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# WOMEN, CAREERS, BABIES: AN ISSUE OF TIME OR TIMING?

Sharon Rabin Margalioth<sup>1</sup>

## I. INTRODUCTION

The motivation to write this paper came with the realization that one of the pressing manifestations of sex inequity today is the fact that women and men do not have a similar chance of “having it all.” That is, the chances of women to combine successful careers with motherhood are overwhelmingly lower than the chances of men to combine work with fatherhood. It seems that women are still confronted with the cruel choice of either having a career or a family life.

The majority of the vast legal literature discussing the work-family tradeoff concentrates on the issue of how to smooth the conflicts and obstacles that arise within the workplace when women enter motherhood and need to balance between their new family responsibilities with their work. The objective of most scholars is to outline policies that will enable women (and men) with family care responsibilities to compete more effectively in the labor market.<sup>2</sup> The underlying assumption of this scholarship

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2. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Mary Becker, *Care and Feminists*, 17 *WIS. WOMEN'S L.J.* 57 (2002); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 *HARV. C.R.-C.L. L. REV.* 79 (1989); Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 *N. ILL. U. L. REV.* 25 (1998) [hereinafter *Fathers and Parental Leave Revisited*]; Vicki Schultz, *Life's Work*, 100 *COLUM. L. REV.* 1881 (2000); Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 *COLUM. J. GENDER & L.* 271 (2002) [hereinafter Smith, *Time Norms*]; Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 *WIS. L. REV.* 1443 (2001) [hereinafter Smith, *Accommodating Routine*]; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *COLUM. L. REV.* 458 (2001); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 *BERKE-*

is that most women can choose to get married and have children, but by doing so they risk jeopardizing their career prospects. The cause of the work-family tradeoff is framed in either discrimination theory, which targets workplace practices such as inflexible long working hours and absence of mandatory paid parental leave as negatively impacting women with care responsibility, or within a theoretical framework that highlights the unequal sharing of childrearing work among spouses which results in less time for women to invest in paid work.<sup>3</sup> These, of course, are complementary explanations; both focus on the time constraints faced by women who perform care work.

The perspective of this Essay is different. It explores the disadvantage that obtaining an education and a career pose in the marriage market for women. This is by no means a new observation. It is a popular perception that "the more successful the woman, the less likely it is that she will find a husband or bear a child."<sup>4</sup> This essay investigates scientific research which substantiates this finding.

In the marriage market, women pay a "success penalty," which can be explained in both social and economic terms.<sup>5</sup> A social norm defined by anthropologists as "female hypergamy" suggests that women tend to "marry up" in various dimensions of their life, including education level, professional success, and economic status.<sup>6</sup> Women's tendency to marry up results in a lower sex ratio of successful women in the marriage market.<sup>7</sup> Another

LEY J. EMP. & LAB. L. 283 (2003); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

3. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

4. Maureen Dowd, *Dominant Women Don't Get Husbands*, SOC'Y PRABHUPADA HARE KRISHNA NEWS NETWORK (2004), at <http://society.krishna.org/Articles/2002/04/008.html> (Sept. 27, 2004) (on file with UCLA Women's Law Journal).

5. See Elaina Rose, *Does Education Really Disadvantage Women in the Marriage Market?*, U. WASH. INST. FOR ECON. RES., Working Paper No. UWEC-2003-15 (2003) at 2, at <http://ssrn.com/abstract=423360> (last visited Dec. 27, 2004) (on file with UCLA Women's Law Journal) (discussing a recurring theme in the media and academic research that career success can disadvantage women in the marriage market).

6. *Id.* at 2-3.

7. Sex ratio is the number of men for each woman in a reference population. Joshua D. Angrist, *How Do Sex Ratios Affect Marriage and Labor Markets? Evidence from America's Second Generation*, IZA Discussion Paper No. 368, 1 (2001), at <http://ssrn.com/abstract=285422> (last visited Dec. 27, 2004) (on file with UCLA Women's Law Journal). Sex ratios are powerful in affecting marriage rates. *Id.* An

explanation, drawn from economic literature, is that the returns from specialization and exchange are greater when partners differ in market relative to home productivity.<sup>8</sup> Hence, according to this explanation, it is efficient if one partner in the family specializes in market work and the other specializes in home work. If education and careers increase market productivity more than home productivity for both men and women, then marriage rates will be greater in hypergamous marriages in which women invest less in education and the labor market than their spouses.

The fact that women pay a success penalty in the marriage market is extremely relevant for the career-family discourse. It may shift the focus from analyzing the impact of work practices in the labor market on the lives of women to an analysis of the impact of women's educational and career decisions on their status in the marriage market. While the current understanding is that the difficulties women face are the result of inflexible workplace structures or unequal spousal sharing of care work, these explanations are only relevant for women who carry these types of responsibilities. It ignores the constraints of the marriage market — that is, educated women are not equally marriageable.

Many women are able to balance careers with family responsibilities because they do not have a family at all. The assumption that most women can get married and have children is based on stereotypes. Because many women prefer to have children within a traditional family, they wish to get married in order to do so. Once women delay their decision to get married, they also jeopardize their chances of becoming mothers.<sup>9</sup>

Concentrating only on how to ease the dual burden of work and family responsibilities is oversimplifying the forces that are at play, and does injustice to this complicated issue. This Essay attempts to address the issues regarding a woman's career-family

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increase in the sex ratio may increase female power in the marriage market and vice versa. *Id.*

8. See Gary S. Becker, *A Theory of Marriage: Part II*, 82 J. POL. ECON. S11 (1974); see also GARY S. BECKER, *A TREATISE ON THE FAMILY* 14-24, 30-53 (1991) [hereinafter BECKER, *A TREATISE ON THE FAMILY*] (concluding that the household division of labor is efficient in light of presumed differences between men and women: either women specialize in the household because they have a comparative biological advantage in household work or because men have a comparative advantage in market work attributable to discrimination against women in the workforce).

9. At this later stage an unmarried woman can decide to become a single mother, although her initial preference was to have children within a marriage. Additionally, at this stage, there is often physiological constraints resulting from the declining fertility of older women.

dilemma by asking how women who aspire to educational and professional success can increase the probability that they will not need to make personal sacrifices to achieve these goals. I contend that it is more a matter of timing and less a matter of time constraints which determine whether women can be successful at both.

The models that have been developed to address the dual burden of combining family and career are based on temporal sequencing. They imply that women must sequence tasks in order to avoid a tradeoff between career and family. Formal feminists still cling to the initial position of the feminist movement that focuses on a woman's career rather than her family, an approach that they contend will enable women to best compete in the labor market.<sup>10</sup> This paradigm has proven disastrous on the family front.

Care feminist theory, which is aimed at enabling women to balance tasks by easing the demands of today's labor market, recommends a modified version of the fifties paradigm of "family-then-career."<sup>11</sup> Women are not called upon to be "stay at home moms" and then enter the labor market (the fifties model), because the labor market is unforgiving to long periods of absenteeism. The parenting accommodation rights model requires employers to adjust the workplace to the special needs of working parents, focusing on enabling women with family responsibilities to partially put their careers on hold, while attending to their family needs.<sup>12</sup> Accordingly, rearing children is the primary responsibility that employers must accommodate.

This Essay analyzes the feasibility of a truly simultaneous approach to raising a family and having a career, even without long-awaited parental accommodation rights in the workplace or benevolent spouses who readily share the burdens of care work. The conclusion is that today, the most effective path for women who *ex ante* declare they wish to "have it all" is not to postpone their plans to have a family in order to safeguard their career opportunities. When looking at empirical data, women who mar-

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10. See Mary Ann Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001).

11. See generally Becker, *supra* note 2 (discussing the evolution of valuing care within feminist theory); Smith, *Time Norms*, *supra* note 2 (discussing the role of law in supporting or inhibiting the development of time norms in the workplace).

12. See, e.g., Smith, *Time Norms*, *supra* note 2, at 281-82 (discussing how current time norms inhibit the development of gender equity in the workforce).

ried young and had their first child by age 30 were the most likely to have both families and careers.<sup>13</sup> Women who delayed motherhood achieved more on the career front, percentage wise, but their prospects of getting married and having children were considerably lower.<sup>14</sup> In a similar manner, women who delayed their commitment to the labor market were more likely to be married and have children, but were confronted with insurmountable barriers to kicking up their careers once they were relieved of their care responsibilities.

The simultaneous approach proposed by this Essay accepts social norms within families and labor market practices as givens. It is foremost a pragmatic model that offers a rule of thumb of how to prioritize in an imperfect world in which regulatory powers are not an effective tool in reforming the design of jobs, and social change is a tenuous and ongoing process.<sup>15</sup> For example, the attainment of higher education impedes the chances of women to marry and have children, even if these women do not enter the labor market in a career path.<sup>16</sup> This has nothing to do with the tension between career and family. This is an expression of the way women are stereotyped in our society: in the marriage market education increases the value of men, but decreases the value of women.<sup>17</sup>

Another example pertains to the “time bind” argument presented by care feminists, which holds that one of the reasons career women remain single is that they are overworked, and in the relevant years do not find time to go out and meet eligible men.<sup>18</sup> However, if this theory were accurate, then the same should hold true for career-oriented men who fare much better

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13. See empirical data *infra* Part IV.A.

14. *Id.*

15. This model does not contain moral judgments on the preferences of women relating to family and career. There are women who do not want to jeopardize their careers by including in the matrix family care responsibilities. If this is a conscious choice it is very rational to postpone any family commitments. Other women are unalarmed by the prospect that performing care work might impede their careers. This model is most relevant for women that insist they want both.

16. See Rose, *supra* note 5, at 2.

17. See Sylvia Ann Hewlett, *Executive Women and the Myth of Having It All*, 80 HARV. BUS. REV. 66, 68 (Apr. 2002) [hereinafter Hewlett, *Executive Women*] (noting that “research shows that, generally speaking, the more successful the man, the more likely he will become a father [but that] . . . [t]he opposite holds true for women.”)

18. See SYLVIA ANN HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* 255-67 (2002) [hereinafter HEWLETT, *CREATING A LIFE*].

in the marriage market than their female colleagues, and incidentally are more likely to marry than men, who work less hours and earn less.<sup>19</sup> Therefore, the time bind argument in this context is not convincing. A plausible explanation for this difference is that high power women are less appealing in the marriage market.

This Essay proceeds as follows: Part II discusses empirical studies regarding the career-family tradeoff that women are confronted with in the United States. Further, I rebut the claim that the segmentation between a woman's family and her career is the product of choice. Part III criticizes reforms that restructure the labor market in order to enable women to balance their careers with family responsibilities. Most policy schemes at best can secure a woman's economic situation (paid leave or job security), but they cannot guarantee professional growth or career tracks. The possibility of shifting housework and care work to men is also discussed. Part IV presents the simultaneous approach and its advantages. Finally, Part V concludes that we should pay closer attention to the dynamics of the marriage market when assessing the failure of women to attain, in a fashion similar to men, both a career and a family.

