TIME NORMS IN THE WORKPLACE: THEIR EXCLUSIONARY EFFECT AND POTENTIAL FOR CHANGE

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Americans who wish to participate in paid work and have a family are confronted with many different barriers to a satisfactory combination of the two. One significant barrier is the prevalence of full-time positions as the dominant form of employment.[1] This article explores the role played by law in perpetuating exclusionary working time norms and the way it also offers some scope for challenging them.

The lack of legitimate part-time jobs limits the options that people have to successfully combine the demands of employment and family. Family responsibilities impose time demands. The long hours of full-time employment positions, and the inflexible schedules that often go with those hours expectations, are not clearly compatible with these family demands. Part-time jobs are generally less available and less legitimate in that they are usually paid at a lower rate than their full-time counterparts, do not offer comparable or even proportional benefits, and amount to contingent employment or the career mommy-track.[2]

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.[3] The limited options of full-time employment or poorly rewarded part-time work act to exclude those

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[1] The focus of the article is on the employer-employee relationship in the workplace, although it is acknowledged that combining self-employment and family responsibilities can raise some similar issues.

[2] *See infra* Part I.A.1.

[3] *See infra* Part I.B.2.

with caring responsibilities, primarily, but not only, women,[4] from equal and full participation in the workforce. Conversely, until employment options apart from full-time are legitimized, parents who currently feel constrained in their jobs and gendered roles are inhibited from participating equally in caring roles.

A pluralism of working arrangements would not only provide a range of options to meet the diverse needs of workers, but could also offer some unexpected benefits to businesses. A variety of legitimate options would give workers a choice over hours that they currently do not have and would thus help to eliminate the gap that exists between the hours a large proportion of employees would like to work and those they are currently working.[5] Benefits for employers in terms of productivity and employee retention are being explored and realized by some organizations and researchers but still remain largely untapped.[6]

In order to develop a range of alternative employment time options, the link between time and the normative concept of a good worker needs to be loosened. Currently, the number of hours one works is seen to reflect not merely a time commitment, but a commitment to the job, an interest in career advancement, productivity, and more generally one's value as an employee. The lawyer, for instance, who puts in extremely long hours at the firm is held up as heroic and as an ideal member of the profession.[7] The shift-worker who is available to do overtime as needed by the employer, or changes shifts at a moment's notice, is also valued highly for hisapparent commitment to the business. Compliance with time demands generally—hours, scheduling, breaks, leave, etc.—is used as a proxy measure of, among other things, reliability, commitment, and productivity.

In some workplaces and public debates, the assumptions about time and productivity or the good worker are being challenged and transformed.[8] Part-time work, flexible schedules, and even telecommuting place into question the assumptions that a worker must work long, rigidly scheduled hours, within the line of sight of the manager. These initiatives are being driven by different forces and have varying results. Gender equity and retention issues are key considerations in many workplaces, as women become a significant part of the workforce and yet are making demands

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[4] Arlie Hochschild, The Second Shift 3-10 (1989); Katharine Silbaugh, Marriage Contracts and the Family Economy, 93 Nw. U. L. Rev. 65, 70 (1998) (women do substantially more home labor than men, regardless of their employment status outside the home). *See infra* Part I.B.2.

[5] *See infra* Part I.B.1.

[6] *See infra* Part I.B.3.

[7] Cynthia Fuchs Epstein et al., The Part-Time Paradox: Time Norms, Professional Lives, Family, and Gender (1999) [hereinafter Fuchs Epstein, Part-Time Paradox].

[8] *See infra* Part I.C.

unlike traditional unencumbered male workers. Globalization and efficiency pressures are also driving experimentation. These developments make clear that the link between time and valuable work is not innate or inevitable. Evidence from European and other industrialized countries, where long employment hours are not so pervasive, reinforces this conclusion. Importantly, these developments also show that experimenting with time norms can improve work and family balance for employees and, at the same time, increase business efficiency.[9]

Whether these experiments throughout workplaces will lead to a widespread reshaping of working time norms is not clear. A pluralization of legitimate working time arrangements that enable workers to combine employment with family or other non-employment responsibilities is in no way guaranteed. What these initiatives do tell us is that understandings of the links between time and worker value are in flux.

One influence on the development of working time norms is law. Law plays various roles in our society, all of which may alter behavior and public norms. The most obvious role of law is regulating behavior by requiring or prohibiting specific conduct. A requirement or prohibition can also act as a public policy statement and influence public attitudes and values about the behavior. In this way the law works to alter norms. Further, law may influence behavior by, for instance, allocating between parties the risk or cost of certain conduct, or by exposing otherwise private conduct in relationships to public scrutiny and judgment.

To illustrate how law can affect working time norms I have chosen to examine, as an example, one particular field of workplace regulation, namely unemployment insurance (U.I.). There are a multitude of laws that regulate the workplace in the United States, from fair labor standards to occupational safety and health regulations, all of which potentially play one or more different roles in influencing behavior and values in relation to working time norms. U.I. regulation is particularly useful as a means of exploring various roles of law because of the subtle and obscured part it plays. It does not explicitly seek to regulate hours, and it would, by most traditional accounts, be seen as irrelevant or neutral in affecting workplace behavior. Yet it is very comprehensive in its coverage, and through its application, interpretation, and cost allocation, it acts to reflect, reinforce, and challenge assumptions and norms about time in the workplace.

In order to determine the role of law in structuring, supporting, or inhibiting the development of working time norms, in this article I aim to reveal the cultural assumptions about the connection between time and worker value; explore how the assumptions are currently reflected, reinforced, or challenged by law in one particular field of employment regulation, U.I.; and comment on what we can learn from this critique about the role of law in this and other fields of regulation in the development of

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[9] *See infra* Part I.B.3.

working time norms, the balancing of work and family, and gender equity in the workforce.

This article attempts to do this in three parts. Part I examines time norms in the workplace—what form they take, how they are created and perpetuated, the exclusionary role they perform, and how they are being challenged in some sites. In this part the link is explored between the use of time norms by employers and a traditional and limiting conception of the ideal worker being unencumbered by family responsibilities, a practice that primarily disadvantages women workers. The way the assumptions about time are being challenged and reshaped in some workplaces and public debates is examined as a basis for analyzing and rethinking public policy in relation to employment and family and gender equity in the workplace.

Part II examines the role of law in various forms—expressive, institutional, and doctrinal—in helping or hindering the development of alternative working time practices. More specifically, this part examines the way in which law, using U.I. law as an example, can reflect and reinforce norms and understandings of the relationship between working hours and worker value, and between employment and family. Recent U.I. developments in some states represent at least a minor disruption to traditional time norms, but countertendencies also persist.

Part III briefly explores what we can learn in using this approach to understand the role of law in the maintenance and development of time norms in the workplace. The U.I. system was not established to regulate time norms, and it does not have that explicit function, but it does play a role in their development and can still play a limited role in their reconfiguration. Further, in itself, the critique of this field of regulation provides an insight into how law perpetuates cultural assumptions and provides an approach by which other fields of law could be examined for their effect on working time norms. Such insights should prove useful both for advocates of gender equity and of a better balancing of work and family, and for those who are simply interested in understanding the complex and multiple roles law can play beyond its most obvious outcomes and explicit objectives.

