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**Feminism and Workplace Flexibility Symposium: Redefining Work:  
Implications of the Four-Day Work Week - Redefining Work:  
Possibilities and Perils**

Vicki Schultz

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## Article

### Feminism and Workplace Flexibility

VICKI SCHULTZ

*Recently Professors Schultz and Hoffman argued that, in order to achieve gender equality at work and at home, scholars and policy makers should consider adopting measures to bring the weekly working hours for both employees who work very long hours at one full-time job and employees who work fewer than full-time hours at one or more jobs into closer convergence toward a more reasonable, family-friendly mean. Today, changed economic conditions have made the idea of a reduced, or reorganized, work week a rational, pragmatic solution to a pressing problem, rather than the politically impractical idea it seemed to be just a few years ago. Yet, few feminists have embraced the idea; most seem committed to a campaign for workplace flexibility that opts for enhancing individual choice for employees, mainly women, as opposed to instantiating a new set of universal norms that could benefit everyone. In this Article, Professor Schultz considers the key differences between the recent flexibility agenda and a broader program to restructure working time. She concludes that the flexibility agenda is not inevitably at odds with the larger goal of achieving gender equality but, absent vigilance, flexibility has the potential to undermine equality in both the short and the long run.*

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# Feminism and Workplace Flexibility

VICKI SCHULTZ\*

## I. INTRODUCTION: THE NEED FOR A MORE REASONABLE WORK WEEK FOR WORKING FAMILIES

Three years ago, Allison Hoffman and I published a piece entitled *The Need for a Reduced Workweek in the United States*.<sup>1</sup> Long before the recession hit, and long before it was popular, we argued in favor of moving toward a thirty-five-hour work week as a new, inspirational, if imperfectly realized, norm for American workers.<sup>2</sup> We introduced to legal audiences a body of research, including *The Time Divide* by sociologists Jerry Jacobs and Kathleen Gerson, showing that the American workforce is bifurcated into two groups: people who work very long hours at one job—the overworked—and people who work, but cannot secure a full-time job—the underutilized. As Jacobs and Gerson point out, there is “a new *occupational divide* between jobs that demand excessively long days and jobs that provide neither sufficient time nor money to meet workers’ needs.”<sup>3</sup>

Situating ourselves within a larger feminist debate, Professor Hoffman and I argued that both overwork and underutilization threaten gender equality, particularly when these issues confront the dual-earner parenting couple that has become the modal family form. Overwork threatens gender equality, because when one person has to work very long hours, his partner may have to cut back her own hours on the job, working fewer hours than she would like in order to pick up the slack at home.

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\* Copyright © 2010 Vicki Schultz. Ford Foundation Professor of Law, Yale Law School. I am grateful to *Connecticut Law Review* for inviting me to participate in this important Symposium and to my editors, including Courtney Scala, for their excellent work on my piece and gracious accommodation of my schedule. Thanks go also to Allison Tait, my research assistant at Yale Law School, for her outstanding work, generosity with her time, and constant good cheer. Finally, I would like to express my appreciation to Professors Michael Fischl and Allison Hoffman for their faith in me, and as always, their inspiration. All errors are, of course, my own.

<sup>1</sup> Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131 (Judy Fudge & Rosemary Owens eds., 2006).

<sup>2</sup> *Id.* See also Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1957 (2000) (“[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.”).

<sup>3</sup> JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 8 (2004).

Underutilization also threatens gender equality, because when one person cannot obtain enough hours of work to earn a living (or to obtain health care or other important benefits), her partner may have to increase his hours on the job, working more hours than either of them would like in order to secure their livelihood. Thus, in both the overwork and underutilization situations, one partner may sacrifice her employment prospects, while the other sacrifices his home life. When some people (historically, disproportionately women) find it difficult to participate meaningfully in paid work and other people (historically, disproportionately men) find it difficult to participate meaningfully in family life, basic principles of gender equality are violated.<sup>4</sup>

Professor Hoffman and I argued that, as the centerpiece of a new program to allow men and women to participate equally in paid work and domestic life, feminists should support measures, legal as well as extra-legal, to create convergence around and support for a new thirty-five-hour work week. We chose thirty-five hours somewhat arbitrarily; the idea was to move both the overworked and the underutilized toward a reasonable norm for working hours that both members of a couple (or a single parent) could achieve and still have a decent amount of time left over for home responsibilities and other life pursuits. We realized that creating a norm in which both partners could work more similar and more reasonable hours would not *guarantee* gender equality. It would merely provide lower earners (disproportionately women) with the bargaining power, and higher earners (disproportionately men) with the time, to enact equality if they wished to do so.<sup>5</sup> We presented evidence showing that, in heterosexual couples in which men and women have more similar working hours and more equal earnings, the partners are more likely to share housework equally.<sup>6</sup> And, at the macro level, countries characterized by more moderate work weeks are associated with greater equality in working time

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<sup>4</sup> For the proposition that large differences in work schedules between men and women correlate with greater gender inequality, see Schultz & Hoffman, *supra* note 1, at 132. See also SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 25 (1989) (identifying “the unequal distribution of the unpaid labor of the family” as the primary issue underlying gender inequalities in society).

<sup>5</sup> For a classic analysis of household bargaining power based on transaction cost economics, see Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LIT. 581, 600 (1985) (arguing that in long-term relationships, the partner with a higher earnings capacity has a more credible threat of exit and therefore has more bargaining power than a partner with a lower earnings capacity, and thus the latter is vulnerable to “opportunistic exploitation” by the former, absent protection). See also Shelly Lundberg & Robert A. Pollak, *Bargaining and Distribution in Marriage*, 10 J. ECON. PERSP. 139, 140 (1996) (reviewing “a number of simple bargaining models that permit independent agency of men and women in marriage”). For an expanded analysis of household bargaining power, see RHONA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* 215–38 (1995) (arguing that women can and should obtain greater household bargaining power by “training up, marrying across or down, and giving solo time with babies to men”).

<sup>6</sup> Schultz & Hoffman, *supra* note 1, at 140 (citing SCOTT COLTRANE, *FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUITY* (1996), and FRANCINE M. DEUTSCH, *HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS* (1999)).

between husbands and wives than countries characterized by greater extremes.<sup>7</sup>

Of course, many of these countries provide other benefits, some of which Americans lack, that make it possible for people to take advantage of moderate working hours.<sup>8</sup> Furthermore, there are serious policy issues and issues of institutional design that would have to be confronted in order to move both the overworked and the underutilized toward more reasonable, more predictable work schedules. To accomplish these objectives, we argued in favor of providing health care and other employment-related benefits on a pro-rata basis (or, better yet, detaching such benefits from employment altogether), providing income supports for low-wage workers, and crafting a system of temporary leaves to support health remediation, care work, and other personal projects.<sup>9</sup>

Implicit in our critique of underutilization and our deep concern for underutilized workers was our recognition of the hardships posed by the irregular, on-demand schedules and the serious insecurity that characterize employment today. In fact, the term “reduced work week” was a misnomer: we were calling less for a “reduced” work week than for a new social ideal and a new set of norms about working time in which most people are able to work regular, predictable schedules for a number of hours (or a range of hours) that lies somewhere comfortably between the two poles of overwork and underutilization and that gives people the ability to plan and to participate meaningfully in important life endeavors in addition to employment. It is this notion of a more predictable, moderate work schedule that I seek to capture here in using the phrase “reasonable work week.”