## II. THE FACTS: THE CAREER-FAMILY TRADEOFF WHICH WOMEN (BUT NOT MEN) CONFRONT

### A. *Preliminaries*

Detecting trends and patterns of women's labor market behavior is a difficult task. The following account is an impartial attempt to find some order in the sea of existing data. The significant increase of women in the labor force since the mid-1960s is one of the most, if not the most, important changes in labor market composition. It may be referred to as the feminization of work.<sup>20</sup>

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19. See Eric D. Gould, *Marriage and Career: The Dynamic Decisions of Young Men*, 8 (2003), at <http://ssrn.com/abstract=424361> (last visited Jan. 10, 2005) (on file with UCLA Women's Law Journal).

20. RICHARD B. FREEMAN, *The Feminization of Work in the USA: A New Era for (Man)kind*, in *GENDER AND THE LABOUR MARKET: ECONOMETRIC EVIDENCE AND OBSTACLES IN ACHIEVING GENDER EQUALITY* 3, 4 (Siv. S. Gustafsson & Daniele E. Meulders eds., 2000).

The general growth in employment to population ratios,<sup>21</sup> which have risen in the past three decades,<sup>22</sup> is attributed to the growing number of women engaging in paid work.<sup>23</sup> By the year 2002, 59.4% of all women in the United States were employed.<sup>24</sup> This occurred while employment rates for men decreased slightly.<sup>25</sup> Another interesting fact is that employment to population ratios of women is significantly higher in the United States than the average in European OECD countries.<sup>26</sup> During this time, the largest increase in women's involvement in the workplace was among married women with young children. Furthermore, between 1970 and 2002, the number of mothers with children younger than six who participated in the labor market doubled from 30.3% to 60.8%.<sup>27</sup>

The price theory model of the supply and demand for labor, which predicts how prices for goods are determined in the market, supports the notion that all other things being equal, a huge influx of any group of workers into the labor market will reduce the groups' average earnings and occupational positions.<sup>28</sup> However, this is not the case with women entering the labor market. The earnings of women relative to men are higher than ever and

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21. Employment to population ratios is the percentage of people who work in a given population, usually calculated based on a population of persons ages sixteen to sixty-four.

22. In 1970 the employment to population ratio stood at 57.4%; by 2002 it had increased to 62.7%. U.S. CENSUS BUREAU, 2003 STATISTICAL ABSTRACT OF THE UNITED STATES, 386 tbl.589, available at <http://www.census.gov/prod/2004pubs/03statab/labor> (last visited Jan. 10, 2005).

23. From 79.7% in 1970, to 74.1% in 2002. See *id.*

24. *Id.* at 387 tbl.591. This is in contrast to a mere 40.8% female employment to population ratio in 1970. *Id.* at 386 tbl.589.

25. From 79.7% in 1970, to 74.1% in 2002. *Id.* at 386 tbl.589.

26. According to the OECD Employment Outlook, in 2001 the employment to population ratios for American women stood at 67.1% compared to 50.9% in OECD Europe. See ORG. FOR ECON. CO-OPERATION AND DEV., OECD EMPLOYMENT OUTLOOK 2002: STATISTICAL ANNEX 301, 306 tbl.B, available at [www.oecd.org/dataoecd/29.pdf](http://www.oecd.org/dataoecd/29.pdf) (last visited Jan. 10, 2005). See also Dora L. Costa, *From Mill Town to Board Room: The Rise of Women's Paid Labor*, 14 J. ECON. PERSP. 101, 114 (2000) ("Although comparisons of women's success in business are harder to make across countries, the available data suggest that women in the United States fare relatively well.").

27. See U.S. CENSUS BUREAU, *supra* note 22, at 391 tbl.597. For single mothers with children under the age of six, the rates since 1999 are even higher. *Id.* For example in 2002 participation rates for this group was 71%. *Id.*

28. FREEMAN, *supra* note 20.



the wage gap is decreasing.<sup>29</sup> This may be due to the increasing levels of women's educational achievements.

On average, women are now more educated than men: In 1960 the ratio of female to male bachelor's degree recipients was 0.54,<sup>30</sup> in 2001 the ratio of women to men with bachelor degrees was 1.33.<sup>31</sup> This means that women are now 33% more likely to earn a bachelor's degree than men. Educational opportunities for women have translated into better representation of women in top occupations. In 2002, 45.9% of all executive, administrative, and managerial employees were women, as were 30.6% of all physicians and 29.3% of all lawyers and judges.<sup>32</sup> Even in traditional male occupations such as engineering and math, the number of female workers is growing.<sup>33</sup>

Nevertheless, the unprecedented success of women in attaining higher education and professional growth has come at a price. Education and success in the labor market decrease the chances of women to be married and have children. The following summary details recent studies on this matter.

### B. *The Effect of Education on Family Status*

Harvard economist Claudia Goldin looked into the effect of college education on the career-family choices of four generations of American women by considering four cohorts of female college graduates.<sup>34</sup> For Cohort I, a group drawn of the upper echelons of American wealth, graduating around 1910, and born around 1890, college education distanced them from the oppor-

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29. See Doris Weichselbaumer & Rudolf Winter-Ebmer, *A Meta-Analysis of the International Gender Wage Gap*, CEPR Discussion Paper No. 4127 (2003), at <http://ssrn.com/abstract=488925> (last visited Jan. 10, 2005) (providing a quantitative review of the empirical literature on gender wage discrimination finding that over time, raw wage differentials worldwide have fallen substantially due mostly to an increased labor market productivity of females).

30. This means that for every woman who received a bachelor's degree two men also received a degree.

31. Ratios computed from data supplied by the U.S. CENSUS BUREAU abstract, *supra* note 22, at 191 tbl.298.

32. See *id.* at 399 tbl.615.

33. Today 10.8% of all engineers and 30.8% of all mathematical and computer scientists are women, compared to a 5.8% representation of women in the engineering profession in 1983. *Id.* This translates to an increase of almost 100% over two decades.

34. Claudia Goldin, *Career and Family: College Women Look to the Past*, in *GENDER AND FAMILY ISSUES IN THE WORKPLACE* 20 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997).

tunity of marriage and children.<sup>35</sup> More than 50% of college graduate women in this cohort either did not get married or, of if they did so, did not have children.<sup>36</sup> Although college men in this generation married and had families at the same rate as men without higher education,<sup>37</sup> college women were set apart from their non-college counterparts. The general conclusion of the turn-of-the-century studies on marriage and college was that the college experience both “caused and enabled women to have lower marriage rates.”<sup>38</sup> Of the female college graduates who were between forty-five and fifty-four years old in 1940, and never married, 88.4% of them were in the labor force that year.<sup>39</sup> This cohort was characterized by Goldin as the “family *or* career” generation.<sup>40</sup>

Cohort II, born around 1910 and graduating around 1933, were more successful at the marriage and childbearing matrix.<sup>41</sup> They usually remained in the workforce for several years after graduation, frequently with aspirations of a full career.<sup>42</sup> Eventually, family intervened and these women were forced out of the labor market.<sup>43</sup> Of this group, 19.1% of women college graduates did not marry by the time they reached the forty-five to fifty-four age range, a considerably higher rate than the 6.1% for those who were not college educated.<sup>44</sup> This cohort can be defined as the “job-*then*-family” generation.<sup>45</sup>

Cohort III graduated around 1955 and was the first generation of women to enjoy greater accessibility to college education.<sup>46</sup> Nevertheless, college for this cohort served mainly as a meeting forum for eligible college graduate men.<sup>47</sup> This group of

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35. *Id.* at 21.

36. *Id.* This is in contrast to 22% of women who did not attend college. *See id.* at 32-33.

37. *Id.* at 32. In 1940 only 10.2% of college graduate men 45-54 years old were never married, roughly the same rate as men in the same age group without a college education (11.4%). *Id.*

38. *Id.* at 31.

39. *Id.*

40. *Id.* at 22 (emphasis added).

41. *Id.* at 21.

42. *Id.*

43. *Id.* (explaining that family eventually intervened, forcing Cohort II women from the labor market).

44. *Id.* at 37.

45. *Id.* at 22 (emphasis added).

46. *Id.* at 21-22.

47. *Id.* at 38-39. In 1960, the probability that a thirty to thirty-nine year old woman was married to a college graduate greatly increased if she had graduated

women graduated, got married early and started a family.<sup>48</sup> Among female graduates who eventually married, 57.2% did so before or within a year of college graduation.<sup>49</sup> Only 10% of college graduate women born between 1926-1935 did not have a baby by the time that they were between thirty-five and forty-four.<sup>50</sup> Once their children were grown, women entered the labor market, generally as teachers.<sup>51</sup> This is indisputably the manifestation of the "family-then-career," era in which the returns on college education were reaped primarily in the marriage market, not the labor market.<sup>52</sup>

Cohort IV graduated around 1972 and was, according to Goldin, "the first [group] for whom a considerable fraction . . . considered a career path."<sup>53</sup> At the time the survey was conducted in 1991, 29% of those attaining a bachelors degree had not yet had a child.<sup>54</sup> Among those with more than four years of education, 33.3% did not have a child.<sup>55</sup> This cohort expressed a preference for having a career and family, but sequenced their actions by concentrating first on the career front and then on family.<sup>56</sup> As a consequence, this cohort had a high rate of childlessness.<sup>57</sup>

A study conducted by Elaina Rose found that women with a graduate degree were more likely to experience childlessness. She found 81.5% of women with sixteen years of education were mothers at age forty-four, while only 63.4% of women with a

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from college. *Id.* at 40. At this time, almost two thirds of all college graduate women between the ages of thirty and thirty-nine were married to a college graduate. *Id.* But, only 10% of high school graduate women were married to a college graduate. *Id.* Thus, not only did college-educated women enjoy higher probability of marrying a college man, but they also married men with higher incomes within each educational level. *Id.* at 40-41.

48. *Id.* at 42.

49. *Id.* at 39.

50. *Id.* at 34 fig.2.4.

51. *Id.* at 22, 42.

52. *Id.* at 22 (emphasis added). The ratio of college enrollment was two men for each woman. *Id.* at 39. The supply of husbands greatly outstripped the demand. *Id.* The college marriage market sex ratio was two, which predicts high marriage rates for women. College graduate women who married college graduate men (two thirds) reaped indirect returns to their education by the higher income of their spouses. *Id.* at 22, 40.

53. *Id.* at 22.

54. These women were between the ages of thirty-seven and forty-seven in 1991. *Id.* at 22.

55. *Id.* at 22, 43.

56. *Id.* at 43.

57. *Id.*

professional degree or doctorate had children at the same age.<sup>58</sup> Furthermore, in regards to the relationship of education and marriage among men, she found that increased education was associated with a greater likelihood of marriage at all ages and has increased over time.<sup>59</sup> In 1980, an additional year of education resulted in a .4% increase in the likelihood of marriage among men.<sup>60</sup> Comparatively, in 1990 there was a 1.1% increase and in 2000 a 1.8% increase for each year of education.<sup>61</sup>

These studies concentrated on the effect of education on the prospect of marriage and motherhood, less on the effect of careers. Education in itself explained lower marriage and motherhood rates among college-educated women, regardless of their actual labor market position.<sup>62</sup> This finding contradicts the argument that the time bind that accompanies balancing a career and family hinders women's prospects in "having it all." However, the studies directly strengthen the argument that educated women are less desirable in the marriage market, while educated men are more desirable.<sup>63</sup>

### C. *The Effect of Careers on Family Status*

A recent study in the Harvard Business Review by Sylvia Hewlett documented that successful women in the labor market are less likely to be married and have children than other women

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58. Rose, *supra* note 5, at 15.

