

THE CLASS CEILING

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When we discuss women in the corporation—the focus of this Symposium—we often focus on the number of female chief executive officers, managers, general counsel, and board members. Women now constitute twelve percent of corporate officers, four percent of top corporate earners, one percent of Fortune 500 CEOs,¹ and fourteen percent of the general counsels at Fortune 500 firms.²

An increasingly sophisticated literature examines the barriers women have faced as they have sought access to these jobs, including different leadership styles and sex discrimination.³ And, the explanations that former Harvard University President Lawrence Summers suggested for why women are disproportionately not scientists and mathematicians—that they may not be innately suited to do this work, they may face discrimination, and their family responsibilities often preclude eighty-hour weeks⁴—could also be used, by some, to explain why there are not more women corporate officers.

Sex discrimination provides the most compelling explanation for the disparity, but the difficulties that women face in balancing their caretaking with their workplace responsibilities is another factor for why there are comparatively few women at the highest levels of corporations. In an important study of why highly successful educated women have dropped out of the paid workforce, two researchers found that it was not an “unfettered” choice to leave their professions; in-

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1. Deborah L. Rhode, *Introduction to THE DIFFERENCE “DIFFERENCE” MAKES: WOMEN AND LEADERSHIP* 3, 6 (Deborah L. Rhode ed., 2003).

2. Ashby Jones, *Women Account for 14% of Fortune 500 GCs*, RECORDER (Cal.), July 1, 2004, at 1.

3. *E.g.*, Alice H. Eagly et al., *Social Role Theory of Sex Differences and Similarities: A Current Appraisal*, in *THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER* 123 (Thomas Eckes & Hanns M. Trautner eds., 2000); CATALYST INC., *WOMEN “TAKE CARE,” MEN “TAKE CHARGE:” STEREOTYPING OF U.S. BUSINESS LEADERS EXPOSED* (2005), available at <http://www.catalyst.org/files/full/Women%20Take%20Care%20Men%20Take%20Charge.pdf>.

4. Marcella Bombardieri, *Summers’ Remarks on Women Draw Fire*, BOSTON GLOBE, Jan. 17, 2005, at A1.

stead, the women exhibited high levels of ambivalence about staying home.⁵ They left work because of workplace inflexibility and the amount and pace of the work, but also because of the pull to spend time with their children.⁶ About two-thirds of the women cited their husbands' influence on their decisions, including their lack of support for child care and other household work, and, for twenty-five percent of the women, their husbands' expectation that the woman would be the one to cut back on work.⁷

As was true of this particular study, much of the work/family literature is focused on the demands faced by professionals—most often lawyers, journalists, and professors—demands that frequently involve the high costs of child care, the difficulties of working the number of hours required for advancement, and on how women face these demands.⁸ Although much of the caretaking literature is preoccupied with female professionals, it is important to note that most women are not working the sixty-hour weeks that may be common for some lawyers and other professionals, most are not spending upwards of \$1,000 a month on child care, and most are unable to leave their jobs when confronted with the difficulties in balancing their competing responsibilities. More to the point, such an examination overlooks all of the other female employees in the corporation, such as administrative assistants, secretaries, custodians, and line workers, as well as all of the female workers who facilitate women's work within the corporation, such as child-care providers or food workers. Consequently, a distinct classist element can underlie such a focus, and we want to turn that emphasis around to consider issues of most relevance to nonprofessional women—middle-class and lower-income women—who also struggle to balance the demands of work and family, but without the resources available to affluent women.

In his discussion of elite careers, Scott Coltrane observes that carework research initially focused on men and women in upper-level jobs because they were most likely to develop egalitarianism with respect to working both within and outside of the home.⁹ He explains that although more women are gaining access to these higher-level

5. Pamela Stone & Meg Lovejoy, *Fast-Track Women and the "Choice" to Stay Home*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 62, 66 (2004); see also MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* (2003).

6. Stone & Lovejoy, *supra* note 5, at 68, 72.

7. *Id.* at 75, 78.

8. See Scott Coltrane, *Elite Careers and Family Commitment: It's (Still) About Gender*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 214, 214-15 (2004) (discussing findings of research on women in professional careers).

9. *Id.* at 214.

jobs, and that assumptions concerning men's role as the primary breadwinner are beginning to change, assumptions concerning women's role as primary caretaker are proving more difficult to change.¹⁰ In fact, he argues, "I suspect that achieving work-family balance is now easier in middle- and working-class occupations than it is in the elite professions."¹¹

We disagree. Ultimately, it is women at the bottom, not the top, of the income scales who should be the focus of policy initiatives, those who have the fewest not the most choices. And, we also suggest, the balance is more difficult for these women because they do not have access to the same benefits, such as vacation leave, sick leave, health care as professional women, or to child care that money can buy.

While finding quality child care is problematic, particularly for low-income women, the costs of child care rarely cause, or justify, women to exit the labor force, nor is it the case that it is impossible to achieve some reasonable balance between work and family lives—which is generally contrary to the picture drawn by much of the existing literature. Moreover, it is the many women who do not have the choice to exit the workforce who must create a balance, with little societal (or private) help.¹² Even as some women are able to achieve high-level positions, this is no guarantee that there will be a trickle-down effect that eliminates the barriers to workplace advancement and work/family balance faced by other women.¹³

This Article first describes the conditions of work for women of differing incomes. It then catalogues many of the work/family proposals that attempt to balance caretaking and employment, including restructuring part-time work and the workweek itself, changing family

10. *Id.* at 215.

11. *Id.*

12. Between 1997 and 2001, fifty-two percent of children with single mothers had mothers who worked full-time. HSIEN-HEN LU & HEATHER KOBALL, NAT'L CTR. FOR CHILDREN IN POVERTY, LIVING AT THE EDGE RESEARCH BRIEF NO. 2, THE CHANGING DEMOGRAPHICS OF LOW-INCOME FAMILIES AND THEIR CHILDREN 5 (2003), available at <http://www.nccp.org/media/lat03b-text.pdf>. Seventy-one percent of children with single mothers live in low-income families. *Id.* at 6 tbl.3. Peggie Smith observes that the conflict between caretaking responsibilities and work "is particularly acute for low-income single parents, who typically hold jobs that lack flexibility and provide few, if any, benefits. Whereas dual-income couples with children may experience work-parenting conflicts that are simply disruptive inconveniences, similar conflicts can devastate low-income single parents." Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 Wis. L. Rev. 1443, 1453-54 (footnote omitted).