I. TIME NORMS IN THE WORKPLACE

Time is used to structure employment and to control workers. A plethora of time norms shape each job and workplace—how many hours a day or week the employee is expected to work, at what time of day these hours are to be worked, whether payment is per hour, week, or month, what leave is available, what breaks are permitted during the work day, and expectations about overtime or attending out-of-hours events (such as meetings, client functions, or traveling). Some jobs also have longer-term time norms for career progression. As Lotte Bailyn notes, "[s]ince time is one of the easiest aspects of work to measure precisely, it pervades the

mechanisms of evaluation and control."[10] The way in which these time demands are established, communicated, used, and enforced reflects and shapes the norms of the workplace and prescribes an "ideal" worker.

The traditional or "ideal" worker prescribed by time expectations is the worker who is available to work long hours, at least five days a week, all year round, with a few periods of short scheduled leave. Being able to change hours with little notice is also a characteristic of this worker. The ideal worker is necessarily unencumbered by non-employment responsibilities, such as family caring work. This reflects and reinforces a paradigm in which employment and family occupy distinctly separate spheres.

Three particular aspects of working hours act to construct the ideal worker: the number of hours worked, when these hours are worked, and the nature and extent of leave available. These practices are described below, followed by an analysis of why they also constitute problematic time norms. To conclude Part I, evidence is presented of how these norms are being challenged and reshaped in some arenas.

A. Time in the Workplace

1. Number of Hours

The working time practice that is most clearly tailored for and representative of a worker unencumbered by family responsibilities is the practice of full-time work. Full-time employment is standard: in most industries and occupations the vast majority of jobs are offered as "full-time" positions, although the number of hours this constitutes varies greatly.[11]

Furthermore, working hours are increasing. Despite the promise held out by technological advancement, the United States has not become a nation of short working hours and ample leisure, as explored by Juliet Schor in her thought-provoking work, The Overworked American.[12] A century of declining working hours came to an end around the 1940s, and since the 1960s annual hours have actually been increasing.[13] An analysis of American working time from 1969 to 1987 shows that "the average

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[10] Lotte Bailyn, Breaking the Mold: Women, Men, and Time in the New Corporate World 86 (1993).

[11] According to the Changing Workforce Study, "[e]ighty-five percent of employees are scheduled to work full-time—35 hours or more a week—at their main or only jobs." James T. Bond et al., The 1997 National Study of the Changing Workforce 70 (1997) [hereinafter Changing Workforce Study].

[12] Juliet B. Schor, The Overworked American: The Unexpected Decline in Leisure 1 (1992).

[13] *Id.* at 29.

employed person is now on the job an additional 163 hours, or the equivalent of an extra month a year,"[14] with women's employment showing the greatest change.[15] Schor concludes that "the pattern of women's employment is getting to look more and more like men's."[16]

Comparing the hours trajectories of the United States and Europe, Schor found that a divergence since the 1950s has resulted in great transatlantic differences. For example, as of 1988, U.S. manufacturing employees worked "320 more hours—the equivalent of over two months—than their counterparts in West Germany or France."[17]

This increase in average work hours and two other changes in work have contributed to Americans' feeling of being time squeezed. First, an increase in the number of women who are working (and working full-time hours) has shifted the family norm from single-income to dual-earner households.[18] The man is now the sole breadwinner in less than one quarter of American dual-parent families.[19] Women have joined the workforce in unprecedented numbers, resulting in a greater proportion of the adult population being in the labor force than at any other time since the Second World War.[20] By entering employment, women put a squeeze on the amount of time available to undertake family caring and household work; when more hours are in paid work, fewer hours are available for family work.[21]

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[14] *Id.*

[15] While men's working time increased by ninety-eight hours, or two-and-a-half standard weeks, women's hours increased during this period by 305 hours, which translates to an additional seven-and-a-half standard weeks. *Id.*

[16] *Id.* at 30. However, married fathers still work significantly longer hours (50.8) than married mothers (40.4). Changing Workforce Study, *supra* note 11, at 37.

[17] Schor, *supra* note 12, at 2.

[18] Jerry A. Jacobs & Kathleen Gerson, Who Are the Overworked Americans?, 56 Rev. Soc. Econ. 442, 445 (1998) [hereinafter Jacobs & Gerson, Overworked Americans?].

[19] Department of Labor, Futurework: Trends and Challenges for Work in the 21st Century (1999), *at* http://www.dol.gov/dol/asp/public/futurework/report/chapter3/main.htm-1b (last visited May 7, 2001) [hereinafter Futurework].

[20] Jerry A. Jacobs & Kathleen Gerson, Overworked Individuals or Overworked Families? Explaining Trends in Work, Leisure, and Family time, 28 Work & Occupations 40, 45 (2001). Women are generally working full-time, not part-time; the proportion of women working part-time in the U.S. is among the lowest in industrialized countries. Jacobs & Gerson, Overworked Americans?, *supra* note 18, at 449.

[21] Jacobs & Gerson argue that the squeeze arises because "[m]ost families can no longer rely on the unpaid support of a woman at home, yet the structure of employment has not changed sufficiently to accommodate the transitions in workers' private lives." Jacobs & Gerson, Overworked Americans?, *supra* note 18, at 450.

A second factor is a significant increase in the proportion of Americans working long work weeks.[22] The forty-hour week remains the model pattern, with nearly forty percent reporting this standard work week in 1997, but it "has become less typical than it was thirty years ago."[23] The United States is one of only two industrialized countries that has more than twenty percent of its workforce working fifty or more hours per week.[24]

Such long employment weeks are no longer restricted to a few occupations, but are filtering across a range of occupations and extending down the corporate hierarchy.[25] Long weeks, however, are still most common among professional workers and managers.[26]

For some workers, long employment weeks are created by overtime[27] or working a second job. Despite productivity increases, the number of hours worked as overtime has increased in some sectors.[28] For some workers the additional hours may be welcome, providing additional and premium remuneration. For others, however, overtime is mandated by

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[22] *Id.* at 445. Jacobs and Gerson note that there is also an increase in the number of Americans working short work weeks, hence figures on the average work week do not capture the full picture of working time changes. *Id.* The bifurcation leaves those working long weeks particularly squeezed in trying to balance work with family (and those who work short weeks may be squeezed for money rather than time). *Id.*

[23] *Id.* In 1997 over one quarter of male workers put in more than fifty hours per week, and one in ten female workers did the same, compared to twenty-one percent and five percent respectively in 1970. *Id.* at 444.

[24] *Id.* at 449. The other country is Australia. *Id.* In a comparison with other industrialized countries, Jacobs and Gerson note that "the United States stands out more in terms of those working very long weeks than in terms of the average work week." *Id.* at 450.

