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WOMEN IN THE WORKPLACE: WHICH WOMEN, WHICH AGENDA?

BY

MICHAEL SELMI AND NAOMI CAHN¹

I. Introduction

When we talk about women in the workplace, there is a tendency to speak in broad generalizations, and too often our own experiences deeply influence those generalizations. This has been particularly true of the work and family literature that has blossomed in the last decade. That literature has brought greater attention to the difficulty so many women (and men) face in balancing the demands of their work and family obligations, particularly as the pressures on both ends of those scales has intensified. It appears that many employees today are working longer hours with less bargaining power while parents scramble to provide their children with the means to stay ahead in an increasingly competitive educational environment. At the same time, much of the literature has focused on a small segment of women – typically professional women, lawyers, professors or corporate executives.² One prominent commentator has even gone so far as to suggest that the focus on professional women is appropriate because professional women typically have a more difficult time meeting the demands of

¹ Professors of Law, George Washington University Law School. We have benefited from the research assistance of Gening Liao, Peerapa Joann Moolsingtong, and Marissa Sunback, as well as the financial support of the George Washington University summer research program.

² As is perhaps not surprising, the law review literature has paid particular attention to the difficulties of women lawyers. For a recent sampling of the literature see Frances E. Bivers, et al, *Where Will Women Lawyers Be in 25 Years?* 12 COLUM. J. GENDER & L. 383 (2003); Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923 (2002). Law Professor Anne Alstott has also recently written a book, calling for various reforms for working parents, which appeared shaped by her experiences with her daughter. See ANNE L. ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* viii (2004) (discussing her child's illness).

their work and family lives.³ The media has also demonstrated a disproportionate interest in the travails of professional women with a particular concentration on the phenomenon of professional women who leave the workforce to become full-time mothers.⁴

As a result of the focus on professional women, the policy proposals many work-family scholars have advocated tend to reflect the interests, and the options, of those same women. The most frequently mentioned proposals – creating more and better part-time work, shorter work hours and greater workplace flexibility – are proposals that are of utility primarily to professional women, those, in other words, who can afford to trade less income for more family time.⁵ Even outside of specific proposals, virtually all of the current literature seeks to enable women to spend less time in the workplace.

We think this focus is misplaced for at least two reasons. As is perhaps too obvious to mention: most women are not professionals; they are not lawyers, executives, professors or even architects or advertising agents. Most women, like most men, toil in the lower economic strata, performing the service work that propels our economy with little hope of substantial advancement or power. In addition, the notion that middle class women have an easier time balancing work and family demands than their professional

³ See Scott Coltrane, *Elite Careers and Family Commitment: It's (Still) About Gender*, 596 ANNALS 214, 216 (2004) (“I suspect that achieving work-family balance is now easier in middle and working-class populations than it is in elite professions.”).

⁴ The influential New York Times has caused considerable controversy by chronicling the lives of professional women who have left the workplace, and more recently the aspirations of Yale college students who expect to leave the workplace after having children. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42 (discussing the lives of a group of stay-at-home mothers with professional degrees); Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1 (discussing aspirations of a sample of Yale undergrads). The more recent New York Times article is representative of much of the work in this area: while the headline would lead one to believe the story may focus on a comprehensive survey, in reality, the story was based primarily on the responses to an email survey of a self-selected group from two Yale dorms. For similar stories see Katherine Kersten, *More Young Women Feeling at Home*, STAR TRIBUNE, Oct. 6, 2005, at 2B (chronicling author's own experiences); Claudia Wallis, *The Case for Staying Home: Caught Between the Pressures of the Workplace and the Demands of Being a Mom, More are Sticking With Kids*, TIME MAG. Mar. 22, 2004, at 50 (cover story).

⁵ These issues are discussed in more detail in section II, *infra*.

counterparts is simply wrong, and diverts attention from other more pressing issues.

Professional women have all of the advantages money can buy, and even though their jobs may entail long hours and substantial stress, they have more resources available to them to achieve a workable balance than is true for nonprofessional women.

Additionally, they have also typically chosen their professions and lifestyles in a way that most women have not. We do not mean to suggest that because professionals have chosen their careers, they should be satisfied with what they have – even among professionals the available choices for those who seek some balance between their work and family demands are far too limited. Yet, the fact that so many professional women have chosen their careers, and also have the means to obtain some balance – though it may not be their preferred balance -- suggests that our policy choices should target those who have the fewest choices, those who have the fewest resources, rather than those who have the most.

In this essay, we want to shift the focus so as to bring class issues directly into the analysis, and we want to do so by first analyzing the current state of the workplace with a particular focus on working hours. As we discuss in detail, in today's labor market, there are actually more underemployed women, women who would prefer to work longer hours as a means of obtaining more income, than overemployed women. Contrary to popular perception, the reality of working hours is that there has not been a substantial increase over the last two decades. Rather, the primary change in the workplace with respect to working hours has been that more women are working full-time than they did in an earlier era. In other words, although most workers are not working substantially longer hours than in previous decades, more women are working hours associated with a

full-time schedule, and this shift has inevitably created conflicts in work-life balance in ways that are difficult but predictable, particularly if our social norms outside of the workplace fail to evolve with the changing nature of the labor force. To the extent, working women are expected to also fulfill the demands of the home, including childcare and housework, both men and women are likely to experience considerable stress as a result of women having less time to devote to the home. As has been widely chronicled, this is what has largely occurred – as men continue to put in longer hours in the labor market and trail women by substantial margins in their efforts at home. Yet, the alternative of having women devote fewer hours in the labor market, as they frequently did before the 1970s, through part-time work, shorter workweeks, or flextime, is not a realistic option for most women, and even if it were, is unlikely to lead to any measurable degree of workplace equality.⁶ In the second part of the paper, we will demonstrate why the current work-family proposals target an elite group of women, those who can afford to trade income for time.

Rather than concentrating on policy options that would enable some women to spend more time out of the workplace, in this paper we offer policy proposals that are designed to allow women to spend more time in the workplace, or to spend the same amount of time with less worry and stress about their children during that time. Our proposals are to increase the length of the school day while providing more publicly financed before and after school programs; concentrate on changing the allocation of

⁶ We have previously written about the potential equality harms certain work-family proposals can have, and in this paper we will concentrate on illustrating how the proposals will not benefit most women. For our prior discussions relating to equality issues see Michael Selmi and Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 MAINE L. REV. 290, 296-306 (2002); Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHIC-KENT L. REV. 1557 (2001).

responsibilities within the home; and target domestic violence which both disproportionately affects lower-income women and substantially interferes with their work obligations.

II. WHERE DO WOMEN WORK? THE DIFFERENCE INCOME MAKES.

In this section, we want to explore some of the differences that exist among working women at various income levels so as to assess the policy proposals most frequently touted by work and family scholars. Before beginning our empirical discussion, we want to highlight an entrenched feature of the labor market, which is that good jobs tend to be good across the board. Bad, or low-paying jobs, on the other hand, tend to have no significant advantages over higher wage jobs. For example, good jobs tend to have higher pay with greater flexibility, better benefits and higher status, while low-wage jobs fare poorly on all of these dimensions. While it might be thought that good jobs tend to be more stressful, there is little to substantiate greater levels of stress at higher job levels although those jobs do tend to have longer hours and increased stress may be associated with longer working hours. Nevertheless, the distinction between good and bad jobs will be documented more fully below and is worth keeping in mind because the focus on high wage women and the demands they face often obscures the far more difficult conditions that low-wage women encounter.

A. Working Hours.

¹¹ See, e.g., JULIET SCHOR, *THE OVERWOKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991); ARLIE HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997).