59. *Id.* at 12.

60. *Id.*

61. *Id.*

62. See Goldin, *supra* note 34, at 21-23. An exception is for Cohort III in the Goldin study. This cohort presents a special case in which college facilitated marriage, as college became a place to meet one's spouse. But, even for this cohort, marriage rates among college graduate women were lower than for high school graduates. See *id.* at 55 n.34.

63. This observation can support a signaling thesis. Education can serve to signal ambition. The longer women stay on the education track the stronger the signal. The reason women are devalued in the marriage market in proportion to their ambition is quite obvious. These women signal to prospective partners that they do not intend to specialize within the household in care work. The implication is that there is a threat that some care work will be shifted to the spouse. If the preferences of men are to specialize in labor market work, they prefer partners that intend to specialize in care work. This hypothesis is strengthened by research showing that men tend to worry more than women do about the effect of women's career commitments on the quality of mothering. See LEE BADGETT ET AL., *BREADWINNER DAD, HOMEMAKER MOM: AN INTERDISCIPLINARY ANALYSIS OF CHANGING GENDER NORMS IN THE UNITED STATES, 1977-1998* (2000).

in the population.<sup>64</sup> This is in stark contrast to men.<sup>65</sup> For men, the likelihood of being married and having children increases with labor market success.<sup>66</sup> According to the study, only 60% of “high achieving” women ages forty-one to fifty-five were married, as opposed to 76% of high achieving men in the same age group.<sup>67</sup> In the “ultra—achievers” category only 57% of women ages forty-one to fifty-five were married, while 83% of their high achieving male counterparts were married.<sup>68</sup> The prospect of having children for high achieving women was even slimmer. In the forty-one to fifty-five age group, 33% of high achievers and 49% of ultra achieving women were childless.<sup>69</sup> However, only 25% of high achieving men and 19% of the ultra achieving men were childless.<sup>70</sup>

A handful of other studies conducted throughout the nineties that surveyed different segments of the population documented that women committed to careers experienced high childlessness rates.<sup>71</sup> For example, a 1993 study of Harvard's female graduates of professional schools reported that 34% were childless. A 1994 study found that 61% of female American managers were childless. A 1996 study of women in corporate leadership documented a 36% childlessness rate. A 1998 study of women in academia found that 50% were childless.<sup>72</sup> A 2001

64. See Hewlett, *Executive Women*, *supra* note 17, at 66-73. This article summarizes the findings in HEWLETT, *CREATING A LIFE*, *supra* note 18. The survey targeted the top ten percent of women, measured in terms of earning power, and focused on two age groups: an older generation ages forty-one to fifty-five, and their younger peers, ages twenty-eight to forty.

65. Hewlett, *Executive Women*, *supra* note 17, at 66.

66. *Id.*

67. *Id.* Hewlett defines “high achievers” as women who are earning more than \$55,000 in the younger group, and \$65,000 in the older group. *Id.*

68. *Id.* at 68. Hewlett defines “ultra-achievers” as women who are earning more than \$100,000 a year. *Id.* at 66.

69. *Id.* at 69.

70. *Id.*

71. Summaries of these studies are in HEWLETT, *CREATING A LIFE*, *supra* note 18, at 313-14 n.8.

72. Regina M. Watkins et al., *The Juxtaposition of Career and Family: A Dilemma for Professional Women* (1998), at [http://www.advancingwomen.com/awlw/winter98/awlv2\\_watkins5.html](http://www.advancingwomen.com/awlw/winter98/awlv2_watkins5.html) (last visited Jan. 10, 2005) (on file with the UCLA Women's Law Journal). This study relies on an earlier survey by Nancy Hensel, *Realizing Gender Equality in Higher Education: The Need to Integrate Work/Family Issues* (1991), available at <http://library.adoption.com/Resources-and-Information/Realizing-Gender-Equality-in-Higher-Education-The-Need-To-Integrate-Work-Family-Issues/article/4258/1.html> (last visited on Feb. 3, 2005) (on file with UCLA Women's Law Journal). The authors of these studies suggest that the high childlessness rates among women in academia is the result of the time constraints the tenure

study of women working on Wall Street reports that only half of women had children compared to 74% of men.<sup>73</sup>

Another study concentrating on the correlation of career decisions to the marriage market for men found that marital status was strongly correlated with career choices.<sup>74</sup> Conditional on wages, blue-collar workers were significantly less likely to be married than white-collar workers. Higher wages for men increased the chances of being married.<sup>75</sup> The author concluded that: "the literature ignores the evolutionary instinct in men to achieve material success in order to attract female partners. This instinct is alive even in today's modern economy. If there were no returns to career outcomes in the marriage market, the result suggests that men would work less, study less, and if they did work, they would work more in the blue collar sector than the white collar sector."<sup>76</sup>

#### D. *Are Educated and Career Women Choosing Not to Have Children?*

One can argue that career women either do not want children,<sup>77</sup> or that childless career women understand that care responsibilities will hinder their career prospects and therefore they consciously choose to give up on this facet of life. Both contentions suggest that career women make a lifestyle choice when

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track creates, which coincides with the prime fertility years of women. Academia is perhaps the archetypal professional institution in which there is flexibility, ability to work at home, and inability of employers to monitor precise time commitments. The fact that high childlessness rates are reported for this sector leads me to suspect that other factors are influencing this outcome, it may be the persistence in attaining formal education.

73. Catalyst, *Women in Financial Services: The Word on the Street: Factsheet* (2001), available at <http://www.catalystwomen.org/bookstore/files/fact/women%20in%20Financial%20Services.pdf> (last visited Jan. 10, 2005) (on file with the UCLA Women's Law Journal). Other relevant facts from this survey are that 67% of the women were married or living with a partner as opposed to 86% of the men; 79% of the partners of women were working full time, while only 28% of the partners of men worked full time. *Id.*

74. See Gould, *supra* note 19, at 8. Similar findings from various studies are discussed in M. V. Lee Badgett & Nancy Folbre, *Job Gendering: Occupational Choice and the Marriage Market*, 42 *INDUS. REL.* 270, 274 (2003) (concluding that social status, earnings and wealth have a much larger positive effect on men's success in dating and marriage than on women's).

75. See Gould, *supra* note 19, at 8.

76. *Id.* at 31.

77. Perhaps representing the fact that the opportunity cost of childbearing is rising as women establish high-end careers, making parental time increasingly expensive.

choosing to be a professional.<sup>78</sup> However, empirical data shows that most childless women do not deliberately choose to remain permanently childless.<sup>79</sup>

Therefore, one can assume that the lack of children in the lives of many successful women is not because they do not want children. For example, the previously discussed Goldin study found that of the women that remained childless in 1991, 62.9% desired children when asked about their family choices in 1978.<sup>80</sup> This translated to 19% of an entire cohort that was ultimately disappointed with their "family outcome."<sup>81</sup> Goldin rebuts the hypothesis that there is a self-selection process in which women who choose to go to college were less interested in matrimony and maternity than their non-college peers, concluding that college actually provided a treatment effect.<sup>82</sup>

In the Hewlett survey, women reported that being childless was not a conscious choice for them, but rather a "creeping

78. See, e.g. ZILAI, *To Have or Not to Have: Reasoning of Childfree Wives and Husbands*, at [http://wl.middlebury.edu/zgan/stories/storyReader\\$23](http://wl.middlebury.edu/zgan/stories/storyReader$23) (last visited Jan. 10, 2005) (on file with UCLA Women's Law Journal). The author concludes that:

Women are more likely than men to consider career opportunities as a cost of having children. Since the responsibility of looking after children and doing related housework mostly falls on women, they would miss a lot of opportunities of promotion, further education or other kind of personal development, which already favor male employees much more. In addition, it is women who actually give birth to the child. Managerial or administrative women usually can not afford the time off to give birth. And many companies are unwilling to allow paid maternity leaves, or even fire any female employee who gets pregnant. Thus, having children can not only hurt women's chances of development in career, but can also cost them their jobs.

*Id.*

79. See Joyce C. Abma & Linda Peterson, *Voluntary Childlessness Among U.S. Women: Trend and Determinants (1995)*, available at [http://www.cpc.unc.edu/pubs/paa\\_papers/1995/abma.html](http://www.cpc.unc.edu/pubs/paa_papers/1995/abma.html). This study finds that the proportion of all women that expect to be permanently childless remains very low (4.3% of ever married women in 1990). *Id.* The focus of this study was on married women who chose to remain childless, and therefore does not relate directly to the unmarried population, which is at the center of this paper. *Id.* Nonetheless, this study highlights the fact that social changes have not altered the preferences of women to become mothers at some point in their lives. *Id.* Temporary voluntary childlessness has been found to be on the rise, meaning that women prefer to delay their maternal plans, but not give them up altogether. *Id.*

80. Goldin, *supra* note 34, at 49.

81. *Id.* The 19% disappointment rate is computed by multiplying the percentage of women who had previously stated that they desired to have children (60%) by the percentage of women who ultimately remained childless (30%). *Id.*

82. By "treatment effect" Goldin refers to a situation in which college education is responsible in part for lower marriage rates among women college graduates. *Id.* at 34-35.

nonchoice,” meaning that circumstances, usually career-oriented, dictated the childless path of their personal lives.<sup>83</sup> Many deeply regretted this outcome.<sup>84</sup> Some defined their lives as a failure because of their childlessness.<sup>85</sup> For example, 31% of the ultra high achieving women in the forty-one to fifty-five age group said they still wanted to have children, while only 14% of high achieving women agreed with the statement “looking back at their twenties when they graduated from college they definitely did not want children.”<sup>86</sup> While these numbers are somewhat higher than the average for the general female population in westernized countries, where approximately 9% to 12% of young women state that they expect to remain childless,<sup>87</sup> 14% is still significantly lower than the percentage of women who end up remaining childless. These figures suggest that the majority of women in the childless category are disappointed with this outcome.<sup>88</sup>

#### E. Summary

The data sketches the following picture: American women’s work revolution was successful on many frontiers. In the past three decades, there has been a tremendous growth in women’s education attainment and participation rates in the labor market. The increase in women’s labor supply was not followed by depressed wages. Women are now able to enter high-end jobs and their representation rates in lucrative professions are catching up with those of men. But success for women is not without costs. Marriage and motherhood rates among women decrease with increases in educational and professional success, even though these same factors correlate to increase in marriage incidence and fatherhood for men. These statistics lead to the conclusion that it is not likely that high achieving women can have it all in terms of career and family.<sup>89</sup>

Yet, these statistics do not reflect on the *causes* of the trade-off. Is this reality the product of the dual burden that women,

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83. Hewlett, *Executive Women*, *supra* note 17, at 71.

84. *Id.*

85. For a body of anecdotal evidence on this issue, see HEWLETT, *CREATING A LIFE*, *supra* note 18; *see also*, Hewlett, *Executive Women*, *supra* note 17, at 71.

86. HEWLETT, *CREATING A LIFE*, *supra* note 18, at 86-87.

87. *See id.* at 312 n.4.

88. Both Hewlett and Goldin have found that roughly 20% to 30% of the entire relevant cohort (defined either by education or career success) remain childless unintentionally. *Id.* at 86-87; Goldin, *supra* note 34, at 49.

