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The Cost of Non-Billable Work

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I. Introduction

Tasks as small as organizing after-work drinks and as big as designing the firm's website create and sustain loyalty, increase productivity, and hold an organization together. In the crisis conditions of the COVID-19 quarantine, workers created new systems to keep governments, businesses, and schools functioning while also figuring out new ways to keep staff safe, connected, and engaged. Yet law and business oddly ignore or devalue these tasks, which are commonly known as "non-billable work" or "office housework." Equally surprising is employment law's failure to link non-billable work to pay disparities based on race and gender. Women tend to do more non-billable work—and women of color still more—than men, which shunts

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them away from the billable work that leads to promotions and raises.¹ This pattern stems from the common misperception of non-billable work as a gift to the organization, which gives male workers and the organization a free ride. This Article seeks to remedy that problem by revealing the cost of non-billable work to female workers, demonstrating its value to organizations, and providing an analytical framework to redistribute its cost from the workers who do it to the organizations that it benefits.

The invisibility of non-billable work can be traced to commonalities it shares with time-sucking tasks in home life, such as scheduling doctors' appointments and paying bills, and life-cycle events such as planning weddings, funerals, and birthday parties. A crisis expands these tasks exponentially, as when the COVID-19 pandemic required everyone to make or buy gloves and masks, maintain social distance with anyone outside of their household, and of course care for sick people. Columbia law professor Elizabeth Emens dubs these tasks "admin."²

First, these tasks are invisible if done well.³ The well-planned summer associate program is less likely to run into difficulties, advance planning for office retreats makes for seamless logistics, an effective hiring or admissions committee weeds out sub-par candidates, and a well-written and researched continuing legal education presentation should maintain the presenter's professional reputation. Likewise, scheduling a doctor's appointment can prevent serious illness, paid bills keep the Wi-Fi functioning, and a well-planned holiday party sustains personal relationships and community. Access to and proper use of protective personal equipment, combined with the effective implementation of social distancing policies, prevent spread of a serious illness such as COVID-19, minimizing its effect on the workplace.

Second, many of these tasks seem trivial—the workplace equivalent of sweeping crumbs off the counter at home.⁴ Yet they take more time, thought,

1. Kimberly T. Schneider & Phanikiran Radhakrishnan, *Three Dilemmas for Academics: Gender Disparities in Scholarship, Teaching, and Service*, 11 INDUS. & ORGANIZATIONAL PSYCHOL. 428, 430–31 (2018); Joan C. Williams et al., *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*, AM. BAR ASS'N & MINORITY CORP. COUNSEL ASS'N 18 (2018), <https://www.mcca.com/wp-content/uploads/2018/09/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf> [<https://perma.cc/F6TD-W95Z>].

2. See, e.g., ELIZABETH F. EMENS, *LIFE ADMIN* ix (2019); Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1409 (2015) (discussing many forms of "admin" that take family members' time and energy).

3. Mary Anne Wichroski, *The Secretary: Invisible Labor in the Workworld of Women*, 53 HUM. ORG. 33, 38 (1994).

4. On the home front women also generally do more than their fair share of housework and have less leisure time than their male partners. See, e.g., Claire Cain Miller, *Young Men Embrace Gender Equality, but They Still Don't Vacuum*, N.Y. TIMES (Feb. 11, 2020), <https://www.ny-times.com/2020/02/11/upshot/gender-roles-housework.html> [<https://perma.cc/L9PX-WALL>].

and effort than the people who evade these tasks realize and contribute to collective welfare in real and substantial ways.

Managers are more likely to ask women to “volunteer” for these tasks, because people tend to assume that women are more willing to do these often-thankless jobs, and even enjoy them.⁵ Moreover, women are more likely than men to say “yes.”⁶ Yet that veneer of collegiality conceals a good measure of compulsion. It also masks how gendered expectations impose most of non-billable work’s costs on women and allocate most of its benefits to male employees and to the organization itself.

This Article’s argument for redistributing the cost of non-billable work proceeds in four parts. The first Part gives examples of non-billable work from the pending sex discrimination case against the global law firm Jones Day, provides a three-part typology describing a range of non-billable work, and links it to gender discrimination. The second Part articulates a theoretical explanation for why organizations and workers themselves often mistake non-billable work for a gift due instead of real work. Seeing collegiality and economic gain as mutually exclusive “Hostile Worlds,” in the phrasing of Princeton sociologist Viviana Zelizer,⁷ covers up the work’s economic value under a blanket of collegiality. The third Part proposes the metaphor of a mosaic to disrupt erroneous Hostile Worlds thinking and replaces it with a more accurate understanding that allows collegiality to exist alongside the economic gains that billable work confers on organizations. Finally, the fourth Part shows how the mosaic metaphor can help advocates in employment discrimination cases. Together these insights give legal doctrine, organizations, and workers themselves a tool to enable them to see the value of non-billable work and consequently improve the respect and compensation that comes from it.⁸

5. Joan C. Williams & Marina Multhaup, *For Women and Minorities to Get Ahead, Managers Must Assign Work Fairly*, HARV. BUS. REV. (Mar. 5, 2018), <https://hbr.org/2018/03/for-women-and-minorities-to-get-ahead-managers-must-assign-work-fairly> [<https://perma.cc/B2BP-F6BX>]. Military argot dubs this kind of forced volunteerism as being “voluntold” to do a task. See Geoffrey Ingersoll & Jeremy Bender, *41 Phrases Only People in the Military Will Understand*, BUS. INSIDER, (Nov. 1, 2014, 10:00 AM), <https://www.businessinsider.com/phrases-only-people-in-the-military-know-2014-10> [<https://perma.cc/FY9H-YL42>].

6. Williams et al., *supra* note 1, at 19.

7. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 43 (2005).

8. A rich literature on invisible work includes Marion G. Crain et al., *Introduction: Conceptualizing Invisible Labor*, in *HIDDEN WORK IN THE CONTEMPORARY WORLD* 6 (Marion G. Crain, Winifred R. Poster & Miriam A. Cherry eds., 2016) (defining “invisible labor” as “activities . . . within . . . paid employment that workers perform in response to requirements (either implicit or explicit) from employers and that are crucial for workers to generate income, . . . yet are often overlooked, ignored, and/or devalued by employers, consumers, workers, and ultimately the legal system”). Other forms of invisible labor are done by workers behind seemingly automatic websites, cooks and caterers who prepare prepackaged food, and student “brand

II. Making Non-Billable Work Visible

To value something, we must first see it. We start with the specific: detailing the Jones Day associates' allegations against the firm. Then, extending the analysis beyond law firm associate life, the typology set out below identifies three types of non-billable work that occur in most organizations. Seeing the breadth and variety of non-billable work makes clear the importance of empirical research demonstrating that women do most non-billable work, and the injustice of them suffering for it.

A. *Non-Billables at a Large Law Firm*

In the pending gender discrimination case against Jones Day,⁹ the plaintiffs—female associates—allege that the firm's pervasive “fraternity culture” bred pregnancy discrimination, sexual harassment, and pay disparities.¹⁰ In that kind of culture, it is hardly surprising to find allegations about lunches at Hooters in the Complaint.¹¹ But also telling—and not highlighted as actionable—are repeated instances in which the firm expressed and enforced gender and racial hierarchies by shunting female associates and even partners toward non-billable work and away from work that led to bonuses and promotions.

Specifically, the plaintiffs allege that the firm allocated a “disproportionate share of non-billable work” to women. The tasks included recruiting new and summer associates, organizing elements of the summer program, and training new associates.¹² Making these associates the face of the firm at law schools provided a valuable show of seeming diversity, as shown by the firm's directing an African-American plaintiff to recruit African-American candidates.¹³ Likewise, prepping materials for a partner's continuing legal

representatives” who encourage their classmates to buy goods and services. *Id.* at 19–20, 23. Early discussions of emotional work and other forms of non-billable work include ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART* (1st ed. 1983); ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1st ed. 1977).

9. Third Amended Class and Collective Action Complaint, *Tolton v. Jones Day*, No. 19-945 (D.D.C. Aug. 16, 2019). Other firms involved in similar claims include Chadbourne Parke and Proskauer Rose. Elizabeth Olson, *Lawsuit Presses the Issue of Lower Pay for Female Law Partners*, N.Y. TIMES (May 7, 2017), <https://www.nytimes.com/2017/05/07/business/dealbook/law-firm-pay-gender-bias.html> [<https://perma.cc/ZH8J-AWP6>]; Debra Cassens Weiss, *Proskauer Partner Resolves Her Gender Bias Suit Against the Firm*, A.B.A. J. (Aug. 13, 2018, 10:05 AM), https://www.abajournal.com/news/article/proskauer_partner_resolves_her_gender_bias_suit_against_the_firm [<https://perma.cc/KB8K-ADFD>].

10. Third Amended Class and Collective Action Complaint, *supra* note 9, ¶ 28.

11. *Id.* ¶ 27.

12. *Id.* ¶¶ 36, 85–87, 295.

13. *Id.* ¶ 295.

education course¹⁴ benefitted the firm even as it exacted its opportunity costs on the associate who performed the work. And pro bono representation—of which the plaintiffs allege female associates did a disproportionate share—benefitted the firm’s reputation even as it harmed the associates who did it when the firm discounted hours spent doing the work.¹⁵ That discount apparently applied even if management directed an associate to do the pro bono work.¹⁶ Female partners were not exempt from compulsory non-billable work: the plaintiffs claim that the partner in charge of diversity told them that she took the post only because the firm made her.¹⁷ In-house remedies did not exist, due to a powerful and ubiquitous slogan of “no whining” at Jones Day that allowed the firm to simultaneously require, benefit from, and ignore the non-billable work.¹⁸ For instance, when one plaintiff declined to be the social chair of the summer program, the partner assigned a male associate to do the work and instructed a female associate to assist him.¹⁹

Allocating the cost of non-billable work disproportionately to female attorneys translated to fewer billable hours for them—or working more to report the same billables as their male peers—and also less work on promotion-related projects. One plaintiff claims that she spent 226 hours in a year on “community engagement representing the firm,” which translates to nineteen hours a month.²⁰ In a forty-hour-a-week position, that is about half a week every month spent on non-billable work. On top of more than fifty hours of billable work in a typical week and other forms of discrimination, that load seems like more than a person could or should bear.

