

Women Going Backwards: Law and Change in a Family Unfriendly Society

Sandra Berns

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The challenge of integrating work and family in order to value family without reinforcing traditional gender roles is a challenge that has not yet been met by any country. Rather, it is a work in progress — work that is complicated by the lack of a coherent vision to replace the division of responsibilities by gender. While concepts of gender equality have challenged and broken the traditional allocation of wage-earning to men and nurturing to women as inherent and natural, equality norms have failed to generate a concrete vision of work and family without gender as an organising principle. Gender neutrality, shared parenting and equal employment opportunity have operated as necessary pieces of a new vision, but it is neither a complete nor a comprehensive vision, and its necessary structural pieces have not been clearly or sufficiently articulated.

The lack of a new vision is apparent in Professor Sandra Berns' comprehensive analysis of Australian work/family policy over the past three decades in *Women Going Backwards: Law and Change in a Family Unfriendly Society*. Berns identifies the persistence of traditional gender roles and the traditional vision of work and family amidst significant legal reforms and change in a broad range of Australian law. In this complex, nuanced, sophisticated and well-argued book, Berns makes the case that changes heralded as part of a movement toward gender equality and social justice have perversely resulted in pushing women back rather than moving them forward.

Examining changes in the areas of equal opportunity law, family law, industrial relations law, social welfare law and taxation law, Berns demonstrates how care-giving continues to be valued for women, while wage work is no more accessible and remains highly gender segregated, with a widening wage gap. Things are not only not getting better; they are getting worse, and this is occurring within the context of laws and rhetoric that support equality. Equality has been used to demand fathers' rights to balance women's perceived, but not real, empowerment in the family and at work. At the same time, the rhetoric that attacks equality has increased, pitting efficiency and globalisation against equality in the workplace.

The negative position of Australian women is sometimes due to perverse effects of some 'reforms' but, as Berns also demonstrates, it is also linked to the gendering of neutral policies. So, for example, family-friendly policies are seen as women's policies, as special treatment for women. This contrasts sharply with the broad acceptance historically of the 'family wage', a policy understood to benefit men but never criticised as special treatment. Instead, the family wage was simply accepted as the expression of a social norm. Berns thereby points to the deep cultural embeddedness of the gendered norm of work and family, a cultural norm that would be a significant challenge even if contrary structural changes were in place.

Berns describes the current state of Australian law and policy, then, as profoundly flawed and at odds with itself. Having abandoned the traditional gendered allocation of work and family under pressure from equality norms, that allocation nevertheless remains deeply ingrained both legally and culturally. Equality norms have had only limited effect, however, because of the persistence of the traditional model and the unwillingness to wholeheartedly embrace an equality norm. But that ambiguity or dissonance may also reflect, as Berns suggests, a lack of social consensus or vision about a new resolution of work and family responsibilities.

Berns captures this ambiguity when she argues that the Australian system continues to be premised on the 'unencumbered citizen'. The unencumbered citizen is one who operates as a individual rather than as one connected to others — or, if connected to others, those connections in no way interfere with the ability to do wage work or operate in the public sphere. This is the subject at the core of liberal theory, a subject without care-giving or nurturing responsibilities. This unencumbered citizen is the operating premise of public policy. Historically, the unencumbered citizen was also a strong breadwinner. Berns argues that the breadwinner norm has shifted to a weak breadwinner norm, both because of the decline in men's wages and the shift to more casual and temporary work, as well as the assumption of the equality norm that women will engage in wage work that reduces the need for male breadwinning. The unencumbered citizen is seen as raceless, classless, genderless. But, as Berns argues, this neutrality is simply a facade; it instead tells us that this citizen is white, male and middle class — the individual who operates without disadvantage and therefore ignores the current structure of privilege. The privilege, however, comes with a price: care-giving, while optional for men, is not a real choice for them. They cannot encumber themselves without endangering their independence and self-sufficiency, thus becoming marginalised citizens.

Men's disadvantage under this confused, counter-productive system is a strong theme in Berns' analysis. Although fathers' rights advocates have had some success in convincing legislators and courts that men are subject to bias in the family law system, at the same time the persistence of the traditional norm continues to impose full breadwinner obligations on men. Those economic obligations pose a nearly insurmountable barrier to greater nurturing by men. The gender identification of nurture continues, to the detriment of men, children and women, since this undermines either true shared parenting or the ability of men to be the sole or primary nurturer.