89. HEWLETT, *CREATING A LIFE*, *supra* note 18, at 19.



and not men, are expected to carry, or is it an outcome of the sequencing decisions women make which effect the sex ratios in the marriage market to their disadvantage? Determining causality is complicated, and one can assume that both factors impact the outcome. In the following section, I present the "time bind" explanation, and discuss the feasibility of various reforms offered to alleviate the time pressure women face.

### III. AN ISSUE OF TIME

#### A. *Laying Down the Theoretical Background*

The promise of sex equality carries with it a social obligation that women will enjoy the same opportunities as men, while fulfilling themselves professionally as well as personally. However, the dual burden of work life and family life placed disproportionately on the shoulders of women in our society hinders women from achieving success in both areas of life.<sup>90</sup> Two schools of thought have emerged to explain how women may achieve this "dual success." One concentrates on reforming workplace practices; the other targets the structure of sharing family responsibilities within the household.<sup>91</sup>

Women who enter motherhood and then carry the bulk of family responsibility are expected to compete in the labor market for jobs and promotions with men who carry little or no such responsibilities. In working environments where employees' time commitments are highly valued, and in many cases a prerequisite of employment or advancement, women with family responsibilities are at a severe disadvantage.<sup>92</sup> A woman can certainly choose to handle her career by mirroring the behavior of her male colleague, however, she may be making a choice to absolve herself of family responsibilities.

Advocates for restructuring work practices to eliminate the gender time gap are associated with the feminist care move-

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90. See generally WILLIAMS, *supra* note 2; Dowd, *supra* note 2; Malin, *supra* note 2; Smith, *Time Norms*, *supra* note 2; Travis, *supra* note 2; Williams & Segal, *supra* note 2.

91. See Schultz, *supra* note 2, at 1904-05 (noting how the primary cause of women's economic disadvantage is viewed, either as being caused by "women's position within families" or women's position within "the work world," dictates one's view on the "primary locus" for policy change).

92. See Smith, *Time Norms*, *supra* note 2, at 274-75 (explaining how time demands shape workplace norms and prescribe the "ideal" worker); WILLIAMS, *supra* note 2, at 1-2 (explaining how the ideal worker norm is framed around traditional life patterns of men and therefore excludes most mothers of childbearing ages).

ment.<sup>93</sup> Care feminists claim that desirable employment opportunities are structured around an “ideal male worker” — a worker without time constraints who is willing to relocate and travel on short notice with the workplace as his primary commitment.<sup>94</sup> Care feminists perceive current workplace practices, which emphasize time commitment, as discriminatory because of their disparate impact on women.<sup>95</sup> They would like to amend the workplace practices that disadvantage women with family responsibilities from succeeding in the workplace.<sup>96</sup> The format is to install a duty to accommodate the needs of working parents, similar in substance to the accommodation requirements of the ADA.<sup>97</sup>

One way to accommodate the needs of women with family responsibilities is to institute career paths with reduced hours. However, unlike today’s “mommy track” jobs, these career tracks would not penalize workers but would instead offer promotions and career growth.<sup>98</sup> Other recommendations include building up the Family and Medical Leave Act with paid maternity and paternity leave.<sup>99</sup> Lobbyist groups are seeking unpaid career breaks with job security for up to 3 years for employees who want to take care of their children. Additionally, Vicki Shultz has suggested a regulation on the amount of hours worked

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93. See Becker, *supra* note 2, at 58-60 (discussing the development of the feminist care movement).

94. WILLIAMS, *supra* note 2, at 2, 5-6 (defining the “ideal worker” as one who works full time and overtime and takes little or no time off for childbearing or child rearing, in other words, the traditional male employee).

95. See Williams & Segal, *supra* note 2, at 83-86 (discussing the possibility of utilizing Title VII of the Civil Rights Act to address the difficulties working mothers face in succeeding in a labor market crafted around the reduced family responsibilities of an ideal male worker).

96. *Id.*

97. See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 457-59 (2001) (suggesting that the ADA “offers promising models of substantive equality on which to build a theory of workplace accommodation for family caregiving responsibilities”); Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The “Unfair Advantage” Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 949 (2000).

98. See Hewlett, *Executive Women*, *supra* note 17, at 72 (“high-level jobs should be created that permit reduced hours and workloads on an ongoing basis but still offer the possibility of promotion”).

99. See MINDY FRIED, *TAKING TIME: PARENTAL LEAVE POLICY AND CORPORATE CULTURE* 155-61 (1998).

in a week, creating cap on hours for all workers,<sup>100</sup> which would serve to eradicate altogether the concept of an ideal worker able to work endless hours. This would also have the effect of blurring the most pronounced differentiator between the typical male and female employee. These types of reforms would presumably benefit everyone by enabling all workers to have more free time to pursue other interests in their lives.<sup>101</sup>

While care feminists do not dispute the fact that women carry the bulk of household and child rearing responsibilities, they do not concentrate on how to place some of these burdens on third parties. Some commentators are less optimistic about the prospects of instigating a revolution within the structure of the family.<sup>102</sup> Others view it as an autonomy issue, arguing that women should have the right to take the primary responsibility for childrearing without being devalued by society, or penalized for this choice in the labor market.<sup>103</sup>

A competing theory is that the problem of the time gap should be attacked at home where it is instigated, not within the labor market where it merely impacts women. Formal feminism is associated with the school of thought that workplace practices are perceived neutral and non-discriminatory as long as women are given the exact same opportunities as their fellow men. The present legal legacy of Title VII of the Civil Rights Act, which follows the construct of formal equality in relation to sex discrimination, is adequate in dealing with sex discrimination in the workplace, because it primarily guards and protects women from being stereotyped and treated differently than men. Formal feminists suggest that accommodating the special needs of women with family responsibilities within the workplace undermines the achievements of women in the labor market because it taints all women by treating them as potential "special needs employees,"

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100. See Schultz, *supra* note 2, at 1956-57; see also Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 467 (1998).

101. See Schultz, *supra* note 2, at 1957 (noting how a reduced workweek could benefit both women with care responsibilities and men and women without family responsibilities).

102. See Margaret F. Brinig, *The Influence of Marvin v. Marvin on Housework During Marriage*, 76 NOTRE DAME L. REV. 1311, 1327-28 (2001).

103. See Joan Williams, *It's Snowing Down South: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 813-18 (2002) (summarizing the various viewpoints in the debate).

which ultimately discourages employers from hiring and promoting women.<sup>104</sup>

This notion helps explain why formal feminists argue that the remedy to the time bind lies not in the workplace but in the home. Formal feminists call on women to demand a more equitable allocation of housework responsibilities within their own families in order to enable them to have more time to devote to their careers.<sup>105</sup> If women were able to equally share housework and child rearing responsibilities with men it would narrow the time gap between men and women in the workplace. Accordingly, once women are freed of some domestic responsibilities they would be able to enjoy both worlds, on equal terms with men.

It is unsurprising that there are tensions between the two camps that are campaigning for the elimination of the time gap.<sup>106</sup> Reforms that please the accommodations camp sabotage the endeavor of formal feminists to ensure that women will not be stereotyped in the labor market as caregivers. Similarly, contrary to a formal feminist position, accommodation reforms have the effect of preserving a traditional allocation of family responsibilities between spouses.

On the other hand, the insistence of the formal camp that labor market practices are sex neutral because women are free to mimic the work behavior of "ideal" male workers is professed by care feminists to be insensitive to the every day reality of working mothers. The proposition that women should focus on equi-

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104. Case, *supra* note 10, at 1759 ("All women may be at increased risk for employment discrimination in a world in which women do all the childbearing and most of the childrearing if benefits, especially benefits required by law, for childbearing and childrearing come from the employer."). *Id.*

105. ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) [hereinafter *THE SECOND SHIFT*].

106. *But see* Travis, *supra* note 2, at 287-78. Travis attempts to mitigate the differences between the two schools of thought stating that:

The gendered nature of work/family conflicts has many causes, which originate both inside and outside of the workplace. Where commentators differ is in their assessment which of those causal origins is the most significant. Accordingly, the debate should be conceptualized not as a dichotomy, but as a discussion of where one situates oneself along a causal continuum, with one end of the continuum representing causes solely external to the workplace and the other end representing causes solely internal to the workplace. The closer one situates oneself to either end of the continuum helps to prioritize one's choice of approaches for addressing work/family conflicts.

table sharing of care work is considered both naïve (unworkable in today's social framework) and a devaluation of the importance of care work. My concern is that both avenues to eliminate the time gap are doomed to fail.

## B. *Attempts to Restructure the Workplace*

In attempting to restructure the workplace it is important to address two issues: whether the call to regulate the workplace in order to accommodate the needs of working mothers is equitable and if such regulation is practical and effective.

### 1. Moral Challenge

Formal feminism has dominated the initial legal treatment of sex equality in the United States.<sup>107</sup> However, formal feminists are not particularly engaged with the issue of children, and the need for women to balance family and work responsibilities in order to achieve both. As long as women are formally able to take advantage of the same work opportunities as men, formal feminists are not concerned about the tradeoffs women make between work and family. Formal feminists focus on the sameness between the sexes and their call for equality is based on that sameness.<sup>108</sup> The lack of children is viewed as a personal choice, even if it is circumstance driven. While it is possible to define the breach of equality in a formal manner, by stating that precisely because most men can achieve a workable balance between career and family but women must choose, there is no formal equality. Formal feminists, concentrating on workplace discrimination, view this issue as lying outside the reach of workplace regulation. Any attempt to remedy the inherent differences between the sexes would result in undermining other formal equalities attained in the workplace such as equality among women with family responsibilities and those without.

For example, Mary Anne Case rejects the concept of easing the burdens which working mothers face by granting them special workplace rights (accommodations).<sup>109</sup> The special treatment of working mothers comes at the expense of co-workers not eligible for these accommodations.<sup>110</sup> Childless women, like her-

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107. Becker, *supra* note 2, at 58.

108. WILLIAMS, *supra* note 2, at 217-32.

109. Case, *supra* note 10, at 1706.

110. *Id.* at 1759. The same argument is developed in ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* (2000).

self, are expected to pick up the slack for women with children by working harder and ultimately funding the benefits program for women who opt to have children.<sup>111</sup> Underlying this theory is the notion that formal equality is disrupted when accommodating the special needs of women attempting to have it all. Workplace equality is about the work being shared equally and the combined wage and benefit package being equal for all workers; not favoring one group at the expense of another.<sup>112</sup>

The recent Supreme Court case *U.S. Airways v. Barnett* highlights the idea that an employee's accommodation rights end where the burden of providing those rights affects the rights of fellow employees.<sup>113</sup> In *Barnett*, a case regarding an ADA disability accommodation request, the court held in favor of an employer who refused to retain a disabled employee in a position that was subject to seniority privileges, because granting accommodation would unfavorably impact other workers.<sup>114</sup>

Another concern raised by formal feminists is that accommodation rights for working mothers may stigmatize women of childbearing age, whether they plan to become mothers or not. Employers, grouping all women of childbearing age as potential mothers, may refrain from hiring or promoting women of childbearing age in fear of later encountering the costs and difficulties of adhering to the mandated parental accommodation requirements.<sup>115</sup> The experience with accommodation mandates

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111. Case, *supra* note 10, at 1758; BURKETT, *supra* note 110, at 25-62. This is substantiated by studies that have found that "54% of high achieving women without children say that in their workplaces people without children are unfairly expected to pick up the slack for those who have children and that this rift between working parents and the "childfree" has the potential of becoming ugly." CREATING A LIFE, *supra* note 18, at 91.