13. Debra E. Meyerson & Robin J. Ely, *Using Difference to Make a Difference*, in THE DIFFERENCE "DIFFERENCE" MAKES, *supra* note 1, at 129, 132-33.

and medical leave policies, and increasing governmental incentives for both employers and individuals. Next, it analyzes the utility of these proposals for women and men who work at different levels within the corporation, ranging from CEO to factory employee to in-home nanny/child-care worker.

In this Article we suggest that proposals focused on restructuring the balance between work and family are insufficient; instead, we should center our efforts on three particular areas as a way of seeking to enhance the life choices of all women throughout the corporation. First, we should focus on women's opportunities for education, ranging from elementary school to college, as both a means to provide more economic choices to women and of chipping away at the prevailing gender stereotypes; restructuring the school day and school year to accommodate wage labor, rather than concentrating solely on restructuring the workplace; and, finally, integrating domestic-violence issues and carework literature into the workplace to facilitate women's ability to work.¹⁴ These choices will help both lower- and higher-income women as they manage their lives; and, because they concern issues both within and outside of the workplace, could have an impact on women's class mobility. For example, as working-class women attain higher levels of education and feel safer in their workplaces, their economic situations should improve, and they may have access to some of the opportunities that wealthier women now have.

There is also an argument developed by corporate social-responsibility scholars and work/family scholars that corporations should buy into these proposals. The data on whether improved work/family policies benefit corporate wealth maximization are, however, ambiguous.¹⁵ While we believe that corporations would enhance the overall social good by supporting these policies, we are, in this Article, more concerned with the first step of articulating appropriate policies than with justifying these policies on a cost-benefit basis.

14. We recognize that there are additional options for reconciling caretaking and equality in the workplace for women, but we focus on these as among the most important both practically and symbolically. In a previous article, we discussed the importance of workplace equity. Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289 (2002).

15. See JOAN WILLIAMS, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 84-88 (2000) (discussing the mixed success of implementing work/family policies); Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1316 (2004) (arguing that corporate economic growth calculations should include analysis of social indicators).

I. WHERE DO WOMEN WORK? THE DIFFERENCE INCOME MAKES

In this Part, we want to delineate the differences that exist among working women at different income levels in order to better assess the policy proposals that work/family scholars have advanced to alleviate some of the demands that attend to the balancing act women frequently perform. Before beginning our empirical discussion, it is important to emphasize that an entrenched feature of the labor market is that good jobs tend to be good in all measurable ways. 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 be higher paying with more flexibility, better benefits and higher status, while low-wage jobs fare poorly on all of these dimensions. This distinction between good and bad jobs will be documented more fully below, but it is worth keeping in mind because our focus on high-wage women and the demands they face often obscures the far more difficult conditions that low-wage women encounter. Of course, even good jobs have their downsides, such as long hours generally without the possibility of overtime, the inability to leave work at the office, and the obligation to be tied to e-mail even while on vacation or at night. Notwithstanding these drawbacks, however, we suspect that because of the pay and benefits (and perhaps because of the prestige), virtually everyone—men and women—would choose these jobs over those available to people with less education.

A. *The Hours Women Work*

During the last decade, a lively debate has erupted over working time and the demands of work and family. One camp, which is largely in accord with the popular perception, is that there has been a surge in working time.¹⁶ Americans now work more than any other country, and it is frequently asserted that the average American worker has added two weeks of work over the course of the last ten to fifteen years. 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.¹⁷

16. *E.g.*, ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997); JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991).

17. *E.g.*, Ellen Galinsky et al., *The Role of Employers in Addressing the Needs of Employed Parents*, 52 J. SOC. ISSUES 111, 116 (1996).

The other camp, which has received far less media attention, sees the issue 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.¹⁸ 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.¹⁹ First, they conclude that “the average length of the workweek does not appear to have changed appreciably in recent decades. To the contrary, the American worker, on average, appears to be putting in about the same amount of time on the job as did his or her counterpart thirty years ago.”²⁰ Men and women, however, continue to work different hours, with men working an average of about forty-two or forty-three hours a week, while women work thirty-five to thirty-six hours per week.²¹ When commuting times are added into the equation, the average full-time worker spends about 9.2 hours away from home on work-related activities.²² These averages, however, obscure 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 measured by fifty or more hours in a week.²³ 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.²⁴ For women, the comparable

18. See, e.g., JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME* 5 (2d ed. 1999).

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

20. *Id.* at 19.

21. *Id.* at 19-20.

22. These figures are from the *2004 American Time Use Survey* conducted by the Department of Labor's Bureau of Labor Statistics. *Full-Time Workers Spent 9.2 Hours on Job, Related Travel Per Day in 2004*, BLS Says, Daily Labor Report (BNA) No. 182, at D-1 (Sept. 21, 2005).

23. JACOBS & GERSON, *supra* note 19, at 34 tbl.1.2, 35.

24. *Id.* We are using “professional” as a shorthand for the government category of professional, managerial, and technical employees.

figures are about one in six (17.1%) professionals and one in fourteen (8.0%) of those working in other occupations.²⁵ Consistent with the emphasis on professionals, college-educated men and women are far more likely to work long hours than those without college degrees.²⁶ Nearly forty percent of college-educated men work fifty or more hours in a week, compared to about one in eight men without college degrees.²⁷ 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.²⁸ Because only about twenty-eight percent of the workforce has college degrees, and fewer than ten percent have advanced degrees, only a small segment of the workforce, typically the most highly compensated, is actually working extremely long hours, and this is especially true for women.²⁹ In fact, 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 long working hours.

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.³⁰ The differences, however, are not stark—for both men and women, the longest hours are only two hours different from the shorter-hour workers.³¹ 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.³²

It should be emphasized that 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

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 36. Jacobs and Gerson note that “43.7 percent of those working fifty or more hours a week have a college degree.” *Id.*; see also Daniel Hecker, *How Hours of Work Affect Occupational Earnings*, MONTHLY LAB. REV., Oct. 1998, at 8, 9 (indicating that based on 1997 data, approximately fifteen percent of women worked more than forty-four hours in a week).

30. JACOBS & GERSON, *supra* note 19, at 34 tbl.1.2, 37.

31. *Id.*

32. *Id.* at 37.

degrees earned (\$11.87).³³ Importantly, women with some college education earned only a modest amount more than those with high school degrees, and the wage premium for a college or advanced degree is both substantial and has increased sharply over the last two decades.³⁴ Significantly, the largest group of female workers (32.4%) is now composed of women with some college education.³⁵ As we discuss later, improving educational opportunities will also provide access to higher-paying jobs with more benefits for a substantial group of women.