During the last decade, a lively debate has erupted over working time and the demands of work and family. One camp, which is largely reflected in popular opinion, is that there has been a surge in working time.¹¹ This perception is based on some government statistics, as well as frequent polls demonstrating that most workers, men and women alike, would prefer to work fewer hours so that they could achieve better balance in their lives.¹² The other camp, which has received far less media attention, sees the issues quite differently. Based primarily on what are known as time diaries in which men and women record their daily activities in minute details, a number of scholars have argued that men and women actually have more free time now than they did in previous decades.¹³ According to these scholars, an important reason for the increased time is that many domestic services are now purchased, thus freeing up significant portions of time, and women have also benefited by a modest increase in the time men devote to family activities. Not surprisingly, a recent comprehensive study indicates that the truth lies somewhere in between these two positions.

In their recent book, *THE TIME DIVIDE*, Jerry Jacobs and Kathleen Gerson analyze the latest available data regarding working time and arrive at some surprising conclusions. Because this book provides important data on many issues of central importance to work and family scholars, we will examine the book in some detail, particularly to highlight how the data often differ from the prevailing assumptions. Perhaps most significant, the authors conclude that “the average length of the workweek does not appear to have changed appreciably in recent decades. American workers, on average, are putting in

¹² See, e.g., Ellen Galinsky, et al., *The Role of Employers in Addressing the Needs of Employed Parents*, 52 J. OF SOCIAL ISSUES 111, 116-18 (1996) (discussing polls suggesting parents would like to work less).

¹³ See JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME* (1999).

about the same time on the job as thirty years ago.”¹⁴ Men and women, however, continue to work different hours, with men working an average of about 42 or 43 hours a week, while women work 35 to 36 hours per week.¹⁵ When commuting times are added into the equation, the average full-time worker spends about 9.2 hours away from home each day on work-related activities.¹⁶ These averages, however, mask the substantial variations that occur among subgroups of men and women.

As has been well documented, long hours are most common among professionals and managers, and a substantially higher percentage of men than women work long hours, as defined by those who are working fifty or more hours in a week. More than one-third (37.2%) of professional men work fifty or more hours a week, compared to just over one-fifth (21.3%) of men in other occupations.¹⁷ For women, the comparable figures are one in six (16.7%) professionals and one in fourteen (7.1%) of those working in other occupations.¹⁸ Consistent with the emphasis on professionals, college-educated men and women are far more likely to work long hours than those without college degrees. Nearly forty percent of college-educated men work 50 or more hours in a week, compared to about 12% of men without college degrees. Among women, one in five with college degrees work fifty or more hours but only one in twenty of those with less than a high school degree do so.¹⁹ Since only about 28% of the workforce has college degrees, and fewer than 10% have advanced degrees, only a small segment of the workforce, typically

¹⁴ JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 19 (2004).

¹⁵ *Id.* at 19-20.

¹⁶ These figures are from the 2004 American Time Use Survey conducted by the Department of Labor’s Bureau of Labor Statistics, and are available in the Daily Labor Report, Spet. 21, 2005, at D-1.

¹⁷ We are using “professional” as a shorthand for the government category of professional, managerial and technical employees. *See id.* at 35.

¹⁸ *Id.*

¹⁹ *Id.* at 35.

the most highly compensated, is actually working extremely long hours, and this is especially true for women.²⁰ In fact, as discussed more below, a larger group of women is working less than they would desire, and on balance, underemployment is at least as significant a problem for women as overemployment.

When we add race into the equation, the gender comparisons are reversed, as white men tend to work more than nonwhite men, while white women work the least amount among women. The differences, however, are not stark – for both men and women, the longest hours are only two hours different from the shorter hour workers.²¹ For women, the primary difference is that more white women work part-time; among full-time workers, white women tend to work longer hours than black or Hispanic women.²²

Not surprisingly, the labor market rewards longer working hours with substantial additional compensation and, as discussed in detail below, greater flexibility and better access to important benefits such as health insurance and pensions. In terms of compensation, those with advanced degrees in 2003 earned on average \$25.47 per hour, more than twice what those with high school degrees earned (\$11.87).²³ Women who had attended college without graduating earned only a modest amount more than those with high school degrees, and the wage premium for a college or advanced degree is

²⁰ Jacobs and Gerson note that 43.7 percent of those working 50 or more hours has a college degree. *Id.* at 36. See also Daniel Hecker, *How Hours Worked Affect Occupational Earnings*, 121 MONTHLY LABOR REV. 8, 9 (1998) (based on 1997 data, approximately 15% of women worked more than 44 hours in a week).

²¹ *Id.* at 37.

²² *Id.*

²³ The income data are compiled from the comprehensive biannual analysis THE STATE OF WORKING AMERICA 2004/2005 published by the Economic Policy Institute (EPI). Although the Economic Policy Institute is associated with liberal policy reforms, its data analysis is widely respected and relied on across the ideological spectrum. For the data on the wage differences based on education level see Table 2.19, at 155.

substantial and has increased sharply over the last two decades.²⁴ Significantly, the largest group of female workers (32.4%) is now composed of women with some college education.²⁵

Returning to the issue of working time, perhaps the most important issue for our analysis is that virtually all of the increase in working hours is attributable to women's increased hours in the labor market. As the authors explain, "In percentage terms, over three quarters (77.7%) of the growth in working time among married couples is due to the growth of dual-earner households, while the remaining quarter (22.3 percent) represents an increase in couples' working time, particularly among dual-earner couples."²⁶ The growth in working time has been primarily concentrated among highly educated, and highly compensated, couples. An issue that is too often overlooked in the work family literature is that there are really two, or perhaps three, very different labor markets – a small group of overemployed individuals and a larger group of underemployed individuals, including a substantial group of women, with a third overlapping group of individuals who are undercompensated for the hours that they work. Importantly, most workers are unwilling, and unable, to trade income for fewer hours, in large part because they feel squeezed by the demands not just on their time but also on their wealth.

So far we have been focusing on working hours independent of the demands of family life but the presence and number of children remain an important factor in determining how many hours parents devote to the workplace. Nevertheless, children

²⁴ The average wages for women were \$13.60 per hour for those with some college and \$20.19 per hour for the college educated. Accordingly, the wage premium for obtaining some college is only 14.5% whereas the premium for obtaining a college degree is 70%. *Id.*

²⁵ *Id.* For men the largest group remains those with a high school degree, a group that comprises 32.6% of the male workforce. *Id.* at Table 2.18, p. 154.

²⁶ *Id.* at 46.

turn out to be not as significant a factor as is often assumed. Dual-income parents with children worked a combined 3.3 hours less than couples without children, a difference, the authors note that is “only slightly greater than the 2.6 hours that separated working parents and childless couples in 1970.”²⁷ Women, however, tend to reduce their hours more than men. In 2000, men with three or more children worked 0.7 hours more than childless men, while similarly situated women worked 5.8 fewer hours than married women without children.²⁸

Single mothers also comprise a significant and growing portion of the labor market. In 2000, just over one fifth (21.9%) of families were headed by women, which was double the percentage in 1970, and upwards of eighty percent of single mothers were working.²⁹ This represents a sharp increase in the percentage of single mothers in the labor market, which is attributable in significant measure to various government initiatives, such as the expansion of the Earned Income Tax Credit and welfare reform changes, and just over two-thirds of single mothers worked full-time.³⁰

As noted earlier, a critical assumption of the work-family literature is that workers, women in particular, would like to work less, and polls continually support this concept. These polls and surveys, however, tend to ask a simplistic question, namely whether workers would like to work less, something akin to asking students if they would like to have a longer recess. When workers are asked a more specific question, it becomes clear

²⁷ *Id.* at 49.

²⁸ *Id.* at 49.

²⁹ See Hanming Fang & Michael P. Keane, *Assessing the Impact of Welfare Reform on Single Mothers*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1, 53-55 (2004) (76.6% of single mothers with children five and under worked in 2002).