## II. A NEW OPENING

As enthusiastic as audiences tend to be whenever I mention that Professor Hoffman and I have written a piece called *The Need for a Reduced Workweek in the United States*—the mere mention of the title is frequently greeted by applause from overburdened audience members—the idea has not been widely taken up by feminist lawyers or law professors.<sup>10</sup>

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<sup>7</sup> See JACOBS & GERSON, *supra* note 3, at 128–38 (analyzing the joint working hours of dual-earner couples in a survey of ten countries, including the United States, and finding that more moderate work weeks (e.g., thirty-five hours) are more conducive to gender equality).

<sup>8</sup> *Id.* at 141–45 (discussing the regulation of working time, part-time work, and the availability of childcare support in ten countries, including the United States).

<sup>9</sup> See Schultz & Hoffman, *supra* note 1, at 142–49 (suggesting some combination of legislative mandate, private industry initiative, and collective bargaining to effectuate convergence toward a moderate work week and related solutions such as comp time).

<sup>10</sup> For exceptions, see Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 4–5 (2005) (citing both *Life's Work* and *The Need for a Reduced Workweek in the United States*, and stating that a shorter work week is a key component of creating increased gender equality); Michelle A. Travis, *The Future of Work-Family Policy: Is “Choice” the Right Choice? Review of Women and*

Indeed in some quarters, our idea seems to be regarded as a wildly impractical, overly “utopian” proposal<sup>11</sup>—as though bold proposals to tame market forces for the benefit of society could only be suggested by wild-eyed radicals or wide-eyed innocents, or both.

What a difference four years, and a deep recession, makes. Today, as we enter another year of what people are calling “the greatest economic crisis since the Great Depression,”<sup>12</sup> we are encountering another period of escalating unemployment,<sup>13</sup> poverty,<sup>14</sup> housing foreclosures,<sup>15</sup> and

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Employment: Changing Lives and New Challenges, 13 EMP. RTS. & EMP. POL’Y J. 385, 428 (2009) (citing our proposal for more reasonable working hours approvingly as a way forward).

<sup>11</sup> In an earlier article, I spelled out a vision that would allow everyone—women and men alike—to participate fully in paid work and other important pursuits, such as family work. Schultz, *Life’s Work*, *supra* note 2, at 1883. Some feminists criticized my article as being overly utopian or unrealistic. See, e.g., Martha M. Ertman, *Love and Work: A Response to Vicki Schultz’s Life’s Work*, 102 COLUM. L. REV. 848, 858 (2002) (suggesting that “[i]f women engage in more wage labor and men in less, it seems likely that . . . many men would use the freed up time to play more rather than to vacuum or write Christmas cards”); Joan Williams, “*It’s Snowing Down South*”: *How To Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 821, 823 (2002) (calling the idea of a reduced work week a “rosy vision” that has “no significant constituency”). But see Philomila Tsoukala, Gary Becker, *Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 390, 409–10 (2007) (citing both Ertman’s piece and *Life’s Work* and responding to Ertman’s Christmas card scenario by saying that: “Card-writing is not the obvious equivalent of dish-washing or diaper-changing” in that Christmas card-writing could be seen as the equivalent of many activities that men engage in that build social capital).

Some critics also recognized the appeal of the reduced work week. See, e.g., Naomi Cahn & Michael Selmi, *The Class Ceiling*, 65 MD. L. REV. 435, 452–54 (2006) (citing both *Life’s Work* and *The Need for a Reduced Workweek in the United States*, and calling the reduced work week proposal unrealistic, but acknowledging its appeal and likely efficacy).

<sup>12</sup> During the 2008 Presidential election, then-candidate Barack Obama referred to the current recession as “the worst financial crisis since the Great Depression” repeatedly in speeches. E.g., Obama: *U.S. in Worst Crisis Since Depression*, REUTERS, Oct. 8, 2008, <http://www.reuters.com/article/idUSN0749084220081008>. President Obama has also used this phrase frequently. See, e.g., President Barack Obama, Remarks During the Weekly Address (Feb. 7, 2009), available at <http://www.whitehouse.gov/blog/2009/02/07/compromise> (referring to the “greatest economic crisis since the Great Depression”). Moreover, the characterization has been repeated by a number of government officials and members of the banking industry. See Martin Crutsinger, *G-20 Leaders Declare Summit a Success*, ASSOCIATED PRESS, Sept. 25, 2009 (discussing government officials’ vows to control dangerous financial imbalances); Heather Stewart, *We Are in the Worst Financial Crisis Since Depression, Says IMF*, GUARDIAN (U.K.), Apr. 10, 2008, at 28 (reporting the IMF’s warning that “[t]he US mortgage crisis has spiralled into ‘the largest financial shock since the Great Depression’”).

<sup>13</sup> The national unemployment rate has nearly doubled—rising from 4.8% to 9.7%—in the last two years alone. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, [http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data\\_tool=latest\\_numbers&series\\_id=LN\\_S14000000](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LN_S14000000) (last visited Apr. 20, 2010). Some recent news stories report guarded optimism as the unemployment rate plateaus. See Peter S. Goodman & Javier C. Hernandez, *Flat Jobless Rate a Sign the Worst Slump Is Past*, N.Y. TIMES, Mar. 6, 2010, at A1 (noting that the American economy lost fewer jobs than expected in February 2010, causing some economic experts to “expect the economy to begin steadily gaining jobs” through spring). The optimistic tone, however, is not standard. See *Jobs Still Elusive, 5 States Post Record Unemployment Rates in January*, N.Y. TIMES, Mar. 10, 2010, at B9 (noting that while the unemployment rate for the beginning of 2010 was better than December 2009, California, South Carolina, Florida, North Carolina, and Georgia all reported new highs for joblessness).

<sup>14</sup> “The increase in the poverty rate between 2007 and 2008 was the first statistically significant annual increase since 2004. The 2008 poverty rate (13.2%) was the highest since 1997.” Press Release, U.S. Census Bureau News, Income, Poverty, and Health Insurance Coverage in the United

deepening human desperation;<sup>16</sup> today, as employers and employees, businesses and union leaders, legislators and activists, policy makers and scholars address the need to cut costs and stay afloat in an equitable manner, the idea of a reduced work week suddenly appears to be a rational, pragmatic solution to a pressing problem, rather than the ridiculously impractical proposal it seemed to be just a few years ago.<sup>17</sup>

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States: 2008 (Sept. 10, 2009), available at [http://www.census.gov/Press-Release/www/releases/archives/income\\_wealth/014227.html](http://www.census.gov/Press-Release/www/releases/archives/income_wealth/014227.html). This Census Bureau press release made national news. See Eric Eckholm, *Last Year's Poverty Rate Was Highest in 12 Years*, N.Y. TIMES, Sept. 11, 2009, at A12; Don Lee & Lisa Girion, *U.S. Poverty Rate Reaches 11-Year High*, L.A. TIMES, Sept. 11, 2009. 2009 poverty rates were even worse. See Heidi Shierholz, *New 2008 Poverty, Income Data Reveal Only Tip of the Recession Iceberg*, ECON. POL'Y INST., Sept. 10, 2009, available at [http://www.epi.org/publications/entry/income\\_picture\\_20090910/](http://www.epi.org/publications/entry/income_picture_20090910/) (noting that the poverty rate increased from 12.5% in 2007 to 13.2% in 2008).