112. See Travis, *supra* note 2, at 326-27. The author argues that because many people remain unconvinced that accommodation under the ADA is a form of equal opportunity, and instead view the ADA as a social welfare statute, that the ADA has been less effective than many had hoped. *Id.*

113. 122 U.S. 1516 (2002).

114. *Id.* at 1522. The Court stated that:

[A] demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees — say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.

*Id.*

115. Case, *supra* note 10, at 1758 ("Permanently childless women like me will be in a lose/lose situation — so long as we are potentially mothers, we are at risk for discrimination; so long as we are not actually mothers, we get no offsetting compen-

for disabled employees under the ADA reveals that employers do attempt to avoid the hiring of disabled employees entitled to accommodation in order to avoid the extra costs associated with the accommodation.<sup>116</sup> This is economically rational, especially due to the fact that most workplace discrimination litigation in the past two decades involved firing decisions, and not hiring decisions.<sup>117</sup> Accordingly, many advocates of a strict formal equality paradigm view accommodation rights for working mothers as penalizing all women of childbearing age because they are more susceptible to workplace statistical discrimination given that they are "potential mothers."<sup>118</sup>

Advocates of a formal equality regime embrace the situation in which childless women compete successfully with men for jobs and promotions because employers are not fearful of hiring and promoting women. For example, a formal feminist would likely not find it discriminatory for an employer to terminate a mother who cannot keep up with her work demands so long as she was hired and promoted on equal terms as her male counterparts. Therefore women who do not bear family responsibilities, or the ones who successfully manage to pursue their careers without interruptions, are better off without parental rights. Hence, according to formal feminists, parental rights can only sabotage women's equality in the workplace.

## 2. Is Restructuring the Workplace Workable?

Today, the most vocal agenda being advanced in an attempt to solve the family-work conflict is the restructuring of the workplace. The popularity of such reforms has to do with the fact that the workplace is a tangible and solid target to attack, with more

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sation from the increased childcare benefits."); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183 (2001) (arguing that the maternalization of women's identity should be opposed).

116. Employment levels of disabled individuals have fallen since the enactment of the ADA, while wage levels for these individuals have not been depressed. Daron Acemoglu & Joshua Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. OF POL. ECON. 915 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693 (2000).

117. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1027 (1991).

118. See Case, *supra* note 10, at 1758.

potential for regulation than gender roles within the family. The largest area of strife are long and inflexible hours of work.<sup>119</sup>

The redress is to shorten the workweek for all workers, men and women alike, in order to blur the distinction between the disparate amount of time that men and women can afford to spend at work.<sup>120</sup> Another proposal that would serve to accommodate people with family responsibilities is to enable workers with family responsibility to work flextime and/or shorter work hours without being penalized career wise for taking advantage of these options.<sup>121</sup> This proposal is connoted and influenced by the reasonable accommodation requirements of the ADA.

*a. Regulation of the Workweek*

Americans are overworked.<sup>122</sup> Decreasing the amount of time people spend at work could benefit both men and women.<sup>123</sup> With work hours lengthening both for men and women, regulating the time people spend at work would help eradicate the differences between workers who are constrained by family responsibilities (disproportionably women) and those who are not constrained (disproportionably men). Under a regulated system, workers who cannot commit to a 50-hour workload would

119. ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME & HOME BECOMES WORK* (1997). See also *Executive Women*, *supra* note 17, at 68 (explaining that the more successful the woman, the longer her work week. 29% of high achievers and 34% of ultra achievers work more than 50 hours a week. A third of these women work longer hours than they did five years ago. The time issue affects not only the presence of children in women's lives, but also careers of high achieving women who enter motherhood. A large majority of high potential women, who left their careers when their child was born, felt that this decision was forced on them by long workweeks, unsympathetic employers and inflexible workplace).

120. See, e.g., Schultz, *supra* note 2, at 1956-57 (advocating legislative measures to reduce the standard full-time workweek for everyone).

121. See, e.g., Smith, *Time Norms*, *supra* note 2, at 271-72.

122. JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE IN LEISURE* 29-30 (1991). Schor finds that since the 1960s annual hours have actually been increasing. *Id.* In her analysis of American working time from 1969 to 1987 she finds that "the average employed person is now on the job an additional 163 hours, or the equivalent of an extra month a year." *Id.*

123. Schultz, *supra* note 2, at 1955-56. Schultz states that:

We must also restructure working time so as to eliminate the gender disparity associated with full-time and nonstandard work. This means abandoning proposals to create part-time or other nonstandard jobs *for women*, and redefining what is "standard" in a way that will encourage *men and women* from all walks of life to work at a livable pace.

*Id.* (emphasis added).



not be penalized when compared with their peers. This proposal intertwines both care and formal feminist ideology and does not undermine formal equality principles because it regulates the sexes equally and favorably impacts women with family responsibilities. Restricting work hours would also enable men to become active participants at home<sup>124</sup> whereas today many men suffer professional and social penalties for choosing to perform care work at home.<sup>125</sup>

Jacobs and Gerson suggest a regulatory cap of thirty to thirty-five hours per week similar to the initiative of some European countries, a solution which would do away with the overtime pay structure under FLSA.<sup>126</sup> Overtime pay may explain the ever-lengthening workweek;<sup>127</sup> therefore, eliminating overtime would serve to disincentivize a long workweek and may help to achieve a unified shorter workweek. Similarly, in order to establish a unified workweek, professional and managerial employees should not be exempt from FLSA regulation.<sup>128</sup>

Regulating the work week is a controversial concept that spreads the social and economical costs of unemployment among employed workers. Restricting work hours in Europe was brought about to deal with high rates of structural unemployment whereby work sharing was implemented in a stagnated and highly regulated labor market. Regulating work hours in America, especially hours worked by white collar workers, would be virtually impossible.<sup>129</sup> This proposal is detached from a prag-

124. *Id.* at 1957. Schultz argues that:

[W]e should consider amending the Fair Labor Standards Act to reduce the standard workweek to thirty-five or even thirty hours per week for everyone including the upper-level workers who are currently exempted — as a way to create a new cultural ideal that would allow both women and men more time for home, community, and nation. A reduced workweek should alleviate work-family conflict for everyone and help promote greater sharing of employment and housework among men and women.

*Id.*

125. See *infra* note 173 and accompanying text.

126. See Jacobs & Gerson, *supra* note 100, at 470; see also Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1932-49 (1999).

127. See Jacobs & Gerson, *supra* note 100, at 470.

128. *Id.* at 467. If the structure of exemptions is preserved, employers will keep on working exempt employees overtime, undermining the goal that the workweek will be capped for all workers. *Id.*

129. This scheme will only work if we do not exempt any employees. Once high level jobs are exempt the issue of whether women can put in the same amount of

matic expectation of the extent to which the government can regulate and enforce labor market practices.

Another option is to amend FLSA in three different ways: shortening the workweek from forty hours to thirty or thirty-five hours, increasing over time pay to double, instead of time and a half, and mandating overtime to employees that are currently exempt — in particular professional and managerial employees. Some argue that professional and managerial employees are overworked because of the managerial overtime exemption. Hence, these amendments may deter employers from working their high level employees overtime due to the added costs.<sup>130</sup> Nevertheless, tampering with overtime regulation would probably not carry with it the expected result of shortening the workweek because overtime pay is mainly relevant to minimum wage earners. Moreover, the standard wage of workers earning more than the minimum wage could be adjusted downward in order to keep the overall wage of high level workers intact.

Accordingly, the firm and its workers are likely indifferent to the exact combination of straight time and overtime wage rates that would result in the same level of weekly compensation.<sup>131</sup> Empirical evidence supports the claim that overtime pay regulation has no discernible impact on overtime hours, as straight time hourly wages adjust to changes in overtime premium.<sup>132</sup> This means that extending the mandate to pay over-

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hours in paid work as men will surface, affecting the promotional ladder from its first steps.

130. Jacobs & Gerson, *supra* note 100, at 457.

131. John Addison & Barry Hirsh, *The Economic Effects of Employment Regulation: What Are the Limits?*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 125, 141-42 (Bruce E. Kaufman ed., 1997). The authors state that:

The argument that overtime premium will increase employment is weakened further by the possibility that as a result of the premium the straight-time wage will decrease so that the wages hours combination is of equivalent value to workers. That is the availability of jobs offering overtime hours may reset an equilibrium straight-time wage that is slightly lower than it would be in the absence of the premium.

*Id.*

132. See Stephen J. Trejo, *Does the Statutory Overtime Premium Discourage Long Workweeks*, 56 INDUS. & LAB. REL. REV. 530 (2001) [hereinafter Trejo, *Statutory Overtime Premium*]; Stephen J. Trejo, *The Effects of Overtime Pay Regulation on Worker Compensation*, 81 AM. ECON. REV. 719 (1991). Trejo's empirical work on the effect of expanded coverage of overtime pay mandates on work schedules supports the compensating deferential model in which work schedules are largely unaffected and straight hour wages are adjusted to mitigate the increased costs of overtime hours. Trejo, *Statutory Overtime Premium* at 549-50. It rejects the alternative model according to which the demand for overtime hours is decreased with the

time to managerial and professional employees will only depress the regular hourly wages of these employees, without having any affect on the length of the workweek. This harms employees who will not engage in overtime work, as their standard wages will be depressed downward. Since women tend on average to work less hours than men, implementing this proposal may serve to increase the wage gap between men and women.

*b. Regulation of Workplace Practice: Accommodation Rights for Parents*

A separate way to address the time bind problem is to specifically target workplace accommodations towards the special needs of workers with family responsibilities. The vision is that such accommodation will disparately favor women, giving them a fair chance of "having it all."<sup>133</sup> This model is inspired by the accommodation paradigm of the ADA, which requires employers to reasonably accommodate the needs of an otherwise qualified individual.<sup>134</sup>

Under this model, employers may be required to provide paid parental leave, subsidize or build childcare centers, and potentially enable long career breaks with job security for parents who wish to spend time with their children. Most importantly, employers would be required to design jobs with reduced hours — jobs that will not carry any penalty for the decision to work a reduced hour load.<sup>135</sup> These new "mommy tracks" existing on all levels of skills and responsibility, would not suffer from the stigma of non-commitment, and would provide promotional and career growth.<sup>136</sup> In other words, there would be two employment tracks in the workplace. The regular track would be de-

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introduction of overtime mandates. *Id.* The model of the FLSA which assumes that overtime pay will promote work-sharing and boost up employment rates is not substantiated by empirical work. *Id.* at 550.

133. *See, e.g.,* Smith, *Time Norms*, *supra* note 2, at 281-82 (explaining how current time norms in the workplace cast primarily females as "non-ideal" workers and impede gender equity in the workplace).

134. Americans with Disabilities Act, 42 U.S.C § 12112 (2000).

135. Smith, *Time Norms*, *supra* note 2, at 295. Smith argues that if a range of alternative work time options was available and legitimized — in terms of rewards, recognition, responsibility, and interest — as standard full-time employment alone is now legitimized, this would go a long way toward enabling people to balance their employment and family commitments. Existing working time norms act to exclude full participation in both employment and family. *Id.* at 360.