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 Jacobs and Gerson explain, "In percentage terms, over three quarters (77.7 percent) 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."³⁶ In addition, and as follows naturally from our earlier discussion, the growth in working time is concentrated primarily among highly educated and highly compensated couples.

The presence and number of children remain an important factor in determining work hours, but again, children turn out less significant as a factor than is often assumed. Dual-income parents with children worked 3.3 hours less than similar 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."³⁷ Women, however, tend to reduce their hours more than men when children enter the relationship. For example, in 2000, men with three or more children worked 0.7 hours more than child-

33. The income data are compiled from the comprehensive biannual analysis *The State of Working America 2004/2005* published by the Economic Policy Institute (EPI). LAWRENCE MISHEL ET AL., *THE STATE OF WORKING AMERICA 2004/2005* (2005). Although the EPI 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 *id.* at 155 tbl.2.19.

34. *Id.* at 155 tbl.2.19. 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.*

35. *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 154 tbl.2.18.

36. JACOBS & GERSON, *supra* note 19, at 46.

37. *Id.* at 49.

less men, while similarly situated women worked 5.8 fewer hours than married women without children.³⁸

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 that existed in 1970, and upwards of eighty percent of single mothers are in the workforce.³⁹ This represents a sharp increase in the percentage of single mothers who are in the labor market, which is attributable in significant measure to various government initiatives such as the expansion of the earned income tax credit (EITC) and welfare-reform changes, and in 2000, just over two-thirds of single mothers worked full-time.⁴⁰

Nor does it appear that women desire to work fewer hours if a reduction in hours would be accompanied by a loss of income. Within the work/family literature, it is frequently asserted that workers would like to work fewer hours based on survey data, but these surveys typically ask a rather unhelpful question, namely whether workers would like to work less. Working less for the same pay is a proposition that most anyone would likely sign on for, but the real issue of importance is whether workers would be willing to trade pay for shorter working hours. On this issue, Jacobs and Gerson note that fewer than ten percent of workers desire to work less when the trade-off includes a loss of income, while nearly thirty percent would like to work more.⁴¹ In another survey cited by the authors, sixty percent of the respondents indicated they could not afford to work less.⁴² 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.⁴³

38. *Id.*

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

40. *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. Rosenbaum, *Welfare, the Earned Income Tax Credit, and the Labor Supply of Single Mothers*, 116 Q.J. ECON. 1063 (2001) (finding that the EITC accounted for the largest percentage shift in employment of single mothers).

41. JACOBS & GERSON, *supra* note 19, at 74-75. Twelve percent of the respondents could not choose an answer. *Id.* at 75.

42. *Id.* at 75.

43. AM. FED'N OF LABOR-CONGRESS OF INDUS. ORGS., AFL-CIO 2004 ASK A WORKING WOMAN SURVEY REPORT, 4 fig.3, 6 fig.4 (2004), available at http://www.aflcio.org/issues/jobs_economy/women/speakout/upload/aawwreport.pdf. According to the survey, forty-three

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, although men generally have far greater control over their work than women do.⁴⁴ Additionally, their higher income enables them 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.

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. It has been repeatedly documented that well-educated professional women tend to marry well-educated professional men who also have high incomes, and their combined income provides even greater security and flexibility. Higher levels of education are also associated with less traditional family values, and as a result, educated professional men tend to have a higher commitment to equal parenting. Educated professional men work demanding hours, which may not always allow them to fulfill their expressed commitment to egalitarian roles. Nonetheless, their less traditional attitudes can provide a more supportive environment for balancing various conflicting demands, including a greater willingness to contract out services.

Even if the higher-wage men do not, in fact, share in the family demands, there is still a significant question of whose responsibility it should be to induce their participation. Just as is true for professional women, professional men have greater flexibility in their jobs, and higher family income provides far more options for meeting various demands. If men fail to assist in those demands, they, and their spouses, should assume some responsibility for the arrangements. It is

percent of women indicated they were very worried about the loss of mandatory overtime. *Id.* at 4. 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 ninth of ten on the list of priorities. *Id.* at 6 fig.4. Tenth on the list was child care, and first was the affordability of health insurance. *Id.* 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. *E.g.*, THOMAS I. PALLEY, PLENTY OF NOTHING 65 (1998) (reporting survey results where eighty-two percent of respondents said they would be willing to work longer hours to keep their job).

44. JACOBS & GERSON, *supra* note 19, at 101 fig.5.1.

less clear that we ought to create governmental policy because of affluent men's reluctance to alter their traditional patterns.⁴⁵

Professional women also have greater access to health care, are less dependent on their husband's health insurance, and can better 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 twenty-two percent of service workers, compared to fifty percent of white-collar workers, participated in an employer's health insurance plan in 2003.⁴⁶ Part-time workers had the lowest access to health care with only nine percent of such workers participating in a health benefit plan.⁴⁷ Access to comprehensive health insurance is essential for the routine and preventive care that can keep workers and their children healthy, and those without health insurance are far more likely to miss work for their own or their children's health issues.⁴⁸

Relatedly, professional women have considerably more paid sick leave available to them than is true for 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 indi-

45. It is often asserted that men are reluctant to break traditional patterns because of the penalty they will experience in the labor market. *E.g.*, Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077-78 (1994). Years of data, however, document that women are penalized in the labor market for their childrearing responsibility, and there is no conceivable argument why women, but not men, should be penalized. It might be that men are penalized to a greater extent than women because they are breaking from stereotype whereas women are acting according to stereotype, 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, 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. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 758-59 (2000).

46. William J. Wiatrowski, *Medical and Retirement Plan Coverage: Exploring the Decline in Recent Years*, MONTHLY LAB. REV., Aug. 2004, at 29, 31 tbl.2. 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. Press Release, Henry J. Kaiser Family Found., Women's Health Insurance Coverage 1 (Nov. 2004), available at <http://www.kff.org/womenshealth/upload/Women-s-Health-Insurance-Coverage-November-2004-Update.pdf>.