<sup>15</sup> A January 2010 year-end report by RealtyTrac, finding a record 2.8 million U.S. properties with foreclosure filings in 2009, shows a total of 3,957,643 foreclosure filings—default notices, scheduled foreclosure auctions, and bank repossessions—were reported on 2,824,674 U.S. properties in 2009, a 21% increase in total properties from 2008 and a 120% increase in total properties from 2007. The report also shows that 2.21% of all U.S. housing units (1 in 45) received at least one foreclosure filing during the year, up from 1.84% in 2008, 1.03% in 2007, and 0.58% in 2006. Press Release, RealtyTrac, *RealtyTrac® Year-End Report Shows Record 2.8 Million U.S. Properties with Foreclosure Filings in 2009* (Jan. 14, 2010), <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?itemid=8333>.

<sup>16</sup> For one cut on the desperation, see Don Peck, *How a New Jobless Era Will Transform America*, ATLANTIC, Mar. 2010, available at <http://www.theatlantic.com/magazine/archive/2010/03/how-a-new-jobless-era-will-transform-america/7919/> (describing the psychology of unemployment and stating that “men in particular described the erosion of their identities, the isolation of being jobless, and the indignities of downward mobility”). Although some commentators claim that the recession and its effects are sufficiently gendered to warrant the label “mancecession,” there are also those who point to the equal hardship suffered by women. See Posting of Catherine Campell to *The Mancecession*, <http://economix.blogs.nytimes.com/2009/08/10/the-mancecession/> (Aug. 10, 2009, 14:54 EST) (arguing the former); Nancy Cook, *What Mancecession?*, NEWSWEEK, July 16, 2009, available at <http://www.newsweek.com/id/206917> (discussing the latter); see also Press Release, Am. Psychiatric Ass'n, *Women's Mental Health Hit Hard by Recession, Yet Many Show Resilience and Resourcefulness in Coping with Stress* (Apr. 2009), available at <http://www.psych.org/MainMenu/Newsroom/NewsReleases/2009NewsReleases/WomensMentalHealthHitHardbyRecession.aspx>.

<sup>17</sup> In the United States, Utah was the first state to mandate a four-day, ten-hour-a-day work week for state employees. See Jenny Brundin, *Utah Finds Surprising Benefits in 4-Day Workweek*, NPR, Apr. 10, 2009, <http://www.npr.org/templates/story/story.php?storyId=102938615>; Robert Gehrke, *Utah Sticks with Four-Day Workweek*, SALT LAKE TRIB., Dec. 2, 2009. Utah's program does not reduce working hours or pay, but some other programs do. Many new furlough programs, both voluntary and mandatory, recently have been instituted, particularly at universities such as the Universities of California, Idaho, New Mexico, and Colorado. In these programs, employees work reduced hours in exchange for reduced pay. See Rachel Cook, *Students Are Bracing for Tuition Hikes*, IDAHO FALLS POST REG., Mar. 10, 2010, at A1; Jesse McKinley, *Thousands in California Protest Cuts in Education*, N.Y. TIMES, Mar. 5, 2010, at A13; Martin Salazar, *Job Cuts, Furloughs Possible at UNM*, ALBUQUERQUE J., Dec. 11, 2009, at A1; *Bracing for Latest Budget Bloodbath*, ST. NEWS SERV., Oct. 27, 2009.

Consideration of a reduced work week is not limited to the public sector. There also seems to be a new willingness to consider a reduced work week for both partners and staff in law firms. See Emma Sadowski, *London's Norton Rose Explores Reduced Work Hours as Layoff Preventative*, LEGAL WK., Mar. 19, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202429035343>. Human resources professionals have even begun promoting the idea. See Claudia N. Lombardo, *Shorter Workweek in a Tough Economy*, HR HERO, Feb. 4, 2010, <http://hrhero.com/hl/articles/2010/02/04/shorter-workweek-in-a-tough-economy/> (recommending the reduced work week in order to prevent layoffs and to start “going green”).

Economist Dean Baker proposes modest employer tax credits to induce employers to reduce working time rather than laying off workers (and to make up for some of the employees' lost wages).<sup>18</sup> For example, he proposes giving a credit of up to \$2500 to cover ten percent of the pay of someone earning \$25,000 a year or less. Baker explains that if employers of fifty million workers reduced their employees' working time by an average of five percent, demand would be little changed, because the workers would be getting paid almost the same despite shorter hours. "With these workers putting in 5 percent fewer hours, and demand unchanged, employers should want to hire (or not lay off) roughly 5 percent more workers, or 2.5 million workers." Thus, he argues, a reduced work week tax credit is a "bureaucracy-free way to reduce the unemployment rate at a relatively low cost."<sup>19</sup> As a long-term benefit, Baker adds, "workers and employers may like the new work arrangements and keep them in place after the tax credit is removed."<sup>20</sup>

Baker's idea is considered a serious policy option: there are bills pending in state legislatures, such as Maryland's,<sup>21</sup> to award this sort of tax credit to employers who offer a reduced work week. In addition, legislation pending before Congress would offer incentives for employers to reduce working time as one strategy for achieving workplace flexibility.<sup>22</sup> Even without such incentives, many employers are reducing hours as a way of cutting costs in order to avoid layoffs and create a sense of shared sacrifice in hard times. A recent survey of 245 companies found

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<sup>18</sup> Posting of Dean Baker to Room for Debate, <http://roomfordebate.blogs.nytimes.com/2009/03/29/europes-solution-take-more-time-off/> (Mar. 19, 2009, 20:00 EST). Baker has also written a related issue paper for the Center for Economic and Policy Research on providing tax credits to employers in reducing working time to prevent layoffs. See generally DEAN BAKER, CTR. FOR ECON. & POLICY RESEARCH, JOB SHARING: TAX CREDITS TO PREVENT LAYOFFS AND STIMULATE EMPLOYMENT (Oct. 2009), available at <http://www.cepr.net/documents/publications/job-sharing-tax-credit-2009-10.pdf>.

<sup>19</sup> Posting of Dean Baker, *supra* note 18.

