to anticipate the need to update his approach to account for cultural changes, as he repeatedly emphasizes that each stage differs for different cultures. See Erikson, *supra* note 3, at 57–58. Psychologists have retained his work in the canon, suggesting that his work survives the updating. See, e.g., David R. Schaffer, *Developmental Psychology: Childhood and Adolescence* 44–46 (5th ed. 1999) (describing Erikson’s theory of psychosocial development). For an analysis of psychoanalytic theory in feminist theory, see Flax, *supra* note 17, at 27–28.

Erikson’s seventh stage, generativity versus stagnation, also addresses both love and work. While he seems to focus on parenthood, the majority of people, because they engage in both parenting and wage labor, would experience generativity in both realms. Erikson defines generativity as “the interest in establishing and guiding the next generation.” Erikson, *supra* note 3, at 97. While Erikson’s assumptions of repronormativity are problematic for some feminists, see Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *Colum. L. Rev.* 181, 183–98 (2001), these difficulties are tempered by Erikson’s acknowledgment that “there are people who, from misfortune or because of special and genuine gifts in other directions, do not apply this drive to offspring but to other forms of altruistic concern and of creativity.” Erikson, *supra*

importance of both love and work for a healthy personality, then feminist theory could similarly embrace work for wages and work for love.

Certainly, Schultz recognizes that love and work are both important to a good life. But her tone and focus suggest that she believes that work done for wages is a more effective and transformative target for feminist reforms. A broader perspective contests this either/or approach and instead takes a both/and approach that embraces a range of reforms. As legal feminists envision new relationships among the state, the market, and domestic relations, they can do so by looking at both wage labor and domestic arrangements. Schultz sagely cautions against an exclusive focus on heterosexual intimacy that reifies gender roles,²¹ yet her either/or approach runs the risk of erring in the other direction, focusing on wage labor in a way that risks overlooking the problems that intimate arrangements pose for various kinds of marginalized people, women among them.

Remunerating homemaking labor makes sense because pay and relative autonomy are both routes to and evidence of citizenship. While not pretending to exhaustively list the bases for citizenship (or to answer whether love alone is a ground for citizenship), I do want to contribute to the project of revealing the worth of many women's contributions, contributions systemically devalued by rules and rhetoric that assume money is only for public activities and that domestic activities are entirely private—and thus uncompensated. While Schultz seems to take much (though by no means all) of this public/private convention at face value, I try to challenge it by proposing bridges across the purported divide between the market and the family.²²

Any critique of the public/private distinction runs into the problem both of accounting for the split as it manifests itself in doctrine and of acknowledging its incoherence. For example, a same-sex couple can have many marital rights and obligations through the private law of contract, but not through the public law of marriage.²³ Yet the very distinction is

note 3, at 97. Alternative routes by which a person could achieve generativity rather than slide into stagnation might include teaching, mentoring, community involvement such as political activism, writing, and art. Any of these could be either wage labor or intimate affiliation, or both. Erikson's eighth and final stage, integrity versus despair and disgust, similarly involves both love and work. A person has achieved integrity, the fruit of the previous stages, if he or she "has taken care of things and people and has adapted himself [or herself] to the triumphs and disappointments of being, by necessity, the originator of others and the generator of things and ideas." *Id.* at 98.

21. Schultz, *supra* note 1, at 1908.

22. Ertman, *Bridging*, *supra* note 20, at 81–85; Ertman, *Commercializing*, *supra* note 7, at 17–29; Ertman, *Contractual Purgatory*, *supra* note 20, at 1108–11; Ertman, *Reconstructing*, *supra* note 20, at 1215–19.

23. *Posik v. Layton*, 695 So. 2d 759, 761 (Fla. Dist. Ct. App. 1997). The court in *Posik* held that a same-sex cohabitation agreement was enforceable, explaining:

But even though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this type of agreement. By prohibiting same-sex marriages, the state has merely denied homosexuals the rights granted to married

incoherent, as purportedly private law is state created and enforced, and thus also public.²⁴ My work seeks to address these problems by acknowledging that business and family are not synonymous, while also contesting the conventional wisdom that they are opposites.²⁵ By revealing the way that business metaphors and tools enrich our understanding of intimate life, I try to counteract inequalities within relationships and among different types of relationships. This project of “[b]ridging the private/private split”²⁶ mines commonalities between the market and the family without collapsing the two.