47. Wiatrowski, *supra* note 46, at 31 tbl.2.

48. One of the issues that is often overlooked in the critiques of the workplace is that substantial evidence indicates that employment is generally good for one's health. Many postulate that this is because healthy people choose to work, but studies have indicated that the relationship primarily runs in the other direction with employment improving health prospects. *E.g.*, Catherine E. Ross & John Mirowsky, *Does Employment Affect Health?*, 36 J. HEALTH & SOC. BEHAV. 230, 230 (1995). Studies also suggest that homemaking generally has a negative effect on women's health. *Id.* at 240; see also Eliza K. Pavalko & Brad Smith, *The Rhythm of Work: Health Effects of Women's Work Dynamics*, 77 SOC. FORCES 1141 (1999) (documenting the health benefits of employment on older women).

cate that nearly half of the workforce (forty-nine percent) do not have any paid sick leave, which translates to more than fifty-nine million workers.⁴⁹ Full-time workers (sixty percent) are more apt to have paid sick leave than part-time workers (sixteen percent), and white-collar workers are likewise far more likely to have paid sick leave than blue-collar or service-industry workers.⁵⁰ 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 about one-quarter of less-affluent workers.⁵¹

The absence of paid sick leave for low-income workers is problematic not just for sick-leave purposes, but because many employers offer sick leave in lieu of paid maternity leave. In their 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.”⁵² 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.⁵³ As a result, without paid sick leave, most low-income women

49. VICKY LOVELL, INST. FOR WOMEN'S POL'Y RES., NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON'T HAVE PAID SICK LEAVE 6-7 (2004). The data are based on government surveys and are consistent with the data reported by the government. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 1999 SUPPLEMENTARY TABLES (2000), available at <http://www.bls.gov/ncs/ebs/sp/ebtb0001.pdf> (reporting paid sick leave statistics for different types of employees).

50. LOVELL, *supra* note 49, at 6, 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.* at 8.

51. KATHERIN ROSS PHILLIPS, URBAN INST., SERIES B, NO. B-57, GETTING TIME OFF: ACCESS TO LEAVE AMONG WORKING PARENTS 4 tbl.2 (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. *Id.* Of this group, 52.8% had more than three weeks of leave, and only 8.7% had one week or less. *Id.* 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. *Id.* 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. *Id.*

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

53. *Id.* at 54.

are left with little or no paid time off after the birth of a child, and women tend to be concentrated in certain industries, like the service industry, that provide disproportionately few benefits.⁵⁴

Finally, high-income women are substantially more likely to have access to on-site child care and to child care support services than are other working women. Employer-provided child care remains a relatively rare employee benefit, but its availability tends to be targeted at government workers and high-income women. A government survey of private industry indicated that five percent of workers had access to employer-provided child care, which included seven percent of white-collar workers and only two percent of blue-collar workers.⁵⁵ Child care 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, of whom fourteen percent had such benefits compared to six percent of blue-collar workers and four percent of service workers.⁵⁶ When the distribution is broken down by wage, workers earning \$15 per hour or higher were three times as likely to have child-care benefits as those earning lower wages.⁵⁷

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, correspondingly, more likely to use relative, parent, or sibling care.⁵⁸ Relative care is generally less expensive than organized day care; while seventy-three percent of lower-income women paid for organized care, such as child-care centers, only twenty-seven percent paid for relative care.⁵⁹ In addition to its cost, relative care has other advantages, such as its flexibility and accessibility.⁶⁰ Nonetheless, because of their greater wealth, higher-income women can afford more and varied organized care for their children, regardless of employer subsidies. In her study of child-rearing practices in different social classes, Annette Lareau concluded that “[c]hildren’s activities were expensive. A \$25 enrollment fee, which middle-class parents dis-

54. *Id.* at 42 fig.1.

55. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, Mar. 2004, at 23 tbl.19 (2004), available at <http://www.bls.gov/ncs/ebs/sp/ebsm0002.pdf>.

56. *Id.*

57. *Id.*

58. SUNHWA LEE, INST. FOR WOMEN’S POL’Y RES., WOMEN’S WORK SUPPORTS, JOB RETENTION, AND JOB MOBILITY: CHILD CARE AND EMPLOYER-PROVIDED HEALTH INSURANCE HELP WOMEN STAY ON JOBS 3 & fig.2 (2004), available at <http://www.iwpr.org/pdf/C359.pdf>.

59. *Id.*

60. *Id.* at 3 n.7. The author also suggests that relative care may be preferable because of a common culture of child-rearing. *Id.*

missed as 'insignificant,' 'modest,' or 'negligible,' was a formidable expense for all poor families and many in the working class. . . . Many activities also required special clothing. . . . [One family estimated the cost of their child's activities] at \$4,000 annually."⁶¹ Equalizing opportunities might involve not just providing access to these activities for lower-income children, but also providing transportation.

II. A FAMILY-FRIENDLY WORKPLACE FOR THE WORKING CLASS

In the previous Part, we explored the substantial advantages affluent women have in the workplace compared to lower-wage women and touched on the ways in which those advantages are relevant to their ability to balance work and family demands. Although affluent and professional women work longer hours than other women, they also have all of the resources at their disposal to obtain some meaningful balance between their work and family lives. For this group, a reduction in hours is a feasible financial alternative because they can afford, or can best afford, to work fewer hours even when that reduction is accompanied by a loss of income. Purchased child care or greater involvement by a spouse are also viable balancing options. This is not to suggest that these women have an easy time balancing work and family demands, or even an easier time, but we do want to highlight how their situation in the workplace actually provides them with particular 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 Part also highlighted an important point that can be easily overlooked, namely that there is a great heterogeneity among working women and their interests may diverge rather sharply based on class, race, and other differences. 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. This, however, would adversely impact professional women, who not only benefit directly from high levels of income inequality, including their ability to pay low wages for child-care services, but who, because they tend to be married to high-income men, benefit doubly. As a result, while women generally share an interest in balancing their work and family demands, not all women will want to, or be able to, make the same tradeoffs to do so; for many women, certain options such as part-time work or even a reduced workweek are foreclosed by financial constraints.

61. ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 248 (2003).

From this perspective, in crafting policy choices, it may be necessary to emphasize the needs of one group over another, and in this Article, we will emphasize the needs of working women and seek to identify policy choices that meet their particular needs. 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. Moreover, we have a long way to go before professional women obtain equality, however measured. We believe, however, the focus ought to be on working women because they have the least ability to engage in forms of what might be called self-help, and accordingly, their needs appear most pertinent to governmental intervention.