<sup>20</sup> *Id.*

<sup>21</sup> Income Tax Credit-Flexible Workweek, H.B. 1207, 2009 Leg., 426th Sess. (Md. 2009). The bill's purpose is to provide tax credits to businesses that allow employees to work "a flexible workweek," described as either "four 10-hour days per week" or "nine 9-hour days every 2 weeks." *Id.* § 10-728(A)(3)(I)-(II). California Assembly Member Van Tran has introduced a bill in the California Assembly that would allow workers to choose to work four ten-hour days. Workplace Flexibility Act of 2009, 2009 CA A.B. 141, 2009-10 Reg. Sess. (Cal. 2009). Interestingly, in each of these bills, reduced work week proposals are described under the rubric of "flexibility"—a fact that may reflect the now ubiquitous usage and appeal of that concept.

<sup>22</sup> The Working Families Flexibility Act, H.R. 1274, 111th Cong. (2009), introduced in March 2009 by Reps. Carolyn Maloney (D-N.Y.), George Miller (D-Cal.), John Lewis (D-Ga.), and Elijah Cummings (D-Md.), has been referred to the House Subcommittees on Education and Labor, Oversight and Government Reform, House Administration, Judiciary, and Courts and Competition Policy. The bill would give employees the right to request a change in the terms or conditions of employment "if the change relates to—(1) the number of hours the employee is required to work; (2) the times when the employee is required to work; or (3) where the employee is required to work." *Id.* § 3(a). While still a senator, President Obama co-sponsored a companion bill in the Senate along with former Senator Ted Kennedy (D-Mass.) and former Senator Hillary Clinton (D-N.Y.). Working Families Flexibility Act, S. 2419, 110th Cong. (2007).

that thirteen percent adopted reduced work weeks in February 2009, and another eight percent were considering doing so, up from only two percent in December 2008.<sup>23</sup>

This is the time for innovation. To paraphrase President Obama's White House Chief of Staff, Rahm Emanuel, people who are concerned about gender equality and about Americans' well-being should not let a good crisis go to waste. Although taking steps to create a more reasonable work week norm does not *necessarily* advance gender equality—and, in fact, it is easy to imagine some versions that could set it back<sup>24</sup>—the willingness of law makers and business leaders to consider a reduction in working time, together with Congress's enactment of universal health care, creates an opportunity for progressive people to push for pro-women, pro-family, and, ultimately, pro-people measures to create reasonable working hours for most Americans. This is an opening that may not come along again for many years.

### III. WHY AREN'T MORE FEMINISTS ASKING FOR REASONABLE WORKING HOURS?

Feminist lawyers and law professors have the theoretical, practical, and legal wisdom to create sound policy measures as well as the analytical and political skills to get such measures noticed. And yet, from a brief review, it appears that few feminists are seizing the moment to craft or call for proposals for more reasonable working hours, despite the fact that doing so could help alleviate work/family conflicts, help women and men obtain more secure jobs and better benefits, and promote gender equality in general.<sup>25</sup> Instead, the majority of feminists and women's rights

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<sup>23</sup> Rachel Bernstein, *Four-Day Workweek Goes from Luxury to Necessity for Some Businesses*, BALT. BUS. J., Mar. 13, 2009, <http://baltimore.bizjournals.com/baltimore/stories/2009/03/16/story5.html?b=1237176000^1793574>.

<sup>24</sup> Such arrangements might include programs that do not stabilize work schedules and therefore create unpredictability, making it harder for people to organize household schedules. Similarly, forced furloughs or work reductions that strip employees of income and even, potentially, of benefits by dropping them below a certain hours-per-week threshold, could represent a setback unless steps were taken to compensate employees for those losses in the long run. Conversely, however, systems in which a reduced schedule is made entirely optional for individual employees run the risk of creating more sex segregation and further marginalizing women workers, as discussed below. See *infra* notes 33–36 and accompanying text.

<sup>25</sup> In preparing this Article, I canvassed the law review literature and reviewed the websites of a number of leading women's rights organizations and found that few, if any, proposed or even seriously analyzed measures to converge on a more reasonable work week norm. For example, the National Organization for Women does not currently include employment, workplace, or work week issues among their "Top Priority Issues" or "Other Important Issues." National Organization for Women, Key Issues, <http://www.now.org/issues/> (last visited Apr. 21, 2010) (listing issues important to the organization with "Economic Justice" being one of the most relevant key issues). Ms. Foundation for Women lists "Economic Justice" as a "Broad Change Area," but does not discuss workplace arrangements. Ms. Foundation for Women, Economic Justice, [http://ms.foundation.org/our\\_work/broad-change-areas/economic-justice/economic-justice](http://ms.foundation.org/our_work/broad-change-areas/economic-justice/economic-justice) (last visited Apr. 21, 2010). The Feminist Majority Foundation lists "Sweatshops" as an area of advocacy, but nothing closer to workplace

organizations are urging a set of programmatic changes that fall under the umbrella concept of “workplace flexibility.”<sup>26</sup> Even in the current economic climate, it seems, feminists are continuing to advocate for programs that offer flexibility to individual employees rather than for policies that would promote more predictable, more reasonable working hours for employees across the board. As a result, systemic problems go unaddressed and business practices that create inequality and disempower workers go unchallenged.

Flexibility programs do sometimes envision allowing individuals to request reduced hours and to modify other aspects of their work schedules in the name of achieving greater flexibility. Although these sorts of modifications would often be very beneficial to employees, there are nonetheless key conceptual and practical differences between such proposals to afford flexibility and measures to create a reasonable work week. One of the points of departure is that workplace flexibility programs create individualized solutions that allow particular people to maneuver around workplace norms that create gender inequality, whereas a

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flexibility. Feminist Majority Foundation, *Feminists Against Sweatshops*, <http://feminist.org/other/sweatshops/index.html> (last visited Apr. 21, 2010). Organizations that do address workplace issues for women include the National Women’s Law Center and Legal Momentum. The National Women’s Law Center lists “Workplace Fairness & Flexibility” as an issue and has online information about equal pay, pregnancy discrimination, sexual harassment, the Family and Medical Leave Act, affirmative action, women in the military, and equal opportunity. National Women’s Law Center, *Workplace Fairness & Flexibility*, <http://www.nwlc.org/display.cfm?section=employment> (last visited Apr. 21, 2010). Legal Momentum lists “Employment Rights” as an issue but does not mention regulation of working time. Legal Momentum, *Employment Rights*, <http://www.legalmomentum.org/issues/employment-rights.html> (last visited Apr. 21, 2010).