[25] While such hours were traditionally expected among a limited range of occupations, such as medical residents and top corporate management, this trend toward longer hours has now extended into other occupations, such as law and banking. Downsizing and global competition have led to these hours expectations also being extended down the corporate hierarchy. Schor, *supra* note 12, at 18-19

[26] Jacobs & Gerson, Overworked Americans?, *supra* note 18, at 445. More than one third of men in professional, technical, or managerial occupations work fifty hours or more each week, which contrasts with one fifth of men in other occupations. Similarly for women, one in six in these occupations works fifty or more hours a week, while only one in fourteen does so in other occupations. *Id.*

[27] By definition, "overtime" is peculiar to those employees who are scheduled to work a fixed number of hours and generally corresponds to those workers who are paid by the hour. Salaried or exempt workers may work hours in excess of the standard week, but such hours are often not considered "overtime" because they are simply seen as what is required to do the job, and because they are generally not specifically rewarded.

[28] Michael Smith's study of overtime shows that in January 1995, a post-World War II high of 4.9 hours per week was recorded as an average across all manufacturing jobs, while autoworkers averaged 8.4 hours per week overtime in 1994. Michael Smith, Note, Mandatory Overtime and Quality of Life in the 1990s, 21 J. Corp. L. 599, 599-600 (1996).

their employers.[29] The additional hours further eat into the employees' non-employment time and may exacerbate struggles to balance family responsibilities in a way that cannot be financially compensated.[30]

Moonlighting—performing more than one job—"is now more prevalent than at any time during the three decades for which we have statistics," according to Schor.[31] Between six[32] and thirteen[33] percent of all employees report having two or more jobs. Even the higher figure is probably quite conservative because some workers would not report their second jobs.

2. When Those Hours Are Worked

The predominant work practice of full-time positions is characterized not only by the number of hours an employee works, but also by when those hours are worked. Generally, the work is carried out in solid slabs of time, uninterrupted by breaks other than short, scheduled ones. There are many norms that regulate the time at which these hours are worked.

Most work is carried out during the day, although a number of workplaces use shifts scheduled around the clock. According to the Changing Workforce Study, seventy-two percent of employees "work regular daytime schedules at their main or only jobs, in contrast to twenty-eight percent of employees who work evening, night, rotating, split, and variable shifts."[34]

Shift-work can be seen as a solution to many employment and family conflicts. By working different shifts, parents are able to undertake more of their childcare personally, rather than needing to rely upon other family members or paid caregivers. A fifth of American working parents work opposite shifts,[35] a practice which can place strain on relationships.

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[29] According to the Changing Workforce Study, "Eighteen percent of employees are *required* to work paid or unpaid overtime hours once a week or more with little or no notice" and forty-nine percent are *required* to work such overtime at least once a month. Changing Workforce Study, *supra* note 11, at 74.

[30] Smith, *supra* note 28, at 600-01. The Fair Labor Standards Act also restricts employers from offering non-exempt workers time off in lieu of overtime payments.

[31] Schor, *supra* note 12, at 31. Particularly high increases are noted among women. *Id.*

[32] *Id.*

[33] Changing Workforce Study, *supra* note 11, at 71. The secondary jobs provided an average additional thirteen hours of work per week. *Id.*

[34] *Id.* at 70

[35] Arlie Hochschild, The Time Bind: When Work Becomes Home and Home Becomes Work 37 (1997) [hereinafter Hochschild, Time Bind].

The need to be able to change shifts readily poses a particular problem; a change in shift (even without a change in the number of work hours) can require a change in childcare, something which is not always easy or even possible to arrange. For single parents, who necessarily rely more on other family or on paid caretakers for childcare, this can be especially difficult.

Recently, there has been a lot of discussion and apparent practice of "flexibility" in the workplace, primarily in hours of work. We have seen a flourishing of flextime and suggestions that flexible hours will be the panacea for many of the woes of the new economy. However, while nearly "half of all employees are able to choose—within some range of hours—when they begin and end their workdays, . . . only one in four can change daily schedules as needed."[36] Most Americans do not have flexibility in their work hours.[37]

Strict compliance with time requirements is often expected and judgments are made about non-complying workers. The employee who turns up late is seen as slack, lazy, or simply insubordinate. The employee who is absent, other than for his own sickness, similarly scores marks against his name. There is a "rightness" attached to compliance with time expectations, and sometimes, regardless of reasons, a cloud over deviance. Elaborate policies are often developed with respect to absences and lateness, involving notification requirements and warnings. Punching the time-clock is not just a thing of the past.

3. Leave

Two other working time practices that pose particular problems for caregivers are the expectation that employees work all year round with few breaks and that they work year after year until retirement without career breaks. The lack of breaks during the year, aside from the short periods of annual leave and public holidays afforded to most workers, cannot easily be reconciled with the caring responsibilities of raising children. Even children who are in school have substantial vacations that need to be covered by alternative care when parents are not afforded similar breaks from work.

Americans are working with historically and comparatively few paid breaks each year. Schor notes that through the 1980s paid time off in America was actually shrinking; there has been an increase in the number of weeks worked on average by Americans each year, with more employees working all year round, rather than taking the summer off.[38] This is in

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[36] Changing Workforce Study, *supra* note 11, at 98.

[37] *Id.*

[38] Schor, *supra* note 12, at 32. American workers "have gotten *less* paid time off—on the order of three-and-a-half fewer days each year of vacation time, holidays, sick pay, and other paid absences. This decline is even more striking in that it reverses thirty years of

contrast to the growth in paid time off in European countries.[39] In 1987, Kamerman and Kahn identified this decrease in paid time off and noted the striking contrast to European workers: while the average American has two or fewer weeks' annual vacation, the European mandated entitlement is in the order of four to five weeks per annum.[40]

The availability of leave for personal sickness and the sickness of dependents is limited. Although no employment regulation requires it, most employers would afford sick leave at least to their full-time employees. However, there is no general practice that allows employees to use this leave for purposes other than their own sickness. Some employers offer generic leave, sometimes called "personal days," but the other alternative in the event of dependent sickness is for employees to lie about their own health in order to use their own sick leave. The fundamental expectation is that workers show up at work unless they, personally, are medically unable to do so; the state of dependents is not the responsibility of employers.

Some employees are eligible for leave under the Family and Medical Leave Act of 1993[41] (FMLA), but leave under this Act is limited. The Act had a long and arduous birth[42] and represents the most significant policy development in the field of work and family in recent history. It has been described as "a major milestone in the legal support of family life because it explicitly recognizes that family life events have an impact on the workplace, and requires the workplace to accommodate these events—albeit in a modest way."[43] However, leave is limited to childbirth or serious illness of dependents,[44] is only available to those employees in workplaces

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progress in terms of paid time off." *Id.* One explanation for the 1980s reduction in average paid leave is a restructuring of the labor market. More casual or contingent workers, and early retirements, mean an overall reduction in seniority which is reflected in measured time off because vacation times in America are usually related to duration of employment. *Id.*

[39] *Id.*

[40] "[T]he average American worker in private industry has two weeks of vacation plus some additional holiday [but] [a]lmost three quarters of the workers with less than a year of service have a week or less vacation time" in contrast to the "typical vacation in northern and western Europe [which is] four to five weeks, for all employees, mandated by national legislation." Sheila B. Kamerman & Alfred J. Kahn, The Responsive Workplace: Employers and a Changing Labor Force, 58 (1987).

[41] 29 U.S.C. §§ 2601-54 (1994).