136. Hewlett, *Executive Women*, *supra* note 17, at 72 ("High-level jobs should be created that permit reduced hours and workloads on an ongoing basis, but still offer the possibility of promotion.").

signed to meet the employer's organizational needs that may require the current work schedule. The other track, offering reduced hours for workers to meet family needs, would still give the employees a meaningful opportunity to receive promotions, and enable them to advance to the highest levels in the organization. However, the implementation of accommodation rights for parents presents many legal obstacles.<sup>137</sup>

### i. Legal Issues

Because parents are not a protected group under Title VII, one has to construct a theory about why work practices that exclude women with childcare responsibilities are equivalent to sex discrimination.<sup>138</sup> Turning to disparate treatment law is not helpful, since this model is applicable only when women claim they can work like men.<sup>139</sup> Disparate treatment is relevant to combat stereotyping of women because they are mothers, not in restructuring work practices. Thus, disparate treatment is relevant only to the exceptional that are being discriminated against on account of their maternal status although they can keep up with the employer's demand.<sup>140</sup>

Another option is to utilize disparate impact theory to reexamine work practices.<sup>141</sup> Under disparate impact law employment practices are deemed discriminatory when they disproportionately impact, without a business necessity justification, the chances of protected group members to be hired, promoted, or fired. Disparate impact litigation can examine the legality of mandatory overtime, availability of leave or part time work, requirements of traveling, all of which are based on the

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137. For the legal analysis, I draw heavily on Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345 (2003).

138. For the range of theories, see Williams & Segal, *supra* note 2, at 133-37.

139. *Id.* at 124 (explaining that "[a] disparate impact claim under Title VII can be brought whenever an employer intentionally treats . . . workers differently on the basis of sex").

140. Kessler, *supra* note 97, at 412-19; see also Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337 (1999).

141. "Under disparate impact theory, practices or policies that appear to be neutral on their face may be found to violate Title VII if they have a significantly negative impact on applicants or workers of one sex," and the employer cannot provide a business necessity justification for this practice. Williams & Segal, *supra* note 2, at 134 n.379.

expectation of a carefree male worker, and unfavorably impact women.<sup>142</sup>

The current discourse in disparate impact law focuses on safeguarding equality within the workplace and not at home. It cannot address cases in which the plaintiff claims that certain employment practices are disparately impacting the ability of group members (women, for example) to successfully balance their time at home and work. Accordingly, it seems unlikely that courts would view the effects of the employment practices as a form of discrimination.<sup>143</sup>

Aside from utilizing a model relating the disparate impact women face in the workplace, granting parents accommodation rights has become the principle model for alleviating the parental burden in the workplace. Although there is no statute or case law which integrates this model in relation to parents' rights, the legal literature has turned to disability accommodation law under the ADA<sup>144</sup> and religious accommodation rights under Title VII<sup>145</sup> as possible paradigms to assist parents at work. However, accommodation is a limited strategy in redressing women's workplace disadvantages attributed to care giving.<sup>146</sup>

The ADA has not effectuated wide-scale changes in the structure of employment for the disabled.<sup>147</sup> The model is apparently unworkable because the ADA makes disability a "protected characteristic" but does not perceive performance-related disability as a legitimate "non-discriminatory" business concern.<sup>148</sup> Thus, the courts have rejected requests for accommoda-

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142. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1226-27 (1989) (detailing the ways to challenge prevailing work norms, including stringent absenteeism limits and demanding travel and time commitment requirements under disparate impact theory); Sturm, *supra* note 2, at 484-89 (detailing how disparate impact law might encourage employers to reexamine prevalent work practices which systemically exclude women); Williams & Segal, *supra* note 2, at 133-37 (detailing cases that were successful in bringing a disparate impact claims).

143. Even those scholars that have initially brought forward the possibility to turn to disparate impact law are skeptical about its ability to initiate wide scale changes in work practice. See Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 755 (2000); Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1517 (2001); Chamallas, *supra* note 140, at 354; *Accommodating Routine*, *supra* note 2, at 1458.

144. Kessler, *supra* note 97, at 457-59.

145. *Accommodating Routine*, *supra* note 2, at 1445-73.

146. Arnow-Richman, *supra* note 137, at 362-67.

147. Acemoglu & Angrist, *supra* note 116, at 950.

148. Arnow-Richman, *supra* note 137, at 363.

tion pertaining to hours of work, mandatory overtime, and pace of work, defining all of them as non-reasonable accommodation related to performance.<sup>149</sup> While the issue of parental accommodation rights in the workplace is unsettled, such precedents will surely affect future interpretation of any legislated parental accommodation mandate.

## ii. Labor Market Forces

Labor market forces make it highly unlikely that care accommodation mandates will be effective. Promotions in high-end jobs usually take the form of tournaments in which co-workers are competing among themselves for the better jobs and promotions.<sup>150</sup> In order to motivate employees and extract effort, there is an implicit understanding that only a small fraction of the workers will end up in the most prestigious jobs in the organization.<sup>151</sup> The high payoffs are supposed to elicit great effort from all workers.<sup>152</sup> Ever increasing work hours are most probably the product of the continuous process of job tournaments, in which workers' performance is evaluated against the work performance

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149. *Id.* at 364-66. The author discusses the following cases to support this argument: *Davis v. Microsoft Corp.*, 37 P.3d 333, 335-36 (Wash. Ct. App. 2002) (upholding employer's decision not to accommodate a hepatitis C infected employee who requested to work forty hours a week with no overtime where all other employees were expected to work overtime. According to the court Microsoft demonstrated that the structure of the position does not lend itself to a regular forty-hour workweek. The court in no way questioned the wisdom of the employer's work expectation or considered the norms that underlie an eighty hour availability requirement, a requirement that would systematically exclude employees with any number of disabilities); *Davis v. Fl. Power & Light Co.*, 205 F.3d 1301, 1305-06 (11th Cir. 2000) (finding mandatory overtime work to be an essential function of the job in denying employee's ADA claim where employer had a policy of processing all customer orders within twenty-four hours and employee's coworkers worked an average of two hundred and sixteen overtime hours each in the year preceding employee's termination); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1121 (10th Cir. 1995) (finding that the plaintiff-employees who were grocery selectors, could not keep up with the pace standards, and were therefore terminated are not entitled to relief under the ADA, because the new productions standards imposed by the company was an essential function of the job).

150. RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY*, 402-04 (6th ed., 1996). For implementation of this model in the legal discrimination context, see David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 59 (1998).

151. See Charny & Gulati, *supra* note 150, at 72 n.56 (describing the "up-or-out" partnership decisions at law firms).

152. *Id.* at 72.

of their peers.<sup>153</sup> Winning the tournament likely means letting go of family friendly work rights.

Tournaments have three central features: the "winner" of any given promotion or career opportunity is not predetermined, the "winner" is selected based on relative performance in comparison to other co-workers,<sup>154</sup> and the rewards are concentrated in the hands of the "winner," creating a large differential between winning and losing. The tournament appears to be a game where the winner takes it all and which seemingly disregards the work that co-workers have contributed during the tournament.<sup>155</sup>

Tournaments can explain why salaried employees often put in long hours at work and are willing to travel and relocate their families at the wishes of their employers.<sup>156</sup> Tournaments create a race to the top in work-related investments.<sup>157</sup> Tournaments also create collective action which ultimately benefits the employer.<sup>158</sup> For example, if one worker is working more hours, all of the contestants must catch up in order to maintain their relative position in the race. Each worker may continually heighten the benchmark, implicitly requiring all others to match.<sup>159</sup>

The nature of job tournaments makes it clear why the accommodation for workers with care responsibilities is not a workable solution. The essence of a tournament is to create a competitive atmosphere. Therefore, individuals on the accommodation track would not have a fair chance at winning the tournament, because it is unlikely that they could outperform workers who work twice as many hours.

Furthermore, even when an accommodated employee could outperform a traditional track employee, the employer may dis-

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153. EHRENBERG & SMITH, *supra* note 150, at 403.

154. *Id.* at 402-04. They may be labeled as the other contestants. *Id.*

155. *Id.* Envisioning a tennis tournament might be helpful.

156. *Id.*

157. *Id.* Or a race to the bottom if one defines these investments as harming the well being of these employees and their families.

158. *Id.*

159. *Id.* One of the reasons American employers prefer long hours is that management assumes a linear relationship between time and productivity: longer hours are assumed to deliver proportionally more output per employee. See *Time Norms*, *supra* note 2, at 283. The implementation of tournaments has been mentioned also in the context of signaling and information market failure: distinguishing between work-committed applicants and leisure-committed applicant. EHRENBERG & SMITH, *supra* note 150, at 402-04. By insisting and making good on the promise that workers will need to work very hard, the employer weeds out leisure oriented applicants. *Id.*

pute “the winner,” in order to keep the rules of the game intact. Ultimately, an employer is less interested in the specific skills of the winner and more interested in the general incentive mechanism created by the tournament that promotes long hours and a full-time commitment to the job.<sup>160</sup> By rewarding those that work less hard, the tournament’s function is undermined. At the end of the day, the accommodation track would likely shadow the traditional mommy track, where contestants have no real chance to win the tournament, and therefore no extrinsic incentive to perform exceptionally well.

While it is possible for an employer to have two tournaments, one for workers with family responsibilities and another more traditional tournament, it is unlikely that such a system would be successful in instituting two parallel tracks of equally desirable promotions. The existence of an accommodation track could disrupt the smooth operation of the regular track because employees in the regular track would constantly be aware of the disparate expectations from their colleagues on the accommodation track. This awareness would surely affect employees’ motivation to work hard.<sup>161</sup> Moreover, as recent studies pertaining to compensation in the labor market reveal, employees are very concerned with equitable distributions of pay and promotions.<sup>162</sup> Employers, aware of this, cater their policies to meet employees’ quest for formal equality; separate tracks would undermine this goal.<sup>163</sup>

### C. *Attempts to Restructure Who Performs Care Work*

Information about the relative time the sexes spend at work and on household chores confirms that women carry most of the burden of household work regardless of their employment sta-

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160. See Charny & Gulati, *supra* note 150, at 72 (noting that employers use the tournament model as a solution to the shirking and moral hazard problems in the workplace by replacing the “stick” (the threat of firing) with a “carrot” (the chance for promotion and bonuses)).

161. TRUMAN F. BEWLEY, WHY WAGES DON’T FALL DURING A RECESSION 70-85, 110-130 (1999) (stating that although non-unionized establishments can offer better compensation packages to some workers and not others, employers avoid this strategy for fear that perceptions of inter-employee inequality will damage morale and productivity).

162. *Id.*

163. *Id.*



tus.<sup>164</sup> If men spent more time on care work, it would release women of some of their responsibilities, freeing them to invest more time in their careers while restricting the amount of time men are able to spend on the job. This would arguably equalize the time men and women were able to commit to their careers.<sup>165</sup> Hochschild argues that men doing more care work is a possible solution to the family — career dilemma women face.<sup>166</sup> By restructuring family responsibilities, women could shift some of the household workload to their spouses or third parties.<sup>167</sup>

In attempting to restructure the distribution of housework between the sexes, it is important to look to the reasons why women are performing the bulk of care work while men are resistant to this shift. An economic explanation would suggest that time availability determines which spouse performs housework, inferring that women who work less hours are more available to perform these tasks.<sup>168</sup> However, empirical data suggests otherwise.