II. LEGAL REFORM HAS FOCUSED ON BOTH LOVE AND WORK

While Schultz recognizes that there “are many viable directions for change,” she also asserts that, from her vantage point, “they all begin with paid work.”²⁷ She is absolutely right that a number of legal victories for all women, people of color, older people, and disabled people have involved work-related legislation, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination Act, and the Americans with Disabilities Act.²⁸ However, other victories are part and parcel of these major struggles. *Loving v. Virginia* marked the first time that the United States Supreme Court struck down legislation on the grounds that it served the ends of white supremacy.²⁹ Federal statutes passed to implement the Civil War Amendments to the U.S. Constitution similarly addressed rights other than employment: the right to contract, the right to own property (which relates to labor but is not limited to it), the right to be free of violence perpetrated under color of state law, and the right to enjoy equal protection of the law without suffering harassment.³⁰ Citizenship, in short, rests on many things, only one of which is wage labor.

Schultz observes that the federal Employment Nondiscrimination Act (ENDA), if passed, would have prohibited employment discrimination on the basis of sexual orientation, but she does not mention the way

partners that flow naturally from the marital relationship. . . . But the State has not denied these individuals their right to either will their property as they see fit [or] to privately commit by contract to spend their money as they choose. The State is not thusly condoning the lifestyles of homosexuals or unmarried live-ins; it is merely recognizing their constitutional private property and contract rights.

Id.

24. See Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 562 (1933); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997, 1013–14 (1985).

25. Ertman, *Bridging*, supra note 20, at 84–85.

26. Id. at 84. Thanks to Julie Nice for this pithy description of my work.

27. Schultz, supra note 1, at 1928.

28. Id. at 1930–31.

29. 388 U.S. 1, 7–8, 11 (1967).

30. 42 U.S.C. §§ 1981, 1983, 1985 (1994). Also relevant was the right of formerly enslaved people to marry, which was a key component of citizenship. Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* 132 (1995).

that it was linked to legislation banning same-sex marriage.³¹ Congress overwhelmingly passed the Defense of Marriage Act (DOMA) on the same day that it declined to pass ENDA.³² Apparently, the main reason Congress came as close as it did to passing ENDA was that progressive legislators attempted to protect gay people against employment discrimination in order to balance the injury to gay people caused by DOMA.³³ When DOMA passed and ENDA died on the same day, gay people lost on two equally important fronts.

One could argue that ENDA's defeat was more important because it has direct financial implications for gay people. But while the right to sit at a lunch counter is worth little if you do not have the money to buy a hamburger,³⁴ both employment and intimacy rights could equally provide you with the means to buy that lunch. Employment, as Schultz rightly points out, gives one not only the cash to sustain oneself, but also social power such as respect from others, bargaining power in intimate relationships, and a "stronger sense of [one's] value and place in the world."³⁵ Less directly, but no less powerfully, legal recognition of intimate affiliations results in benefits under laws governing social security, intestacy, workers' compensation, insurance, and numerous other areas that affect one's standard of living as well as status as a citizen and community member. In short, homemaking labor, if remunerated, could provide the people who do it with cash, social and bargaining power in intimate relationships, and a sense of value and place in the world. It seems that Schultz, Williams, Silbaugh, and I could agree that citizenship and market power are linked, but apparently Schultz disagrees that remuneration of homemaking labor would help women's citizenship claims.³⁶ She seems to think that homemaking will retain its low value even if monetized, whereas we suggest that the very fact of payment will increase its value.

In short, rules related to wage labor are not the most important ones. To say that they are seems essentialist, suggesting both that wage labor is one thing and homemaking labor something entirely different, and also that wage labor is transhistorically and essentially preeminent. A better approach would allow legal reformers to attend to the full range of issues affecting citizenship, including both work for wages and work for love. Under this model, each person would select a focus based on his or her

31. Schultz, *supra* note 1, at 1930.

32. Elaine Povich, *Gays Lose on Two Fronts*, *Newsday*, Sept. 11, 1996, at A4. DOMA bans same-sex marriage as a matter of federal law and authorizes states to decline to recognize same-sex marriage performed in other states (should any state lift the ban on same-sex marriage). 28 U.S.C. § 1738(c) (Supp. V 1999).

33. See Povich, *supra* note 32 (reporting on the circumstances of the surprisingly close defeat of ENDA).

34. See Gary Chartier, *Civil Rights and Economic Democracy*, 40 *Washburn L.J.* 267, 267 (2001) (arguing that economic democracy is integral to civil rights).

35. Schultz, *supra* note 1, at 1945.

36. *Id.* at 1883.

interests, opportunities, and abilities.³⁷ What Schultz seems to see as a distressing trend in feminism can also be viewed as a healthy heterogeneity of strategies on different fronts.