<sup>26</sup> Feminist organizations have tended to emphasize measures to facilitate workplace “flexibility” for individual employees rather than measures to create a more standardized, reasonable work week for all or most employees. The Alfred P. Sloan Foundation has funded efforts to promote workplace flexibility. One prominent Sloan-funded organization is Workplace Flexibility 2010. Housed at Georgetown Law School and directed by Professor Chai Feldblum (now, EEOC Commissioner), the organization is a center “designed to support the development of a comprehensive national policy on workplace flexibility.” Georgetown Law, *Workplace Flexibility 2010*, <http://www.law.georgetown.edu/workplaceflexibility2010/about/mission.cfm> (last visited Apr. 21, 2010). Their policy initiatives include advocating for flexible work arrangements, time off, and career maintenance and re-entry. *Id.* A second prominent organization is the Center for WorkLife Law, housed at UC Hastings College of Law and directed by Professor Joan Williams, which emphasizes the issues of “workplace flexibility [and] flexibility bias,” focusing on family responsibilities discrimination as a new form of employment discrimination. WorkLife Law, *Public Policy: Workplace Flexibility & Flexibility Bias*, <http://www.worklifelaw.org/WorkplaceRedesignFlexibility.html> (last visited Apr. 21, 2010). Feminist scholarship has also focused in large part on the idea of workplace flexibility. *But see generally* WORK-LIFE POLICIES (Ann C. Crouter & Alan Booth eds., 2009) (discussing some of the problems attendant to the flexibility agenda). Several chapters within *Work-Life Policies* are particularly relevant. *See, e.g.*, Chai R. Feldblum, *Policy Challenges and Opportunities for Workplace Flexibility: The State of Play*, in WORK-LIFE POLICIES, *supra*, at 251, 252 (examining future directions for research); Ellen Ernst Kossek & Brian Distelberg, *Work and Family Employment Policy for a Transformed Labor Force: Current Trends and Themes*, in WORK-LIFE POLICIES, *supra*, at 3, 3 (addressing the state of work/life research); Susan J. Lambert, *Making a Difference for Hourly Employees*, in WORK-LIFE POLICIES, *supra*, at 169, 170 (addressing issues affecting hourly workers); Ruth Milkman, *Flexibility for Whom? Inequality in Work-Life Policies and Practices*, in WORK-LIFE POLICIES, *supra*, at 197, 200–04 (addressing issues affecting lower wage workers).

reasonable working hours program attempts to change those norms in ways that would help level the playing field for men and women across the board. Thus, although the workplace flexibility agenda offers some benefits to employees and holds allure for many feminists, it is appropriate to sound a cautionary note about embracing flexibility alone. Flexible workplace options are no panacea. In fact, pushing flexibility in and of itself, without attending to its pitfalls, runs the risk of lending legitimacy to a larger neoliberal project of labor “flexibilization”<sup>27</sup> that is anything but friendly to women, families, or workers.

#### A. What Is “Flexibility”?

There are many definitions of workplace flexibility,<sup>28</sup> but most definitions include a few key components:

1. Flexible work arrangements, including the ability to work part-time or part-year, to take phased retirement, to work a compressed work week (like the four-day, forty-hour week), to telecommute, or to schedule working hours that are not the standard times that most employees work;

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<sup>27</sup> Although the origin of this term is unclear, it has been used frequently since the 1990s in European and American scholarship to refer to a set of changed employment patterns that have emerged with the most recent wave of globalization. According to Katherine Stone, “[f]lexibilization refers to the changing work practices by which firms no longer use internal labour markets or implicitly promise employees lifetime job security, but instead seek flexible employment relations that permit them to increase or diminish their workforce and reassign and redeploy employees with ease.” Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time*, 44 OSGOODE HALL L.J. 77, 78 (2006) (emphasis omitted). Jerry Jacobs and Kathleen Gerson, however, note a difference between the American and European uses: “In the U.S. context, ‘flexible’ work arrangements refer to schemes designed to help workers respond to family concerns; in Europe, however, the term ‘flexibilization’ refers to employers’ desire to bend regulations such as maximum-hours rules to enhance productivity and cut labor costs.” JACOBS & GERSON, *supra* note 3, at 129. It is precisely the slippage between those two different concepts that concern me here.

<sup>28</sup> The U.S. Department of Labor’s Women’s Bureau defines “workplace flexibility” as situations in which “[w]orkday start and end times differ from the workgroup’s standard, yet the same number of hours per day is maintained.” U.S. DEP’T OF LABOR, WOMEN’S BUREAU, FLEX-OPTIONS GUIDE: CREATING 21ST CENTURY WORKPLACE FLEXIBILITY 4 (Apr. 2009), available at <http://www.we-inc.org/flexguide.pdf>. The Women’s Bureau report details a menu of flexibility options that encompass:

[1] Scheduling of Hours (e.g., flextime, compressed work weeks, shift flexibility) . . . [2] Amount of Hours (e.g., part-time, job sharing) . . . [3] Place of Work (e.g., telecommuting, seasonal relocation) . . . [4] Management of Time (e.g., meeting-free flexibility, report late) . . . [5] Organization of Career (e.g., off- and on-ramps, leaves of absence) . . . [and] [6] Other Time Off (e.g., personal days, floating holidays, vacation buying).

*Id.* at 1. The Workplace Flexibility 2010 initiative at Georgetown Law School adds: “Flexible Work Arrangements (FWAs) alter the time and/or place that work is conducted on a regular basis—in a manner that is as manageable and predictable as possible for both employees and employers.” Georgetown Law, Workplace Flexibility 2010, Flexible Work Arrangements, [http://workplaceflexibility2010.org/index.php/policy\\_components/flexible\\_work\\_arrangements](http://workplaceflexibility2010.org/index.php/policy_components/flexible_work_arrangements) (last visited Apr. 21, 2010).

2. Paid and unpaid leaves for different lengths of time to deal with family, medical, and personal issues, including sick leave and short-term disability leaves, family leave to care for a newborn or sick family member, or time off to attend parent-teacher conferences and the like; and
3. Career maintenance and re-entry (sometimes known as “off-ramps and on-ramps”), including moving from full-time to part-time work and vice versa, re-training for employees re-entering the workforce, and related mechanisms for keeping people connected to the workplace during long absences, such as allowing them to engage in project-based or other non-standard work.

Looking at this list, any reader might ask: what could possibly be wrong with demanding, or having, this type of flexibility? Every individual should have such options—indeed, having them would give all employees the freedom to craft their own work lives in a way that would suit their own needs at any given moment in the life course. Put this way, we can see the appeal of the flexibility agenda: it offers the prospect of individual *choice*—an ideal that resonates with deeply-held American commitments to individualism and freedom, ideals that have frequently appealed to second wave feminists.<sup>29</sup>

Yet, I would argue, the notion that workplace flexibility allows each of us, as individuals, to craft a life free of antiquated workplace structures and gender norms, such as the “ideal-worker norm,”<sup>30</sup> is an illusion. Individuals do not live or work in a vacuum; they live and work in institutions and in groups of other people. Allowing individuals to opt out of an existing set of norms—especially norms that are as solidified and shored up by legal and institutional structures as are the current patterns of overwork and underutilization—does not necessarily change those norms. As individuals pursue their own paths, their choices tend to aggregate and

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<sup>29</sup> The idea of choice has been very important in second wave feminist discourse in that many feminist scholars and activists have simultaneously embraced the idea of individual choice and sought to uncover the way societal institutions structure and create gender bias around people’s choices. For a good overview of the development of feminist thought, see DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 12 (1989) (examining how American feminism grew out of a liberal tradition and therefore placed great value on notions of “individual liberty and autonomy”). A thread of feminist critique co-exists, challenging the idea that true choices are available to women. See Kathryn Abrams, *Ideology and Women’s Choices*, 24 GA. L. REV. 761, 795 (1990) (discussing “ideological determination” in women’s decision making and suggesting that feminists need “alternate modes of discourse”).