Finally, 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 they chose the law as a field as the best option among limited choices. Low-wage workers have substantially more constrained 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. From that perspective, those at the lower rungs are more deserving of society's attention than those closer to the top.⁶² The trickle-down theory, that adding women to the top of the ladder will inevitably improve the lives of women stuck on the lower rungs, is not intuitively plausible. As Devon Carbado and Mitu Gulati argue in the context of racial minorities, those who achieve leadership positions may "not have the racial commitment, or feel institutionally empowered, to lift as they climb."⁶³ Similar arguments have been made about women; without attempting to verify these theories, the numbers of women in leadership positions are so sparse that "lifting" others may not, at any rate, be feasible.⁶⁴

With this general framework in mind, we analyze some of the most prominent policy proposals intended to create a more family-friendly workplace. As a general matter, the different work/family proposals can be divided into four distinct categories: (1) restructur-

62. For a similar recent analysis see Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433, 441-46 (2004).

63. Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1646 (2004).

64. See, e.g., Meyerson & Ely, *supra* note 13, at 129 (discussing the negligible impact of women in leadership positions on the success of other women).

ing part-time work; (2) revising and expanding family and medical leave policies; (3) changing the nature of the workweek through various measures such as thirty-five hour workweeks, compressed days, or no mandatory overtime; and (4) developing governmental incentives for both businesses (to encourage more family-friendly workplaces) and individuals (providing a homemaker tax credit, for example).⁶⁵ 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 day care, 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 leave earlier. Commitment to the workplace also facilitates women's long-term economic security because women should have larger retirement savings as a result of their more continuous workforce history.⁶⁶

A. *Restructure Part-Time Work*

Part-time workers are typically paid less per hour than their full-time counterparts and receive fewer benefits;⁶⁷ 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. Indeed, one survey suggested that as many as seventy-five percent of part-time workers would prefer full-time work.⁶⁸ Despite this widely recognized phenomenon, work/family scholars continue to advocate the development of good part-time jobs that receive proportionate benefits. There is very little reason, however, to believe that 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/fam-

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

66. Retirement security is correlated with employment. While social security is available to nonworking or lower-earning spouses, it is available at one-half the rate available to the worker. 42 U.S.C. § 402(b)-(c) (2000); Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111, 114 (2004); Lee Anne Fennell, *Relative Burdens: Family Ties and the Safety Net*, 45 WM. & MARY L. REV. 1453, 1497 n.113 (2004).

67. Debbie N. Kammer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 352 (2004).

68. PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* 141 (1999).

ily 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 segment of the workforce. Consistent with this perspective, employers pay lower wages and fewer benefits for part-time work, at least in part because these jobs may be less efficient for the employer.⁶⁹ To be sure, some jobs can be done on a part-time basis,⁷⁰ and perhaps a substantially larger group of part-time jobs could be created with little cost, but most part-time work includes a certain amount of inefficiency—the time lost in more frequent start-ups during 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 often urge, 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 to the effect 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.

Second, again as a purely practical matter, 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 involves the sharing of costs by the employee. It is generally not feasible to provide a part-time worker with half a health plan, and it is likewise generally not possible to require the workers to pay twice the premiums required of a full-time worker. Conceivably, a limited policy might be created for part-time employees emphasizing such things as catastrophic care, but this kind of a policy would not cover most of the care that part-time employees need.

Beyond these practical questions concerning implementation, there are social and cultural problems with the emphasis on part-time

69. There is also some evidence that part-time jobs pay less because such jobs attract workers with less human capital. See Barry T. Hirsch, *Why Do Part-Time Workers Earn Less? The Role of Workers and Job Skills*, 58 *INDUS. & LAB. REL. REV.* 525, 546-47 (2005) (“Wage level analysis shows that much of the part-time wage disadvantage for women and men can be accounted for by measurable differences in workers and jobs.”)

70. One prime example of a large part-time employer is United Parcel Service, Inc., which employs a substantially larger workforce during holidays and has many part-time workers. CAPPELLI, *supra* note 68, at 140.

work. It has been demonstrated repeatedly that part-time work tends to be both marginalized and classified as women's work wherever it has been developed. Many European countries have far more extensive part-time sectors than exist in 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.⁷¹ Equally clear, wherever an extensive part-time market has been implemented, part-time work is almost exclusively women's work.⁷² And just as was true in the United States, many part-time workers would like to work longer hours. In the Netherlands, which has the most extensive part-time sector in Europe, up to forty percent of the workers would prefer to work longer hours.⁷³ 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. 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.

B. *Change the Nature of the Workweek*

Recently, a number of scholars have advocated shorter workweeks of thirty-five hours per week for all employees as a means of facilitating a balance between work and family demands.⁷⁴ As a concept, it is difficult to argue with reducing working hours, and this has long been the focus of the union movement. Indeed, 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

71. 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 or Part-Time Isn't Working?* 10 (April 2004) (unpublished manuscript, on file with authors) (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").

72. 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 ninety-five percent of employed mothers of young children. EILEEN APPELBAUM ET AL., *ECON. POL'Y INST., SHARED WORK VALUED CARE: NEW NORMS FOR ORGANIZING MARKET WORK AND UNPAID CARE WORK* 17 (2002).

73. Joel F. Handler, *The "Third Way" or the Old Way?*, 48 *U. KAN. L. REV.* 765, 777 (2000).

74. E.g., Vicki Schultz, *Life's Work*, 100 *COLUM. L. REV.* 1881, 1957 (2000); Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States* 8 (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 91, 2004) available at <http://www.ssrn.com/abstract=618801>; see also Gillian Lester, *A Defense of Paid Family Leave*, 28 *HARV. J.L. & GENDER* 1, 4-5 (2005) (proposing a shortened workweek).

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 for women workers only. 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.

For many years now, there has been a curious tension between Europe and America when it comes to economic and labor initiatives. Among American scholars, Europe appears to offer significantly better policies designed to limit the amount of time workers spend in the workplace, and Europeans tend to have substantially more leisure time, particularly in their vacations which often stretch to eight weeks. Yet, many European countries look with envy at our economic growth and are currently rethinking some of their labor policies. In particular, the move towards a shorter workweek appears to be coming to an end.