III. IDENTITY POLITICS VERSUS POST-IDENTITY POLITICS IN THE CONTEXT OF POSITIVE AND NORMATIVE REFORMS

Progressive reforms have the difficult task of both remedying inequality (which requires accounting for it) and creating the conditions for the situation in which there is no longer inequality. In other words, reforms must be both effective (positive) and transformative (normative). I believe that the proposals for remunerating homemaking labor combine these positive and normative goals.

Schultz, in contrast, suggests that legal feminist reforms to remunerate homemaking labor are merely effective—getting cash to primary homemakers—but not transformative because, she contends, they leave undisturbed the view of homemaking as gendered female. She articulates this critique by saying that homemaking proposals mistakenly embrace gender identity politics when they should abandon identity politics in favor of coalitions with the labor movement and other groups.³⁸ Her visionary proposal, however, stumbles on its own identity politics. While she seems to reject identity politics based on gender, she also seems to embrace another identity, namely *worker*.³⁹ She takes pains to say she does not mean to flatten the richness of human variation into a two dimensional worker,⁴⁰ and wants to reinvigorate prohibitions against em-

37. On an institutional level, advocacy organizations could devote resources on the basis of strategic considerations such as the political and cultural climate or the particular decisionmaker. As a practical matter, the organizations would also likely account for the interests, strengths, and weaknesses of their staff. If their best litigator has spent her career focusing on employment law, it may make sense to craft a reform agenda that mines this expertise as long as other considerations make this choice a logical one.

38. Schultz, *supra* note 1, at 1941. She maintains that:

Feminists must join forces with the labor movement and with a broad array of other groups—including white middle class heterosexual men—not simply to advance each other's interests, but to create a *common* interest in remaking social life so that paid work becomes the cornerstone for our best conceptions of citizenship and care.

Id. Such an alliance is consistent with the current trend of increased union organizing activity in the sex work industry. See, e.g., *Live Nude Girls UNITE!* (First Run Features 2000) (documenting union organizing by erotic dancers in San Francisco); <http://www.livenudegirlsunite.com> (updating information on unionization of San Francisco erotic dancers).

39. Schultz, *supra* note 1, at 1940–41 (explaining that implementing reforms to “achieve universal access to life-sustaining work” requires “moving beyond forms of identity politics that press for essentialist forms of recognition and reevaluating ‘women’s experience’”); *id.* at 1890 (“[J]obs create people . . .”).

40. *Id.* at 1938 (“A universal approach does not mean we can, or should, pretend that everyone is the same. If we are to make sure everyone can participate in work, we cannot reduce anyone down to the lowest common denominator—an abstract dehumanized category of ‘worker.’”); *id.* at 1958–59 (“Sexuality and reproduction are a part of life, . . . as

ployment discrimination on the basis of race and sex as well as bolster affirmative action, antiharassment, and pay equity measures.⁴¹

One way to understand the tension between these two approaches (identity and what could be called post-identity, but might be more accurately described as post-gender-identity) is to see it as a tension between positive and normative goals. Positive and normative goals overlap, however, since creating a new cultural and legal climate is a big part of eradicating unequal conditions. Presumably all feminist reforms contain the normative goal of creating conditions in which femininity and women are no longer devalued, but reasonable feminists can disagree about whether particular reforms contribute to that normative vision. These areas of disagreement among feminists demonstrate the distinctions between positive and normative elements of reform. Homemaking labor reform proposals, for example, account for the positive fact that women do most housework and may continue to do so despite changes such as remunerating homemaking labor (a positive insight). Making such proposals requires a language of gender identity politics in which we can talk about what men and women generally do. On a normative level, in contrast, homemaking labor reforms envision a world in which those identity politics no longer make sense because the reforms themselves have so profoundly changed the identity categories. For example, the remuneration of housework could fundamentally redefine how we see men and women, masculinity and femininity. Thus, on that normative level, the very identity categories (men and women, masculinity and femininity) that are essential to the positive reforms become illegible on a normative level once the positive reforms have the desired normative effects. Similarly, Schultz's positive reforms for the workplace (such as strengthening sex discrimination, sex harassment, and pay equity rules) presuppose gender identity categories, while her normative vision of a labor market in which everyone participates on equal footing would, if realized, render those identity categories meaningless.⁴² Perhaps identity politics are an indelible part of positive reforms, while post-identity politics inform normative aspects of progressive reforms. As an ambitious call for progressive reform, it is not surprising that *Life's Work* includes both positive and normative elements.

The positive reforms that Schultz discusses include nondiscrimination provisions, which inevitably invoke identity.⁴³ To determine whether a person has suffered discrimination on the basis of race or sex one must make identity based determinations, such as precisely defining race and

are disability and aging. The workplace is not hermetically sealed from these foundational courses of life, and we should not seek to make it so").