B. Typology of Non-Billable Work

Non-billable work takes many forms, from informal kindnesses, such as taking up a collection for a colleague’s wedding present,²¹ to formal, ongoing tasks required for an organization to keep its doors open, such as serving on a hiring, admissions, or accreditation committee. The following typology identifies three distinct kinds of non-billable work: office housework; “glue

14. *Id.* ¶¶ 196–97.

15. *Id.* ¶¶ 37–38.

16. *Id.*

17. *Id.* ¶ 58.

18. *See, e.g., id.* ¶¶ 54, 231, 259–60.

19. *Id.* ¶ 260.

20. *Id.* ¶ 173.

21. Along the same lines, a physician who greets front office staff by name every morning gets the team off to a collegial start, smoothing the way for staff, patients, and physicians to cooperate all day. Likewise, a flight attendant’s smile becomes the product—or an important aspect of the service—that an airline sells its customers. *See, e.g.,* HOCHSCHILD, *supra* note 8, at 4, 92–93.

work” that holds people and projects together;²² and organization maintenance.

Office housework mirrors household tasks such as food management (i.e., lunch orders), event planning and supervision (i.e., holiday parties), and managing technology (i.e., phone conferences; Wi-Fi access; and printer glitches). Glue work builds and sustains trust and community through onboarding new employees, mentoring, retreat planning and administration, running diversity and other committees, and board membership outside the organization. The third category, organizational maintenance, keeps the shop operating via hiring and promotion or university admissions, website updates, professional writing (i.e., blog posts), and well-researched and written continuing legal education materials. None of these tasks are billable, yet they generate tremendous value by sustaining trust and collegiality, decreasing attrition, cultivating talent, preventing obsolescence, and complying with internal and external requirements for staying in business.²³

The grid below lists the three categories of non-billable work, the range of time and effort for each type, and a handful of examples.²⁴ These examples cannot capture the variety of non-billable tasks across organizations and industries, but the list does include examples from both business and nonprofit contexts like universities.

22. Software engineer Tanya Reilly coined the term “glue work” for tasks such as reviewing design documents, onboarding new people, and improving processes. She contends that glue work can be “career limiting” and “push people into less technical roles.” Tanya Reilly, *Being Glue*, NO IDEA BLOG, <https://noidea.dog/glue> [<https://perma.cc/7FFX-DG5Y>] (last visited Feb. 4, 2020). For a video of Reilly’s speech, see, LeadDev, *Technical Leadership and Glue Work - Tanya Reilly*, YOUTUBE (May 10, 2019), https://www.youtube.com/watch?v=KCIAPip-nKqw&list=PLBzScQzZ831_qiY6iuS-jHmp1QvdE8m5_&index=10&t=0s [<https://perma.cc/KZ98-RNDB>].

23. See *infra* notes 32–35 and accompanying text.

24. Definitional projects invite challenges about inclusion and exclusion. Here, non-billable work includes both tasks that are also done at home such as meal planning and record keeping, and tasks that are unique to office life like recruiting, formal mentoring, and website creation and maintenance. For a thorough categorization of at-home administrative work, along with tips for minimizing it, see EMENS, LIFE ADMIN, *supra* note 2. Another researcher cataloged social support given and received at work by grouping types of support: sharing, listening, counselling, nonwork services, encouragement, and caretaking. Gail M. McGuire, *Intimate Work: A Typology of the Social Support That Workers Provide to Their Network Members*, 34 WORK & OCCUPATIONS 125, 129 (2007).

TIME AND EFFORT	SMALL/OCCASIONAL	MEDIUM	LARGE/ONGOING
OFFICE HOUSEWORK	<ul style="list-style-type: none"> • life events recognition (i.e., wedding; baby; condolence) • food management (i.e., occasional breakfast meeting) 	<ul style="list-style-type: none"> • leave banks • plan parties • food management (i.e., regular lunch meetings) 	<ul style="list-style-type: none"> • team-building events (i.e., soccer Saturdays; football pool)
GLUE WORK	<ul style="list-style-type: none"> • spot mentoring • take notes • attend meetings • smooth ruffled feathers 	<ul style="list-style-type: none"> • plan retreats • repeat mentoring • spot covering • present at meetings 	<ul style="list-style-type: none"> • formal mentoring • longer-term covering
ORGANIZATION MAINTENANCE	<ul style="list-style-type: none"> • recruit • mentor students • presentations • rain-making trips 	<ul style="list-style-type: none"> • minor committee • entertain clients • serve on boards • publish 	<ul style="list-style-type: none"> • design and maintain website • major committee (i.e., hiring, accreditation, administrative, or strategic planning)

Some of these items—especially in the office housework category—seem like plain kindness instead of work. But those kindnesses convey immense value. For example, the healthy, fast-food alternative Sweetgreen trains servers to provide what they dub a “sweet touch” in their ninety seconds of contact to try to make each customer a little happier.²⁵ The heightened competition of digital commerce may translate to a decrease in niceties like sending cards or flowers for birthdays and holidays, but law firms and executive-search companies still take clients out to the ball game, theater, and even to Las Vegas. The plan is that what happens in Vegas doesn’t stay in Vegas, but instead spills over into trust and collaboration in future business endeavors. As Wharton Professor Adam Grant put it in a *New York Times* editorial: “When friends work together, they’re more trusting and committed to one another’s success. . . . [T]hey share more information and spend more time helping,” and can even “make better choices and get more done” if

25. Heather Long, *Meet Sweetgreen -- the 'next Chipotle'*, CNN MONEY (July 10, 2015, 2:54 PM), <https://money.cnn.com/2015/07/10/investing/sweetgreen-brand-next-chipotle/index.html> [<https://perma.cc/9F3U-42GW>].

there's still room for constructive criticism.²⁶ A 2009 study likewise found that workers report higher job satisfaction when they feel they have the opportunity for friendship.²⁷

Kindness matters because while corporations and LLCs are artificial persons, they are controlled by human beings with hearts, families, loyalties, and a preference for working with people they trust. Recognition of humanity goes a long way. When a friend of mine who is a banker lost his father, the bank catered the post-shiva dinner. On the lighter side, ping-pong tables and cafeterias create value by bringing employees together to eat and play, and the relationship-building banter that comes with both. Google ups the ante by offering an on-site gym, massage therapy, and free meals, all of which grease the tracks for employees to cultivate friendships and other collaborations.²⁸ At the other end of the spectrum, Amazon has been highly criticized for its dog-eat-dog culture that prides itself on ignoring the social niceties.²⁹ Most workplaces fall in-between these extremes. For example, my law school holds book parties for faculty authors, and circulates cards for employees who get married, have kids, or lose a family member. These efforts can create and sustain the powerful social glue that promotes what I call "us-ness."³⁰

Once trust and a sense of "us-ness" develops, only a fool takes it for granted because keeping a customer or employee is much cheaper than getting a new one. Virgin Group founder Richard Branson sees business success as "all about people, people, people," a category in which he includes employees.³¹ Non-billable work goes a long way in mitigating the "workers as machines" phenomenon common in industries requiring billable hours or sales quotas. Further, it makes employees stick to an organization. According to the Society for Human Resource Management's (SHRM's) 2015 Globoforce Employee Recognition Survey, retention, employee engagement,

26. Adam Grant, Opinion, *Friends at Work? Not So Much*, N.Y. TIMES (Sept. 4, 2015), <https://www.nytimes.com/2015/09/06/opinion/sunday/adam-grant-friends-at-work-not-so-much.html> [<https://perma.cc/2JM8-5KPV>].

27. Carolyn Dickie, *Exploring Workplace Friendships in Business: Cultural Variation of Employee Behaviour*, 17 RES. & PRAC. HUM. RESOURCE MGMT. 128, 128–29 (2009).

28. Jillian D'Onfro & Lucy England, *An Inside Look at Google's Best Employee Perks*, INC. (Sept. 21, 2015), <http://www.inc.com/business-insider/best-google-benefits.html> [<https://perma.cc/JN5K-88RJ>].

29. Jodi Kantor & David Streitfeld, *Inside Amazon: Wrestling Big Ideas in a Bruising Workplace*, N.Y. TIMES (Aug. 15, 2015), <https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html> [<https://perma.cc/QLL4-TJ6K>].

30. MARTHA M. ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* xviii (2015).

31. Jack Preston, *Richard Branson: What Your Office Says About Your Business*, VIRGIN: ENTREPRENEUR (Aug. 10, 2017), <https://www.virgin.com/entrepreneur/richard-branson-what-your-office-says-about-your-business> [<https://perma.cc/84YM-28EC>] (quoting Richard Branson).

and succession planning top the list of most human relations professionals' concerns.³² They are not just being nice. According to a 2006 SHRM report, one of Caterpillar's European plants not only saved \$8.8 million from decreased attrition, absenteeism, and overtime by increasing employee engagement, but also witnessed a \$2M profit increase and 34% jump in highly satisfied customers.³³ Manpower Group Solutions, a global leader in recognizing and solving workforce problems, should appreciate the relationship between non-billable work and the bottom line. Indeed, Manpower Vice President Steve Lopez urges companies to invest in retention strategies just as they do in their brand, tailoring strategies to employees' needs instead of taking a one-size-fits-all approach.³⁴

Recognizing everyone's basic human need to feel supported can prevent expensive surprises. According to Harvard Business School Professor David A. Thomas, failure to coach subordinates means that

[employers are] likely to be blindsided by events they should have foreseen and in many cases fixed—such as the sudden departure of a star employee for greener pastures or, more commonly, a sense of discouragement that festers when someone believes, with reason, that the organization is not in his or her corner.³⁵

In short, organizations cultivate supportive social networks among workers because it benefits them.