³⁰ *Id.* at 51. From 1993-2002, the work participation rate of single mothers increased from 67.8% to 79.1%. *Id.* at 54. For a discussion of the various government policies and incentives targeting single women see Bruce D. Meyer & Dan T. Rosebaum, *Welfare, The Earned Income Tax Credit, and The Labor Supply of Single Mothers*, Q. J. OF ECON. 1063 (2001) (finding that the EITC accounted for the largest percentage in shift in employment of single mothers).

that few workers would be willing to trade more time off for less income. On this issue, Jacobs and Gerson note that fewer than 10% of workers desire to work less when the trade-off includes a loss of income, while nearly 30% would like to work more.³¹ In another survey cited by the authors, sixty percent of the respondents indicated they could not afford to work less.³² Consistent with these data, a recent survey by the AFL-CIO indicated that a substantial percentage of working women feared the loss of mandatory overtime, while in contrast, controlling one's hours fell far down on the list of priorities among those women.³³

B. The Benefits of High Income Jobs.

Despite their longer hours, professional workers often have the most flexibility and control over their work time. This control and flexibility comes in several forms. Based on survey data, professional workers express greater autonomy over their schedules than other workers, although men generally have far greater control over their work than women do.³⁴ Additionally, their higher income enables professional women to purchase more private care, prepared meals, and other services to aid their efforts to balance work and family demands and to free up time that can be spent with children or other family members. In some ways, this may be a mixed blessing at best because many professional women might prefer to spend more time with their children rather than to

³¹ *Id.* at 74-75. Twelve percent of the respondents could not choose an answer. *Id.*

³² *Id.* at 75.

³³ See AFL-CIO 2004 Ask a Working Women Survey Report, Figures 3 & 4. According to the survey, 43% of women indicated they were very worried about the loss of mandatory overtime. Forty-two percent of women listed controlling work hours as very important but this figure, which was from a different question than mandatory overtime, was the 9th of 10th on the list of priorities. Tenth on the list was childcare, and first was the affordability of health insurance. Other surveys indicate that the vast majority of workers would work longer hours to keep their job suggesting that a fear of losing one's job might impose a significant restraint on lower working hours. See THOMAS I. PALLEY, PLENTY OF NOTHING: THE DOWNSIZING OF THE AMERICAN DREAM AND THE CASE FOR STRUCTURAL KEYNESIANISM 65 (1998) (reporting survey results where 82% of respondents said they would be willing to work longer hours to keep their job).

³⁴ Jacobs and Gerson, *supra* note --, at 101-02.

contract out childcare services. But this is part of the choice that has been made, a choice to pursue a meaningful professional career, which typically involves full-time work. While this may strike many as unfair, few individuals, men or women, have the choice to pursue a meaningful career while working reduced hours. This is not a choice widely available to men; as noted before, most men work longer hours than women. Nor is this a choice available to lower-income women who need more hours in the workplace just to get by. Accordingly, professional women are not being denied a choice available to others, but their desire to take time away from the workplace without penalty is a choice that is currently unavailable to all but a fortunate few, and it is not at all clear why creating such an option should be a principal policy focus.

This is particularly true since professional women are also more apt to obtain help from their male partners, or perhaps more accurately, they have the greatest ability to obtain help from their male partners. Well-educated professional women tend to marry well-educated professional men, and their combined income undoubtedly provides even greater security and flexibility. Indeed, working-class couples are more likely to support traditional gendered ideologies of male as breadwinner, woman as homemaker.³⁵ Higher levels of education are also associated with less traditional family values, and as a result, educated professional men tend to have a greater commitment to equal parenting. Professional men also work the longest hours and those hours may not always allow them to fulfill their expressed commitment to equal parenting. Yet, their less traditional attitudes regarding gender norms may provide a more supportive environment for balancing work family conflicts, including a greater willingness to contract out services.

³⁵ FRANCINE M. DEUTSCH, *HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS* 184 (1999).

Of equal importance, even if the higher wage men do not, in fact, share in parenting and other family demands, there is still a question of whose responsibility inducing their participation ought to be. On this score, much of the work family literature lets men off the hook too easily, either under the assumption that men really are unable to do their fair share or under the belief that calls for equal parenting have for too long fallen on deaf ears. But surely one of the best means for achieving a workable balance is for men to share in the various family obligations and to assume that option is foreclosed is to abandon an important equality strategy.³⁶

Professional women also have greater access to health care, are less dependent on their husband's health insurance, and can best afford the rising premiums. In contrast, lower income women, particularly those who work in the service industry, have far lower levels of health insurance. For example, only 22% of service workers, compared to 50% of white collar workers participated in an employer's health plan in 2003.³⁷ Part-time workers had the lowest access to health care with only 9% of such workers participating in a health benefit plan. Access to comprehensive health insurance is essential for the routine and preventive care that can keep workers and their children healthy, and those

³⁶ It is often asserted that men are reluctant to break traditional patterns because of the penalty they will experience in the labor market. Years of data, however, document that women are penalized in the labor market for their childrearing responsibility, and there is no reason why women, but not men, should suffer a labor market penalty. It may be that men will be penalized to a greater extent than women because they are breaking from stereotype whereas women are acting according to stereotype when they take time away from the workplace for childrearing, and there is some limited support for this proposition, limited in part because the available samples are so small. To the extent men do suffer a higher penalty than women, it is likely attributable to the small numbers of men who share fully in childrearing, and if more men did so, it is likely the penalty for such behavior would be reduced. See Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707,758-59 (2000) (arguing that if wage penalties might decrease if more men took leave).

³⁷ See William J. Wiatrowski, *Medical and Retirement Plan Coverage: Exploring the Decline in Recent Years*, MONTHLY LABOR RVW. 29, 31 (Aug. 2004). According to the Henry J. Kaiser Family Foundation, women who have health insurance are less likely to be insured through their own job and more likely to have dependent coverage than men. See *Women's Insurance Coverage at 1* (Henry J. Kaiser Family Foundation Nov. 2004).

without health insurance are far more likely to miss work for their own or their children's health issues.

Relatedly, professional women have considerably more paid sick leave available to them than lower-income women, and the availability of paid sick leave is often a critical factor in balancing unexpected demands from outside of the workplace. Recent data indicate that nearly half of the workforce (49%) do not have any paid sick leave, which translates to more than 59 million workers.³⁸ Full-time workers (60%) are more likely to have paid sick leave than part-time workers (16%), and white-collar workers are likewise far more likely to have paid sick leave than blue-collar or service industry workers.³⁹ Affluent workers in all industries are nearly twice as likely to have access to paid leave than low-income workers, and more than half of such workers have access to three or more weeks of leave compared to fewer than one-quarter of less affluent workers.⁴⁰

The absence of paid sick leave for low-income workers is problematic not just for sick leave purposes, but sick leave often becomes the only available paid maternity leave.

³⁸ Vicky Lovell, *No Time to Be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave at 6-7* (Institute for Women's Policy Research 2004). The data are based on government surveys and are consistent with the data reported by the government. See U.S. Dep't of Lab., Bureau of Lab. Stat., *National Compensation Survey: Employee Benefits in Private Industry in the United States, 1999 Supplementary Tables* (2000).

³⁹ *Id.* at 8. The report explains: "The three occupations with the highest paid sick leave coverage rates are all white-collar: executive, administrative and managerial (73 percent), professional and technical (71 percent), and administrative support and clerical (68 percent). In blue-collar, sales, and service-sector jobs, roughly one-third to two-fifths of workers have paid sick leave. *Id.* See also U.S. Dept. of Labor, *supra* note --, at table 1 & 3 (documenting differences in leave levels between professional and blue-collar workers).

⁴⁰ See Katherine Ross Phillips, *Getting Time Off: Access to Leave Among Working Parents at 4* (Urban Institute Report No. B-57, April 2004). The survey breaks down the level of income based on the federal poverty level, and we are defining affluence as the highest income group reported which is for incomes that are 200% or more than the poverty level. 52.8% of this group had more than three weeks of leave, and only 8.7 had one week or less. In contrast, only 23.4% of those with incomes between 100-200% of the poverty level had more than three weeks, and 30.4% had one week or less. For those making less than poverty level wages, a surprisingly high percentage had access to more than three weeks of paid leave, 29.0%, while 35.1% had access to one or less weeks of leave.