41. Id. at 1955. This approach requires retaining gender identity politics for some purposes.

42. See id. at 1955–56.

43. Id. at 1955.

sex.⁴⁴ Yet, Schultz reminds us, identity politics present their own dangers.⁴⁵ Among these dangers is the possibility that if we adopt a rule that accounts for the fact that women do most homemaking labor, we may inadvertently perpetuate the inequality inherent in the division of labor.

Accordingly, Schultz prefers that feminists fight to get men to do their share, confident that the pattern can change if women engage in more wage labor and men engage in less of it.⁴⁶ Unlike Schultz, I think that making male partners pay their sweeties for homemaking labor might be a catalyst for that change, as it would allocate the cost of that labor to the primary wage earner rather than to the primary homemaker. Primary wage earners might be less enthusiastic about gendered specialization of labor if they had to foot the bill for it.

The ideal that Schultz advocates, of everyone working for wages, does not guarantee a change in the allocation of homemaking labor. As such, her proposal may leave many marginalized people behind. Women who work for wages still do the majority of homemaking, a pattern known as the second shift.⁴⁷ As a result, men enjoy more leisure time, on average, than women do.⁴⁸ If women engage in more wage labor and men in less, it seems likely that this pattern would continue, and many men would use the freed up time to play more rather than to vacuum or write Christmas cards.⁴⁹ This result is made more likely when we consider the sociological literature analyzing gendered divisions of homemaking labor as a key aspect of performing gender roles. Women feel they are feminine (and are perceived as such) by doing housework, and men feel they are masculine by not doing it.⁵⁰ Recent evidence suggests that even same-sex couples engage in this gendered division of labor, indicating that the pattern may be more entrenched than previous research sug-

44. Such questions have included: Does ethnicity count as race? Must it be discrimination against a member of a historically marginalized race, such as African Americans or Asian-Americans, or is discrimination against white people also actionable? What does it mean to be sexually harassed? Is same-sex harassment actionable? Is sexual orientation harassment actionable?

45. Schultz, *supra* note 1, at 1891, 1905, 1941.

46. *Id.* at 1883, 1906–07.

47. Arlie Hochschild & Anne Machung, *The Second Shift* 8 (1989).

48. Beth Anne Shelton, *Women, Men and Time: Gender Differences in Paid Work, Housework and Leisure* 139 (1992).

49. See June Carbone, *From Partners to Parents: The Second Revolution in Family Law* 17 (2000) (noting study finding that husbands of full-time homemakers averaged two minutes less housework each day than husbands of women with full-time jobs).

50. See Scott J. South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 *Am. Soc. Rev.* 327, 344, 329 (1994) (concluding from an empirical comparison of housework in marital and nonmarital households that men and women are “doing gender” more in marriage than in cohabitation, which they define as “a routine accomplishment embedded in everyday interaction . . . where, in addition to accomplishing tasks, housework ‘produces’ gender through the everyday enactment of dominance, submission, and other behaviors symbolically linked to gender”).

gested.⁵¹ For all these reasons, I suspect that the allocation will only change when the very meaning of gender and sexual orientation profoundly changes. Such an alteration requires more than feminist women encouraging their male partners to do more laundry. It is no less revolutionary than and inextricably linked to Schultz's (positive and normative) proposals of reallocating homemaking labor, legislating lower work hours, increasing minimum wages, and providing paid labor for everyone.⁵²

Like Schultz's proposal, the proposals for remunerating homemaking labor combine both positive and normative elements. Yet Schultz contends that her approach is "forward-looking," implying that the approaches she criticizes are backward.⁵³ Joan Williams's work, for example, proposes some of the same positive reforms that Schultz does. They both propose lowering the hours that both men and women work,⁵⁴ making employers account for the changes in a person's life that result from reproduction and other aspects of intimate life,⁵⁵ and getting men more involved in homemaking labor.⁵⁶ Both, moreover, attend to the danger that particular proposals could exacerbate class inequalities.⁵⁷ There are, however, real differences between their approaches. Williams recognizes