UCLA psychologist Shelley Taylor calls these efforts “tending,” or taking care of one another, and documents its immense value to the health, education, and welfare of families, schools, workplaces, and the wider culture.³⁶ Cornell philosopher Kate Manne likewise sees tending as “genuinely good

32. GLOBOFORCE, 2015 EMPLOYEE RECOGNITION REPORT 3 (2015). Globoforce commissioned SHRM to conduct the survey used for the report. *Id.* at 22.

33. ROBERT J. VANCE, SOC'Y FOR HUMAN RES. MGMT., EMPLOYEE ENGAGEMENT AND COMMITMENT: A GUIDE TO MEASURING AND INCREASING ENGAGEMENT IN YOUR ORGANIZATION 1 (2006).

34. *A New Take on Employee Retention: Applying User Experience Principles to Attract and Retain Talent*, MANPOWERGROUP (July 28, 2015, 5:22 AM), <https://www.manpowergroup.com/media-center/news-releases/A+New+Take+on+Employee+Retention+Applying+User+Experience+Principles+to+Attract+and+Retain+Talent> [<https://perma.cc/HJV2-3Q3D>].

35. Martha Lagace, *Manager or Mentor? Why You Must Be Both*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Nov. 26, 2001), <https://hbswk.hbs.edu/item/manager-or-mentor-why-you-must-be-both> [<https://perma.cc/A44F-LSFP>] (quoting Professor Thomas).

36. SHELLEY E. TAYLOR, *THE TENDING INSTINCT* 12–13 (2002). Other scholars term it “kin maintenance,” “caretaking work,” or “caretaking labor.” See, e.g., Micaela di Leonardo, *The Female World of Cards and Holidays: Women, Families, and the Work of Kinship*, 12 *SIGNS* 440, 450 (1987) (using the term “kin maintenance”); Martha Albertson Fineman, *Contract and Care*, 76 *CHL.-KENT L. REV.* 1403, 1406 (2001) (using the term “caretaking work”); Martha T. McCluskey, *Caring for Workers*, 55 *ME. L. REV.* 313, 314 (2002) (using the term “caretaking labor”).

and the lack thereof [as] bad,” if we want civic interactions to be civil.³⁷ Yet market and social forces systemically devalue care work. In the home, these tasks are viewed as labors of love, and in the office as friendship or collegiality.³⁸ Even the people who perform non-billable work often see these tasks as something other than real work.

That error hurts some people more than others because women—especially women of color—are more likely to do this work.³⁹ In other words, devaluing non-billable work allocates more of the work’s cost to females and more of its benefits to men.

C. Gender and Sham Consent

According to the logic of Manne’s book *Down Girl*, this willful blindness towards carework is misogynist.⁴⁰ The logic of misogyny, she contends, treats women not as “human beings,” but as “human givers when it comes to the dominant men” who look to women for “approval, admiration, deference, and gratitude, as well as moral attention, sympathy, and concern.”⁴¹ Indeed, the very emotional quality of that “work” may contribute to its devaluation. Italian sociologist Silvia Gherardi sees “emotionality as an organizing principle” that belongs to “the symbolic universe of the female and is therefore devalued.”⁴²

A 2007 study of academia reveals that female faculty members spend 15% more time each week on non-billable work than their male colleagues—or about six extra hours a week.⁴³ One 2018 study reported that male faculty do seven more hours of research each week than women, more than half of a day every week on an activity highly correlated with promotion and compensation. Their female colleagues, on average, spent those seven hours on

37. KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 110–11 (2018) (emphasis removed).

38. The same insistence on separation between rational and emotional has shaped law’s traditional reluctance to acknowledge the impact of emotion on legal doctrine and processes. See, e.g., *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999) (multiple essays on the role of emotion in shaping the law).

39. TAYLOR, *supra* note 36, at 22; Williams et al., *supra* note 1, at 19.

40. That blindness is hard to counteract, if Manne is right that misogyny perpetuates itself by “self-masking”: a person who draws attention to it is liable to give rise to more of it. MANNE, *supra* note 37, at xix. Manne explains that when a woman resists the caretaker role, the men who depend on her support may resent it, and seek “payback, revenge, retribution.” *Id.* In addition, women’s resistance to being cast as caretakers may be characterized as “transgressions or bald-faced lies.” *Id.*

41. *Id.*

42. SILVIA GHERARDI, *GENDER, SYMBOLISM AND ORGANIZATIONAL CULTURES* 158 (1995).

43. Linda Babcock et al., *Gender Differences in Accepting and Receiving Requests for Tasks with Low Promotability*, 107 AM. ECON. REV. 714, 715 (2017) (citing Stephen R. Porter, *A Closer Look at Faculty Service: What Affects Participation on Committees?*, 78 J. HIGHER EDUC. 523, 534 (2007)).

teaching (one hour), mentoring students (two hours), and serving on committees for a whopping five more hours than men, every week.⁴⁴ Female faculty of color are asked to carry particularly high service loads on department and university committees.⁴⁵

First-person accounts echo these findings. Elaine Ezekiel, a marketing director for a software company, wrote a blog about “work that falls outside of job descriptions” and other variations of non-billable work that often lead to less workplace recognition.⁴⁶ Yet the tasks she lists—doing the office dishes, showing new employees around, and assisting in job interviews—while not in the job description, help the organization run smoothly.⁴⁷ Along the same lines, software engineer Tanya Reilly coined the term “glue work” to describe tasks such as reviewing design documents, onboarding new people, and improving processes that makes software companies run.⁴⁸ Reilly’s compilation of workers’ stories reveals that people—often women—who do glue work can be seen as less technical, and thus less likely to be promoted to project manager or senior engineer.⁴⁹

Women may volunteer for these “glue” tasks, but their consent is highly constrained. As Manne observes, a woman, more than a man, “tend[s] to be in trouble when she does not give enough, or to the right people, in the right way, or in the right spirit.”⁵⁰

Empirical evidence documents that gender expectations pressure women to do more non-billable work than men. One 2015 study reported that women are twice as likely to “volunteer” for “non-promotable” office tasks like writing a report, serving on a committee, or organizing an event.⁵¹ This gender gap appears to be a function of having both men and women in a

44. Schneider & Radhakrishnan, *supra* note 1, at 428. See also Babcock et al., *supra* note 43. Another study using data from 140 institutions also found gender disparity in committee assignments, though at a lower rate (1.5 more activities per year and half an hour more per week). Cassandra M. Guarino & Victor M.H. Borden, *Faculty Service Loads and Gender: Are Women Taking Care of the Academic Family?*, 58 RES. HIGHER EDUC. 672, 682 (2017).

45. Schneider & Radhakrishnan, *supra* note 1, at 430.

46. Elaine Ezekiel, *Who’s Doing the Glue Work at Your Company?*, ATOMIC OBJECT (Oct. 3, 2018), <https://spin.atomicobject.com/2018/10/03/glue-work-strategies/> [https://perma.cc/ZYM6-S43J].

47. *Id.*

48. Reilly, *supra* note 22.

49. *Id.*

50. MANNE, *supra* note 37, at xix; *CFW Survey: ‘I Care’ and the Other Reasons You Do ‘Office Housework’*, PA. CONF. FOR WOMEN, <https://www.paconferenceforwomen.org/cfw-survey-i-care-and-the-other-reasons-you-do-office-housework/> [https://perma.cc/ZRU7-59MW].

51. Linda Babcock et al., *Why Women Volunteer for Tasks That Don’t Lead to Promotions*, HARV. BUS. REV. (July 16, 2018), <https://hbr.org/2018/07/why-women-volunteer-for-tasks-that-dont-lead-to-promotions> [https://perma.cc/T2BG-3H52] (stating “women were 48% more likely to volunteer than men”). See also Babcock et al., *supra* note 43.

group. In all-male or all-female groups, women were just as likely as men to volunteer. The researchers found that both men and women were more generous when their group had more men in it.⁵²

Perhaps both men and women feel entitled to benefit from the tending of women, but less so of tending by men. Alternatively, the presence of men may pressure women to take on a feminine caretaking role and create disincentives for men to risk emasculation by volunteering to do the work.⁵³ In this view, non-billable work is a gender performance in which the report-writers and committee personnel perform femininity, and those who evade those tasks perform masculinity. Worse still, burdening women with non-billable work steers them away from tasks that are likely to lead to promotion—and directs men toward promotion-related tasks—which likely contributes to gendered pay disparities.⁵⁴

Scholars like business school professor Adam Grant, negotiation expert Debora Kolb, law professor Joan Williams, and businesswomen like Facebook COO Sheryl Sandberg have criticized this gendered imbalance and urged managers to rotate the tasks instead of imposing them on women.⁵⁵ But their focus is more on coaching women how to evade non-billable work than on helping organizations do a better job of valuing it. For example, Williams advises women to sit far away from the phone in a meeting in which participants have to call in, lest they get saddled with making the call and troubleshooting issues like dropped connections.⁵⁶

D. *Emergency Non-billable work*

Routine teleconference glitches pale in comparison to the technical and other challenges that exponentially expanded the quantity, necessity, and value of tending and other non-billable labor during the COVID-19 crisis.

52. Babcock et al., *supra* note 43, at 743.

53. *See id.* (finding that when both men and women are present in a group, women are 50% more likely to volunteer, and in single-sex groups, the gender gap in volunteering is eliminated).

54. Williams et al., *supra* note 1, at 19, 26; Guarino & Borden, *supra* note 44, at 690.

55. JOAN C. WILLIAMS & RACHAEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK 110–13 (2014); Adam Grant & Sheryl Sandberg, Opinion, *Madam C.E.O., Get Me a Coffee*, N.Y. TIMES (Feb. 6, 2015), <https://www.nytimes.com/2015/02/08/opinion/sunday/sheryl-sandberg-and-adam-grant-on-women-doing-office-housework.html> [<https://perma.cc/2JPB-Y4YL>]; Vicki Jakes, *Women Need to Stop Doing “Office Housework” Right Now*, MEDIUM (June 8, 2018), <https://medium.com/@heyvickijakes/women-need-to-stop-doing-office-housework-right-now-93403372a9a6> [<https://perma.cc/MSX7-4QLB>]; Debora M. Kolb & Jessica L. Porter, “Office Housework” Gets in Women’s Way, HARV. BUS. REV. (Apr. 16, 2015), <https://hbr.org/2015/04/office-housework-gets-in-womens-way> [<https://perma.cc/G7MD-9ZMM>];

56. Joan C. Williams, *Sticking Women with the Office Housework*, WASH. POST (Apr. 16, 2014, 10:09 AM), https://www.washingtonpost.com/news/on-leadership/wp/2014/04/16/sticking-women-with-the-office-housework/?utm_term=.66def1ba9780 [<https://perma.cc/ZAB6-D372>].