In an analysis of institutional factors that compel employers to offer paid maternity and paid sick leave, sociologists Doug Guthrie and Louis Marie Roth found that “pregnancy leave is tied to sick leave policies within many U.S. organizations as a result of pregnancy legislation in the 1970s and 1980s.”⁴¹ Based on a survey of more than 700 organizations, the authors found that the percentage of women in an industry had no significant effect on paid maternity leave policies, but did have a significant effect on the probability that a firm offered paid sick leave.⁴² As a result, without paid sick leave, most low-income women are left with little or no paid time off after the birth of a child, and women tend to be disproportionately present in certain industries, like the service industry, that provides relatively few benefits.⁴³

On the federal level, the principal legislative initiative aimed at work-family issues has been the Family and Medical Leave Act (FMLA), which provides up to twelve weeks of unpaid leave for qualified employees for the birth or adoption of a child, and to care for a serious illness of oneself or certain statutorily designated others.⁴⁴ In terms of access to FMLA leave, many low-income workers are unable to take advantage of this benefit. FMLA leave is available only to “eligible” employees, those who have worked a minimum of 1,250 hours for their employer over the previous 12-month period and whose employers have 50 or more employees. Two surveys of the FMLA have sought to identify the primary reason that prevented individuals who needed to take leave from

⁴¹ See Doug Guthrie and Louise Marie Roth, *The State, Courts, and Maternity Policies in U.S. Organizations: Specifying Institutional Mechanisms*, 64 AMER. SOCIOLOGICAL REV. 41, 56 (1999).

⁴² *Id.* at 54.

⁴³ *Id.* at Figure One, p. 42.

⁴⁴ See 29 U.S.C. §§2601 et seq.

doing so.⁴⁵ The surveys allowed employees to list multiple reasons for not taking leave. By far the largest category within both surveys was an inability to afford the leave.⁴⁶

High-income women are also the most likely to have access to on-site childcare and to childcare support services than are other working women. Employer-provided childcare remains a relatively rare employee benefit but its availability tends to be targeted at government workers and high-income women. A recent government survey of private industry indicated that five percent of workers had access to employer-provided childcare, which included seven percent of white collar workers and only two percent of blue collar workers.⁴⁸ Childcare resource and referral services were available to a larger group of employees, approximately ten percent of all employees, but again the benefits were skewed towards white collar workers; fourteen percent had such benefits compared to six percent of blue collar and four percent of service workers.⁴⁹ When the distribution is broken down by wage, workers earning \$15 per hour or higher were three times as likely to have childcare benefits as those earning lower wages.⁵⁰

Not surprisingly, higher income women are almost twice as likely as lower income women to use some form of organized child care, and lower income women are,

⁴⁵ See David Cantor et al., U.S. Dep't of Lab., *Balancing the Needs of Families and Employers, The Family and Medical Leave Surveys, 2000 Update (2001)* (also reproducing some facts of the 1996 survey) [hereinafter *Balancing the Needs*]; Comm. on Family and Med. Leave, U.S. Dep't of Lab., *A Workable Balance: Report to Congress on Family and Medical Leave Policies (1996)* [hereinafter *A Workable Balance*], available at <http://www.ilr.cornell.edu/library/downloads/keyworkplacedocuments/familymedical.pdf>.

⁴⁶ *Balancing the Needs*, *supra* note __, at tbl.2.17. 77.6% of those who were unable to take leave in the 2000 survey, and 65.9% in the 1996 survey, listed financial constraint as a reason for not taking leave. *Id.* Large numbers of employees also listed work-related reasons, with 52.6% indicating that work was too important, and 42.6% expressing a fear that the taking of leave would adversely affect their career advancement. *Id.*

⁴⁸ U.S. Dept. of Labor, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2004*, at Table 19, p. 23 (2004).

⁴⁹ *Id.*

⁵⁰ *Id.*

correspondingly, more likely to use relative, parent, or sibling care.⁵¹ Relative care is generally less expensive than organized day care; while 73% of lower-income women paid for organized care, such as child care centers, only 27% paid for relative care.⁵² In addition to its cost, relative care has other advantages, such as its flexibility and accessibility.⁵³ Nonetheless, because of their greater wealth, higher income women can afford more and varied organized care for their children, and often the quality is significantly better at high-end daycare centers that are more likely to meet professional regulatory standards. Equalizing opportunities for all women might involve not just providing access to these benefits for lower income children, but also providing transportation.

Finally, sexual harassment tends to be more prominent among lower-income and blue collar women than professional women. In a comprehensive examination of a decade of sexual harassment cases, the authors found two thirds of the cases were brought by blue-collar and clerical workers, while one-third were brought by management and professional employees.⁵⁴ Regarding the nature of the claims, the authors explained: “Conforming to stereotypes, physical harassment was significantly more likely in the blue-collar and pink-collar cases than in higher status occupations.”⁵⁵

⁵¹ Sunhwa Lee, *Women’s Work Supports, Job Retention, and Job Mobility: Child Care and Employer-Provided Health Insurance Help Women Stay on Jobs 3* (2004), available at <http://www.iwpr.org/pdf/C359.pdf>.

⁵² *Id.*

⁵³ *Id.* at 3 n.7 (also suggesting that relative care may be preferable because of a common culture of child-rearing).

⁵⁴ See Ann Juliano and Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 560-61 (2001). For an additional discussion of such cases see Rebecca K. Lee, *Pink, White, and Blue: Class Assumption in the Judicial Interpretations of Title VII Hostile Environment Sex Harassment*, 70 BROOKLYN L. REV. 677, 693 (2003).

⁵⁵ Juliano and Schwab, *supra* note __, at 567. The authors found that nearly half of the blue-collar and clerical cases contained an allegation of physical harassment, compared to 32% of management case and 38% of cases denoted as professional. *Id.* at 570. Interestingly, the authors also found that blue and

III. ACHIEVING A BALANCE FOR THE WORKING CLASS.

In the previous section, we explored the substantial advantages affluent women obtain in the workplace and we explored some of the ways those advantages are relevant to their ability to balance work and family demands. We certainly do not mean to suggest that professional women have an easy time balancing work and family demands, but we do want to highlight how their situation in the workplace actually provides them with relative advantages rather than disadvantages, especially when we recall that only a small group of women are working more than fifty hours in a week.

The previous section also highlighted an important point that can be all too easily overlooked, namely that there is a great heterogeneity among working women and, as a result, their interests may diverge rather sharply as well. To offer one important example, low-income women would likely benefit most by reductions in the staggering income inequality that runs rampant in the United States. At the same time, reducing that inequality would likely take away one of the strongest advantages professional women have. Professional women not only benefit directly from their own high income, but because they tend to be married to high income men, they benefit doubly from our pervasive income inequality. As a result, while women generally share an interest in balancing their work and family demands, not all women will want to make the same tradeoffs to do so, and for many women, certain options such as part-time work or even a reduced workweek are foreclosed by financial constraints. From that perspective, crafting policy choices may require emphasizing the needs of a particular group of

clerical workers were more successful in their claims, which is consistent with repeated findings that cases involving explicit sexual conduct have a higher probability of success.

women over another, and in this paper we highlight the needs of lower and middle-income women and seek to identify policies that will most meet their particular needs. Again, this is not because the needs of professional women are unimportant; on the contrary, the success of professional women is important on many levels, and women at all levels ought to, at a minimum, be afforded the choices and opportunities that men have and we have a long ways to go before professional women obtain equality, however measured. Rather, we believe the focus ought to be on working women because they have the least ability to engage in what might be called self-help, and accordingly, their needs appear most pertinent to governmental intervention. In addition, women at the upper ranks of the corporation have largely chosen their profession. Despite the deep dissatisfaction one often finds within law firms and other stressful professions, it would be difficult to suggest that anyone was ever compelled to be a lawyer or that someone chose the law as a field as the best option among limited choices. Low-wage workers have substantially more constrained career choices, and although some of those constraints are often the result of individual choices, they are just as frequently, if not more so, the product of life circumstances, and again, from that perspective those at the lower rungs are more deserving of society's attention than those closer to the top.⁵⁶