51. Christopher Carrington, *No Place Like Home* 14–16 (1999). While Carrington's study of fifty-two gay families concludes that most gay couples divide homemaking duties unequally, he concedes that these findings run contrary to research done in the 1970s and 1980s. *Id.* at 5–6, 12–16. Carrington suggests that this new data may be due to cultural changes encouraging gay families to organize in traditional ways, as well as his methodology of observing families and interviewing family members separately. *Id.* at 12–14, 16–17. For older research suggesting that same-sex couples are less likely than opposite-sex couples to specialize in homemaking labor or wage labor, see Philip Blumstein & Pepper Schwartz, *American Couples* 148 (1983) (suggesting that "same-sex couples cannot assign housework on the basis of who is male and who is female"); Michelle Huston & Pepper Schwartz, *The Relationships of Lesbians and of Gay Men*, in *Under-Studied Relationships* 89, 108–11 (Julie T. Wood & Steve Duck eds., 1995); Virginia Rutter & Pepper Schwartz, *Same-Sex Couples: Courtship, Commitment, Context*, in *The Diversity of Human Relationships* 197, 209–11 (Ann Elisabeth Auhagen & Maria von Salisch eds., 1996).

52. Schultz, *supra* note 1, at 1955–58. Schultz also proposes that all people enjoy empowering working conditions, such as meaningful access to decisionmaking about the conditions under which they work. *Id.* at 1948–52.

53. *Id.* at 1943 (asserting the imperative of "the task of creating a new forward-thinking feminist politics by articulating why work matters so much to women as well as to men"). In proclaiming her approach as "forward-looking," Schultz writes:

This, to me, is a forward-thinking vision that builds on current trends and age-old aspirations to enable women and men of all walks of life to become full citizens—and fuller human beings—in the twenty-first century. This is what it means to secure the right to pursue a life's work.

Id. at 1940.

54. Williams, *supra* note 7, at 111; Schultz, *supra* note 1, at 1956–58.

55. Williams, *supra* note 7, at 94–96; Schultz, *supra* note 1, at 1952–53, 1958–59.

56. Williams, *supra* note 7, at 100; Schultz, *supra* note 1, at 1883.

57. See, e.g., Williams, *supra* note 7, at 233 (discussing asset redistribution strategies); Schultz, *supra* note 1, at 1945–48 (discussing the living wage).

that in an ideal world fathers would truly share family work, but she pragmatically focuses on current conditions by supporting making part-time work more remunerative for primary caretakers.⁵⁸ In contrast, Schultz suggests that all people should have similar work schedules and that parents should equally share homemaking and parenting responsibilities.⁵⁹ Moreover, while neither author suggests that full-time mother care or full-time third party care is optimal, Williams defends what she calls “the norm of parental care,”⁶⁰ while Schultz strongly supports childcare provided by non-family members.⁶¹ In sum, both Schultz and Williams propose wide ranging reforms to law and culture. Rather than characterize one approach as “forward-thinking” and the other as “backward-thinking,” I see them both, like any ambitious proposal, as containing the seeds of both liberation and subordination.

My perspective incorporates the postmodern insight that there is no position outside power relationships, and further that any particular institution has the potential to be both subordinating and liberating.⁶² It therefore rejects dichotomies, choosing a both/and rather than an either/or approach. I choose this method on the theory that neither strategy is perfect and that selecting one as superior carries more dangers than does contesting the distinction.⁶³ Under this approach, instead of positing one place as ideal for human flourishing (such as the workplace, if proper conditions are met), legal feminists instead could recognize the inevitability of engaging with power (from various subject positions), and resist that power by performing repetitions inside the power relations. We can engage in a progressive agenda to the extent that we can strategically shape the cultural forms we repeat.⁶⁴ Schultz seems to suggest that all people, men and women, should perform the role “worker” in gender- and race-neutral ways, hoping that doing so will affect the performance of “woman,” “man,” “wife,” “husband,” “mother,” and “father.”⁶⁵ One can

58. Williams, *supra* note 7, at 52–54.

59. Schultz, *supra* note 1, at 1956–57.

60. Williams, *supra* note 7, at 52.

61. Schultz, *supra* note 1, at 1900–02.

62. For canonical statements of these positions, see generally Judith Butler, *Gender Trouble* 4–5 (1990); 1 Michel Foucault, *The History of Sexuality: An Introduction* 10–12 (Robert Hurley trans., Pantheon Books 1978) (1976).

63. See Flax, *supra* note 17, at 36 (stating that “[a] discourse as a whole cannot be true or false because truth is always contextual and rule dependent”); see also Brenda Cossman, *Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories*, 48 *Clev. St. L. Rev.* 49, 59 (2000) (noting that legal victories are often losses and that litigants should expect to both win and lose in any given case).

64. See Butler, *supra* note 62, at 147 (stating that feminism’s critical task is to “locate strategies of subversive repetition” involving the critical repetition of constructed identities).