Millions of American workers had to figure out how to do at least some of their jobs online. Behind the scenes—and thus less visible—were the people at each workplace who enabled that huge increase in remote communication. These employees spent hours troubleshooting issues such as ensuring the bandwidth and confidentiality of online communications, determining which tasks could be accomplished through telework, adjusting workers' hours and compensation as business income decreased, and obtaining loans or government support to survive the pandemic.

Take teachers. Over four million educators—from kindergarten through graduate school—had only days to improvise ways to replicate the functions of school without an actual school building. Isolated at home, these teachers of subjects from basic reading skills to organic chemistry harnessed technologies new and old in an effort to reach and teach every student.⁵⁷ Add to that the administrators who researched, trained, publicized and troubleshot problems such as students' patchy internet access and hackers sabotaging online classrooms. They did all that extra non-billable work on top of great increases in at-home tending to keep their households healthy and functioning. Grocery shopping entailed long lines, protective gear, and cleaning food outside the front door before bringing inside. The mandates to stay home and socially distance required people to rethink how they did things, from greeting neighbors on a dog-walk to participating in religious services. Laundry doubled and became outright hazardous for people sharing washers and dryers with other households. Buying or making protective gear became something of a national obsession. Parents also managed kids' physical distance from school and friends, initially home-schooling and later to helping kids navigate online teaching. Thousands upon thousands cared for sick family and friends, all while managing the social, emotional, and financial tolls of quarantine, the possibility of contracting a potentially fatal illness, and grief.

The employment-side items on this list illustrate the three types of non-billable work: office housework, glue work, and organizational maintenance. Office housework during the COVID-19 crisis included managing technology, such as the teachers or workers in a dermatology practice transitioning to online communications almost overnight, and food-related tasks like maintaining workers' connection to the office through regular on-line lunches or happy hours. Glue work included contributing to leave banks, sharing tips about staying healthy with colleagues, and covering for coworkers when illness or family care responsibilities arose. Organizational maintenance in the pandemic included writing client alerts to sustain connections when the doors

57. Cory Turner et al., *'There's a Huge Disparity': What Teaching Looks Like During Coronavirus*, NAT'L PUB. RADIO (Apr. 11, 2020, 7:01 AM), <https://www.npr.org/2020/04/11/830856140/teaching-without-schools-grief-then-a-free-for-all> [https://perma.cc/9RUZ-ZTEQ].

were closed, and decision-making about furloughs and other measures to prevent an organization's collapse.

Like non-billable work generally, these tasks are only visible when things go wrong, such as the breached confidentiality of a meeting conducted over Zoom, or thousands of children—including special needs and low-income kids—falling behind and not catching up to their more wired peers.⁵⁸ Emergency conditions exacerbate that invisibility because the survival of people and organizations properly crowd out all other considerations. Consequently, the workers who have transitioned entire companies to new and unfamiliar virtual apparatuses—while also maintaining health and morale—likely will not get the credit or money they deserve.

Media coverage during the pandemic rightly highlighted the immense risks that front-line workers in health care, public transportation, food delivery, and grocery stores faced to protect the wider community.⁵⁹ They deserve raises and increased employment security, in addition to thanks from apartment balconies.⁶⁰ Along the same lines, the admin workers in all kinds of organizations could and should get credit and compensation for their essential—albeit non-billable—tasks.

The majority of these front-line workers are female, and women of color are more likely to do these essential jobs than any other group.⁶¹ Public health experts have long known that the tending work that women do more of at home and in workplaces is key to preparedness and crisis response.⁶²

58. See, e.g., Alyza Sebenius & Kartikay Mehrotra, *Zoom Grapples with Security Flaws that Sour Users on App*, BLOOMBERG (Apr. 2, 2020, 1:53 PM), <https://www.bloomberg.com/news/articles/2020-04-02/zoom-grapples-with-security-flaws-that-sour-some-users-on-app> [https://perma.cc/QVE6-Y7C8]; Turner et al., *supra* note 57.

59. Molly Kinder, *COVID-19's Essential Workers Deserve Hazard Pay. Here's Why—and How It Should Work*, BROOKINGS INSTITUTION (Apr. 10, 2020), <https://www.brookings.edu/research/covid-19s-essential-workers-deserve-hazard-pay-heres-why-and-how-it-should-work/> [https://perma.cc/XZL2-PFAV].

60. Claire Cain Miller, *Could the Pandemic Wind up Fixing What's Broken About Work in America?* N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/upshot/coronavirus-future-work-america.html> [https://perma.cc/JF9J-HG92]; Alan Taylor, *Music and Encouragement from Balconies Around the World*, ATLANTIC (Mar. 24, 2020), <https://www.theatlantic.com/photo/2020/03/music-and-encouragement-from-balconies-around-world/608668/> [https://perma.cc/3LKV-NW9M].

61. Rashawn Ray, *Why Are Blacks Dying at Higher Rates from COVID-19?* BROOKINGS INSTITUTION (Apr. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/04/09/why-are-blacks-dying-at-higher-rates-from-covid-19/> [https://perma.cc/EJ7Q-C92B]; Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html> [https://perma.cc/ZKX9-Y3PA].

62. Clare Wenham et al., *COVID-19: The Gendered Impacts of the Outbreak*, 395 LANCET 846, 846 (Mar. 6, 2020) [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(20\)30526-2.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)30526-2.pdf) [https://perma.cc/2SJM-JYZK].

Doubtless, many of these workers see their efforts as “taking one for the team” because they value the team. But that gift-like element of the work does not erase the immense value of the work, nor the costs of it to the people who do it. Self-isolation protects the person in quarantine from infection and also protects those outside the household from infection by the person quarantined. That mix of altruism and self-interest, which you could call “solitary solidarity,” vividly illustrates the imperative for law and society to see and properly value office housework and other tending tasks.

This Article explains how people and organizations fall into the mistake of seeing non-billable work as a gift given by workers with no expectation of return, then offers a new model to correct that error. It builds on two pieces I wrote for the *Harvard Business Review*, one authored with marketing strategist Shula Darviche,⁶³ which aim to convince human resources departments and other policy makers that valuing non-billable work is in their self-interest. This Article adds a theoretical framework grounded in economic sociology to those articles, which should help academics, organizations, and employment law allocate the costs of non-billable work more justly.⁶⁴

III. The Error of Hostile Worlds Thinking

Committee work, technology troubleshooting, mentoring, and colleague support may be invisible when it comes to respect and remuneration, but they are hardly done furtively in the dark back corners of offices. Instead, the “work” part of non-billable work is hidden in plain sight by virtue of an analytic error that economic sociologists call “Hostile Worlds.”⁶⁵ A Hostile Worlds view sees market and non-market spheres as Hostile Worlds that, if

63. Martha Ertman & Shula Malkin Darviche, *Do You Know Who Holds Your Office Together?*, HARV. BUS. REV. (Sept. 23, 2015), <https://hbr.org/2015/09/3-steps-to-giving-office-housework-its-proper-due> [<https://perma.cc/9FMV-QU7J>]; Martha Ertman, *Reclassifying Office “Housework”*, HARV. BUS. REV. (Aug. 17, 2015), <https://hbr.org/2015/08/reclassifying-office-housework> [<https://perma.cc/HS2R-JM8P>].

64. The zeitgeist may be moving toward recognizing the value of carework. Two recent books by founders of the Wages for Housework Movement resurrect these decades-old arguments. SILVIA FEDERICI, *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND FEMINIST STRUGGLE* 6–9 (2012); SELMA JAMES, *Marx and Feminism*, in *SEX, RACE AND CLASS, THE PERSPECTIVE OF WINNING: A SELECTION OF WRITINGS, 1952–2011* 151–53 (2012). See also Dayna Tortorici, *More Smiles? More Money*, N+1 (2013), <https://nplusonemag.com/issue-17/reviews/more-smiles-more-money/> [<https://perma.cc/5F3M-QTH3>] (reviewing FEDERICI, *supra* and MARTHA ROSLER, *METAMONUMENTAL GARAGE SALE* (2012)); Noah Zatz, Opinion, *Taking Unpaid Housework for Granted Is Wrong*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 9, 2014), <https://www.nytimes.com/roomfordebate/2014/09/09/wages-for-housework/taking-unpaid-housework-for-granted-is-wrong> [<https://perma.cc/KC22-C5L8>]. These movements see linkages between care work for families and also pay for nannies and health aids.

65. ZELIZER, *supra* note 7, at 20–21.

allowed to overlap, contaminate both and crowd out altruism.⁶⁶ In the context of non-billable work, Hostile Worlds thinking conveniently allows organizations and others who benefit from the work to overlook the work's sizeable benefits to them and undercompensate the workers who perform it.

Researchers and commentators increasingly notice non-billable work, but even they generally fail to see its true value. Instead of arguing to increase its remuneration, a raft of advice literature provides tips for how women can avoid this work.⁶⁷ While many of these commentators say that managers should more equitably assign these tasks, they seem skeptical that it will ever happen. This Article offers managers, lawyers, and other policy-shapers a conceptual framework and language to enable and perhaps legally require managers to better see and value the work as well as the workers who do it.

The core challenge is to provide managers with a metaphor that is sufficiently "sticky" to displace the intuitively powerful metaphor of markets and non-markets as Hostile Worlds. Commodification theorists have developed a rich literature revealing the myopia of Hostile Worlds approaches by showing that things and relationships operate simultaneously in and out of the market, but they have not generated a concrete, simple metaphor to transport that insight into courtrooms and human resource departments.⁶⁸ This Article proposes the metaphor of mosaic to fill that gap.