With this general framework in mind, we want to now analyze some of the most prominent policy proposals advanced by work-family scholars as way of gaining a more family-friendly workplace. As a general matter, the different work family proposals can be divided into four distinct categories: (1) restructuring part-time work to make it more desirable; (2) changing the nature of the work-week through various measures such as

⁵⁶ For a similar recent analysis see Nancy E. Dowd, *Bringing the Margins to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433 (2004).

thirty-five hour workweeks, compressed days, or no mandatory overtime ; (3) revising and expanding family and medical leave policies; and (4) developing governmental incentives for both businesses (to encourage more family friendly workplaces) and individuals (providing a homemaker tax credit, for example).⁵⁷ Many of these policies are designed to provide women with the option of spending less time in the workplace, much like they did in an earlier era. We, on the other hand, emphasize a set of proposals – lengthening the school day, providing more public daycare, and ensuring women access to higher education – that are designed to facilitate women’s commitment to the workplace by making it easier to stay longer rather than to leave earlier.

1. The Allure of Part-time Work.

One of the primary policy proposals advocated by work-family scholars is creating more and better part-time work. In today’s labor market, part-time workers are typically paid less per hour than their full-time counterparts, and they receive fewer benefits;⁵⁸ the primary benefit, of course, is that it allows the part-time worker more time at home. While some companies have created good part-time jobs, particularly in industries such as seasonal or retail work that lend themselves to part-time work, the examples remain isolated. One survey suggested that as many as seventy-five percent of part-time workers would prefer full-time work.⁵⁹ Despite this widely recognized phenomenon, work family scholars continue to advocate the development of good part-

⁵⁷ For a catalogue of nineteen of these changes, see Joan C. Williams and Holly Cohen Cooper, *The Public Policy of Motherhood*, 60 J. SOC. ISSUES 849, 857 (2004).

⁵⁸ See, e.g., Thomas Nardone, *Part-Time Employment: Reasons, Demographics, and Trends*, 16 J. LABOR RSCH. 275 (1995).

⁵⁹ See PETER CAPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET DRIVEN WORKFORCE* 141 (1999).

time jobs that receive proportionate benefits, but there is very little reason to believe such jobs can be readily or viably created.

As a purely practical matter, two barriers to developing good part-time jobs seem endemic to the current labor market. First, work family scholars frequently proclaim the advantages and efficiency of part-time work as a means of encouraging employers to create more part-time jobs. Yet, most employers clearly believe otherwise, as part-time work remains a small, and not a growing, segment of the workforce. Consistent with this perspective, employers pay lower wages and offer fewer benefits for part-time work, at least in part because these jobs are not more efficient for the employer and part-time work attracts different kinds of employees. To be sure, some jobs can be done on a part-time basis,⁶⁰ and perhaps a substantially larger group of part-time jobs could be created with little cost to the employer. But most part-time work includes a certain amount of inefficiency – the time lost in more frequent start ups on the day, the administrative costs that accompany adding more workers to a payroll, and if workers are sharing a job, the time lost in sharing information. From a basic economics perspective, if part-time jobs were as economically efficient as work-family scholars suggest, we would expect employers to create more of them on their own initiative. We do not mean to suggest that whatever the market produces is the efficient result, but we do mean to suggest that the various calls from work-family scholars that employers do not know what is good for them rings hollow without far more substantial support for the economic desirability of part-time jobs.

⁶⁰ One prime example of a large part-time employer is United Parcel Service, which employs a substantially larger workforce during holidays, and has many part-time workers. *See* CAPELLI, *supra* note, at 140.

Second, it is not at all clear how we would create proportionate benefits for part-time work, at least for such things as health insurance. Most of the calls for proportional benefits borrow from European mandates, but in Europe the government provides health insurance. In contrast, most health insurance in the United States is provided through private employers and almost all such plans require employees to share in the costs of insurance premiums. It is generally not feasible to provide a part-time worker with half a health plan, and it is even less feasible to require them to pay twice the premiums required of full-time workers when they are receiving half the income. Conceivably a limited health plan might be created for part-time employees that include such things as catastrophic care, but this kind of a policy would not be truly proportional other than in the limited sense that it might offer half of the benefits offered to full-time employees.

Beyond these practical implementation questions, it has been demonstrated repeatedly that part-time work tends to be both marginalized and dominated by women wherever it has been developed. Many European countries have far more extensive part-time sectors than the United States, and nowhere do we find a robust part-time market in which workers are not penalized in either wages or promotional opportunities for working part-time.⁶¹ Equally clear, wherever an extensive part-time market has been implemented, part-time work is almost exclusively the domain of women.⁶² And just as was true in the United States, many European part-time workers would like to work

⁶¹ See Sandra Fredman, *Women at Work: The Broken Promise of Flexicurity*, 33 *INDUS. L.J.* 299 (2004) (discussing limitations of England's part-time sector); Sara Connolly & Mary Gregory, *Women at Work: Two Steps Forward, One Step Back? At 10* (noting that within Europe "almost half of all women working part-time are employed in an occupation which pays less than two-thirds of the average hourly rate.") (unpublished paper on file with the authors).

⁶² Within Europe, the Netherlands has created the most substantial part-time labor force, and women tend to dominate the sector, with more than two-thirds of employed women working part-time, as well as 95% of employed mothers of young children. See EILEEN APPELBAUM ET AL., *SHARED WORK, VALUED CARE: NEW NORMS FOR ORGANIZING MARKET WORK AND UNPAID WORK* at 17 (2002).

longer hours. In the Netherlands, which has the most extensive part-time sector in Europe, up to 40% of the workers would prefer to work longer hours.⁶³ This latter fact highlights an important, and obvious, limitation to the call for more part-time work – this is a benefit of interest to a small segment of the workforce, most likely high income women who can afford the loss of pay that would accompany shorter hours but who also work the kind of job that is less amenable to shorter hours. As a result, even if it were feasible to create good part-time jobs that were not the exclusive province of women, this would not be a policy initiative that would benefit most working women.

2. *Towards a Shorter Workweek.*

Recently, a number of scholars have advocated shorter work-weeks of 35 hours for all employees as a means of facilitating a balance between work and family demands.⁶⁴ As a concept, it is difficult to argue with reducing working hours and this has long been the focus of the union movement, and the forty-hour workweek is a substantial improvement over working conditions from earlier eras where six and even seven ten hour days were not uncommon. A shorter workweek for all workers also holds an important advantage over part-time work in that it would become the norm for all workers, rather than a track designated exclusively for women workers. This has been one of the motivating factors behind the shorter hour movement in Europe, although other motives were frequently more important in pushing the reforms forward, including most prominently, reducing unemployment by sharing work. Indeed, the lessons from Europe are instructive regarding the benefits of a shorter workweek.

⁶³ See Joel F. Handler, *The “Third Way” of the Old Way?* 48 KAN. L. REV. 765,777 (2000).

⁶⁴ E.g., Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1956-57 (2000); Vickii Schultz and Alllison Hoffman, *Precairous Work and Working Time: The Case for a Reduced Workweeek in the United States*, available at www.ssrn.com; Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J. L. & GENDER 1, 4-5 (2005).