65. Schultz, *supra* note 1, at 1883–84. Neutrality, for Schultz, seems to mean decreased sex and race segregation in employment as well as equalization of pay and other conditions of employment. *Id.* at 1955–56 (suggesting “abandoning proposals to create part-time or other nonstandard jobs *for women*, and redefining what is ‘standard’ in a way

read the literature on remunerating homemaking labor as attacking the same problem from the opposite direction. This literature suggests that people perform “primary homemaker” work with financial entitlements, with the belief that doing so will improve both the material conditions under which the work is performed and the normative value accorded to the work and the people who do it. Joan Williams and I both make this analysis explicitly.⁶⁶ I like to think our proposals are not as regressive as Schultz seems to suggest.

Contrary to Schultz’s assertion that “solutions that focus on spousal income-sharing inevitably cast the husband (or higher-earning spouse) as the ‘boss,’ and the homemaker (or the lower-earning spouse who is presumed to do most of the housework) as the employee,”⁶⁷ my proposal views the primary homemaker as a secured creditor—a very powerful role—and the primary wage earner as the debtor.⁶⁸ The primary homemaker would have these rights by virtue of a document I call a Premarital Security Agreement (PSA). Granting creditor rights to primary homemakers furthers several goals consistent with Schultz’s approach. First, on a positive level, it gives financial support to primary homemakers and provides them with the independence and social value that come along with

that will encourage *men and women* from all walks of life to work at a livable pace”). But see *id.* at 1959 (clarifying that work is not conceptualized as a “sex-free zone” for purposes of sexual harassment law).

66. Williams, *supra* note 7, at 198–99; Ertman, *Commercializing*, *supra* note 7, at 92 (describing how Premarital Security Agreements (PSAs), my proposed vehicle for recognizing the debtor/creditor relationship between spouses, serve the feminist end of “identify[ing] opportunities for subversive repetition of identity constructions, repeat[ing] those identity constructions, and in doing so reveal[ing] their status as socially constructed rather than natural”). I note that:

[u]nder PSAs, the relevant identity is that of a married woman in a traditionally female gender role as primary homemaker. The repetition is her continued performance of that role, but with the twist of commodifying her domestic labors through a PSA. By playing the feminine domestic role with the (masculine) market accoutrements of a secured creditor, the homemaker reveals that her role is constructed rather than natural.

Id.

For further analysis of how PSAs cohere with some of the goals of poststructuralist theory, see Ertman, *Reconstructing*, *supra* note 20, at 1234–50.

67. Schultz, *supra* note 1, at 1911. Unlike Schultz, I do not read the other literature on remunerating homemaking labor as analogizing primary homemakers to employees. For example, while Richard Posner justifies alimony as severance pay for a terminated employment contract, Richard A. Posner, *Economic Analysis of Law* 164 (5th ed. 1998), he suggests that the primary wage earner is not the boss, but rather that spouses employ each other. *Id.* at 156–57.

68. For a description of how primary homemakers are analogous to secured creditors and primary wage earners are analogous to debtors, see Ertman, *Commercializing*, *supra* note 7, at 19–23. The particular analogy is important because “secured creditors are among the most powerful legal players in American law. They can repossess debtors’ property, including cars, business equipment, intangible property, and other items essential to business and personal survival.” *Id.* at 94–95 (citations omitted). For further analysis, see *id.* at 92–96.

cash. Second, on a normative level, it blurs the divide between market work and family work by giving homemaking labor some market attributes, such as the right to compensation and a self help remedy for collecting it. My proposal for remunerating carework, therefore, is consistent with Schultz's call to rethink the relationships among the state, the market, and the family. Third, consistent with Schultz's plea to expand gender and sexuality options,⁶⁹ PSAs could contribute to a redefinition of gender roles and heterosexuality. PSAs could supplement the meaning of *wife* as socially and economically weak by adding the socially and economically powerful rights of a secured creditor. In attaching these powers to the archetypally feminine role, and increasing the likelihood that men would engage in homemaking labor, PSAs could in turn contribute to a redefinition of femininity, masculinity, and indeed, heterosexuality. In addition, PSAs could also contribute to creating the social conditions for legal recognition of same-sex relationships by highlighting financial aspects of intimate affiliation, thus counteracting conservative rhetoric that views marriage as a divinely ordained institution solely for the begetting and raising of children.⁷⁰

All of this sounds great until one considers the dangers in both family and market rhetoric. As Schultz points out, there are dangers in creating incentives for women to engage in traditionally feminine roles.⁷¹ There are also dangers in privatized solutions to domestic relations problems.⁷² The trick, I suspect, is to propose changes that minimize the dangers inherent in either context, while maximizing the liberatory potential. Schultz is absolutely correct that income sharing proposals run the risk of reifying class, gender and racial differences.⁷³ But focusing on paid labor runs its own risks.