For readers inclined to embrace a Hostile Worlds view, consider the following examples of market and nonmarket overlap. They show how law and society do not designate some transactions and items as entirely outside the market. Instead, we routinely permit, regulate, or ban the exchange depending on who is giving and receiving money, and the purpose of the exchange.⁶⁹

66. *Id.* at 20–24. Some scholars embrace this view of complete incommensurability. *See, e.g.*, ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (2012). Other scholars adopt a framework of complete commensurability, which aligns with Zelizer's terms "Nothing But" because that analytical framework flattens all interactions into a single metric, as in "Nothing But" market exchanges. *See, e.g.*, Elisabeth M. Landis & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). Other law and economics scholarship combines exchange and sociobiology. *See, e.g.*, RICHARD A. POSNER, *SEX & REASON* (1992).

67. 3 *Ways Women of Color Can Say 'No' to Office Housework*, MELANIN COLLECTIVE (Apr. 13, 2018) <https://www.themelanincollective.org/ideas/2018/4/13/3-ways-women-of-color-can-say-no-to-office-housework> [<https://perma.cc/F5QZ-ER9B>]; Jakes, *supra* note 55; Ruchika Tulshyan, *Women of Color Get Asked to Do More "Office Housework." Here's How They Can Say No*, HARV. BUS. REV. (Apr. 6, 2018), <https://hbr.org/2018/04/women-of-color-get-asked-to-do-more-office-housework-heres-how-they-can-say-no> [<https://perma.cc/DH23-EZZZ>]; Williams, *supra* note 56; *see also* Williams & Multhaup, *supra* note 5 (identifying steps that managers, rather than female employees themselves, can take to ensure an equitable distribution of these tasks).

68. *See, e.g.*, sources cited *infra* notes 69, 71, 75, and 76.

69. *See generally* Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, in *THE SOCIAL LIFE OF THINGS* 3 (Arjun Appadurai ed., 1986); Martha M. Ertman & Joan C.

Ordinary people cannot sell OxyContin, but pharmaceutical companies and pharmacies can. Moreover, even legitimate sellers of opioids must sell for proper medical purposes.⁷⁰

Federal law prohibits flesh-and-blood people from selling their organs, yet the biotech and reproductive technology industries market genetic materials.⁷¹

Prostitution laws prohibit paying for sex, yet tort law compensates spouses for loss of sexual service via loss of consortium claims.⁷²

Adoptive parents cannot pay genetic parents to adopt their child, but they can reimburse some costs and also pay adoption agencies, doctors, and lawyers.⁷³

In each of these cases the question is not whether a relationship or item is market-inalienable, but who controls and benefits from the transaction.⁷⁴

Commodification scholars largely agree on this analysis, but unfortunately, we lack a shared shorthand to describe the phenomenon. Peggy Radin calls it “incomplete commodification,” Greg Alexander offers up the phrase “civic property,” Michele Goodwin discusses “hybrid commoditization,” and Tsilly Dagan and Talia Fisher use the term “nuanced alienability.”⁷⁵ Zelizer uses the phrases “differentiated ties” or “connected lives.”⁷⁶ None of these

Williams, *Preface: Freedom, Equality, and the Many Futures of Commodification*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 1 (Martha M. Ertman & Joan C. Williams eds., 2005).

70. Purdue Pharmaceutical and other opioid manufacturers face multiple lawsuits arising out of their aggressive sales and marketing practices. *See, e.g.*, Nick Corasaniti, *New Jersey Sues Pharmaceutical Company Amid Spiraling Opioid Crisis*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/nyregion/nj-opioid-lawsuit.html> [<https://perma.cc/A3W8-B8JB>]; Kate King & Sara Randazzo, *New Jersey and Alaska Sue Purdue Pharma for Opioid Marketing*, WALL ST. J. (Oct. 31, 2017), <https://www.wsj.com/articles/new-jersey-sues-purdue-pharma-for-opioid-marketing-1509472418> [<https://perma.cc/KJR6-A7XL>].

71. *See, e.g.*, MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* 18–19 (2006); KARA SWANSON, *BANKING ON THE BODY* 3–4 (2014).

72. *E.g.*, TEX. PENAL CODE § 43.02 (2019) (criminalizing paying or receiving a fee for sex in Texas); RESTATEMENT (SECOND) OF TORTS § 693 (AM. LAW INST. 1977) (describing a tortfeasor’s liability to a spouse for impairing the first spouse’s “capacity for sexual intercourse”).

73. *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-3A-45 (LexisNexis 2013) (stating that adoptive parents cannot pay for birth mother’s maternity clothes unless the birth mother has a note from doctor that she cannot work); MD. CODE ANN., CRIM. LAW § 3-603 (LexisNexis 2002).

74. Joan Williams & Viviana Zelizer, *To Commodify or Not to Commodify: That is NOT the Question*, in *RETHINKING COMMODIFICATION*, *supra* note 69, at 362.

75. GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY* 40 (1997); GOODWIN, *supra* note 71, at 21–22; MARGARET JANE RADIN, *CONTESTED COMMODITIES* 102 (1996); Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 140 (2011). *See also* Stephen J. Choi et al., *Altruism Exchanges and the Kidney Shortage*, 77 L. & CONTEMP. PROBS., no. 3, 2014, at 289, 292 (using “altruistic exchange” to discuss paired kidney exchanges).

76. VIVIANA A. ZELIZER, *ECONOMIC LIVES* 4 (2011); ZELIZER, *supra* note 7, at 22.

terms have stuck because none conveys a message as clear and compelling as the Hostile Worlds metaphor.⁷⁷

IV. Theoretical Framework

Having defined non-billable work and sketched out concrete ways to recognize and better value it, we turn to a theoretical frame to understand how we got to that state of devaluation and how to change the situation.

A. *From Economics to Social Psychology*

Economist Gary Becker's Nobel Prize-winning work on labor specialization in marriage addresses the value of family care work and reveals the cost on families if they skimp on care.⁷⁸ The research of psychologist Shelley Taylor discussed above shows the value of those tasks in workplaces. Taylor's term—"tending"—describes the many relationship-enhancing activities that happen among friends, family, and colleagues.⁷⁹

Taylor shows how tending, like a simple "good morning" from the boss, reduces stress and its emotional, physical, and social toll. People with close, supportive ties to family, friends, and colleagues are less likely to get sick—from cancer or colds—and when they do, the disease is often less severe. Having just one good friend at work translates to fewer sick days.⁸⁰ Mentoring, a common method of workplace tending, can improve skills, increase job opportunities and satisfaction, and increase longevity on the job.⁸¹ More generally, the social satisfaction that comes with trusting and supportive work friendships often creates cohesion in work, increasing productivity and loyalty to colleagues and the organization.⁸² It's also efficient since it helps employees work up to their potential, keeps health insurance premiums down, and prevents the decreased productivity of extended sick leave.

77. "Sticky" metaphors shape how we think. *See generally* MALCOM GLADWELL, THE TIPPING POINT (2000) (exploring the "stickiness" of social phenomena); CHIP HEATH & DAN HEATH, MADE TO STICK (2007) (examining the traits that make an idea "sticky"). *Made to Stick's* test for stickiness shows why Hostile Worlds is so sticky: it is simple, unexpected, concrete, credible, emotional, and tells a story ("SUCCES"). HEATH & HEATH, *supra*, at 16–18.

78. GARY S. BECKER, A TREATISE ON THE FAMILY 277–306 (2d ed. 1993) (discussing altruism, or care work, in the family).

79. TAYLOR, *supra* note 36, at 11–12.

80. *See id.* at 1–3, 52–69.

81. *See, e.g.,* Naz Beheshti, *Improve Workplace Culture With A Strong Mentoring Program*, FORBES (Jan. 23, 2019, 12:00 PM), <https://www.forbes.com/sites/nazbeheshti/2019/01/23/improve-workplace-culture-with-a-strong-mentoring-program/> [<https://perma.cc/6PMZ-L4L2>] (citing several studies concluding mentoring programs improve job satisfaction and increase retention and promotion).

82. ZELIZER, ECONOMIC LIVES, *supra* note 76, at 242–42, 246, 251–57; Viviana A. Zelizer, *Intimacy in Economic Organizations*, 18 ECON. SOC. OF WORK 23, 29–30, 33–34, 43 (2009).

Bad tending, in turn, increases stress and its social and financial consequences. At the extreme, abused or neglected children become adults with more health and emotional problems, including depression, drug and alcohol abuse, heart disease, diabetes, and cancer.⁸³ Likewise, an impersonal or toxic work environment can increase stress and its effects.⁸⁴

B. *Commodification Theory*

The simplest approach to the combination of altruism and exchange that comprises non-billable work is to decry or deny it. For example, scholars such as Elizabeth Anderson and Michael Sandel defend a hermetic distinction between the market and non-market realm.⁸⁵ Law sometimes expresses this willful blindness to overlaps of markets and non-markets by refusing to legally enforce the agreement, relegating it to a not-legally-binding bargain that I call a “deal” in my book *Love’s Promises*.⁸⁶

A prime example is the 1988 *Baby M* surrogacy case, in which the New Jersey Supreme Court refused to enforce a surrogacy agreement, insisting that “[t]here are, in a civilized society, some things that money cannot buy.”⁸⁷ Some states still refuse to enforce commercial surrogacy agreements. Law may also treat a “deal” as criminal. Maryland, like most states, makes it a crime to sell, barter or trade a child for money or anything of value.⁸⁸ Likewise, the National Organ Transplant Act (NOTA) imposes a penalty of \$50,000 or five years imprisonment for transferring “any human organ for valuable consideration” and California courts refused to recognize John Moore’s property interest in his cells that researchers turned into a commercial product without his knowledge or consent.⁸⁹ Another expression of Hostile Worlds analysis is the tendency to treat housework as if it was not work. For example, Minnesota refused to grant work release to an incarcerated wife and mother who sought it to care for her family, reasoning that “homemaking is not employment.”⁹⁰

83. TAYLOR, *supra* note 36, at 41, 55, 76–77.

84. At the extreme is France’s giant telecom company, France Télécom, whose managers, thwarted in downsizing with legal constraints on layoffs, so brutally harassed workers that as many as thirty-five employees committed suicide. Adam Nossiter, *35 Employees Committed Suicide. Will Their Bosses Go to Jail?*, N.Y. TIMES (July 19, 2019), <https://www.ny-times.com/2019/07/09/world/europe/france-telecom-trial.html> [<https://perma.cc/GXG8-4P6P>].