In 1998, France legislated a mandatory thirty-five-hour workweek, with requirements for significant overtime for hours worked in excess of thirty-five hours and a higher overtime premium for hours worked beyond forty-four in a week.⁷⁵ 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 have high productivity.⁷⁶ As a result of this last factor, the legislation required workers be paid the same wages for a thirty-five-hour week that they were being paid for their longer weeks previously.⁷⁷ The system, after having been in place for only a short time,⁷⁸ has begun to unravel, and the government has relaxed the provisions in a number of ways.⁷⁹ French companies complained about their ability to compete in a global economy, and there was also no appreciable decline in unemployment as a result of the short workweek.⁸⁰ Germany has also

75. See JACOBS & GERSON, *supra* note 19, at 189-90 (describing the French workweek).

76. Charles Fleming, *French Disagree on Shorter Workweek—Some Believe Plan May Prove Good for Business*, WALL ST. J., Feb. 12, 1998, at A17.

77. JACOBS & GERSON, *supra* note 19, at 189.

78. The law was phased in beginning in 2000. Fleming, *supra* note 76, at A17.

79. Katrin Bennhold, *France Votes to Overhaul 35-Hour Workweek*, INT'L HERALD TRIB., Mar. 23, 2005, at 3.

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

moved towards increasing work hours, and efforts to reduce the workweek have largely failed in Great Britain.⁸¹

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 utopian one day may become the norm in a future generation, and there can be little objection to shorter workweek proposals that do not include a reduction in pay. Yet, given that we have had such a difficulty in the United States of raising even the minimum wage, it seems even more unlikely that we might adopt a shorter workweek that includes no cut in salary, which would effectively impose a national wage increase of twelve percent across the board.

C. *Changes to Family and Medical Leave*

On the federal level, the principal legislative initiative has been the Family and Medical Leave Act (FMLA),⁸² which provides up to twelve weeks of unpaid leave for qualified employees to cover the birth or adoption of a child and to care for a serious illness to oneself or certain statutorily designated others.⁸³ As should have been expected, unpaid leave 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.⁸⁴ 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.⁸⁵ As noted in the previous Section, nearly half of the workforce has no paid sick leave,⁸⁶ and the FMLA has filled a minor gap by providing a limited form of unpaid leave that allows women job protection and the retention of benefits when they are on leave. Without the FMLA, those without any 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

81. See JACOBS & GERSON, *supra* note 19, at 141-42 (“[O]nly the United States and the United Kingdom have no statutory maximum working time . . .”); David R. Francis, *Europe Reluctantly Eyes a Longer Work Week*, CHRISTIAN SCI. MONITOR, July 15, 2004, at 17.

82. 29 U.S.C. §§ 2601-2654 (2000).

83. *Id.* § 2612(a)(1).

84. One of us has recently addressed the limitations of the FMLA. See Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65 (2004).

85. *Id.* at 76-77.

86. See *supra* note 49 and accompanying text.

based on whatever vacation or sick leave they may have available to them.⁸⁷

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,⁸⁸ 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.⁸⁹

At the same time, and to reiterate one of the themes of this Article, offering unpaid leave does little to alleviate the burdens on low-income workers who are the least likely to take advantage of such leave for financial reasons.⁹⁰ 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 might induce. These questions suggest the importance of work/family scholars tackling the gender implications of expanding leave provisions that are likely to be utilized only by women.⁹¹ Third, the FMLA—even if it is transformed into a paid leave benefit—continues to privatize child care, which prevents fur-

87. Selmi, *supra* note 84, 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, 191 (2003) (concluding that the "results [indicate] the limited impact of unpaid leave policies").

88. 29 U.S.C. § 2611(4)(A).

89. Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 87 (2000).

90. See Lester, *supra* note 74, at 3 & n.5.

91. Selmi, *supra* note 45, at 711; see also Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177 (2000) (examining the general effect of women's roles at home on their roles in the workplace). As each of us has argued elsewhere, expanding family leave

ther debate on whether private employers, employees themselves, or the government should be responsible for providing these benefits.⁹²

D. *Government Incentives*

Many scholars have suggested government involvement to encourage employers to develop more family-friendly policies and employees to take advantage of these policies. The range of suggestions for government involvement in work/family issues include government contract set-asides for employers whose workers exceed the national averages on parental leave⁹³ and providing tax breaks or other benefits for women who remain at home. One more recent proposal has been developed by Anne Alstott to create caretaker allowances for parents.⁹⁴ Building on the work she has previously done with Bruce Ackerman, 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.⁹⁵ 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 then be used to further their education or provide for retirement.⁹⁶

Like a shorter workweek, there is little to object to by providing government support to parents, but this proposal seems no less likely to be adopted than a shorter workweek. Moreover, under Alstott's plan, all parents would receive the annual stipend and could use it for various purposes, whereas it seems that this is precisely the kind of plan that should be means-tested. Part of the idea behind providing stipends to all parents would be to mimic social security, but the plan differs significantly in that social security is funded through payroll taxes while the caretaker allowance would be distributed from general revenue regardless of whether the caretaker is in the workforce. There seems, however, little reason to provide a subsidy to wealthy women who are staying home with their children, and it is not at all clear that women would ultimately benefit from that arrangement.

must include implementing techniques to involve more men in child care. *E.g.*, Cahn, *supra*, at 219-20; Selmi, *supra* note 45, at 773.

92. For an example of this debate, see Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1405 (2001).

93. Selmi, *supra* note 45, at 775-76.

94. ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 75 (2004).

95. *Id.* at 75-76, 181.

96. *Id.* at 77-78.

III. BEYOND RESTRUCTURING THE WORKPLACE

In the previous two Parts, we demonstrated how the interests of working women can diverge sharply based on income, and how many of the popular proposals developed by work/family scholars are of primary interest to high-income women and would be of less utility 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 Part, 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 and providing women with greater control over their workplace choices. Accordingly, we focus on three such reforms: education, domestic violence, and restructuring the school day. Although (apart from restructuring the school day) these are not traditional foci for the carework literature, they would all allow poorer women to make more informed choices concerning carework issues because they facilitate both workforce attachment and increased income.

A. Education

Higher levels of education are correlated not just with higher wages, but also with higher levels of workforce participation—and with fewer children.⁹⁷ Education thus enhances women's life choices. Women with college degrees or beyond have a labor force participation rate of eighty-six percent, while only fifty-five percent of women without high school degrees are in the labor force.⁹⁸ As noted previously, there is likewise a sharp and well documented wage premium associated with increasing education levels,⁹⁹ and the substantially higher wages associated with higher levels of education undoubtedly enhance women's economic power while providing a greater array of choices. For example, 14.1% of all individuals with less than a high school education were among the working poor, defined to include the 7.4 million people who work but whose income falls below the

97. Marisa DiNatale & Stephanie Boraas, *The Labor Force Experience of Women from 'Generation X'*, MONTHLY LAB. REV., Mar. 2002, at 3, 4 tbl.1, 6.