[42] Donna Lenhoff & Claudia Withers, Implementation of the Family and Medical Leave Act: Toward the Family Friendly Workplace, 3 Am. U. J. Gender & Law 39 (1994) (includes a chronology of the passage of this bill through the legislature, entitled Women's Legal Defense Fund Legislative Development of the Family and Medical Leave Act (1993)).

[43] *Id.* at 40.

[44] 29 U.S.C. § 2612(a)(1)(A) (1994). The FMLA provides leave for employees with serious health conditions; to care for a parent, spouse or child with a serious health condition; and for the birth of a child or placement of child for adoption. 29 U.S.C. § 2612(a)(1)(B)-(D) (1994). Since the leave is only available for *serious* medical conditions, it

that have at least fifty employees,[45] and can only be used by those employees who have worked at least 1250 hours in the past year for the particular employer.[46] Many employees are thus ineligible for any FMLA leave, or the particular illness of their dependent does not qualify them for leave under the Act.

Leave under the FMLA is also unpaid and carries some risks. Even if employees are technically eligible for the leave, in order to utilize it they must be able to afford to accept the remuneration loss. Further, as with many family-friendly policies, although there is a formal guarantee of no disadvantage,[47] workers are apparently reluctant to take it up, because they still perceive a risk of being penalized for it in their jobs.[48]

For many employees, career breaks for child bearing, or longer breaks to encompass child rearing, are difficult, if not impossible, to obtain. There has traditionally been an assumption that an employee who wants time off for child rearing must quit his job and opt out of the workforce rather than take leave. Again, the FMLA provides some assistance, but eligibility is limited, and the maximum leave under the Act is twelve weeks per year. While this might be adequate to deal with emergencies of child rearing, it is a very short time in which to bear a child and recover for work. Neither the Act nor employers have provided much assistance to those parents who want to stay out of the workforce for any longer than the first three months of their child's life. The norm is unbroken career progression.

B. How are these Time Norms Problematic?

These practices reflect values and expectations associated with time in the workplace and combine to construct a worker ideal that is problematic in three ways. First, many workers are not freely choosing to work the hours they do, but feel pressured to work these hours and are constrained by the limited working time options that are available. Second, the time norms act to exclude those who do not fit the ideal worker mold. Since such non-ideal workers are primarily women, the norms inhibit the development of gender equity in the workforce. In so doing, they also

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cannot be used for the more common need of children who are only *moderately* ill, but too ill to attend school or day-care.

[45] 29 U.S.C. § 2611(4)(A)(i) (1994).

[46] *See* 29 U.S.C. § 2611(2)(A) (1994) (providing the hours requirements that employees must satisfy to obtain leave under the Act).

[47] *See* 29 U.S.C. § 2612(a)(1) (1994).

[48] Such concerns may justify an alternative description of the Act as "primarily a symbolic act, which afforded no significant assistance to working women or men, . . . perhaps retarded progress on the family leave front more than it has plausibly helped." Michael Selmi, The Limited Vision of the Family and Medical Leave Act, 44 Vill. L. Rev. 395, 396 (1999).

promote the primacy of paid employment over caring labor and thus subordinate the needs of dependents in our society. Finally, the homogenization of the worker ideal inhibits businesses from fully capitalizing on the diversity of their workforces. Experimentation with alternative work schedules represents an opportunity for organizations to learn from and accommodate demands of both a changing workforce and a rapidly changing global market.

1. Free Choice?

Why do employees work the hours they do? If employment hours are freely chosen, or at least equally bargained for, do they represent a problem? Are they indicative of a choice about the American desire for material wealth and the satisfaction of working hard? A number of explanations have been posited about employment hours, and some of these challenge the notion that Americans are freely and independently choosing the work and hours they are performing.

Pressure from employers along with cultural understandings[49] about the workplace and employment limit worker choices and compel them to work longer hours than many would freely choose.[50] There is evidence that most workers would choose to work fewer hours if given the option and that the proportion of workers stating this is increasing.[51] Unsurprisingly, the proportion is highest among those who work the longest hours.[52] Most workers do not have the option of trading lower remuneration for shorter

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[49] Levine & Pittinsky describe culture as "'a set of values, beliefs, and norms (that is, expected behaviors) that are held in common by people in a group' . . . [and include] all the messages, assumptions, values, and norms about how time should and should not be spent." James A. Levine & Todd L. Pittinsky, Working Fathers: New Strategies for Balancing Work and Family 96 (1997).

[50] Schor, *supra* note 12, at 66; Jacobs & Gerson, Overworked Americans?, *supra* note 18, at 452 ("[M]ost American workers experience a significant gap between how much they work and how much they would like to work.")

[51] Sixty-three percent of employees surveyed in 1997 said that they would like to work fewer hours. This figure is up from forty-seven percent in 1992, a difference of seventeen percentage points in five years. Changing Workforce Study, *supra* note 11, at 73-74.

[52] Jacobs and Gerson note that in the 1992 Changing Workforce study, the proportion of workers who wanted to work fewer hours was as high as eighty percent among those who worked over fifty hours per week. For this group, the difference between actual hours and ideal hours was substantial, with those working between fifty and sixty hours preferring to work twelve hours fewer, while those who worked more than sixty hours had a preference for a full twenty hours fewer. Jacobs & Gerson, Overworked Americans?, *supra* note 18, at 454.

hours, although many report that they would choose to do this if it were offered.[53]

To say that employees are freely able to choose their employment conditions, employees must have options. There must be an option to work a different way with the particular employer, or to go to another employer who does offer an alternative arrangement. And to say that the hours are bargained for is to assume that employees have bargaining power. As Jacobs and Gerson point out, the findings of the Changing Workforce Study make clear that "[s]ince personal 'tastes' do not explain why some people are putting in very long work weeks and others very short ones, it appears that employers are organizing work schedules for reasons other than the needs and preferences of employees and their families."[54] Employers generally prefer employees to work long hours and thus offer full-time employment as the only option. If alternative arrangements are offered, they are often only offered to those few employees who do have some bargaining power, the highly skilled or valuable employees who are able to choose to go elsewhere or leave the workforce.

American employers prefer long hours for a number of reasons. One is the management culture that assumes a linear relationship between time and productivity: longer hours are assumed to deliver proportionally more output per employee.[55] A second factor arises from the way in which remuneration and benefits are structured by law. Those workers who are exempt from overtime provisions under the Fair Labor Standards Act (FLSA) of 1938 are paid by the week or longer, rather than by the hour.[56] They are not entitled to be paid for hours worked over the standard in the FLSA of forty per week. Under this payment structure, employers are permitted, and arguably even encouraged, to get more out of their workers by working them longer hours, at no additional specific labor cost to the organization.

Another structural element of remuneration that encourages long hours, and one that is in some ways unique to the United States, is the

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[53] Changing Workforce Study, *supra* note 11, at 74 (Twenty percent of employees who would like to reduce their hours claimed that they did not do so, because their employers would not permit it.); Jacobs & Gerson, Overworked Americans?, *supra* note 18, at 453 n.12; Joan Williams & Cynthia Thomas Calvert, The Project for Attorney Retention: Balanced Hours: Effective Part-Time Policies for Washington Law Firms 9 (2001) ("Slightly over 70 percent of men [attorneys] in their twenties and thirties (in contrast to only 26 percent of men over 65) said . . . that they would be willing to take lower salaries in exchange for more family time."). Levine and Pittinsky note, however, that at times workers simply assume, based on their own perception of the workplace culture, that requests for shorter hours or other alternative arrangements would be refused. They call this "colluding," or blaming the culture. Levine & Pittinsky, *supra* note 49, at 97-102.