Berns' core concept of the 'unencumbered citizen' is similar to the argument that Joan Williams has made in the American context about the vision of the 'ideal worker' as one without family or care-giving responsibilities.¹ The ideal worker is available to the employer to work up to 10 hours a day, and consequently has little time to contribute to housework and child care. This worker also depends upon a flow of care work for support of wage work, in addition to being unavailable to do significant amounts of

¹ Williams (1999).

housework or care work. To the extent an employer can impose last-minute demands for overtime or special projects or travel, those demands assume someone who does not have other responsibilities, or that those responsibilities can take second place or be displaced by the needs of wage work.

Berns, like Williams, argues that this norm continues to dominate policy about work and family. While not explicitly gendered, it is understood to be male. Structurally and culturally, men are supported in meeting this norm, while women are not. It is a norm that ignores care-giving. It is therefore inevitably partial and, because it operates in a gendered way, it is discriminatory and inegalitarian. It is also anti-family: since family is not valued, then the consequence would be smaller families or less care.

Berns demonstrates specifically how traditional gender norms persist by sustaining the unencumbered citizen at the core of Australian work/family policy. Berns carefully examines five separate areas of law: equal opportunity law; family law; industrial relations law; social welfare law; and tax law. She demonstrates how the intersection of these areas of law reinforces traditional gendered allocations of work and family. Interwoven in her analysis is comparison particularly to the United States and United Kingdom as negative models that Australia increasingly is moving towards, and contrasting this with Sweden, as a model of broad support for egalitarian work/family relationships. As she consistently points out, however, even with the breadth of Swedish policies the goals of gender equality and de-gendering the work/family relationship have not been achieved. Workplace culture continues to subvert even the most progressive work/family policies.

Beginning with equal opportunity law, Berns acknowledges that this has been a primary focus of advocates for women's equality, insuring that women have the same opportunities as men to choose the kind of work they do and who to work for. As Berns documents, however, despite equal opportunity law, Australia remains highly sex segregated, with a persistent and arguably widening wage gap. Her analysis is that equal opportunity law has been marginalised at best, and at worst is largely irrelevant to the occupational patterns in the Australian workplace. A major failing of existing law is that it does not cover businesses with less than 100 employees. But, even more significantly, the structure of equal employment opportunity law, as in many countries, is a structure of formal equality — for example, ensuring that women have equal opportunity to perform the same jobs as men. If those jobs are structured in a way inconsistent with care-giving responsibilities, however, then the equality insured is only theoretical, not real.

One specific example of a structural problem not addressed by equal employment law is the problem of the length of the workday. Berns points out that the conventional eight-hour (or more) workday is inconsistent with family responsibilities. She also points out that greater flexibility in the workplace, often touted as more family friendly, may in fact result in longer hours. She suggests that working hours need to be viewed from a lifetime perspective, so that in peak caring years, workers who are parents would be limited to a six-hour working day.

Weak equal employment laws are linked to changed family law that nevertheless presumes equal work opportunity. As Burns explains, family law traditionally strongly supported the breadwinner/caregiver roles, allocated by gender. Widows with children, and later all single mothers, were generously supported in a manner sufficient to make it unnecessary for them to do wage work while raising children, or at most necessitating part-time work. If the breadwinner was absent, the state stepped in as a substitute breadwinner. Care and nurture were supported, but in a way that reinforced dependency and gender-specific roles. Reform in family law has moved away from support of this gender-specific norm toward joint or shared parenting and replacement of state support with collection of private support from spouses. The collection of child support has in turn fuelled a fathers' rights movement resistant to child support and also claiming rights of access to their children. The consequence has been the enactment of a gender-neutral family law regime, although it remains highly gendered in reality, with nearly all young children being cared for by their mothers. At the same time, mothers are expected to share in financial support of children, although the wage labour market is no more welcoming than before to workers who are also nurturing parents. Finally, the strong social welfare support of single parents has shifted towards a requirement of work in order to receive support. Thus, if a mother remains married, the family and work law systems combine to reinforce the primacy of her care-giving role. If a mother is a single parent, however, the shift in the social and private support structures now encourages, or even requires, that she engage in wage work, despite lack of experience or opportunity during marriage. Australia is shifting toward stigmatising single parents.²

Berns also describes popular perceptions of family crisis that blame the crisis on shifting gender roles. Women are vilified, and men are the objects of sympathy. Lower fertility rates, starting families when women are older, more non-marital children, less marriage and more divorce are blamed on the disintegration of the traditional order, and blamed particularly on feminists. Ignored are the links between these statistical patterns and continuing lack of opportunity for women.

The family has become more fragile, but the exposure of that fragility has exposed a cultural attachment to the traditional family. Amidst shifts in family law toward a shared, egalitarian family law, there has been nothing to shift support from the old 'social settlement' to a new one. Most notably, caring and working do not combine, creating differently gendered problems for mothers and fathers. Finally, shifts in social support for parents reflect also changing social perceptions of single parents, moving towards the US view that such parents and family structures are bad, and should be discouraged.