98. *Id.* at 6. For men, the difference in participation rates is not nearly as dramatic: ninety-five percent of men with college degrees participate in the labor force compared to eighty-six percent of those who do not have high school degrees. *Id.*

99. See *supra* notes 33-35 and accompanying text for the specific figures.

poverty threshold, while only 1.7% of college graduates fell into this category.¹⁰⁰ Black women appear especially disadvantaged by the lack of a high school diploma: 28.0% of all black women in the labor force who did not have a high school diploma were among the working poor, compared to 16.9% of comparable black men, 12.1% of comparable white men, and 13.9% of comparable white women.¹⁰¹ As we have already noted, many of these occupations in the working poor include the least flexible working conditions and the fewest benefits which would enable workers to take advantage of opportunities for balance.

A college degree is particularly important for women compared to their male counterparts because women face a sharply limited low-skill market, whereas among male-dominated positions, there are still well paying careers available for high school graduates, though the number of such positions is decreasing with each passing year. Again, the data are revealing: in 1999, one-third of women were in jobs paying poverty-level wages compared to twenty percent of men, and women with less than a high school education earned \$2.39 less per hour than their male counterparts.¹⁰² Black and Hispanic women stand to benefit the most from increasing their education levels since they tend to be concentrated in the lowest rungs of the low-wage sector and will therefore receive the strongest wage boost from obtaining higher levels of education.¹⁰³

Enhancing the educational attainment of women remains the best means for achieving greater equality and choices, and, correspondingly, for facilitating the balancing process for lower-income women. Promoting education could be done through various incentive programs to reward working women for returning to school and obtaining a degree. Yet it is also important to find ways to impress upon young women the importance of obtaining both a high school and a college degree. Given that so many young individuals leave college without a degree, and without the corresponding employment advantages that attend to college degrees, there is a large group of individuals who could readily improve their market position simply by finishing college. For those women with children, providing greater

100. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 983, A PROFILE OF THE WORKING POOR, 2003, at 1-2 (2005), available at <http://www.bls.gov/cps/cpswp2003.pdf>.

101. *Id.* at 8 tbl.3.

102. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2000-2001, at 130 tbl.2.10, 155 tbl.2.19, 156 tbl.2.20 (2001).

103. *See id.* at 164-67 (providing data related to wages, education, as well as race and ethnicity).

public support for child care would also facilitate greater college attendance and completion.

B. *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.¹⁰⁴ As many as one-half of all domestic-violence victims report that domestic violence has contributed to their losing a job.¹⁰⁵ A study in Wisconsin of current and former welfare recipients who were victims of domestic violence "found that 30% had lost a job because of the violence and 58.7% were afraid to go to work or school because of threats."¹⁰⁶

Rates of domestic violence appear to be higher for poorer women and for couples who are experiencing financial strain.¹⁰⁷ Indeed, household income correlates inversely with domestic violence.¹⁰⁸ Households with incomes between \$7,500 and \$25,000 had a domestic-violence rate almost triple that of households with incomes over \$50,000.¹⁰⁹ As many as sixty percent of women receiving welfare have been victims of domestic violence as adults (compared to twenty-two percent of women in the general population), and as many as thirty percent reported abuse within the last year.¹¹⁰

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 carework literature.¹¹¹ Yet they are doubly significant; not only are many battered

104. LISE MCKEAN, CTR. FOR IMPACT RESEARCH, *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>.

105. Margaret Graham Tebo, *When Home Comes to Work*, A.B.A. J., Sept. 2005, at 42, 42-44.

106. Legal Momentum, *Welfare & Poverty: Domestic and Sexual Violence*, <http://www.legalmomentum.org/issues/wel/violence.shtml> (last visited Jan. 20, 2006).

107. MICHAEL L. BENSON & GREER LITTON FOX, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *WHEN VIOLENCE HITS HOME: HOW ECONOMICS AND NEIGHBORHOOD PLAY A ROLE 2* (2004), available at <http://www.ncjrs.org/pdffiles1/nij/205004.pdf>.

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

109. *Id.*

110. Press Release, Family Violence Prevention Fund, *The Facts on Welfare and Domestic Violence*, available at <http://www.endabuse.org/resources/facts/Welfare.pdf> (last visited Jan. 20, 2006).

111. "Freedom to pursue employment and freedom from violence are essential ingredients of women's liberation," notes Jody Raphael, "but only rarely have feminists analyzed

women mothers, who must balance child care with work, but the additional factor of domestic violence deeply affects their ability to perform that balance. To the extent that the carework 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.¹¹² Yet such a burden can be onerous.¹¹³ Among the proposals that would help domestic-violence victims are expanding FMLA-type leave to cover absences when victims are seeking medical help, finding emergency housing, or obtaining legal help;¹¹⁴ ensuring eligibility for unemployment insurance if domestic violence forces a woman to terminate her employment;¹¹⁵ and integrating domestic-violence education and counseling into employment training programs.¹¹⁶ Although many states allow employees who are crime victims to take leave from work for their participation in a criminal proceeding, fewer than ten states have enacted laws that apply these leave provisions to domestic-violence victims.¹¹⁷ Because domestic-

how the two intersect.” Raphael, *supra* note 108, 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) (arguing that work/family feminists do not focus on the issues that matter to sex/violence feminists and vice versa).

112. See 29 U.S.C. § 2612(a)(1) (2000) (listing leave requirements).

113. See 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) (describing difficulties in qualifying for FMLA leave); see also *Municipality of Anchorage v. Gregg*, 101 P.3d 181 (Alaska 2004) (granting FMLA leave to victim of domestic violence after plaintiff demonstrated all elements required by the Act); *Reynolds v. Fraser*, 781 N.Y.S.2d 885 (N.Y. Sup. Ct. 2004) (holding 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).

114. See Violence Against Women Act of 2005, S. 1197, 109th Cong. (as passed by Senate, Oct. 4, 2005).

115. This reform is already in place in a majority of states. Legal Momentum, Violence Against Women: Fact Sheets on State Laws, <http://www.legalmomentum.org/issues/vio/FactsheetPage.shtml> (last visited Jan. 20, 2006).

116. MCKEAN, *supra* note 104, at 27. 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) (“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.”).