<sup>30</sup> See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 5, 64 (2000) (identifying and deconstructing the “ideal worker norm”). Earlier work simply referred to the same phenomenon as a “male norm[.]” Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1138 (1986).

accrete into settled patterns—patterns that are sometimes unanticipated, but that are often predictable with a little excavation and foresight. As these patterns come to be taken for granted, they begin to ground widely-held assumptions about social life. What are the key assumptions upon which most programs of workplace flexibility are based, and what patterns are emerging or are likely to emerge as individuals pursue flexible workplace options?

### B. *Assumptions and Accretions*

As I have argued, one of the key assumptions—and alleged virtues—of workplace flexibility is that flexible work arrangements allow individuals the freedom to craft their own schedules and places of work. Yet, the social meaning and the value of those choices is always constrained by what other people are doing. In the real world, “choice” often reduces to opting for something different from the mainstream pattern, rather than altering that pattern for everyone in a way that widens the horizon of available choice and makes one’s own choice more meaningful.

In many places that offer flexible work options, such as the right to reduce one’s hours, to telecommute, or to take family leave, it is likely that women will disproportionately opt for these choices.<sup>31</sup> This prospect may materialize for a variety of reasons, including labor market discrimination that depresses women’s wages and makes it less expensive for women to cut back on their work than their male spouses or partners, at least in the short run. To the extent that it is associated with women’s needs and with family caretaking, workplace flexibility will assume—indeed, already has assumed—a gendered character and meaning.<sup>32</sup> Moreover, in the name of flexibility, many firms will offer part-time work or reduced hours (versus full-time and even overtime), telecommuting (versus intense face time), Blackberries (versus true “off-time”), unpaid leaves (versus continuing presence), and/or casual employment (versus regular hours and a stable

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<sup>31</sup> Jacobs and Gerson found in their cross-national study that it is primarily women who take advantage of part-time and reduced hours work in European countries that offer such options. JACOBS & GERSON, *supra* note 3, at 136–47. In the American context, see ELLEN GALINSKY, KERSTIN AUMANN, & JAMES T. BOND, FAMILIES & WORK INST., *TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND AT HOME 4* (2009), available at [http://familiesandwork.org/site/research/reports/Times\\_Are\\_Changing.pdf](http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf) (stating that in the United States women are more likely to work less than thirty-five hours per week than men, though men are more likely to do so than in the past). See also CYNTHIA NEGREY, *GENDER, TIME, AND REDUCED WORK* 23 (1993) (stating that “women tend to be concentrated in certain types of reduced work”); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 711 (1999) (stating that “strikingly few men take any significant paternity leave”).

<sup>32</sup> Cf. Krista Lynn Minnotte et al., *Occupation and Industry Sex Segregation, Gender, and Workplace Support: The Use of Flexible Scheduling Policies*, 31 J. FAM. ISSUES 656, 676 (2010) (stating that “in industries with higher percentages of women, individuals in more sex-atypical occupations (women in more male-dominated and men in more female-dominated) appear more concerned with how using flexible scheduling policies will affect their careers”).

career trajectory)—patterns which, when set against the backdrop of the more regularized employment norms to which most men adhere, will tend to exacerbate women’s marginalized status rather than improve it.

Ultimately, then, allowing people to exercise individual choice for flexible work options will frequently exacerbate, and even create, new forms of sex segregation in the workplace rather than undermining those patterns. As Sandra Fredman states, “Flexibility is the golden word of modern labour market policy. . . . The real life experience is very different.”<sup>33</sup> In real life, Fredman finds, flexibility is associated with “low-paid, low-productivity jobs that do not offer job security, access to training, [or] career development opportunities.”<sup>34</sup> Michelle Travis’s analysis of telecommuting confirms Fredman’s analysis: “Many women telecommuters are finding themselves in exploitative working conditions, as telecommuting arrangements are linked to contingent work status, lower pay, the loss of benefits, less job security, and fewer training and advancement opportunities.”<sup>35</sup> Travis concludes that “telecommuting will likely become for many women a second generation ‘mommy track’ that provides flexibility at the price of marginalization.”<sup>36</sup>

These observations raise a larger, more theoretical point: workplace flexibility programs and their advocates assume that the rhythms and dynamics of family life, and any patterns of sex segregation that are associated with flexible work options, are *exogenous* to workplace arrangements. Indeed, the whole point of flexible work options is to “accommodate” women’s greater involvement with childcare and homemaking by providing more flexible arrangements for family caregivers.<sup>37</sup> Yet, the arrangements of the new economy are not simply responding to, but are actively *producing*, new family dynamics and patterns, as individual families struggle and even reconfigure to adapt to employers’ demands for flexible, on-call labor.<sup>38</sup> In recent decades, as the

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<sup>33</sup> Sandra Fredman, *Precarious Norms for Precarious Workers*, in PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY, *supra* note 1, at 177, 177.

<sup>34</sup> *Id.*

<sup>35</sup> Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261, 265 (2002).

<sup>36</sup> *Id.* at 266. Felice Schwartz sparked the creation of the term “mommy track” in her article, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.–Feb. 1989, at 65, 71–73. Immediate debate and criticism followed. See Beverly Beyette, *A New Career Flap; What’s a Mommy Track and Why Are So Many Women Upset About It?*, L.A. TIMES, Mar. 17, 1989, at View 1; Ellen Goodman, Op-Ed., *Rigid Call for Flexibility*, BOSTON GLOBE, Mar. 16, 1989, at 15. For a more recent take on the phenomenon, see Angie Kim, *The Mommy Track Turns 21*, SLATE, Mar. 31, 2010, <http://www.slate.com/id/2249312/> (speculating whether or not the “mommy track” concept has been unfairly criticized).

<sup>37</sup> See Schultz, *Life’s Work*, *supra* note 2, at 1954–55, 1895 (noting that despite demands for such accommodation and “contrary to the predictions of human capital theory, women are not selecting female-dominated fields to accommodate family responsibilities” and therefore sex segregation in employment is due more to labor market discrimination than to gendered patterns in the home).

<sup>38</sup> The newest wave of globalization has produced a particularly dramatic example in the

more developed economies' manufacturing sectors have given way to the service and knowledge sectors and more firms have adopted global, first-in-time methods of production and service delivery that emphasize the need for flexible labor, more and more people have been shunted into casual forms of work that provide little or no job security or benefits and that entail unpredictable, short-hours schedules that force employees to piece together two or more jobs in order to survive.<sup>39</sup>

Older gender discourses promoting the idea that women prefer such casualized arrangements because they allow women to fulfill their family responsibilities<sup>40</sup> are mobilized to justify these newer patterns of casualization and overwork, which, ironically, render predictable family life difficult if not impossible.<sup>41</sup> Yet, as I have analyzed elsewhere, it is not only women who have been subjected to these harsh new realities: many men have also.<sup>42</sup> In light of these new trends and the rise of economic

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movement of poor women from less developed countries around the globe to do childcare and housework for wealthier families in more developed countries. *See generally* BARBARA EHRENREICH & ARLIE RUSSELL HOCHSCHILD, *GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY* (2002). These women often live with their employers' families and are sometimes on-call almost around the clock. For an analysis of the effects on the children who are left behind by poor mothers who migrate in search of work, see RHACEL SALAZAR PARREÑAS, *CHILDREN OF GLOBAL MIGRATION: TRANSNATIONAL FAMILIES AND GENDERED WOES* 120–40 (2005).