Berns' examination of social welfare policy is more historical than her treatment of other areas, and clearly lays out the shift from explicit support of the breadwinner family, and thus of replacing the breadwinner in the single parent family, to requiring single parents to work. The difficulty with the new system is that dependency continues, linked to the weak labour position of

² See Dowd (1997).

Australian women. Berns describes the shift as one that now accepts the existence of a weak male breadwinner regime. It is not longer expected that a male will support a family and mothers should not work, but the 'worker' remains an individual without family responsibilities.

Berns sees the movement in Australia as adoption of the US/UK model. That would include, most significantly, further cutbacks in the social welfare support structure. In addition, the industrial relations system is unlikely to do anything about the employment structure. It has exacerbated recent tensions because bargaining is now at the enterprise level, which reinforces existing occupational segregation.

Finally, Berns examines the tax system. Here, too, the traditional gender divide is reinforced, under the guise of choice. The choice to live on a single income is strongly supported under the tax system. Family is valued by valuing the traditional family and discouraging young women from maintaining a labour market connection. This rejects a dual worker/carer model. By supporting a single wage earner, it makes the parent who does not work likely to be dependent should the relationship fail. In combination with social welfare policy that now discourages long-term dependency, it helps create a cadre of low-skilled workers. This privileging of single-income families is built on expected choice of women between family and career, while men just become breadwinners. One of the ironies of this structure is that the patterns of work and family that would permit care without wage work of sole parents are criticised, but the same patterns are deemed as worthy and important for those who are more financially privileged.

The primary focus of Berns' book is a look backwards, to evaluate what has changed in the past 30 years and why it has had so little positive impact on the status of women and men — and in fact arguably has caused women, at least, to take a step backwards. Her multilayered analysis reveals how complex the structural and cultural underpinnings of the gender norms of work and family are, and therefore how both changes intended to affect gender relations (like equal employment legislation) and changes focused and generated by other goals (like industrial relations legislation) can have an impact on the ability to shift away from gendered roles of work and family. In the process of her critical analysis, Berns nevertheless also suggests a number of lessons and solutions. These include both a 'big picture' approach and more moderate, concrete, short-term solutions.

Berns suggests that the core orientation must shift from the unencumbered to the encumbered citizen, meaning that every citizen should be presumed to have caring responsibilities. The universal caregiver would be the ideal. This is essential in order to weaken and eradicate the traditional sexual contract. Any further change to achieve greater gender equality and the relinquishment of gender roles in work and family will ultimately fail without a clear social vision to support them.

The reforms of the past three decades reflect a misunderstanding of what causes inequity and what can cure it. Berns concludes that it cannot be done simply by proscribing discrimination. Equity laws have failed to reach occupational segregation and comparable worth, two significant structural

barriers to women's equality. The approach has been to correct what is presumed to be a basically equitable system. But the system is not equitable, and the fix needed goes much deeper. In addition, an anti-discrimination law approach is not sufficient. Equity often fails because of laws other than those thought to be most critical, like the legal arenas identified in this book.

She sees the primary problem in the existing structure as the lack of encouragement for women to be in the workforce and the perpetuation of the breadwinner ideal despite the erosion of the traditional structure of support for that ideal. The failure to eliminate the traditional bargain in the labour market reinforces the traditional split of work in the home.

The pattern of the past 30 years is a narrow lens of gender disadvantage, without linking one thing to the other. In the process, not only is work law not linked to family law, but men's disadvantage is not seen in the perpetuation of women's disadvantage.

Finally, she suggests immediate, modest proposals that would foster choice and be steps towards a different vision of work and family: paid parenting leave; abandoning the 'social wage' reinforcing a single income family; tax policies supportive of the costs of children; part-time entitlement after leave; and the provision of subsidised high-quality child care. This list, however, would represent radical change from the policies of the past three decades.

Berns' work is a valuable contribution not only for assessing policy in Australia, but also for considering similar issues globally. The ultimate losers in the failure to construct policies that support work and family are children and families. If we continue to undermine our children, then ultimately we are undermining our future. It is nevertheless clear that we remain culturally ambivalent about the work/family relationship, even as we embrace in theory the concept of gender equality. Berns suggests we will only resolve that ambivalence by adopting a universal ethic of care. This implies a strategy that requires the definition of 'worker' and 'parent' to change and be degendered. If that work is to be done, then it will depend upon the kind of analysis presented in this book.

References

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