Schultz herself is aware that she, in some cases, keeps conservative company by focusing on paid labor. In addition to discussing the ways that work would be better for welfare recipients than current public benefits, she acknowledges the conservative origins, and limits, of the welfare-

69. Schultz, *supra* note 1, at 1911–12.

70. Ertman, *Reconstructing*, *supra* note 20, at 1246–47. For a discussion of retrograde dangers of same sex marriage, see *id.* at 1247–50. For further analysis of how market metaphors can deconstruct naturalized models of intimate affiliation, see Ertman, *Bridging*, *supra* note 20, at 79–85.

71. Schultz, *supra* note 1, at 1903–05.

72. See Martha M. Ertman, *Changing the Meaning of Motherhood*, 76 *Chi.-Kent L. Rev.* 1733, 1744–46 (2001) [hereinafter Ertman, *Changing*] (discussing weaknesses of purely private law approaches to remunerating care work); Ertman, *Reconstructing*, *supra* note 20, at 1224–54 (discussing potential regressive effects of PSAs on the law governing intimate affiliation).

73. Schultz, *supra* note 1, at 1912–14; see also Jane S. Schacter, *Taking the InterSEXional Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 *Denv. U. L. Rev.* 1255, 1257 (1998) (noting the danger of PSAs reifying traditional gender roles). More recently, I have explored whether private law/public law hybrids might cast a broader net than purely private or purely public remedies to the problem of the nonremuneration of homemaking labor. Ertman, *Changing*, *supra* note 72, at 1744–46.

to-work rhetoric.⁷⁴ Yet Schultz criticizes the carework feminists for citing conservative sources such as economist Gary Becker, apparently seeing a distinction between this strategy and her use of welfare reform to illustrate the importance of work.⁷⁵ This apparent insistence on only aligning herself with other progressives seems to contradict her larger point that “[w]e need a language that speaks to many different audiences—political, corporate, union, academic, activist, and average American.”⁷⁶ Interestingly, Schultz’s Essay shares this very crossover quality with much of the literature on remunerating homemaking labor. Williams wrote her book *Unbending Gender* to appeal to policymakers, primary homemakers, exhausted and alienated ideal workers, and employers.⁷⁷ Katharine Silbaugh bridges legal economics with feminist theory,⁷⁸ and I try to bridge the theoretical concerns of legal economics with various strands of feminist and queer legal theory.⁷⁹

CONCLUSION

In addition to sharing a commitment to address proposals to a broad, diverse audience, Schultz, Silbaugh, Williams, and I share normative commitments to alleviate subordination on the basis of sex, gender, race, class, and sexual orientation. Just as most people would agree with Schultz that “[n]o self-respecting feminist could be against ‘valuing housework,’”⁸⁰ I believe that most people, including most feminists, would agree with psychological theories suggesting that a full life (and

74. Schultz, *supra* note 1, at 1943. Schultz explains:

[T]here is a history of conservative rhetoric that emphasizes the value of the work ethic without an accompanying emphasis on ensuring the conditions under which people can form and realize their ambitions equally; this is the tradition from which those on the right who emphasize the need for poor people to take ‘personal responsibility’ draw.

Id. (footnote omitted); see also *id.* at 1942 (“In some circles, to talk about the value of work risks getting oneself labeled illiberal, anti-feminist, or right wing.”). For an example of integrated reform proposals that include work with other reforms, see generally Lucie White, *Searching for the Logic Behind Welfare Reform*, 6 *UCLA Women’s L.J.* 427 (1996).

75. Compare Schultz, *supra* note 1, at 1903 (critiquing “advocates of family-based approaches” for replicating “some of the same conservative assumptions that have been used traditionally to justify women’s disadvantage” and for relying on human capital literature such as the work of economist Gary Becker), with *id.* at 1932–33 (lauding welfare-to-work reforms as not purely conservative since decent jobs are “the only path that provides real hope for . . . employment in the long run”). Moreover, despite her critique of feminists who rely on legal economic literature, Schultz cites conservatives herself. *Id.* at 1908 n.95 (citing David Popenoe & Barbara Dafoe Whitehead, *The State of Our Unions: The Social Health of Marriage in America* (1999)).

76. *Id.* at 1942.