Women perform substantially more care work than men, irrespective of their commitment to the labor market.<sup>169</sup> Women who work decrease slightly the amount of time they spend on childcare, but this deficit is not mitigated by significant involvement of men in childrearing.<sup>170</sup> Similarly, the scenario does not

164. BETH A. SHELTON, *WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE* 65-66 (1992); For a survey of such studies and data, see Silbaugh, *supra* note 3, at 12-13.

165. See, e.g., Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 712 (2000) (Arguing that in order to progress further toward workplace equality, it will be necessary for men to change their behavior in the labor market and that by forcing men to take family leave upon birth or adoption of a child, current problems would be corrected and the prevailing gender norms would change).

166. *THE SECOND SHIFT*, *supra* note 105.

167. *Fathers and Parental Leave Revisited*, *supra* note 2, at 26-27; Silbaugh, *supra* note 3, at 14-15 (arguing that it is as important to focus on improving the consequences that flow from the uneven distribution of home labor as it is to focus on altering that distribution or accommodating it in the wage labor market).

168. See *supra* note 8.

169. Brinig, *supra* note 102, at 1327-28; Costa, *supra* note 26, at 119 ("Even women who work still disproportionately bear the brunt of domestic chores."); Crain, *supra* note 126, at 1878, 1914 (explaining that despite the increase of women in the waged labor market in the last 25 years, "women continue to perform the lion's share of the homemaking and caretaking duties," and citing research that when women begin work outside the home, their husbands often "retaliate by refusing to assume the burdens . . . of keeping a house and caring for children"); Catherine E. Ross, *The Division of Labor at Home*, 65 SOC. FORCES 816 (1987).

170. COUNCIL OF ECONOMIC ADVISORS, FAMILIES AND THE LABOR MARKET, 1969-1999: ANALYZING THE "TIME CRUNCH" (1999), available at <http://www>.

change in households where women earn more than their spouses.<sup>171</sup> Accordingly, women are unable to shift the burden of care work to their spouses simply by entering the labor market or increasing their earnings relative to men.<sup>172</sup>

Social norms shape our expectations that women will take the primary responsibility for household work and child rearing.<sup>173</sup> Moreover, gender norms are probably more significant than economic forces in preserving traditional gender roles.<sup>174</sup> Historically, society has expressed preferences for maternal care over paternal care and communities and families appear to want to preserve the status quo.<sup>175</sup>

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[newecon.org/ParentingDeficitCEA-May99.html](http://newecon.org/ParentingDeficitCEA-May99.html) (last visited Feb. 03, 2005). This report concludes that “[t]he hours American parents work in paid jobs have increased enormously since 1969 due to a dramatic shift of mothers time from the household to the labor market . . . Virtually all of the increase in total hours families spend on paid work has come from increases in women’s hours [spent on paid work].” *Id.* Additionally, women’s entrance into paid labor decreased slightly the amount of time they spent on childcare by ten percent (from ten to nine hours per week). *Id.* “Fathers did not make up the difference; their childcare time remained about 2.6 hours per week from 1965 to 1985.” *Id.* This suggests that the increase in market work among women has reduced parents’ total childcare time. *Id.*

171. *Id.*; but see BECKER, A TREATISE ON THE FAMILY, *supra* note 8, at 30-53 (theorizing that gender powers outside the workplace are bound to change with women gaining more economical and educational power within the household. As this evolves women will transfer childrearing and household responsibilities to their spouses); FREEMAN, *supra* note 20 (noting that higher wages for women should lead to a shift in the burden of household chores toward men).

172. HEWLETT, CREATING A LIFE, *supra* note 18, at 88. See also Crain, *supra* note 126, at 1877, 1914 (finding that women who out-earn their husbands actually do more housework than those whose husbands out-earn them, or who earn an amount roughly equal to that of their husbands); Travis, *supra* note 2, at 314. Travis found that women become more family-oriented after they start telecommuting whereas men who telecommute become even more work-oriented, as they use the time previously spent on commuting and workplace distractions to do additional paid work, rather than to do unpaid work in the home. *Id.* The author therefore concludes that men who perform paid work from home, regardless of their occupation, typically spend no more time on housework or childcare than men who work outside the home. *Id.*

173. Silbaugh, *supra* note 3, at 8-13 (explaining and describing various sociological research showing that housework is a significant aspect of women’s lives).

174. Michael Selmi and Naomi Cahn, *New Perspectives on Work/Family Conflict: Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289, 305 (2003) (arguing, using data collected from polls, that one reason extensive state support has not substantially improved women’s equality is that gender ideologies, particularly surrounding childrearing, have remained stubbornly resistant to change, even in the face of extensive public policies designed to facilitate childrearing).

175. *Id.* See also Costa, *supra* note 26, at 116 (presenting Gallup polls which confirm that still a significant minority of married women of childrearing age agreed with the statement that preschool children suffered if the mother works).

Employers are antagonistic to men who request parental leave, subjecting them to harassment if they reveal their preference to perform care work at home.<sup>176</sup> Fathers who wish to take active care giving tasks are stereotyped as unworthy workers to a greater extent than women.<sup>177</sup> These stereotypes may cause greater harm to men's careers than to women's because women are at least viewed as acting out the ideal of motherhood in performing care work.<sup>178</sup> Career obstacles created by these stereotypes make it difficult for men to embrace care work traditionally performed by women.<sup>179</sup>

Because social norms in the community, home, and work are the driving forces for the gendered division of care work, it is unlikely that these norms could be overcome by regulation.<sup>180</sup>

176. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1072 (1994). Malin states that:

Most men do take time off immediately following the births of their children. They do so by using accrued vacation and personal days. Fathers take this approach [because] . . . they believe it is all they can get away with — that is, taking a real family leave will jeopardize their careers because of employer hostility.

*Id.* See also Malin, *supra* note 2, at 39. Malin finds that even among large employers providing paternal leave, 41% considered it unreasonable for a man to actually use it, and another 23% considered a reasonable leave for a man to be two weeks or less. *Id.* It appears that many employers extend parental leave to fathers so that they can give the appearance of gender-neutral policies, but never intend for fathers to use it. *Id.* See also, Catalyst, *supra* note 73 (finding that 63% of employers "maintained that it was unreasonable for a father to take" parental leave of one day or more).

177. Malin, *supra* note 176, at 1077 (noting employer and co-worker hostility to fathers' requests for parental leave).

178. *Id.* ("Many employers' willingness to make such accommodations is limited to women workers. Men's accommodation requests are often met by, "Your wife should handle it."); Williams & Segal, *supra* note 2, at 101-02. The authors argue that:

Stereotyping affects fathers as well as mothers. Fathers who assume, or seek to assume, active caregiving roles may experience an even chillier climate than do mothers. Although mothers who take time off from work for caregiving may be considered less valuable workers, they may well be deemed to be living up to widely held ideals of motherhood.

*Id.*

179. Williams & Segal, *supra* note 2, at 102 (arguing that a good father is linked with being a good provider and therefore the father who takes time off from work for caregiving may actually be viewed as a failure as a father.)

180. Even proponents of mandatory paternal leave policies, such as Selmi, are skeptical of the success prospects of such plans. See Selmi, *supra* note 165, at 712, 775. Selmi explains that:

Despite its possible success, the objections to a mandatory paternity leave policy would almost certainly block its implementation. As a legal matter, questions would arise regarding the law's constitutional-

The causes of inequality are perpetuating themselves outside the realm of regulative life, in the context of the family. Thus, it is unrealistic to expect that women will be able to achieve equality in sharing care work.

#### IV. THE SIMULTANEOUS APPROACH: A GENUINE FAMILY AND CAREER MODEL

##### A. *Confronting the Numbers from a Different Angle*

The model of "career-then-family" was presented to American women in the mid-sixties to early seventies.<sup>181</sup> It was built on the presumption that delaying family plans would enable women to compete on equal terms with men in the workplace, without having to worry about the effect that care responsibilities would have on their careers. After stabilizing their professional lives, it was assumed that women could focus on raising their family.

Sequencing tasks was the remedy to discriminatory workplace practices and the uneven sharing of care work among men and women. Earlier I discussed empirical evidence which demonstrates that this order of sequencing significantly hampered the chances of women to eventually get married and have children.<sup>182</sup> I now turn to assess whether the recommendation to concentrate on careers proved fruitful professionally.<sup>183</sup>

Gauging whether a women has achieved a "career" is considerably less objective than determining whether she has been married or had a child.<sup>184</sup> Because careers are generally assessed against a male standard, it can be useful to use this standard for comparison. Goldin used the earnings of women in their late thirties and early forties, when both family and schooling invest-

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ity on both due process and equal protection grounds . . . . Although I believe that a well-developed program could survive constitutional scrutiny, exhorting men to become more involved in their family lives or touting the importance of families seems unlikely to ease the burden on women to any significant extent.

*Id.*

181. Goldin, *supra* note 34, at 43.

182. See *supra* Part II.

183. This was not discussed at all by other scholars, all of whom focus on the issue whether it is discriminatory (instead of simply unfair) that women who wish to promote their careers are driven to give up motherhood, assuming that forgone motherhood increases the chances of women to establish themselves in the paid labor market.

184. Goldin, *supra* note 34, at 43.

ments were generally complete.<sup>185</sup> The standard was set against the twenty-fifth percentile of the distribution of income of men with four years of college education.<sup>186</sup> According to this study, 43% of all women with at least four years of college achieved career status according to this definition; 35% of women who had at least one child achieved career status, and 56% of those who remained childless achieved career status.<sup>187</sup>

These numbers sketch the following: the fact that a woman does not have children increases her chances of having a career within her group (no children). However, 44% of this group, a substantial percentage, did not attain a career.<sup>188</sup> Hence, almost half of the women who did not have children ended up with no career and no family.<sup>189</sup> While motherhood is not the only impediment to women's career success, there can be no question that having children poses additional challenges.

On the other hand, 35% of women with children were successful at having both a family and a career.<sup>190</sup> While there was no data on how old the women were when they had their first child, taking into account the declining chances of women of getting married in their late thirties and getting pregnant at this age, it is likely that many women in this group did not delay motherhood, and were nonetheless successful at achieving both a career and family life simultaneously.<sup>191</sup>

Looking at the numbers from the Goldin study from a different angle, the probability of having a career and family was

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185. *Id.* at 44-49. *But see* Marianne A. Ferber & Carole Green, *Career or Family: What Choices Do College Women Have?*, 24 J. OF LAB. ECON. 143, 147 (2003) (criticizing Goldin's choice of earning measurements arguing that it is entirely likely that many women think of work in a traditionally female profession, for instance kindergarten teaching or the arts as a career although their pay might be too low to satisfy Goldin's criterion).

186. Goldin, *supra* note 34, at 44.

187. *Id.* at 46.

188. Ferber & Green, *supra* note 185, at 148 (finding that if Goldin's data is recalculated the percentage of women without a career in the childless group remains at 56%, and using HRS data the percentage of women without a career increases to 58% among childless women.)