85. ELIZABETH ALEXANDER, *VALUE IN ETHICS AND ECONOMICS* 24–25 (1995); SANDEL, *supra* note 66, at 9–11.

86. ERTMAN, *supra* note 30, at xii–xiii.

87. *In re Baby M*, 537 A.2d 1227, 1249–50 (N.J. 1988).

88. MD. CODE ANN., CRIM. LAW § 3-603 (LexisNexis 2002).

89. National Organ Transplant Act of 1984 § 301, 42 U.S.C. § 274e(a) (2012); *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 480 (Cal. 1990).

90. *State v. Bachmann*, 521 N.W.2d 886, 888–89 (Minn. Ct. App. 1994).

As discussed above, Viviana Zelizer calls this approach Hostile Worlds and critiques it as misdescribing social and legal affairs. As a whole these Hostile Worlds decisions treat transfers that involve babies, human body parts, intrafamilial care work, and other “contested commodities”⁹¹ as gifts instead of exchanges. Defenders of the gift framework contend that it preserves the distinction between people and things, prevents coercive exchanges, and keeps self-interest from crowding out altruism.⁹²

But legal loopholes blur these seemingly clear boundaries between market and non-market transactions, between legally enforceable exchanges and gifts. At least ten states enforce commercial surrogacy agreements, sometimes with conditions such as medical and mental health screening.⁹³ Adoptive parents routinely pay birth mothers’ medical and legal expenses, and also pay agencies for processing the adoption.⁹⁴ NOTA defines “transfer [of] any human organ for valuable consideration” to exclude “human organ paired donation,” as when one person donates a kidney to obtain a kidney for a loved-one for whom the donor is not a match.⁹⁵ Family law allocates marital property to homemakers as well as wage earners on divorce, reasoning that carework contributed to the acquisition of family wealth.⁹⁶

Outside the law, norms often enforce obligations that the law ignores.⁹⁷ Consider work friendships. Sometimes a friendly gesture to a colleague is given as a gift, with no thought to return in any way, as when a healthy employee donates unused leave to his employer’s leave bank so that a sick colleague can take extra leave.⁹⁸ But sometimes reciprocity is expected. If the recipient of a work favor does not reciprocate in some form—as when a professor repeatedly asks colleagues to cover for him in class or on committees

91. RADIN, *supra* note 75.

92. *Id.* at 93–94; RICHARD TITMUS, *THE GIFT RELATIONSHIP* 237–46 (George Allen & Unwin Ltd. 1970); *see* DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE* 80–81 (2010) (discussing various arguments defending the gift framework).

93. *See, e.g.*, FLA. STAT. ANN. § 742-15 (West, Westlaw through 2020 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 47 / 25 (West, Westlaw through P.A. 93-921); WASH. REV. CODE ANN. § 26.26A.715 (West, Westlaw through 2020 Reg. Sess.).

94. ERTMAN, *supra* note 30; *see* IND. CODE § 35-46-1-9 (2019) (allowing payment for adoption services and birth mother’s medical care); MD. CODE ANN., FAM. LAW § 5-3A-45 (same).

95. 42 U.S.C. § 274e(a), (c)(4) (2012); Kevin Sack, *60 Lives, 30 Kidneys, All Linked*, N.Y. TIMES (Feb. 18, 2012), <http://www.nytimes.com/2012/02/19/health/lives-forever-linked-through-kidney-transplant-chain-124.html> [<https://perma.cc/6VQG-PQCF>].

96. ERTMAN, *supra* note 30, at 158.

97. *See, e.g.*, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 157 (1992).

98. *See, e.g.*, *Fact Sheet: Voluntary Leave Bank Program*, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/voluntary-leave-bank-program/> [<https://perma.cc/YE7K-YSLF>].

but routinely turns down similar requests from colleagues—the implicit promise to reciprocate is enforced socially, through norms instead of law.⁹⁹ A person who plays and plays but never pays back may well find his colleagues become too busy to help him out. In short, frameworks that try to rigidly separate market and intimate realms simply fail to capture the way law and society work.

Arguably, covering up market elements within seemingly non-market transactions can serve a good purpose. A dinner guest arrives with a bottle of wine or flowers as a token contribution to the meal instead of handing the host a twenty-dollar bill. It is not a barter: empty-handed guests should be welcomed as warmly as those bearing small tributes that used to be called “hostess gifts.” But these niceties smooth social interaction by enacting a ritual that entitles everyone to a place at the table.

At other times, wrapping up exchange in pretty gift rhetoric facilitates abuses of power and harms the very people that a legal rule purports to protect. A rich literature decries family and tort law’s systemic devaluation of carework for increasing the economic vulnerability of the people who make crucial contributions to their families’ welfare.¹⁰⁰ Refusing to see sex work as a legitimate employment deprives sex workers of protections that other workers enjoy and increases their vulnerability to pimps and abusive customers.¹⁰¹ Likewise, framing adoption as the “gift of life” reflects both anti-abortion activists’ preference for adoption over terminating a pregnancy and also an evangelical push to rescue, as a member of the Christian Alliance for Orphans put it, “at risk children who will be sharpened as Arrows for God, and launched back into society to proclaim the Good News of Jesus to the

99. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 280–83 (1994).

100. See generally ERTMAN, *supra* note 30; MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 4–6 (1995) (suggesting that the “core family unit” consists of mother and child); CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* (Nancy E. Dowd ed., 2014); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, “I Gave Him the Best Years of My Life,”* 16 J. LEGAL STUD. 267 (1987); Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Deborah Stone, *For Love Nor Money: The Commodification of Care*, in *RETHINKING COMMODIFICATION*, *supra* note 69, at 271.

101. LIVE NUDE GIRLS UNITE! (First Run Features 2000). Two of the three creators of #GiveYourMoneyToWomen are sex workers and thus well versed in the price paid by pushing markets into legal and social shadows. Lauren Chief-Elk Young Bear et al., *Give Your Money to Women: The End Game of Capitalism*, MODEL VIEW CULTURE (Aug. 10, 2015), <https://modelviewculture.com/pieces/giveyourmoneytowomen-the-end-game-of-capitalism> [<https://perma.cc/Z8EX-ZPVS>]; Jess Zimmerman, “Where’s My Cut? ”: *On Unpaid Emotional Labor*, TOAST (July 13, 2015), <http://the-toast.net/2015/07/13/emotional-labor/> [<https://perma.cc/75CS-W9MK>].

world.”¹⁰² Christian or not, the view of adoption as a selfless gift from birth parents is consistent with the traditional rule—still law in about half of the states—that allows agencies and adoptive parents to make empty promises to birth parents regarding post-adoption contact such as sharing pictures of the child or periodic visits.¹⁰³

The next section describes the analytic framework that Zelizer puts forward as a more accurate model than Hostile Worlds.

C. *Economic Sociology*

In the framework that Zelizer calls “Connected Lives,” people and institutions perform what she calls “relational work” or “marking” to determine just how the exchange shapes the relationship and the relationship influences the exchange.¹⁰⁴ This process involves four steps, in which courts, legislatures, dinner guests, work colleagues, and other social actors:

- Classify the relationship;
- Examine transactions within the relationship;
- Evaluate media in which economic exchange occurs; then
- Draw boundaries between proper & improper economic exchanges.¹⁰⁵

In this view Hostile Worlds is not a truth that causes outcomes in cases. Instead, Hostile Worlds is an *effect* of the larger process of maintaining a complex interaction between economic and purportedly noneconomic relationships.

For example, imagine a man picking up the bill for a woman’s lunch at an expensive restaurant. To understand the social meaning of that simple action, at Step 1 you identify the relationship. Is it work-related? He could be a lobbyist taking a senator out to urge passage of a bill, an attorney hoping to win a client’s business, or a boss taking his assistant out to lunch. Is it instead intimate? The man could be treating his date, his daughter, or a friend. In Step 2 you examine transactions in that relationship. For example, hierarchies, the role of provider, and access to wealth dictate that a boss pay for his assistant’s lunch, just as fathers pay for their daughters. At Step 3, the media of the transaction—here money for a meal scheduled for a particular purpose—may well reflect a ritualized enactment of social factors identified in Step 2. Fourth

102. KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION* 61, 111, 131 (2013).

103. ERTMAN, *supra* note 30, at 81, 89.

104. ZELIZER, *supra* note 7, at 32, 35; *see also* Zelizer, *Intimacy in Economic Organizations*, *supra* note 82, at 24.

105. *See* ZELIZER, *supra* note 7, at 32–33 (describing the process by which people “differentiate” social ties, mark boundaries between ties, sustain ties by joint activity, and negotiate content of ties).

and finally, you synthesize the information collected in Steps 1 to 3 to determine whether the transaction is permissible.

In some of these contexts, the fact of paying could result in legal punishment. The senator might face sanctions for being improperly influenced, and if the lawyer paying for his client's lunch is also making romantic advances, he might violate ethical rules against mixing romance with representation. In deciding how law ought to treat these exchanges, it is worth noting that the fact of paying does not cleanly map onto social power dynamics. The one who pays holds more power when the boss pays for his assistant, but a male attorney taking a woman who is a potential client to lunch hopes that she will become *his* boss by retaining him.

These examples demonstrate Zelizer's basic premise, that the mere exchange of money in relationships does not distinguish between permissible and impermissible interactions, nor does being the payor or payee. Instead, the co-constitutive interplay of money and social roles plays out in many different ways.