77. See Williams, *supra* note 7, at 101–13.

78. Silbaugh, *Commodification*, *supra* note 8, at 81–84; Silbaugh, *Marital Contracts*, *supra* note 7, at 92–124.

79. Ertman, *Commercializing*, *supra* note 7, at 63–66; Ertman, *Reconstructing*, *supra* note 20, at 1224–26.

80. Schultz, *supra* note 1, at 1900.

full citizenship) includes both work for love and work for wages, sometimes more of one than the other, and often a mixed-up jumble of both. Where we seem to diverge is in designating homemaking labor as *work* by remunerating it. I would like to think that a feminism “worth dying for,” as Schultz describes the feminism that so greatly expanded women’s options in the past thirty years,⁸¹ can account for the value of work done for intimates as well as for wages. If not, it would be helpful if Schultz could further explain two things: first, the basis on which we rigidly separate homemaking labor from wage labor, and second, whether treating wage labor as supreme devalues labor done for love and the (primarily female) people who do it.

81. *Id.* at 1938.

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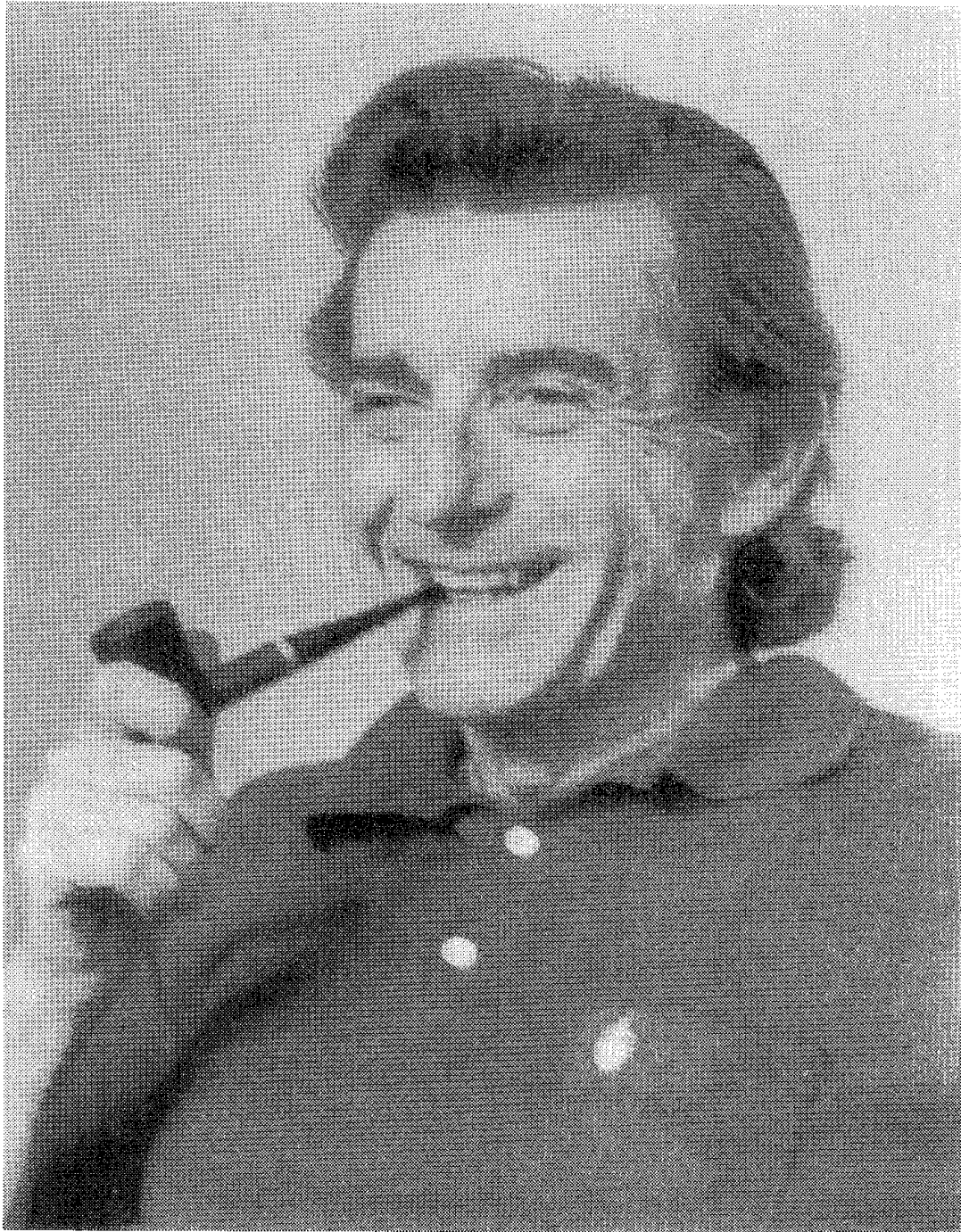
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