<sup>39</sup> *See, e.g.*, JACOB S. HACKER, *THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT—AND HOW YOU CAN FIGHT BACK* 35–60, 63 (2006) (detailing the “rising specter of workplace insecurity”); KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 67–86, 268 (2004) (detailing the new realities of employment patterns and chronicling the shift from an industrial- to technology-based economy that is creating jobs now described as precarious); Schultz, *Life's Work*, *supra* note 2, at 1919–28 (discussing the rise of employment insecurity and loss of identity as the new economy shifts to contingent jobs at the expense of committed careers). For a discussion of the fact that the rise in precarious work is affecting women disproportionately, see Judy Fudge & Rosemary Owens, *Introduction to PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY*, *supra* note 1, at 3, 12–15. The Institute for Women's Policy Research found that women actually perceive themselves to be at economic risk more than men do. *See* VICKY LOVELL ET AL., *INST. FOR WOMEN'S POLICY RESEARCH, WOMEN AT GREATER RISK OF ECONOMIC INSECURITY: A GENDER ANALYSIS OF THE ROCKEFELLER FOUNDATION'S AMERICAN WORKER SURVEY*, at i (2008).

<sup>40</sup> *See* Schultz, *Life's Work*, *supra* note 2, at 1892–1919 (discussing three modes of thought—human capital theory, employment discrimination law, and feminist legal thought—that embrace the “conventional conception of femininity”).

<sup>41</sup> *See* Schwartz, *supra* note 36, at 71–73 (arguing that some women are more committed to their families than their careers and are more costly to employ than men and recommending a two-tiered system that came to be known as the “mommy track”). This debate was rekindled with great energy in 2003 when Lisa Belkin wrote about the “Opt-Out Revolution.” Lisa Belkin, *The Opt-Out Revolution*, *N.Y. TIMES MAG.*, Oct. 26, 2003, at 42 (“It's not just that the workplace has failed women. It is also that women are rejecting the workplace.”); *cf.* Sylvia Ann Hewlett & Carolyn Buck Luce, *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, *HARV. BUS. REV.*, Dec. 2006, at 49, 59 (arguing that women, especially mothers, “simply can't—or don't choose to—work exceedingly long hours”).

<sup>42</sup> *See* Schultz, *Life's Work*, *supra* note 2, at 1884, 1919–28 (explaining how “[i]t isn't simply women, racial minorities, or other low-wage workers who are experiencing the new insecurities: The changes are affecting all but those at the very top . . . [A]lmost all workers . . . are experiencing the problems and dilemmas that women have traditionally faced”).

insecurity that has accompanied them,<sup>43</sup> it should not be entirely surprising that even marriage is becoming the province of the middle classes, a luxury good that many people of lower means no longer feel they can afford.<sup>44</sup>

Although the new economy is producing work and family arrangements that are reshaping class relations, workplace flexibility programs have not caught up with those new class configurations and sometimes even build in older forms of class bias. Many advocates and managers of such programs tend to assume that the people who will take advantage of flexible work options are white-collar employees, mostly from the professional or managerial classes. Flexibility rhetoric typically targets professional and managerial employees who work long hours in one demanding job and tends to ignore the low-wage workers who make do with menial, low-hours jobs, rather than addressing both groups and dealing with the bifurcation.<sup>45</sup> Low-wage workers do have a need for greater flexibility: many of them work in jobs characterized by rigid and unforgiving schedules that can lead to lower mobility or even job loss for those who cannot comply.

Yet, contrary to the assumption underlying many flexibility programs, the major problem facing most employees is not the rigidity, but the unpredictability, of their work schedules. Both overworked and underutilized employees face work schedules that are highly erratic and unpredictable—schedules that make planning family life and covering family and personal commitments difficult, if not impossible, to accomplish. It is widely understood that people who work long hours at professional and managerial jobs are frequently expected to be on-call to work for as long as it takes to get the job done, cancelling other plans as necessary. People who have more casual and lower-paying jobs often confront a similar unpredictability. Their employers often tell them, week by week, how many hours, and when and where, they are expected to work and ask the employees to be on-call to work, on short notice, virtually on demand.<sup>46</sup>

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<sup>43</sup> In the first chapter of Jacob Hacker's *The Great Risk Shift*, he contends that economic "insecurity is increasingly plunging ordinary middle-class families into a sea of economic turmoil." HACKER, *supra* note 39, at 13. He cites the increase in personal bankruptcy filings, the growing mortgage foreclosure rate, and the decline in real income as factors in that economic insecurity. *Id.* at 13–15.

<sup>44</sup> See Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 855 (2004) (discussing the transformation in the meaning of marriage, especially for lower-income individuals: "it is a much sought-after but elusive goal"); see also KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 112 (2005) (showing that poor people believe "it is vitally important that both [women] and their male partners be economically set prior to marriage").

<sup>45</sup> For a discussion on this topic, see Milkman, *supra* note 26, at 198–99.

<sup>46</sup> See JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR WORKLIFE LAW, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 26 (2010) ("Just-in-time scheduling" means that some retail establishments decide how much staff to schedule

Historically, few workplace flexibility programs have acknowledged the problems confronting low-wage workers, let alone proposed concrete steps to address them.<sup>47</sup> For all these reasons, there is cause to be concerned about whether measures to advance workplace flexibility, standing alone, will be a match for employers' demands for flexibilization. Worse still, workplace flexibility rhetoric can be mobilized in the service of these demands by employers, who sometimes appeal to their employees' and customers' needs for flexibility as a way of legitimizing the new irregularities.<sup>48</sup>

In fact, organizations that adopt and implement workplace flexibility programs can be expected to craft and implement them in ways that serve managerial ends.<sup>49</sup> In this regard, it may be telling that the workplace flexibility agenda is almost always connected to, and justified by, a projected increase in business profits and productivity. Across various industries and sectors of the economy, human resource professionals are writing "Workplace Flexibility" guides and making "The Business Case

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[in a given] week based on how many customers were in the store during the same hours the week prior. Many more employers give workers only a few days notice of what hours they are required to work the following week."); Julia R. Henly et al., *Nonstandard Work Schedules: Employer- and Employee-Driven Flexibility in Retail Jobs*, 80 SOC. SERV. REV. 609, 619–23 (2006) (providing specific examples of the perils of flexibilization). See also AMY RICHMAN ET AL., CORPORATE VOICES FOR WORKING FAMILIES, WORKPLACE FLEXIBILITY FOR LOWER-WAGE WORKERS 9–10, 13–14 (2006), available at <http://www.cvworkingfamilies.org/system/files/lowerwageflexreviewreport.pdf> (reporting that low-wage workers have "significantly less access to flexibility" in terms of flexible work arrangements and discussing the unpredictable, non-standard schedules low-wage workers often face).