In 1998, France legislated a mandatory thirty-five hour workweek, with requirements for the payment of significant overtime for hours worked in excess of 35 hours, and an even higher overtime premium for hours worked beyond 44 in a week. The primary impetus behind the legislation was a desire to reduce unemployment, but there was also a push by unions and the socialist government to reduce working time so as to increase leisure time, in part because French workers are highly productive. As a result of this last factor, the legislation required workers be paid the same wages for a thirty-five hour week that they had previously been paid for their longer weeks. The system, after having been in place for only a short time,⁶⁵ has begun to unravel, and the government has now relaxed the provisions in a number of ways so as to weaken their force considerably.⁶⁶ French companies complained about their ability to compete in a global economy, and there was also no appreciable decline in unemployment.⁶⁷ Germany has also moved towards increasing work hours, and efforts to reduce the workweek have largely failed in Great Britain.⁶⁸

But the real objection to shorter workweek proposals is that, in the context of today's economy, within the United States such a proposal seems utterly unrealistic. Obviously, what appears unrealistic one day may become the norm a generation hence, and there can be little objection to a shorter workweek that does not entail a reduction in pay. Yet, given that we have had such a difficulty in the United States even raising the minimum wage, it seems unlikely that we might adopt a shorter workweek that includes

⁶⁵ The law was phased in beginning in 2000.

⁶⁶ See Kaatrin Benhold, *France Votes to Overhaul 35-Hour Workweek*, INT'L HERALD TRIBUNE, Mar. 23, 2005, at 3.

⁶⁷ At the time the legislation was altered to dismantle the shorter workweek, unemployment had reached a five-year high at 10.1% and was not lower than other countries without a short workweek. *Id.*

⁶⁸ See David R. Francis, *Europe Reluctantly Eyes a Longer Work Week*, CHRISTIAN SCI. MONITOR, July 15, 2004, at 17.

no cut in salary, which would effectively impose a national wage increase of 12 percent across the board. And as noted earlier, if workers were asked to choose whether they wanted to work fewer hours for less money, all indications are that a majority of workers would not be willing to do so.

3. *Changes to the Family and Medical Leave Act.*

As should have been expected, and as discussed earlier, the unpaid leave available pursuant to the federal Family and Medical Leave Act has proved a minimally helpful benefit as a form of extended leave, particularly for low-wage women who typically have the least financial means to avail themselves of unpaid leave.⁷⁰ Where the statute has made a significant contribution, and one that was not fully appreciated at the time the statute was enacted, is by providing low-wage workers with some limited means of sick leave.⁷¹ As noted in the previous section, nearly half the workforce has no paid sick leave, and the FMLA has filled an important gap by providing a limited form of leave that allows women some job protection and the retention of benefits when they are on leave. Without the FMLA, those who have no access to sick leave, could be terminated if they were to call in sick. At the same time, based on government surveys, it appears that very few women, of any income level, are relying on the FMLA as a form of maternity leave, preferring instead to cobble together leave time based on whatever vacation or sick leave they may have available to them.⁷²

⁷⁰ One of us has recently addressed the limitations of the Family and Medical Leave Act. See Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. UNIV. J. OF LAW & POL'Y 65 (2004).

⁷¹ *Id.* at 76-77 (noting that the statute has been most useful as a form of sick leave).

⁷² *Id.* at 74-75. Other analyses of leave-taking have come to similar conclusions. See, e.g., Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, 40 Demography 191 (2003) (concluding that the "data indicate . . . the limited impact of unpaid leave policies.").

Since the passage of the FMLA, there have been numerous proposals for revising the Act, although there has been virtually no legislative activity within Congress. Some of the proposals are to expand the scope of the statute to include more employers since currently the statute applies only to employers having fifty or more employees, thus leaving out a significant proportion of the workplace. There have also been suggestions to reduce the eligibility requirements and to expand the scope of the statute to allow for some leave time to attend PTA meetings or other school functions. Many of the proposals could conceivably advantage low-income households since younger, low-income workers are currently the most likely not to be covered by the statute.⁷³

At the same time, and to reiterate what is surely become repetitious, offering unpaid leave does little to alleviate the burdens on low-income workers.⁷⁴ Indeed, expanding unpaid leave simply provides a benefit to those who are least in need – wealthy workers who have far more access to paid leave provisions than low-income workers. Moreover, if we are concerned about women’s equity in the workplace, we need to do more than expand leave provisions. To the extent family leave becomes synonymous with women’s leave, employers may see women as more costly, particularly if income replacement were to become part of the leave provision. Whether women would, in fact, become more costly is a difficult empirical question that would involve analyzing leave patterns for other issues, as well as the loyalty that better leave provisions

⁷³ Lisa Bornstein, *The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 87 (2000).

⁷⁴ See Lester, *supra* note __, at 3.

might induce. Nevertheless, it is important for work family scholars to tackle the gender implications of expanding leave provisions that are likely to be utilized only by women.⁷⁵

4. *Increasing Government Incentives.*

Many scholars have suggested creating governmental programs designed to encourage employers to develop more family-friendly policies, and create incentives for employees to take advantage of these policies. One recent proposal has been developed by Anne Alstott to create caretaker allowances for parents. Building on the work she has previously done with Bruce Ackerman, Professor Alstott has proposed that the primary caretaking parent receive an annual \$5,000 grant, which could be used for child care, education, or retirement savings.⁷⁶ She argues that such an account would be particularly valuable to low and moderate income parents because, although they often spend less on child care than wealthier women, it would help increase their child care options. Any unspent money could be used to further the parent's education or provide for retirement.⁷⁷

Like a shorter workweek, there is little to object to in providing government support to parents, but this proposal seems even less likely to be adopted than a shorter workweek given its costs and the relatively few restrictions on how the money could be spent. Moreover, under Professor Alstott's plan, all parents would receive the annual stipend whereas it seems that this is precisely the kind of plan that one might want to be means-tested. Part of the idea behind providing stipends to all parents would be to mimic social security and the relatively broad support social security has obtained. But the plan differs significantly in that social security is funded through payroll taxes, while

⁷⁵ Selmi, *supra* note --, at 711; *see also* Naomi Cahn, *The Power of Caretaking*, 12 YALE J. L. & FEM. 177 (2001). As each of us has argued elsewhere, expanding family leave must include implementing techniques to involve more men in child care.

⁷⁶ ANNE ALSTOTT, NO EXIT 75, 181 (2004).

⁷⁷ *Id.* at 77-78.

the caretaker allowance would be distributed from general revenue regardless of whether the caretaker was in the workforce. There seems, however, little reason to provide a federal subsidy to wealthy women staying home with their children, and it is not at all clear that women would ultimately benefit from that arrangement.

IV. BEYOND RESTRUCTURING THE WORKPLACE.

In the previous two sections we demonstrated how the interests of working women can diverge sharply based on income, and how most of the popular proposals developed by work-family scholars are of primary interest to high-income women and would provide very little help to lower and middle-class women. This is true, almost by definition, when the proposals are designed to allow women to spend more time out of the labor market given that low and middle-income women typically lack the financial means to take advantage of such initiatives. In this final section, we want to offer a series of reforms that would benefit lower rather than upper-income women, and that would do so by facilitating women's ability to stay in the labor market longer. Rather than simply concentrating our efforts on restructuring the workplace, we believe it is important to consider restructuring school days, providing women with greater control over their workplace choices, and altering the allocation of responsibilities within the household. Accordingly, we focus on three such reforms: restructuring the school day, domestic violence, and changing household roles. Each allows lower-income women to make more informed and constructive choices concerning work-family issues because they facilitate both workforce attachment and increased income.

1. Restructuring School Days and enhancing day care:

Many low income women lose their jobs because of an inability to find satisfactory day care, and their need for daycare stems in part from the structure of the school day. As a result, we emphasize the need to restructure the school day and to expand child care options so that children's schedules become more compatible with their parents' full-time work schedules. The structure of the school day has not changed significantly from a time when women were at home waiting their child's arrival, and indeed, the schedule still largely presumes that an adult, most commonly a woman, will be available by mid-afternoon to assume care of a school-aged child.⁷⁸

In terms of accommodating working parents, a school day that is longer than the work-day would be the best option, although such a lengthy day may be too difficult on many children and would surely be opposed on this ground.⁷⁹ Starting the school day earlier and continuing it until later in the afternoon would be helpful; alternatively providing more publicly funded after and before school programs would provide some accommodation for working parents. Publicly-financed full-day preschool and daycare would also be necessary to enable women to have a more continuous labor force attachment. To be sure, extending the school day, and the age at which public education becomes available, would be enormously costly, but no more so than the costs of the many proposals advanced throughout the work-family literature. Moreover, extended school days would offer significant benefits to many children, particularly for children in need of more school attention.