[54] Jacobs & Gerson, Overworked Americans?, *supra* note 18, at 455.

[55] Bailyn, *supra* note 10, at 83.

[56] 29 U.S.C. § 213(a)(1) (1994).

privatized nature of welfare benefits.[57] Unlike in most European and other industrialized countries, welfare benefits such as health insurance and retirement savings schemes are provided primarily as employment fringe benefits, rather than through national social schemes. Tax incentives are provided through legislation to encourage employers to provide such benefits to their workers. These benefits, however, are generally costed on a per capita basis, rather than being strictly proportional to each employee's remuneration (or hours). This means that for employers to minimize these costs as a proportion of labor costs, they must get as much out of each worker as possible. Crudely, this has translated into a pressure for longer hours.[58]

Finally, employers are not required to account for many part-time workers in order to qualify for the tax benefit on the provision of health insurance and pensions. This diminishes employers' incentive to provide benefits to such workers (and reinforces the perception that only full-time work is valuable). These provisions combine with fair labor standards to encourage a dichotomization in the workforce: exempt employees are engaged to work long weeks in order to cover the cost of their benefits and part-time employees are engaged for short weeks, without benefits.

The decision to work full-time is partly structured by the alternative of part-time work. Part-time employment has become more available,[59] but often such positions are paid at a lower hourly rate, offer fewer fringe

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[57] For a good summary of the development of American "welfare capitalism" or "industrial welfare" and the way in which many welfare benefits in the U.S. are related to workforce status, *see* Kamerman & Kahn, *supra* note 40, at 30-63.

[58] Jerry A. Jacobs & Kathleen Gerson, Toward a Family-Friendly Gender Equitable Work Week, 1 U. Pa. J. Lab. & Emp. L. 457, 462 (1998); Schor, *supra* note 12, at 66 (The "long hours of the post-war period owe a lot to the 'bias of fringe benefits.'"); Bailyn, *supra* note 10, at 86-87 ("[T]ime represents a cultural category associated with a number of strongly held beliefs. These place greater value on employment time than on private time, and they presume that time spent on a job is a valid indicator of dedication and performance. Such beliefs are reinforced by assumptions about managerial control and by national policy that holds employers responsible for much of social welfare.") *See also* Thomas Buchmueller & Robert Valletta, The Effect of Health Insurance on Married Female Labor Supply, 34 J. Hum. Resources 42, 42 (1999) (Wives who have no alternative source of health insurance and prefer to work part-time may work longer hours in order to provide coverage for their families.); and Edward I. McCaffery, The Burdens of Benefits, 44 Vill. L. Rev. 445 (1999).

[59] In fact, the number of employees working part-time is increasing, and it has served many people well in helping them to reconcile employment and family responsibilities. There is some uncertainty about how much of this part-time work is "voluntary"—workers choosing part-time work to fit with their non-employment commitments—or "involuntary"—workers taking (one or more) part-time jobs because they are unable to secure full-time employment. *See, e.g.*, Arne L. Kalleberg, Part-Time Work and Workers in the United States: Correlates and Policy Issues, 52 Wash. & Lee L. Rev. 771 (1995).

benefits,[60] and afford less job security.[61] Such distinctions between full-time and part-time rewards are not limited to low status or low paying jobs; many law firms offering part-time legal positions offer them at a reduced rate of pay rather than on a pro-rata basis.[62] Further, part-time employment often has other disadvantages such as poorer conditions or career barriers.[63] One career limitation is that it has become synonymous with working mothers and mommy-track work, rather than work for serious, career-minded workers. The phenomenon is reported in various industries across the country.[64] In these ways the norm of full-time work is reinforced by the lack of legitimacy or rewards of the part-time alternative.

In the legal industry there is pressure on lawyers not only to work full-time, but to work long weeks, because long hours have become synonymous with professionalism.[65] The worker who puts in the most billable hours is held up as a model employee and the most dedicated to the firm. Under this model, part-time workers are seen as time deviants, bucking the professional norm. While more and more legal offices are offering reduced hours positions, these positions are often still seen either to be off-career track or on an alternative subsidiary track, rather than an equal alternative. Rewards and status are often not commensurate with effort, commitment, or output, or even with hours.

An integral part of the long hour weeks for professionals is the expectation that workers will be available as and whenever the client needs them. This may involve working longer hours at the office to get the job done, or traveling to attend to the client in another city, state, or country. A worker who is totally available for clients is held up at law firms as the ideal worker or the ultimate professional, setting a standard for all workers. This expectation of total availability serves to undermine the acceptability of part-time employment and the lack of availability that is assumed to go with it. Those who choose part-time employment are seen as choosing, at

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[60] Changing Workforce Study, *supra* note 11, at 88. The study reports that "[e]mployees who work part-time at their main jobs . . . are much less likely (51 percent) than full-time employees (90 percent) to have access to personal health insurance coverage."

[61] *See, e.g.*, Kalleberg, *supra* note 59; Ann Bookman, Flexibility at What Price? The Costs of Part-Time Work for Women Workers, 52 Wash. & Lee L. Rev. 799 (1995); Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C. L. Rev. 709 (1986).

[62] Fuchs Epstein, Part-Time Paradox, *supra* note 7.

[63] Phyllis H. Raabe, Constructing Pluralistic Work and Career Arrangements, *in* The Work-family Challenge: Rethinking Employment 128, 129-30 (Susan Lewis & Jeremy Lewis, eds., 1996).

[64] Sue Shellenbarger, Employees Are Seeking Fewer Hours; Maybe Bosses Should Listen, Wall St. J., Feb. 21, 2001, at B1.

[65] Fuchs Epstein, Part-Time Paradox, *supra* note 7.

least to some extent, to opt out of the struggle to attain professional recognition.

Such expectations of long hours and availability are not limited to law firms. Commitment, among other ideal worker qualities, in many exempt, and even non-exempt, jobs has come to be measured by long hours and total availability.[66] In this sense time is used as a way of evaluating employees. Promotions and even assignments can be conditioned upon demonstrations of such commitment of time. As Bailyn states: "[t]he underlying assumption seems to be that employee time belongs to the company, a notion reinforced by the company's evaluation and promotion practices."[67]

This is not to say that the only reason employees put in long hours and standard weeks is because employers demand them. Other factors contribute to the pressure or expectation to work such hours, and these too challenge the notion of *free* choice.

One controversial thesis, posited by Hochschild, is that one reason employees work long hours is because employment provides greater psychological rewards than family life, and fewer stresses than the demands of the home.[68] Another related argument is that paid work is a primary source of respect and citizenship in American culture, and the number of hours one works is taken as a guide to how hard one works, thus determining that level of respect. The notion of "moral hazard," originally an insurance principle, has come to be used more widely to describe the risk in society of people taking advantage of situations or getting what they do not deserve. It is invoked to determine whether a person is deserving in the public eyes of social assistance. A key criteria for determining whether someone is deserving is whether that person is trying to help herself, and this often translates to whether the person is working, or at least trying to get a paid job. Any choices about employment made in this context would not represent merely a consideration about what would be the best way to spend time and accrue income for the worker, but would be structured by such cultural pressures to be seen as a contributor, rather than as a dependent.