<sup>47</sup> A notable recent exception is Joan Williams and Heather Boushey's recent report for the Center for WorkLife Law at UC Hastings College of Law, which discusses the problems of work/family conflict faced by the poor, as well as by the professional and middle classes, in some detail. See WILLIAMS & BOUSHEY, *supra* note 46, at 11–32 (acknowledging the unpredictable schedules faced by low-wage workers under the rubric of "scheduling inflexibility," but failing to offer proposals to lead to greater regularization); see also Lambert, *supra* note 26, at 170 (addressing issues affecting hourly workers); Milkman, *supra* note 26, at 200–04 (addressing issues affecting lower wage workers).

<sup>48</sup> A good example is Starbucks's use of the term "optimal scheduling." According to a Starbucks spokeswoman, the system is "a win-win for our customers and partners that will lead to more stable scheduling and more satisfied partners." Liza Featherstone, *Starbucks Blues: Lean Times and Labor Pains Are Tarnishing the Coffee Giant's Image*, BIG MONEY, Oct. 29, 2008, <http://www.thebigmoney.com/articles/saga/2008/10/29/starbucks-blues?page=full>. At Starbucks, "[a]ny . . . employee who wants full-time hours must be available to work 70 percent of their store's hours of operation," which "[i]n an average store . . . comes to more than 80 hours a week, which makes it impossible for those wanting full-time work to plan other activities, like attending school, let alone planning for childcare." WILLIAMS & BOUSHEY, *supra* note 46, at 24.

<sup>49</sup> See Lauren B. Edelman, Sally Riggs Fuller, & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1590–93 (2001) (discussing the process of managerialization in which firms adapt progressive legal and feminist ideals to suit their own ends). For examples of how organizations have adapted other progressive legal reforms to their own ends in ways that undermined the original aims of the reforms, see *id.* at 1609–15 (discussing how human resource professionals developed diversity programs that undercut the original goals of equal employment opportunity); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2119–31 (2003) (describing how human resource professionals developed sexual harassment policies that focused on the managerial goal of controlling employee sexuality, while neglecting the broader goal of achieving workplace gender equality).

for Flexibility.”<sup>50</sup> The Department of Labor’s Women’s Bureau’s *Flex-Options Guide* proclaims: “Flexibility is no longer merely about accommodating highly valued talent. Business leaders are learning how to position flexibility as a powerful management tool.”<sup>51</sup>

Just as employers have conscripted feminist flexibility rhetoric in the name of achieving business goals, so have some feminists cited business goals and developments approvingly in the name of achieving flexibility for women. Many feminists who advocate flexible work options seek to justify them on the ground that they will increase employers’ productivity. As Susan Lambert writes, “The lack of opposition against labor flexibility practices is also part of the story behind the transfer of risk from corporations onto workers . . . [and] current public discourse on the benefits of increased flexibility options may contribute to the use of labor flexibility practices that undermine stability in hourly jobs.”<sup>52</sup> Other feminists seem to suggest that the decline of full-time employment and the rise of contingent or casual work is a harbinger of a new economic order that may promise greater gender equality.<sup>53</sup> Not only is such a celebration premature; it may also represent what Hester Eisenstein has called a “dangerous liaison” between feminism and neoliberalism.<sup>54</sup> To the extent that feminists accept and even promote workplace flexibility without analyzing the potential gender dynamics and actual empirical patterns that emerge under the new flexible arrangements, they risk romanticizing the new global capitalism and obscuring the ways it has imposed casualization on employees rather than providing them with genuine choice.

#### IV. DANGEROUS DALLIANCE

In a recent article, Nancy Fraser cautions that “second-wave feminism has unwittingly provided a key ingredient of the new spirit of neoliberalism.”<sup>55</sup> She writes:

Our critique of the family wage now supplies a good part of the romance that invests flexible capitalism with a higher

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<sup>50</sup> INST. FOR A COMPETITIVE WORKFORCE, U.S. CHAMBER OF COMMERCE, WORKPLACE FLEXIBILITY: EMPLOYERS RESPOND TO THE CHANGING WORKFORCE 5 (2008), available at [http://icw.uschamber.com/sites/default/files/ICW%20Flex\\_Book\\_2007.pdf](http://icw.uschamber.com/sites/default/files/ICW%20Flex_Book_2007.pdf).

<sup>51</sup> FLEX-OPTIONS GUIDE, *supra* note 28, at 2.

<sup>52</sup> Susan J. Lambert, *Passing the Buck: Labor Flexibility Practices that Transfer Risk onto Hourly Workers*, 61 HUM. REL. 1203, 1205 (2008).

<sup>53</sup> See Carole Pateman, *The Patriarchal Welfare State*, in DEMOCRACY AND THE WELFARE STATE 231, 238–39 (Amy Gutmann ed., 1988) (noting that full citizenship in the welfare state is conditioned on wage work and suggesting that the breakdown of full-time work and the rise of contingent employment may offer opportunities for remaking citizenship in ways that are beneficial to women).

<sup>54</sup> See generally Hester Eisenstein, *A Dangerous Liaison? Feminism and Corporate Globalization*, 69 SCI. & SOC’Y 487 (2005).

<sup>55</sup> Nancy Fraser, *Feminism, Capitalism and the Cunning of History*, 56 NEW LEFT REV. 97, 110 (2009).

meaning and a moral point. Endowing their daily struggles with an ethical meaning, the feminist romance attracts women at both ends of the social spectrum: . . . the female cadres of the professional middle classes, [and] the female temps, part-timers, low-wage service employees . . . [each] seeking not only income and material security, but also dignity, self-betterment and liberation from traditional authority.<sup>56</sup>

For Fraser, feminist discourse has served to legitimate our society's valorization of wage labor at the expense of caregiving. To her analysis, I would add that, absent vigilance, feminist campaigns for workplace flexibility may end up valorizing new forms of insecurity and inequality. Although the campaign for workplace flexibility is motivated by good intentions and will achieve some good things for some people, there is a need for both greater caution and greater ambition. The moment demands caution, because we should be careful not to unwittingly lend support to a flexibility campaign that celebrates individual choice while, at the same time, serves to justify and obscure larger political and economic forces that have deprived employees of predictable and reasonable working hours and stripped many of job security and employment-related benefits. Yet, the moment also demands greater ambition. If we take for granted that the new patterns of overwork and underutilization cannot be changed, then perhaps giving individuals some flexibility to work around them is the best or only solution. We can do better. Why not seize the moment and demand more wholesale change that would provide more reasonable working hours for everyone?

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<sup>56</sup> *Id.*