⁷⁸ As one observer noted, "We have school days and calendars that matched the agrarian work cycle; we should update them to match parents' industrial and postindustrial work schedule and children's increasing need for high-level skills." Jody Heymann, *Can Working Families Ever Win? Helping Parents Succeed at Work and Caregiving*, BOSTON REV., Feb./Mar. 2002, at 4, 13.

⁷⁹ See ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* (2003) It is worth noting that for many children in daycare a day that begins before and ends after the typical workday is already the norm.

Although moderate income women do not generally rely on private care for their child care needs, longer school days enhance the child's educational experience and relieve the day care strain. And, if lengthened school days result in increasing after school options for low and moderate income children, options that their parents would otherwise be unable to provide, then the proposal may help reduce social inequalities.⁸⁰ A final advantage to restructuring the school day is that such a proposal is more consistent with the emphasis in the work-family literature on the public responsibility for children, insofar as the restructuring occurs in the public sphere of state-financed education rather than in the traditionally private sphere of the workplace.

2. Domestic Violence Proposals: Although domestic violence usually occurs within the home, it appears on the job through a variety of means: women may be absent because of injuries or court proceedings; abusers may commit violence within the workplace or prevent women from going to work or training; abusers may undermine women's job confidence.⁸¹ As many as one-half of all domestic violence victims report that domestic violence has contributed to their losing a job.⁸² A study in Wisconsin of current and former welfare recipients who were victims of domestic violence found that 30% had lost a job due to that violence, and that 58.7% were afraid to go to work or school because of such threats.⁸³ Rates of domestic violence appear to be higher for poorer women and for couples who are experiencing financial strain.⁸⁴ Indeed,

⁸⁰ LAREAU, *supra* note __, at 225..

⁸¹ *See, e.g.*, Lise McKean, Self-Sufficiency and Safety: The Case for Onsite Domestic Violence Services at Employment Services Agencies 18-20 (2004), available at <http://www.impactresearch.org/documents/DVpolicyreport.pdf>.

⁸² Margaret Grahan Tebo, *When Home Comes to Work*, 91 ABA J. 42, 42-43 (2005).

⁸³ Legal Momentum, *Welfare and Poverty: Domestic and Sexual Violence*, available at <http://www.legalmomentum.org/issues/wel/violence.shtml>

⁸⁴ Michael L. Benson & Greer Litton Fox, *When Violence Hits Home: How Economics and Neighborhood Play a Role at 2* (2004), available at <http://www.ncjrs.org/pdffiles1/nij/205004.pdf>.

household income correlates inversely with domestic violence.⁸⁵ Households with incomes between \$7,500-\$25,000 had a domestic violence rate almost three times that of households with incomes over \$50,000.⁸⁶ As many as 60% of women who receive welfare benefits have been victims of domestic violence as adults, compared to 22% of women in the general population, and as many as 30% reported abuse within the last year.⁸⁷

Consequently, proposals that provide various benefits to battered women will disproportionately affect lower income women. Battered women are not, however, a common subject of the work-family literature.⁸⁸ Yet they are doubly significant; not only are many battered women mothers, who must balance child care with work, but they also have an additionally critical factor of domestic violence which affects their ability to perform that balance. And, to the extent that the work-family literature is concerned with reconciling work and personal lives (regardless of the existence of children), then domestic violence victims should be of particular concern.

Battered women may be eligible for leave provided by the FMLA if they can meet the eligibility requirements, which would include showing that the violence against them has caused a serious health condition. Yet such a burden can be onerous.⁸⁹ Among

⁸⁵ Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U.J. GENDER, L. & SOC. 367, 367 (2003).

⁸⁶ Raphael, *supra* note __, at 367.

⁸⁷ Family Violence Prevention Fund, *The Facts on Welfare and Domestic Violence*. available at <http://endabuse.org/resources/facts/Welfare.pdf>.

⁸⁸ “Freedom to pursue employment and freedom from violence are essential ingredients of women’s liberation” notes Jody Raphael, “but only rarely have feminists analyzed how the two intersect.” *Id.* at 373. For an analysis of why this might be, see Joan C. Williams, *Fretting in the Force Fields: Why the Distribution of Social Power has Proved So Hard to Change*, 71 UMKC L. REV. 493, 504 (2002).

⁸⁹ Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J. L. & POL’Y 193 (2004); see also *Reynolds v. Fraser*, 5 Misc. 3d 758 (N.Y. Sup. Ct. 2004)(court held that law prohibiting discrimination against domestic violence victims precluded employer from firing worker when employer could not verify that employee was on sick leave because of the confidentiality of the address of her battered women’s shelter).

the proposals that would help domestic violence victims are expanding FMLA-type leave to cover absences when victims are seeking medical help, looking for emergency housing, or obtaining legal help;⁹⁰ ensuring eligibility for unemployment insurance if domestic violence forces a woman to terminate her employment;⁹¹ and integrating domestic violence education and counseling into employment training programs.⁹² Although many states allow employees who are crime victims to take leave from work for their participation in a criminal proceeding, fewer than 10 states have enacted laws that apply these leave provisions to domestic violence victims.⁹³ Because domestic violence victims may need leave for civil proceedings, such as to obtain protection orders, or medical and counseling help, laws with specific protections for domestic violence are far more useful. California's law, for example, prevents an employer from discriminating against an employee who takes leave to obtain legal relief for herself or her children as a result of domestic violence and requires employers to allow victims to take leave for other related purposes, such as receiving services from a battered woman's shelter, and requires the employer to maintain confidentiality.⁹⁴ The class impact is palpable; for example, the

⁹⁰ S. 1197, sponsored by Arlen Specter and Joe Biden

⁹¹ This reform is already in place in a majority of states. Legal Momentum, Violence Against Women: Fact Sheets on State Laws, available at <http://www.legalmomentum.org/issues/vio/FactsheetPage.shtml>

⁹² See Self-Sufficiency, *supra* note __. There is an increasingly well-developed literature on domestic violence and welfare. See, e.g., Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 LAW & POL'Y 205, 207 (1997) (asserting that "the insufficient integration of feminist - specifically domestic violence - perspectives into poverty advocacy, and of poverty concerns into advocacy for battered women, is in part what has allowed the nation's political culture to become so hostile to poor welfare mothers."

⁹³ Legal Momentum, Time Off From Work for Victims of Domestic or Sexual Violence (2005), available at <http://www.legalmomentum.org/issues/vio/timeoff.pdf>.

⁹⁴ Cal. Lab. Code §§230, 230.1 (2005). Illinois has enacted the broadest law prohibiting any kind of employment discrimination against victims of domestic violence, including (as is true of other states) with respect to leave. 820 ILCS 180/20 (2005)⁹⁴ The Illinois law also requires that employers make "reasonable accommodations" for domestic violence victims, such as modifying a work schedule or changing a telephone number, unless this would cause the employer "undue hardship." *Id.* New York City has a similarly broad ordinance. NYC Admin. Code §8-107.1 For a discussion of the laws see see Legal

differences in availability of medical care for poorer and wealthier women may mean that lower income victims must spend more time in medical clinics waiting for appointments and thus need more accommodation.

Many states have adopted legislation that explicitly addresses the availability of unemployment insurance for domestic violence victims.⁹⁵ Under most unemployment statutes, employees are ineligible if they have left work voluntarily without “good cause.” In order to address domestic violence issues, several states, including California and Connecticut, define good cause to include terminating employment in order to protect the employee or her children from domestic violence.