117. LEGAL MOMENTUM, TIME OFF FROM WORK FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE 1-3 (2005), available at <http://www.legalmomentum.org/issues/vio/timeoff.pdf>.

violence victims may need leave for civil proceedings, such as to obtain protection orders, or medical and counseling help, a law with specific protections for domestic violence is 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, 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.¹¹⁸

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.¹¹⁹ 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."¹²⁰ Many states have adopted legislation that explicitly addresses the availability of unemployment insurance for domestic-violence victims.¹²¹ Employees are typically ineligible for unemployment benefits if they have left work voluntarily without "good cause"; 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.¹²²

C. *Rescheduling School and Restructuring Child Care*

Many low-income women lose their jobs because of an inability to find satisfactory day care. We emphasize the need for restructuring the school year and the school day as well as expanding child-care options to make children's schedules more compatible with their parents' full-time work schedules. The structure of the school day has not advanced significantly from a time when women were at home waiting their child's arrival, and indeed, the schedule still largely presumes

118. CAL. LAB. CODE §§ 230, 230.1 (West 2003).

119. 820 ILL. COMP. STAT. ANN. 180/20 (West 1999 & Supp. 2005); see LEGAL MOMENTUM, EMPLOYMENT DISCRIMINATION AGAINST VICTIMS OF DOMESTIC AND SEXUAL VIOLENCE 2 (2005), available at <http://www.legalmomentum.org/issues/vio/discrim.pdf>. New York City has a similarly broad ordinance. See N.Y.C. ADMIN. CODE § 8-107.1 (2001) (prohibiting employer discrimination against actual or perceived victims of domestic violence); see also *Reynolds v. Fraser*, 781 N.Y.S.2d 885, 890-91 (N.Y. Sup. Ct. 2004) (applying the New York City ordinance).

120. 820 ILL. COMP. STAT. ANN. 180/30 (West 1999 & Supp. 2005).

121. LEGAL MOMENTUM, STATE LAW GUIDE UNEMPLOYMENT INSURANCE BENEFITS 1 (2005), available at <http://www.legalmomentum.org/issues/vio/ui.pdf>.

122. *Id.*

that an adult (generally a woman) will be available by mid-afternoon to assume care of a school-aged child.¹²³

In terms of accommodating working parents, a school day that is longer than the work day would be the best option. Some schools in England will be experimenting with longer days, from 8 A.M. to 6 P.M., in an effort to help parents balance their work/family demands, and many schools within the United States have adopted forms of longer days and added after school programs.¹²⁴ Such a lengthy day may be too difficult for many children and would surely be opposed on this ground.¹²⁵ As an alternative, starting the school day earlier and continuing it until later in the afternoon is one possibility; another possibility is offering more publicly funded after-school programs. These proposals would provide some accommodation for working parents, although working parents need additional options for summer vacations, such as year-round school or public support for camps.¹²⁶

Publicly financed full-day preschool and day care would also be necessary to enable women to have a more continuous labor-force attachment. To be sure, extending the school day, and lowering 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 carework literature. Moreover, extended school days would offer significant benefits to many children, particularly if the publicly provided care was of high quality.¹²⁷ For example, several studies have shown that involving poor teenage girls in well-designed

123. In a recent article, Jody Heymann observed, "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.

124. Sarah Halls, *Extended School Hours Plan*, UK NEWSQUEST REGIONAL PRESS, July 1, 2005.

125. See LAREAU, *supra* note 61, at 250-51 (describing how children adjust differently to schedules). It is worth noting that for many children in day care, a day that begins before and ends after the typical workday is already the norm.

126. Wealthier children may attend summer camps which cost hundreds of dollars per week, per child. See Jolayne Houtz, *Get Packing: It's Time to Enroll in Summer Camp, One Answer to Child-Care Needs*, SEATTLE TIMES, Apr. 11, 2004, at E1.

127. See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1527 (2001) (noting "mounting evidence that children in quality daycare do as well or better than children raised by stay-at-home mothers on every imaginable indicator of well-being").

after-school programs can have an effect on the teen pregnancy rate,¹²⁸ thereby increasing these girls' work choices as well.

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 also help reduce social inequalities.¹²⁹ A final advantage to restructuring the school day is that such a proposal is more consistent with the emphasis in the caretaking 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.

All of these proposals—restructuring public policies toward children concerning the school day and day care, providing enhanced educational opportunities, and increasing protection from domestic violence—are expensive. Prioritizing equality in the workplace and fostering equality in the home, however, should be critical social priorities and can be balanced against the economic and social costs of doing nothing.

IV. CONCLUSION

Refocusing work/family proposals to include women who work at different levels in corporations is important both theoretically and practically. Most working women are not general counsels or CEOs, and they are the employees with the most constraints on their work and the most need for help. Because their income is more limited, their choices are also more limited than those of higher-income women. Our goals should be to develop work/family proposals that specifically aid lower-income women and that improve their access to better opportunities. The work/family proposals thus must focus not just on the caretaking/family-balancing process, but also on the contexts in which this process occurs.

Theoretically, as our analysis of work/family issues becomes increasingly sophisticated, that analysis must include class, as well as race

128. Andrea Kane & Isabel V. Sawhill, *Preventing Early Childbearing, in ONE PERCENT FOR THE KIDS: NEW POLICIES, BRIGHTER FUTURES FOR AMERICA'S CHILDREN* 56, 64-67 (Isabel V. Sawhill ed., 2003).

129. LAREAU, *supra* note 61, at 252.

and sex.¹³⁰ Class has been a highly complicated issue in progressive discourse,¹³¹ and we do not intend to suggest that class provides the only important lens for examining working women.¹³² Nor do we want to suggest that all lower- and moderate-income women have the same monolithic needs that should be addressed identically. There are multiple variations not just between classes, but also within classes. Nonetheless, analyzing work/family proposals from the perspective of working-class women provides a deeper analysis of how the law can contribute towards helping workers.

130. For recent articles that focus on race, sex, and the work/family debate, see Dowd, *supra* note 62; Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219 (2004); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029 (2004).

131. Deborah C. Malamud discusses the myth of classlessness in American society in "Who They Are—Or Were": *Middle-Class Welfare in the Early New Deal*, 151 U. PA. L. REV. 2019 (2003).

132. See Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 916 (1999) (discussing how the domestic-service reform movement was "hampered by a racial ideology that questioned whether blacks were entitled to the principles of equality").