An alternative explanation for long working hours is the force of consumerism. Schor argues that the phenomenon of trying to "keep up with the Joneses" means that despite the incredible material wealth of today's American workers, many feel that they are only stationary on a treadmill,[69] and that they must work long hours even to stay on the treadmill.[70] She

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[66] Bailyn, *supra* note 10, at 81.

[67] *Id.*

[68] Hochschild, Time Bind, *supra* note 35.

[69] Schor, *supra* note 12, at 9.

[70] *Id.*

argues that while many consumer products have undoubtedly enhanced the quality of our lives, the Joneses phenomenon keeps us from choosing or fighting for shorter employment hours in order to enjoy these goods and other potential benefits that technological advancement has made possible.[71]

Low wages also lead to long employment weeks. Long weeks are worked at the very bottom of the pay scale, because workers who are paid minimum wage rates need to undertake large amounts of overtime or take up a second job[72] simply to earn enough to support themselves and their families. A wage of $5.15 an hour (the federally mandated minimum wage[73]) represents less than $11,000 per annum if only the standard forty-hour week is worked. Of the sixty-three percent of workers in the Changing Workforce Study who stated that they would prefer to work fewer hours, almost half (forty-six percent) of these workers give as their main reason for not doing so the fact that they need the money.[74] Needs are to some extent socially constructed, as are conceptions of poverty, and thus whether this need for money is to keep the workers above the poverty line, or to help them keep up with the Joneses, is open to debate. However, such low pay rates and the prevalence of poverty among employees undermine the legitimacy of "free choice" arguments in relation to hours of work.

The positive image of a nation simply working hard in order to reap the benefits of higher pay is tainted by the evidence of workers saying they would prefer to work less, and by the picture of the restricted options open to them to do so. The free choice rhetoric also obscures the way in which choice is structured by cultural expectations about gender, parenting, and employment, as described in more detail in the next section.

2. Gendered Norms and their Exclusionary Effects

Homogenous working time norms constrain choices, and act to exclude from full participation in the workforce those who cannot comply with the unencumbered worker ideal. Traditionally, women have borne family caring responsibilities and have thus faced such barriers. However, as explored in this section, increasingly, men are also taking on family caring work and are encountering the difficulties of meeting these hours expectations, which were established in a different time and around a different kind of worker. Conversely, working time norms also act to inhibit efforts by workers to become more involved in family life.

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[71] *Id.*

[72] The prevalence of moonlighting is noted above, *see supra* notes 31-33 and accompanying text.

[73] 29 U.S.C. 206(a)(1).

[74] Changing Workforce Study, *supra* note 11, at 74.

Family responsibilities place time demands on workers, and many employment and family problems can be characterized as conflicting time demands. As Lotte Bailyn asserts

> Time is perhaps the most critical issue in the ability to integrate one's private and public lives. But time is also the traditional way to structure and control work. Managers expect to see their employees at work during a particular period of the day, and they often use time as one of the criteria for the evaluation of performance.[75]

Employment time demands can reflect many things. Some might have been established based on sound functional or organizational needs of the business. Others might reflect a management style or theory, such as the expectation that work be done within the line-of-sight of the manager and that meetings take place in person—if a worker cannot be seen, how is the manager to know that he is working and that the work is getting done?[76] Similarly, control of employee time has traditionally been used as a key management tool.

In any event, such time demands can now act to exclude particular groups of workers, namely those with non-employment responsibilities. Many time demands were established at a time when the workforce was relatively homogenous and made up primarily of male breadwinners who had wives at home to take care of domestic responsibilities. They were established with these participants in mind, and their ongoing use and effectiveness are not always questioned. Operating now within a heterogeneous workforce, many practices can act to exclude those who do not fit the original mold.[77]

How do these norms exclude? Notions of time (and the penalties of time deviance) can be made explicit and can also infuse assumptions about the way in which work is organized and carried out. For instance, a work culture in which long hours are expected, or in which meetings may extend into the evenings and be called with little notice, creates disproportionate pressures on those employees who have the greatest constraints on their time and, in this way, acts to exclude such workers.[78] Since women have

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[75] Bailyn, *supra* note 10, at 79.

[76] *Id.* at 94.

[77] Raabe, *supra* note 63, at 136 ("Current standard work and career patterns can be seen as a form of institutional discrimination that privileges some workers (those without active family involvement) and disadvantages those who want and need to work in alternative ways.").

[78] Levine & Pittinsky provide anecdotes showing that respect is afforded to those who put in extraordinary work hours and serves to restrain worker participation in family life because it idealizes long hours and undermines any company statements about the valuing of work-family balance. Levine & Pittinsky, *supra* note 49, at 70.

traditionally borne, and continue to bear, a disproportionate share of family caring work, they are predominantly the employees with the greatest constraints on their time. On this basis, seemingly gender neutral work practices can have gendered, exclusionary outcomes.

Despite women's increased participation in paid labor, the division of labor in the home has not changed proportionately. We have seen in the past thirty years a dramatic increase in the participation rate of women in the labor force, rising to about sixty percent for all women[79] and, significantly, to 72.3 percent for mothers in 2000.[80] Women continue to bear a disproportionate share of caring responsibilities, called the "second shift" by Arlie Hochschild,[81] regardless of their workforce status.[82]

Childcare is the primary form of caring responsibilities held by workers, and the gender difference is still significant. Forty-six percent of all wage and salaried workers in the U.S. have children under eighteen living at home at least half-time.[83] Of all parents in the workforce, almost twenty percent are single and raising their children alone, which means that they, by definition, must have both financial and day-to-day caring family responsibilities.[84] Women still bear most childcare responsibilities, but men are undertaking more than they were two decades ago. In 1997 employed married fathers reported spending 2.3 hours per workday with their children, an increase from 1977 of thirty minutes.[85] Employed married

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[79] Press Release, Department of Labor, Bureau of Labor Statistics, Employment Status of the Civilian Population by Sex and Age, *at* http://stats.bls.gov/news.release/empsit.t01.htm (last visited Feb. 10, 2002) (The seasonally adjusted figure for the participation rate of women, sixteen years and over, Aug. 2001, is 59.8%). Women thus represent almost one out of every two workers. Futurework, *supra* note 19.

[80] Press Release, Department of Labor, Bureau of Labor Statistics, Employment Status of the Population by Sex, Marital Status, and Presence and Age of Own Children under 18, 1999-2000 Annual Averages, *at* http://stats.bls.gov/news.release/famee.t05.htm (last visited Feb. 10, 2002) (The participation rate for women with children under six is almost sixty-five percent.). Williams notes that from an employment perspective, this means that almost ninety percent of women become mothers during their working lives. Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 2 (2000).

[81] Hochschild, *supra* note 4.

[82] *Id.*; Silbaugh, *supra* note 4.