Zelizer's work has found wide applications in legal scholarship,¹⁰⁶ yet her labels for the highly stylized ground of intermediate commensurability where markets and intimacy shape each other—"differentiated ties" and "connected lives"¹⁰⁷—have not stuck. We need a shared shorthand to map these transactions and decide how law should treat them, one that can reach academics, lawyers, and managers.

The metaphor of mosaic fits that bill.

V. The Mosaic Metaphor

Recall that valuing non-billable work requires that we first render it visible, then properly value it as work. Mosaic works at both levels. First, a visual art form is an apt metaphor for the visibility part of this project because like any art, it exists to be looked at. Second, the mosaic metaphor helps us recognize the "work" in non-billable work in two ways. Regarding the visible elements of non-billable work, a mosaic conveys an image by mixing up different colored stone or tile, just as non-billable work is a *mélange* of altruism and profit generation. The mosaic metaphor also achieves the trick of making visible types of non-billable work that too often remain invisible. Consider the role of the cement in a mosaic. It holds the stones together but is largely invisible. Likewise, non-billable work functions as glue that holds an

106. See, e.g., Martha M. Ertman, *For Both Love and Money: Viviana Zelizer's The Purchase of Intimacy*, 34 L. & SOC. INQUIRY 1017, 1018 (2009) (reviewing VIVIANA ZELIZER, *THE PURCHASE OF INTIMACY* (2005)).

107. ZELIZER, *supra* note 7, at 22 & n.5.

organization together and enables its disparate personalities, departments, and hierarchies to be productive.¹⁰⁸

Unlike the reigning Hostile Worlds view of non-billable work, a mosaic approach reflects the truth that non-billable work has both market and non-market elements. Moreover, the term “mosaic” is neutral, unlike “commodification,” which connotes turning a person into a thing, thereby corrupting sacred values and institutions.¹⁰⁹ Finally, mosaic gives us an accessible way to see and value non-billable work.

Now that we have identified tasks that constitute non-billable work, detailed their contributions to an organization’s productivity, and exposed the gender and race inequities of allowing a Hostile Worlds viewpoint to erase the “work” part of those tasks, it is time to make the core argument of this Article that the mosaic metaphor could convince managers, workers themselves, and employment law to better see, value, and compensate non-billable work.

A. *Illustrating the Mosaic Metaphor*

A mosaic by Helen Bodycomb titled “Unswept Floor” illustrates how the mosaic metaphor captures the complementary roles of market and intimate elements in non-billable work.¹¹⁰



108. *Id.* at 38–40.

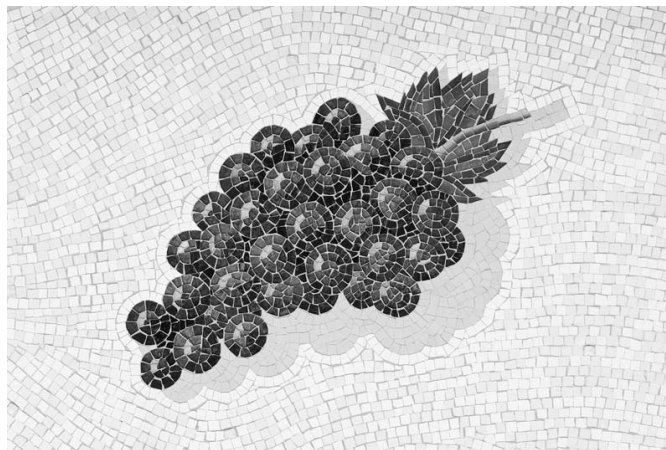
109. See SANDEL, *supra* note 66; Carol M. Rose, *Afterword: Whither Commodification?*, in RETHINKING COMMERCIALIZATION, *supra* note 69, at 402, 418 (discussing the negative associations with the term “commodification”).

110. Helen Miles, *The Unswept Floor Mosaic: ancient and modern*, HELEN MILES MOSAICS (Feb. 13, 2016), <https://helenmilesmosaics.org/mosaics-miscellaneous/unswept-floor-mosaic/> [https://perma.cc/2UX7-NVEV].

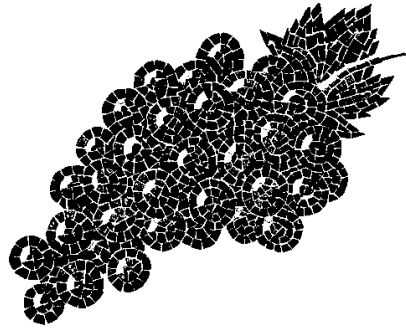
Gradations of color and dark and lighter stones show how the mosaic metaphor better captures the texture of social life than a Hostile Worlds understanding.

Imagine a Hostile Worlds view of grapes. In that all-or-nothing framework, the grapes must be either a rich aesthetic experience—color, texture, taste, and memory of grapes enjoyed in the past or conveyed in art—or mere fuel via calories, vitamins, and fiber to help a body operate. Each color expresses a different aspect of grape-ness. In the former view, the blue tiles depicting the grapes suggest sweetness, the dots of purple bring to mind the warmth of the sun that ripened them, and the green leaves on the stem reflect that they were a short time ago a live, growing plant.

Yet the very healthfulness of grapes is part of what makes the image so pleasing. Granted, you could depict the image in grayscale to bleach out the color of aesthetics to convey the fuel view of grapes:



Reducing the image to black-and-white conveys a more extreme focus on the grapes as mere food-as-fuel:



This last, black-and-white version removes all the shading and most of the depth along with the color, and in doing so renders a barely recognizable object. Gone is the evocation of life from the perspective of a person hungering for the grapes, let alone Dionysian associations of social celebration.

The top image best reflects the lived experience of enjoying a bunch of grapes: it is a mix of aesthetics and fuel-for-the-body. Likewise, the altruism or collegiality that fuels a good portion of non-billable work ought not crowd out the truth that it also shares characteristics with ordinary income-generating work. Just as tiles in different colors play a crucial role in depicting the grapes, a mix of altruism and profit-generating work make up non-billable work such as writing a client alert for a website, serving on a committee, or throwing an engagement party.

The following section tests this hypothesis by suggesting how the mosaic metaphor for non-billable work could help people see non-billable work more clearly and consequently do a better job of compensating it.

B. Mosaic Metaphor in the Office

The gender discrimination inherent in much non-billable work could decrease if organizations recognized the non-billable work, saw its value, and better compensated the people who do it. This section suggests that the mosaic metaphor could help managers, the C-suite, and human resources professionals do that important work.

1. Metaphors Matter

Metaphors help us understand abstract ideas, such as what kind of work is “real” work that merits payment.¹¹¹ They work by targeting a problem and then identifying a source analog to understand it. For example, scientists wondering how sound works (the target) compared it to waves of water (the source), and adopted the metaphor of sound waves because both sound and water waves exhibit periodicity and amplitude.¹¹² Obviously the comparison is not a perfect equation. Waves of sound are neither wet nor blue-green. But the metaphor of sound waves works because of deep structural commonalities between sound waves and waves of water.

Here the target is non-billable work and how organizations can better notice and value it. The dominant metaphor is Hostile Worlds, which assumes that market and non-market realms compete like hostile, warring planets. If they overlap, one will crowd the other out for good. That dominant way of seeing overlaps of altruism and economic exchange contributes to the devaluation of non-billable work by having any collegial motivation for the work convert the whole transaction into a gift that workers give to their employers. That conceptual error enables Jones Day and other employers to ignore the value of non-billable work because they assume it is gratis instead of as part of an economic exchange. In addition, Hostile Worlds views that treat this work as a gift cohere with requiring women to do more of it than men because of the widespread assumption that shopping for, wrapping, and giving gifts is “women’s work.”¹¹³

In reality, non-billable work is often motivated by a mix of altruism and self-interest. Front line workers in a pandemic risk their health for the good of the community, and also rightly expect to be paid for that work. Law firm associates may want to positively contribute to a firm’s reputation by helping a partner create materials for a continuing education course, but they also want the time to count as billable. If they were interested in making a charitable donation, they would probably choose a non-profit or their alma mater, rather than donate their time to help enrich an already-rich organization.

The metaphor of mosaic can correct that error. The metaphor is concrete—literally. Everyone knows that a mosaic is a mix of stones that creates an image, and that it only sticks together because of largely invisible glue. Managers and others who assign non-billable work could quickly grasp that organizations likewise need behind-the-scenes non-billable work to stay in

111. See George Lakoff, *The Contemporary Theory of Metaphor*, in METAPHOR AND THOUGHT 245–46 (Andrew Ortony ed., 2d ed., 1993) (noting the comprehending abstract concepts as concrete images in our understanding of experience).

112. Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 783 (2002).

113. See, e.g., Eileen Fisher & Steven J. Arnold, *More than a Labor of Love: Gender Roles and Christmas Gift Shopping*, 17 J. CONSUMER RES. 333, 333 (1990).

business, and that the work is motivated by both collegiality and exchange-based reasons. Using the terminology that cognitive linguists use to discuss metaphors, business people, lawyers, and judges could quickly grasp that the target (non-billable work) is a mix of altruism and exchange, and the source (mosaic) shares that deep conceptual structure by depicting an image like a cluster of grapes with a mix of different colored, contrasting stones.

2. Stickiness

But not all metaphors stick. The best-selling book *Made to Stick* by Chip and Dan Heath¹¹⁴ has become required reading in business, government, and other contexts because we could all use a little guidance about how to make an idea go viral. The Heath brothers contend that ideas stick if they are simple, unexpected, concrete, credible, and emotional, and tell a story (SUCCES).¹¹⁵ This SUCCES model explains why myths persist and why good ideas take hold. Take, for example, the Hostile Worlds aversion to overlaps between market and non-market realms. It sticks because it has all or most of the items in the Heaths' SUCCES framework.