189. *Id.*

190. Goldin, *supra* note 34, at 44-49.

191. CREATING A LIFE, *supra* note 18, at 87, 114. Hewlett finds that when high achieving women marry, they tend to get married young. *Id.* In the older group only 8% married for the first time after the age of thirty, and only 3% married after the age of thirty-five. Most of the women in each group had their first child in their mid-twenties. *Id.* Among the older group of women the most common age to have a child was twenty-two, and for the younger group it was twenty-nine. *Id.*

exactly equal to the probability of having a career with no family.<sup>192</sup> In the group of women with at least four years of college, 57.7% had children and no career, 16.2% had neither a career nor children, and 13.1% had either a career but no children or both a career and children.<sup>193</sup> For example, in a population of a thousand college graduate women, approximately 580 have children without a career, 160 are left with no career and no family and the remaining 260 women are split in a way in which 130 have both a career and a family and 130 have only a career.<sup>194</sup>

Looking at the numbers this way, it becomes clear that a woman's chances of combining a career with family are equal to her chances of having only a career — both 13.1%.<sup>195</sup> Women who postpone childrearing risk falling into the no children / no career group, without increasing their prospects of having a career. Accordingly, this data suggests that in order to have both a career and children, it may be wiser to get married young and not postpone motherhood.<sup>196</sup>

The traditional feminist's advice of career then family does not seem to garner the advantage of increasing a woman's chances of having both a career and a family. It is a derivative of the assumption that women with no children fair better in the labor market. However, for a woman who wants both a career and a family, it seems that the relevant information is that she has the same chances of having a career with or without children.

In order to "enjoy" the higher probability of having a career, a woman must commit herself to not having children at all, not just delaying motherhood. But, for women who initially want to pursue the dual path, delaying motherhood does not increase

192. Goldin, *supra* note 34, at 47 tbl.2.6. Goldin herself mentions briefly this point when stating that "[f]or every women who attained family and career there was another woman who attained career but has no family, using any of the definitions." *Id.* at 45.

193. *Id.* at 47.

194. Other studies have painted a rosier picture. For example when using a more lenient definition of career, defining career as either A: women who worked twenty years or more in an executive or professional capacity, or B: women who are working full time in an executive, managerial or professional capacity, then 29.4% and 44.3% respectively of all women entered the career and family group. Ferber & Green, *supra* note 185, at 143 tbl.2.

195. Goldin, *supra* note 34, at 47 tbl.2.6. Goldin also uses other criteria (all earning based), but with each measurement the number of women with a career and a family was similar (or higher) than the number of women with only a career. *Id.* at 46 tbl.2.6, 47-49.

196. This conclusion is strengthened when looking at the Ferber & Green numbers, because they use a more lenient definition of a career.

their chances of having a career. It does, however increase the chances that they will eventually fall in the no children category — with a 44% probability of not attaining a career at all.<sup>197</sup>

### B. *The Model*

Women are delaying marriage and motherhood<sup>198</sup> in the belief that sequencing their commitments in this order (career then family) will assist them in attaining both. The high rate of childlessness is a by-product of this strategy.<sup>199</sup> When women turn later in life to the second stage of their sequencing plan, they find insurmountable social barriers in finding a spouse, and physiological barriers in conceiving.<sup>200</sup> The feminist scholarship has overlooked this problem, assuming incorrectly and somewhat stereotypically that the source of the family-work conflict lies solely in the inability to balance work with family responsibility. I argue that some impediments are entrenched in low sex ratios within the marriage market of educated professional women, which makes it difficult for these women to succeed in attaining both a career and a family.

The argument that women who wish to have both a career and a family must understand that they may encounter difficulties on the family front, as well as on the career front, is not just a strand of conservatism; it is the truth.<sup>201</sup> This truth may enable women to make informed decisions about both their personal and professional lives. The suggestion that women should follow the career-then-family path in order to attain balance in their life is detached from marriage market sex ratio studies. Such advice

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197. See *supra* note 185 and accompanying text.

198. Because the decision of marriage and children are intertwined for many women I link these two milestones together. Sure, women can get married young and then postpone the decision to have children for ten years, but most couples once they get married will have children within 5 years, regardless of their age.

199. *Executive Women*, *supra* note 17, at 70 (reporting that although 89% of young high achieving women believe that they will be able to get pregnant deep into their forties, new reproductive technologies have not solved the fertility problems for older women and that only 3%-5% of women who attempt in vitro fertilization in their forties actually succeed in bearing a child).

200. *Id.*

201. See, e.g., Michelle Goldberg, *A Woman's Place* (Apr. 23, 2002) (criticizing Hewlett's book for presenting this argument — "such thinking makes the book weirdly bifurcated between serious, feminist-minded policy recommendations and reactionary personal advice"), at [http://www.salon.com/mwt/feature/2002/04/23/childless\\_women](http://www.salon.com/mwt/feature/2002/04/23/childless_women) (last visited Feb. 10, 2005) (on file with the UCLA Women's Law Journal).

may exasperate the phenomenon that only a minority of women attain their goal of having both a career and a family.

The career-then-family slogan depends on the belief that women are marriageable, regardless of age or status. This belief is feeding on the idea that most women still get married and bear children. But, the data presented in this Essay shows that a growing number of women are not marriageable.<sup>202</sup> The simultaneous model, of family-and-career, takes into account the empirical evidence that there is a substantial minority of women who are successful in having it all, and that these women marry young, during the crucial years of professional growth.

Now, I turn to offer an explanation why women who marry young are more likely to succeed in having a family and a career. Sex ratios in the marriage market are a vital component of the explanation. Hypergamy, one of the pillars of the patriarchal social systems can explain why educated or successful women are less likely to get married. Hypergamy or the "marriage gradient" means that women tend to marry up in various dimensions, including education, professional, and material.<sup>203</sup> Under this theory, a male doctor may well marry a female nurse, but a female doctor would hardly consider marrying a male nurse. The female nurse may be underpaid, but in the marriage market her prospects are better than those of the female doctor because there are more desirable males she can hope to "marry up."<sup>204</sup> The existing literature on marriage and dating points to the conclusion that gender non-conforming occupational choices reduce women's (and men's) attractiveness in the marriage market.<sup>205</sup> Women in male dominated jobs are viewed as less desirable marriage partner.<sup>206</sup>

Hypergamy practices decrease the sex ratio in the marriage market for educated and professional single women. Sex ratios are the number of men for each woman in a reference population.<sup>207</sup> An increase in the sex ratio should increase female

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202. See Goldin Cohort IV data, *supra* Part II.B; see also, Goldin, *supra* note 34, at 36 fig.2.6.

203. See *supra* note 4 and accompanying text.

204. See Badgett & Folbre, *supra* note 74 (suggesting that occupational segregation is perpetuated because women (and men) may be penalized in the marriage market for making non traditional occupational choices).

205. *Id.* at 274.

206. *Id.* at 275.

207. Angrist, *supra* note 7, at 3.



power in the marriage market and vice versa.<sup>208</sup> There is strong empirical evidence that links sex ratios to marriage rates.<sup>209</sup>

As women proceed with their education and career, while remaining single, there are less and less eligible men in the relevant pool.<sup>210</sup> Thus the sex ratio declines to the detriment of those women, decreasing the chances they will eventually get married. Hypergamy coupled with sex ratios theory can also explain why as men become more successful the probability they are married increases.<sup>211</sup> Sex ratios decrease with a man's rising status because the pool of available women increases as more women view marrying him as marrying up.

While some social norms regulating the behavior surrounding marriage have changed, it is imperative that both men and women continue to change their views towards marriage in order to undermine the effects of hypergamy.<sup>212</sup> However, even if women would shun hypergamy by overcoming their emotional attraction to men of higher status, men may still wish to marry younger women with lower status.<sup>213</sup> Because marriage is based on a mutual decision, women alone cannot dissolve female hypergamy.<sup>214</sup>

In order to explain hypergamous marriages, some scholars emphasize the age difference at marriage between men and women.<sup>215</sup> According to the U.S. Census the difference in the median age between men and women at the time of their first marriage was 2.5 years in 1960. Thirty years later, in spite of tremendous social changes the difference in the median age at first marriage between men and women was still 2.3 years.<sup>216</sup>

208. *Id.*

209. *Id.* at 3, 5 (discussing a handful of studies pointing to a strong link between sex ratios and marriage rates).

210. In this explanation age is a proxy of success.

211. *See supra* Part II.C.

212. *See* Amy L. Wax, *Bargaining in the Shadow of Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 643 (1998).

213. *Id.* at 644-47.

214. *Id.* at 645-46. Wax discusses in length the proposition that women will turn to hypogamy mating (marrying down) in order to solve their marriage market bargaining power problem is not foreseeable. *Id.* Her arguments are based on collective action problems and the ingrained preferences and attraction to high status men, which cannot be rationalized. *Id.*

215. Eugenio P. Giolito, *A Search Model of Marriage with Differential Fecundity*, IZA Discussion Paper No. 1082 (2004), available at <http://ssrn.com/abstract=497294> (last visited Feb. 10, 2005) (on file with the UCLA Women's Law Journal).

216. *Id.*

A recent explanation of the existing age gap in marriages, besides hypergamy,<sup>217</sup> is biology.<sup>218</sup> It is a biological fact that women are fertile for less of their lives than men. The consequence of this asymmetry in fecundity is that at any given point of time there will always be more fertile men than women, assuming a relatively equal population split between the genders. Thinking of this imbalance as a relative scarcity implies more bargaining power for the sex in short supply, in this case women, so long as they are fertile. Sex ratios are high during the peak years of women's fertility, but drop dramatically thereafter.<sup>219</sup> If women have more bargaining power when they are young (because of female fertility scarcity) and men as they get older (and still fertile) a pattern of age differences within marriages evolves.

## V. CONCLUSION

Currently, the majority of the discourse pertaining to the family-career conflict that women face concentrates on whether the source of the time gap between men and women is at work or at home. The reforms offered to ease the time bind women encounter range from transforming workplace practices into family friendly organizations to getting men more involved in care work. In this Essay, I have criticized these proposals as unworkable.

The current discourse takes marriage and motherhood for granted. It assumes that the inability to achieve a career — family balance is rooted in the derailed career paths of mothers disabled by time constraints. But, there is another side to this argument: many women are unable to achieve balance because they do not have a family. This is not due to lack of time, but rather to miscalculated timing.

By getting married younger, women improve their chances of having both a family and a career, because as they get older and become more successful, the sex ratio in the marriage market

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217. Hypergamy in itself can explain the age gap, because age is a good proxy of status. Thus women looking for higher status men will end up sorting with older men, and vice versa — men looking for women with less status would sort with younger women.

218. Aloysius Siow, *Differential Fecundity, Markets and Gender Roles*, 106 J. POL. ECON. 334 (1998).

219. Giolito, *supra* note 215, at 39 fig.11. *See also Executive Women, supra* note 17, at 68 (finding that at age twenty-eight there are four single college graduate men for every three single college graduate women, while a decade later at age thirty-eight there is one man for every three women).

begins to diminish to their disadvantage. Accordingly, childrearing sharing norms and labor market practices are not the only forces hindering women from pursuing both a career and children; marriage market conventions also play a significant role. While there is no definitive answer to the obstacles women face in raising a family and pursuing a successful career, a workable solution likely lies in the timing of both.