[83] Hochschild, *supra* note 4, at 29. Thirty-five percent of employees have children under thirteen living at home, and almost one in five employees has children under six living at home. *Id.*

[84] *Id.* at 30. This figure for single parents is up from thirteen percent in 1977. *Id.* at 31. Note that "[s]ingle parent status is defined as not legally married or living in a relationship with a partner, and as having custody of children on a half-time basis or more." *Id.* at 6 n.7.

[85] Changing Workforce Study, *supra* note 11, at 40.

mothers spent almost an hour more with their children, at 3.2 hours per workday.[86]

In addition to caring work, women have traditionally borne greater responsibility for household chores. There is a lingering gender difference, although within married couples the difference in time spent on housework has decreased substantially over the past two decades. Employed married mothers now spend only 0.9 hours each workday more than men, down from a 2.5 hour difference in 1977.[87]

Increasingly, workers also have responsibility for caring for elderly relatives and friends. According to the 1997 Changing Workforce Study, one quarter of the wage and salaried labor force provided elder care during the preceding year.[88] Many working parents are part of the "sandwich generation," caring for both their children and elderly relatives.[89]

These figures demonstrate that a significant proportion of workers at any given stage have domestic responsibilities. Women have entered the workforce in great numbers without necessarily relinquishing all of their traditional responsibility for caring and household work. They certainly do not have "wives" at home to take care of these tasks. But, importantly, nor do most of their male colleagues who are in fact increasingly sharing these responsibilities, in dual income households, as sole parents, or as elder-caregivers.

Workers with such caring and household responsibilities do not front for employment, as their traditional male counterparts did, that is "unencumbered" by non-employment responsibilities, and in a primary breadwinning role. Many fundamental aspects of employment are still, however, rooted in an assumption that workers either have no such caring or household responsibilities, or should be able to delegate them if they are to participate in the workforce. The notion of a standard work week, for example, tells us a story about expectations on employees. The issue of maximum daily hours was one of the rallying struggles of the labor movement.[90] The standard work week was achieved after many

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[86] *Id.* at 38. This figure had not changed significantly for women since 1977, meaning that women have maintained the amount of time spent on childcare despite the increase in their paid work hours. *Id.* at 40. On non-employment days, the difference on average between parents rises to nearly two hours per day, with men spending 6.4 hours and women spending 8.3 hours. *Id.* at 39.

[87] *Id.* at 43. Women spend on average 3.1 hours each workday on household chores, while fathers spend 2.2 hours. *Id.* The gap is slightly larger, one hour, on non-employment days, but has also shown a substantial decrease from three hours in 1977. *Id.* at 44.

[88] *Id.* at 15. For those workers who do have elder care responsibilities, the average amount of time spent each week providing assistance is eleven hours, with men and women spending equal amounts of time. *Id.*

[89] *Id.*

[90] Schor, *supra* note 12, at 79.

unsuccessful battles and has been embedded as a fundamental labor tenet until very recently. This achievement enabled many workers to work fewer hours and thus have more time for non-employment aspects of their lives. The time demand of the standard work week, however, is still based on an assumption that the worker could be free of other responsibilities, ready to devote herself to employment requirements from at least nine to five, five days a week, all year round, without career breaks. The time demand of the standard work week poses a hurdle to anyone with full-time caring responsibilities, even those whose children are in school.

The way in which working time norms are based on the availability and needs of a traditionally unencumbered breadwinner makes them arguably androcentric and exclusionary. As Joan Williams argues:

> [E]mployers who construct workplaces around male bodies and male norms deny equal employment opportunities to women. To expect an employee to work overtime, to travel on short notice, or to undertake other tasks that require insulation from family needs is to presuppose an employee who is male or who is, at least, inhabiting a masculine gender role.[91]

Phase one of the struggle for gender equity in the workforce may have focused on blatant exclusionary practices, but the second overlapping phase is "concerned with transforming the male-centered norms that created both the exclusion and the workplace as women now find it.[92] While women have moved into the workplace, the workplace has not entirely adapted to the different needs and perspectives of its relatively new inhabitants, who are not unencumbered breadwinners.

Many men these days also struggle to conform to the traditional masculine worker mold when they try to combine employment and family responsibilities. Such men may share with women the exclusionary effects of time norms based on a traditional breadwinner model, and, in fact, the lack of recognition that men too have family caring concerns and experience conflict in balancing work and family demands, poses some unique problems for men. In many ways their actual or desired participation in family caring work is not even acknowledged and not given

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[91] Kathryn Abrams, Cross-Dressing in the Master's Clothes, 109 Yale L.J. 74 (2000) 5, 754 (book review) [hereinafter Abrams, Cross-Dressing].

[92] Kathryn Abrams, The State of the Union: Civil Rights: Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1186 [hereinafter Abrams, Workplace Norms]. This view is shared by Mary Joe Frug, *See* Securing Job Equality For Women: Labor Market Hostility to Working Mothers, 59 B.U. L. Rev. 55, 55 (1979) ("Although the labor market gap between the sexes can be attributed in part to overt discrimination against women, full and equal achievement in the work force is still beyond many women because the structure of the labor market makes participation extremely difficult for individuals with major childcare responsibilities.")

the legitimacy that women's is afforded.[93] Men can feel particularly pressured to conform to the ideal worker model, because this is what is required to succeed in the workforce, but also because bread-winning is central to the traditional masculine and fatherhood roles.

The concept of "domesticity," as developed by Williams, captures the shape and forces structuring gender inequality in the workforce and the home. It is summarized by Abrams:

> The normative assumptions of domesticity . . . are embodied in three central tenets: Employers are entitled to "ideal workers" who are immunized from family responsibilities; men are expected and entitled to perform as "ideal workers;" and women should have "all the time and love in the world to give" to their children.[94]

Under this framework, the structure is held in place by two supporting assumptions. The first is "commodification anxiety": "a tendency to characterize (women's) familial labors as an expression of love and commitment and a corresponding reluctance to regard family work as compensable labor."[95] The second is "the use of a rhetoric of choice to describe and justify work/family decisions."[96]

In articulating this framework, Williams highlights the complexity of gender inequality in the workforce. The domesticity explanation captures the way in which preferences are culturally shaped and the way normative assumptions work to limit both women's participation in the workforce and men's participation in family life. The way to address this problem is far from clear or uncontested. Enabling women to enter the workforce has been a necessary but insufficient step to ensure gender equity. Offering a few family-friendly policies does not suffice to solve the problems.

An alternative way of understanding the battles against disadvantage and inequalities in various realms of society is offered by Martha Minow. She has described a set of difficulties generally as "the dilemma of difference":

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[93] Levine & Pittinsky, *supra* note 49, at 14-17.

[94] Abrams, Cross-Dressing, *supra* note 91, at 750.

[95] *Id.*

[96] *Id.* at 750. "Motivated by liberal precepts and by psychological mechanisms of denial, men and women tend to see themselves as free agents, acting on their individual preferences in addressing family and work responsibilities. What this assumption of "choice" obscures is both the constrained character of the alternatives available and the fact that all choices are rigorously conditioned by the normative "force field" created by domesticity. *Id.* at 51 (footnotes omitted).