For example, say that a professor chairs a law school admissions committee. That task—known as “service” on annual reviews—rarely generates pay raises or the respect of colleagues as fellow intellectuals. Yet it is crucial to the school’s continued operation and to maintaining its highly-sought-after ranking. A Hostile Worlds view sees any altruism involved in that non-billable work as drowning out the profit-generating “real work” elements. That metaphorical error sticks because it is:

- Simple: a simple, profound one-sentence idea (i.e., collegiality should be its own reward);
- Unexpected: surprising, triggers interest and curiosity (i.e., how odd to put a price on collegiality);
- Concrete: human actions and sensory information (i.e., two planets at war);
- Credible: from an expert source (i.e., workers’ own experiences);
- Emotional: elicit feelings (desire for haven from a heartless world); and
- Tells a Story: simulation and inspiration (the self-interest planet will destroy the altruism planet).

The Hostile Worlds view of non-billable work is sticky, but it is not true, or at least not nearly as true or pervasive as conventional wisdom suggests. We need a sticky metaphor to describe the actual mix of altruism and self-

114. HEATH & HEATH, *supra* note 77.

115. *Id.* at 14–19.

interest that characterizes non-billable work such as committee work or updating the firm website.

3. See it, Value it, Pay for it

The mosaic metaphor could help managers see non-billable work, value it, and compensate it the way they compensate billable work. First, invisibility. The invisibility of some non-billable tasks is deliberate, in that they are done outside of the workplace or otherwise behind the scenes. For example, when a lawyer takes summer associates to lunch, the interaction is most successful if it looks and feels like common courtesy, rather than work. Likewise, preplanning for a productive meeting or identifying linkages across initiatives is visible only to the people who do that work. That work is visible only if the meeting goes badly because of failure to anticipate a particular issue. The thought, effort, and expertise that go into non-billable work remain largely invisible if the work is done well, just as glue invisibly keeps the stones stuck together in a mosaic. Most people only think about the glue when it stops doing its job, in other words, when one of the stones gets loose or falls out.

Second, the mosaic metaphor could help organizations see non-billable tasks as real work. To return to the lawyer taking the summer associate out to lunch: for many of us who have been in that situation, there's no such thing as a free lunch. It is work. The lawyer is collecting information about the student's professionalism, intelligence, work ethic, and interests. The summer associate is eager to put those qualities on display, and also to suss out whether the firm would be a good place to work. The lunch looks friendly on the surface, and if it goes well should feel fairly friendly, but a close look reveals that lots of pieces have to fit together to make that lunch do the work it is supposed to. Like a mosaic.

The mosaic metaphor may also help businesses do a better job of compensating workers for non-billable work. If a particular non-billable task is done more out of collegiality—such as establishing a leave bank in which employees can donate vacation time to help fund a sick colleague's extended leave—then perhaps an organization could put a lower dollar value on it. But the kind of work that the employee would not see as charity—such as doing on-campus interviewing or writing a blog entry for the firm website—may justify more credit as the equivalent of billable work.

But organizations may be better off not making that type of calculation for every single task. A mosaic works because the stones together create an image. While businesses keep score by tallying how much money they make and lose, and non-profits like universities must likewise manage their bottom line, they should also realize that non-monetary assets like employee loyalty have tremendous value. Accordingly, standard business reporting should include the contribution of non-billable work to profitability as well as more

long-term, “softer” organizational metrics like sustaining culture or reputation, retaining employees, shaping discourse, law or policy, and building an engaged community. Although the value of these organizational metrics can be difficult to pin down to a dollar amount, the difficulty of that calculation does not justify putting the cost of the work on female workers and the benefits on male workers and the organization itself.

Businesses can assign value to non-billable work in a variety of ways, just as mosaics depict a great variety of subjects. Cash value is one possibility: organizations could address committee work, mentoring, website updates, and other non-billable work activities in key assessments like annual reviews, raises, promotions, and partnership shares. Managers could have a pot of cash and gifts to reward team members who do extraordinary work. Social and intellectual capital also counts. Company, department, and team meetings present opportunities to acknowledge employees who take on tending activities consistently. In large organizations where manager approaches and style can vary dramatically, institutionalizing tending as a core value of the culture can help to mitigate that variability and create accountability.

C. *Mosaic Metaphor as Applied to Employment Law*

Metaphors play important roles in legal reasoning, not least because they provide vivid shorthand for complex ideas. For instance, criminal procedure calls evidence that must be excluded because it was obtained illegally “fruit of the poisonous tree.”¹¹⁶ The target is illegally obtained evidence, and the source is a tainted tree with bad fruit. In other words, the metaphor uses a simple, concrete, and compelling metaphor to explain why the law ought not use evidence that was obtained unlawfully.

While the phrase “Hostile Worlds” is largely confined to academic commentary, quite a bit of case law adopts the Hostile Worlds conceptualization of situations in which exchange and intimacy overlap. I have written elsewhere of that pattern and also identified lacunae or trends where legal doctrine acknowledges mosaics of market and non-market elements in families as well as transfers of human genetic material.¹¹⁷ The sex discrimination suit against Jones Day shows that plaintiff-side employment lawyers are overlooking strong factual evidence of discrimination in the form of devalued non-billable work. Other contemporary employment law cases also show

116. *E.g.*, *Nardone v. United States*, 308 U.S. 338, 341 (1939).

117. *See, e.g.*, ERTMAN, *supra* note 30; Ertman, *supra* note 106, at 1034–35; Martha M. Ertman, *The Social Life of Blood, Milk & Sperm*, 51 TULSA L. REV. 393, 400 (2016) (reviewing KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK AND SPERM IN MODERN AMERICA* (2014)).

how the mosaic metaphor could reveal the discriminatory allocation of non-billable work and provide a rationale for remedial action.

Consider the 2016 case of *Coates v. Farmers Group*.¹¹⁸ Lynne Coates earned \$99,000 a year, less than a male colleague with less experience than her and half as much as her male litigation partner who graduated law school a year after her.¹¹⁹ When she complained, she was demoted to paralegal-type work and was kept away from making important court appearances, deposing key witnesses, or representing the company in mediations.¹²⁰ After the case was provisionally certified as a class action of about 300 female attorneys, Farmers Insurance settled for \$4.1 million and agreed to new pay equity policies.¹²¹

Consider too the case of Chia Hong, a Facebook program manager and technology officer who sued her employer for gender discrimination in 2015. In addition to familiar employment discrimination claims like being belittled for taking advantage of a company policy that allowed for time off to volunteer at her child's school, she alleged that she was "ordered to do menial tasks such as organizing parties and serving drinks to male employees—things that the men at Facebook were never asked to do."¹²²

The gender discrimination case of Kleiner Perkins Cufled & Byers venture capitalist Ellen Pao likewise mentions non-billable work. Her allegations—which the jury rejected—included Pao and a female partner being asked to take notes at partner meetings.¹²³ This seemingly innocent query becomes more serious when considered in light of the larger devaluation of non-billable work and its allocation to women generally and often especially women of color. As a female partner at a large Dallas law firm responded to the case: "When women are consistently expected to take notes, pass out office supplies, make copies or do other chores, it sends a distinct message."¹²⁴ In addition, she quotes Facebook COO Sheryl Sandberg in recognizing that

118. No. 15-CV-01913-LHK, 2016 WL 5791413 (N.D. Cal. Sept. 30, 2016) (granting Motion for Settlement and Motion for Attorney Fees).

119. Robin Abcarian, *Farmers Insurance Will Pay a High Price for Discriminating Against Its Female Attorneys*, L.A. TIMES (June 24, 2016, 3:00 AM), <https://www.latimes.com/local/abcarian/la-me-abcarian-discrimination-settlement-20160624-snap-story.html> [https://perma.cc/K29E-LBXH].

120. *Id.*

121. *Id.*

122. Heather Kelly, *Facebook Gets Sued for Gender Discrimination*, CNN BUS. (Mar. 19, 2015, 11:59 AM), <https://money.cnn.com/2015/03/18/technology/facebook-discrimination-suit/index.html> [https://perma.cc/SKQ2-PAY5].

123. Kathleen J. Wu, *What the Legal Profession Can Learn from the Ellen Pao Case*, TEX. LAW. (Apr. 27, 2015, 12:00 AM), <https://www.law.com/texaslawyer/almID/1202724435543/what-the-legal-profession-can-learn-from-the-ellen-pao-case/> [https://perma.cc/2PE9-TETA].

124. *Id.*

non-billable work like taking notes imposes opportunity costs, because “[t]he person taking diligent notes in the meeting almost never makes the killer point.”¹²⁵

Imagine that Farmers Insurance, Facebook, and Kleiner Perkins argued that the female plaintiffs spent less time on profitable work, and thus deserved less pay or other inferior treatment. Imagine, then, that the plaintiffs’ lawyers conducted discovery to calculate how non-billable work got allocated between the companies’ female and male employees. If empirical findings described above are correct that women workers do more non-billable office housework, glue work, and organizational maintenance work, then detailed information about the firms’ practices should yield data showing that firms discriminatorily allocate the cost of non-billable work to female employees. Testimony from experts in organizational sociology and management should demonstrate the economic value of that non-billable work to the organization. The mosaic metaphor could counter claims by the organization that the workers did the non-billable work out of the goodness of their hearts, not with any expectation of respect, progress toward promotion, or bonuses. Courts, like businesspeople and workers themselves, may find that the mosaic metaphor rings more true to their understanding of non-billable work than the existing Hostile Worlds view that markets and non-markets cannot peaceably coexist in a single transaction. The natural consequence of that insight would be remedial compensation for employees who did non-billable work.

VI. Conclusion

Non-billable work is still work. Its value remains largely invisible because it is too often mistaken as a collegial gift instead of work that generates profit and productivity. But that myopia allocates most its costs to female employees, and most of its benefits to male employees and organizations. To remedy this problem employers, theorists, and lawyers must abandon the common misperception that collegiality and market work are Hostile Worlds that cannot overlap. Instead, the warmth that motivates collegiality exists alongside the financial benefits that the tasks bestow on an organization. This Article has debunked the Hostile Worlds myth that non-billable work is a gift that workers selflessly give their peers and employer, and proposed a new metaphor—mosaic—to capture the mix of altruism and exchange in non-billable work. The mosaic metaphor’s simplicity and stickiness should help academics, businesses and employment law better recognize the existence and value of non-billable work, and thus lead organizations and male employees to bear their fair share of its costs.

125. *Id.*