3. Changing Attitudes:

Because women’s identities as mothers and primary caretakers have traditionally been much stronger than men’s identities as fathers and primary caretakers, the gendered division of labor continues.⁹⁶ But this is not a problem centered only on men; women, too, must change. Although women must continue to identify themselves as parents, they must also share fully in that status with men. Fathers, on the other hand, must change to become more caring towards, and more involved with, their children. Just as we see “motherhood as a cornerstone of women’s self-esteem within our society,”⁹⁷ so too must involved fatherhood become a cornerstone of men’s self-esteem. Fatherhood is still too frequently defined in terms of the breadwinning role, rather than in a caregiving role,

Momentum, *Discrimination Against Victims of Domestic and Sexual Violence* (2005), available at <http://www.legalmomentum.org/issues/vio/discrim.pdf>

⁹⁵ Legal Momentum, *Unemployment Insurance* (2005), available at <http://www.legalmomentum.org/issues/vio/ui.pdf>

⁹⁶ See Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177 (2000); Cynthia Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1523-24 (2005).

⁹⁷ Carol Sanger, *M Is for the Many Things*, 1 REV. LAW & WOMEN'S STUD. 15, 66 (1992).

and for many men, fatherhood remains less important to men in their self-definition than to women.

A change in self-definition is occurring in the workplace for women, as women increasingly derive their identity, or parts of it, from their jobs outside of the home, in the same manner that men have always done. Arlie Hochschild has demonstrated how many women are finding their real “home” to be at the workplace,⁹⁸ and she argues that work has become the place where both men and women – at all income levels -- achieve emotional fulfillment, and can become a refuge from their heartless homes. Women go to work not only out of financial necessity but because they want to.⁹⁹

Men have not dramatically changed their workdays to accommodate children, nor has the workplace changed dramatically to accommodate parenting patterns. For example, women remain disproportionately more likely to take FMLA leave: women constituted 58.1% of the leave-takers in 2000, even though women comprised only 48.7% of all eligible employees in the surveyed population.¹⁰⁰ A recent report analyzing the patterns of leave-taking concluded that there was minimal evidence that laws which provide additional weeks of leave to new fathers have had an impact on whether fathers take unpaid leave, or, if so, on how long their leave is.¹⁰¹

⁹⁸ ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 23 (1997). Hochschild discusses how women often “choose” longer hours because of their warm feelings towards work. Although Hochschild has identified part of the motivation that some women stay at work, she ignores the very real economic pressures on families and women. See, e.g., LILLIAM B. RUBIN, *FAMILIES ON THE FAULT LINE: AMERICA’S WORKING CLASS SPEAKS ABOUT THE FAMILY, THE ECONOMY, RACE, AND ETHNICITY* (1994).

⁹⁹ Within the law review literature, see Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

¹⁰⁰ Selmi, *supra* note ; see Joanna Grossman, *Job Security without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. PUB. POL. 17, 54 (2004) (“As a percentage of all employees with young children, 34.1% of men took leave to care for a newborn or newly adopted child, while 68.2% of women took leave either classified as maternity-disability or newborn care”).

¹⁰¹ See Selmi, *supra* note __ (Wash. U.).

Workplace equality does have some impact on the household allocation of labor.¹⁰² But the real changes must occur both within and outside of the workplace, and require a transformation in the gendered expectations of parenthood, so that mothering and fathering are assumed to involve comparable assumptions of time, labor, and commitment. This is trickier than restructuring the workplace. It is undeniably difficult to legislate changes in how men and women perform their parental roles during an ongoing relationship. And, it remains inappropriate (as well as highly unrealistic), to mandate equal legal responsibility for child care or housework.¹⁰³

There are, however, other methods for achieving this goal. First, as one of us has suggested, it may be appropriate to require fathers to take parental leave;¹⁰⁴ such a requirement could help ensure fathers' early involvement with their children. Mandating paternal involvement when the child is young overcomes men's feelings that there is nothing they can do at this early stage. It might also set the stage for additional paternal involvement throughout childhood because fathers may feel more connected and responsible for their children based on their early experiences, and may also gain a greater sense of competency in their role. In addition, providing quality child care regardless of the parents' income, might ease the guilt so many parents experience when working outside the home. And, protecting men against both overt and covert

¹⁰² As one study explained, "Women who feel that they have fewer alternatives to marriage and women whose earnings would put them below the poverty threshold if divorced are more likely to view an unequal division of housework as fair." Mary Clare Lennon and Sarah Rosenfeld, *Relative Fairness and the Division of Housework: The importance of Options*, 100 AM. J. SOC. 506, 525 (1994).

¹⁰³ Spain has recently embarked on just such a legislative experiment. As one news report recently explained, "In Spain, where half the men say they do no housework, a new law requires men to share domestic tasks. Beginning this summer, men must sign an agreement as part of a marriage contract in civil ceremonies. If a husband refuses to do his share, he could face penalties in a divorce settlement if the marriage fails." Marilyn Gardner, *The Artful Dodge of Housework*, CHRISTIAN SCI. MONITOR, July 6, 2005, at 11. Consistent with these new efforts, a Spanish inventor has also created a washing machine that uses fingerprint technology to prevent the same person from doing the laundry twice in a row. See Christopher Hutsul, *An Inventor Balances the Laundry Load*, TORONTO STAR, May 8, 2005, at D1,

¹⁰⁴ Selmi, *supra* note --, [N.C. article].

discrimination if they “act like mothers” might provide additional incentives for more intensive fathering.

Second, an indirect manner of reaching intact family roles is through expectations surrounding post-divorce norms. One solution might be a child custody system with a rebuttable presumption that the children’s best interest would be best served by remaining with the primary caretaker, as is recommended by the ALI’s Principles of Family Dissolution.¹⁰⁵ The presumption would be inapplicable where there was a showing of joint and equitable caretaking, with caretaking broadly defined. This would provide the maximum amount of continuity of care for children while simultaneously protecting the the “investment” of the primary caretaker.

Finally, without the types of support discussed above, women will not be able to leave their homes, and the status quo will continue. In the absence of quality child care, of flexible workplaces, of changes in the ideology surrounding motherhood and fatherhood, women will continue to exercise power in the home. The perception – if not the reality – that working men are penalized for acting like mothers will deter many men from changing their caretaking patterns, while the perception that children are best cared for at home by their mothers will encourage women to stay there. Allowing women and men to have power in the home and the workplace will not lead to interchangeability and androgyny, but will result in better parents and workers.

All of these proposals – restructuring public policies towards children concerning the school day and day care, providing increased protection from domestic violence, and changing familial roles – are expensive. Prioritizing equality in the workplace and

¹⁰⁵ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.08 (Proposed Final Draft, Part II, 2002)

fostering equality in the home, however, should be critical social priorities and can be balanced against the economic and social costs of doing nothing.

V. CONCLUSION

Despite the inroads women have made in entering the labor force, the work-family dilemma has remained surprisingly intractable, in large part because of deep inflexibility that pervades each aspect of the triangular relationship. As work family scholars have demonstrated, the workplace has proved inflexible to adapting to the challenges of working parents, but as we have shown in this essay, it proves more flexible for professional women than women of lower incomes. Men have likewise demonstrated strong resilience to changing their own behavior and patterns both in and out of the home and women, too, have frequently proved inflexible to changing their own norms and gender roles when it comes to issues of childrearing. If we are to make more progress, something is going to have to give, and we strongly believe that women should not relinquish their workplace roles as a means of achieving an acceptable balance. We also believe that most women are not in a position to diminish their workplace lives, and thus, what is necessary, is a greater societal commitment to easing the burden of working parents. This will require new social programs such as better before and after care, more publicly financed daycare, but it will also require greater attention to the needs of working parents, which will also require changing our reigning gender norms. Until we do so, we are likely to pierce the intractability of the current dilemma.