> The stigma of difference may be recreated both by ignoring and by focusing on it. Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual's ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. ... The dilemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation.[97]

In relation to inequality in the workplace, Minow identifies specific risks of alternative approaches of similar versus same treatment of workers. Acknowledging biological differences and using them to justify special accommodations for women, such as maternity leave, can reinforce the same stereotypes that have been used to women's disadvantage in the workplace.[98] Despite the high proportion of workers who have family caring responsibilities, the worker model is still the traditional one of a family with one male breadwinner, and the worker with major caring responsibilities is characterized as "different" in most workplaces.[99] Minow describes this in legal terms:

> Traditional legal rules about what counts as discrimination in employment and in unemployment benefits implement a commitment to neutrality: no differences should be permitted on the basis of gender. But this very commitment to neutrality poses a dilemma for women who face a world of paid employment designed without women in mind. If women seek to have their special needs acknowledged, they depart from the demand for neutrality, yet women's differences reappear in the face of neutral rules that lack any accommodation for pregnancy, motherhood, or child-rearing responsibilities.[100]

One possible way to address this dilemma is to work on shifting the focus away from whether women meet or do not meet the norms of the traditional male worker. The norms themselves need to be de-gendered by integrating women's (and increasingly men's) experiences of having family responsibilities into workplace practices. Until all workers are

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[97] Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 20-21 (1990).

[98] *Id.* at 41.

[99] *Id.*

[100] *Id* (footnotes omitted).

characterized as different, and thus entitled to have their family and other non-work needs acknowledged, the norm of the unencumbered worker will prevail and the worker with caring responsibilities will continue to be labeled as deviant.[101] A de-gendered norm that supports participation in both employment and family caring work would be one in which it is assumed that *all* workers have non-employment responsibilities, whether they be family responsibilities or otherwise, and in which such responsibilities are not stigmatized.

This approach was utilized in the Supreme Court case of California Federal Savings & Loan Association v. Guerra,[102] in which state legislation granting maternity leaves was challenged as being inconsistent with the federal Pregnancy Discrimination Act. Feminist advocates were deeply divided over this issue, lining up on both sides to argue alternatively for similar and special treatment for women. The justices, however, reconceived the problem, rejecting the presumption of the male norm, which would have set up the equal-special treatment choice.[103] Instead, the majority opinion looked at the problem not just from the workplace perspective of the ideal worker, but from a broader perspective that encompassed the dual roles of men and women as workers and family members.[104] As Minow summarizes:

> The Court found no conflict between the Pregnancy Discrimination Act and the challenged state law that required qualified reinstatement of women following maternity leaves, because "California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs." . . . [I]f there remains a conflict between a federal ban against sex-based discrimination and a state law requiring accommodation for women who take maternity leaves, that conflict should be resolved by the extension to men of benefits comparable to those available to women following maternity or pregnancy leaves. Here, the Court used women's experiences as

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[101] Minow makes this point in relation to education for disabled students. *Id.* at 31.

[102] 479 U.S. 272 (1987).

[103] Minow describes the justices' approach:

> What became clear in these arguments was that a deeper problem had produced this conundrum: a work world that treats as the model worker the traditional male employee who has a full-time wife and mother to care for his home and children. The very phrase "special treatment," when used to describe pregnancy or maternity leave, posits men as the norm and women as different or deviant from that norm. The problem was not women, or pregnancy, but the effort to fit women's experiences and needs into categories forged with men in mind.

Minow, *supra* note 97, at 58-59.

[104] *Id.*

> the benchmark and called for treating men equally in reference to women, thus reversing the usual practice.[105]

Similarly, the expansion of working time options to include alternatives such as part-time schedules, flexible hours, compressed schedules, family leave, and sabbaticals as legitimate working arrangements could operate to alter the ideal worker norm and shift the focus and stigma off the worker with family responsibilities as a non-conformer.

3. Productivity, Profitability, and Adaptability

Finally, homogenous working time practices pose a business problem for organizations. By restricting working time options, organizations are obscuring and missing opportunities to improve productivity, profitability, and their capacity to adapt to changes in the rapidly globalizing market.

Homogenized working times impact productivity and profitability in a number of ways. First, companies that simply assume a linear relationship between output and hours worked may be obscuring the ways in which productivity actually varies over the course of hours in a day. People are not machines and do not work consistently at the same level, especially knowledge workers.[106] As Bailyn concludes: "People may be able to work smart for limited periods of time, but not for long hours; fatigue, attention span, and concern over other needs not being met all preclude this linear relationship."[107]

Second, the focus on hours can also obscure the question of profitability for an organization. Law firms, for instance, tend to focus on the revenue of each employee, which is to some extent related to hours and which conceals the costs that long hours have on profitability.[108] Retention of employees in law firms is strikingly low,[109] and the long hours expected of associates to maintain their billable hours has been identified as a key reason for their decisions to leave their jobs.[110] Retention problems represent a loss of talent, and, particularly in fields such as law where

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[105] *Id.*

[106] Bailyn, *supra* note 10, at 83.

[107] *Id.* Bailyn notes that the assumption about this relationship oddly seems more prevalent in American and Anglo management practice as opposed to European practice, where the focus is more specifically on productivity. *Id.* at 84.

[108] Williams & Calvert, *supra* note 53, at 4.

[109] *Id.* at 8 ("A 2000 study by the National Association of Law Placement Foundation found that nearly 40% of associates leave by the end of their third year, and nearly 60% are gone by the end of their fifth year.").

[110] *Id.* at 8, 10.

recruitment and training costs are high, the costs of poor retention can be very significant. A conservative estimate of the cost of replacing a second-year law associate is $200,000, which translates to a cost of one million dollars or more for every five workers lost.[111]

Third, even when employees do not actually leave their organizations, using hours of work as a key criteria for reward and internal promotion can obscure other traits that might be of value to an organization, resulting in an underutilization of resources. Lack of recognition of employees who are contributing to an organization in ways that are not captured by measurement in hours can also result in harm to morale and commitment.

Catalyst, an organization established to research women's advancement in the workforce, has studied the effects of alternative work schedules on businesses. After an initial study of part-time teachers, it examined the circumstances of part-time social workers in public welfare, looking specifically at job-sharing. This research "began to link part-time work to a positive business value: the shorter workday was found to improve productivity and increase retention in a field with a high burn-out factor."[112] Later research widened the study to other workers, and in the 1980s Catalyst conducted a major study of flexible work arrangements developed by businesses to retain high-performing management-level women. The study found

> a growing awareness of the benefits, for both employers and employees, of offering flexible work options. Most of the participants reported positive outcomes such as retention of valued employees, especially women professionals returning from maternity leave; increased productivity and staffing flexibility; improved morale; and an advantage for recruiting female employees.[113]

The evolution of research, such as Catalyst's, into family-friendly business initiatives shows a shift from viewing them as "benefits or favors to viewing them as support for specific business objectives."[114] A growing management literature confirms that failure to address employee needs for variable working time options can impact not only the morale and retention of employees but also a company's ability to address other business demands. The capacity of an organization to respond to and learn from the

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[111] *Id.* at 7.

[112] Marcia Brumit Kropf, A Research Perspective on Work-Family Issues, *in* Integrating Work and Family: Challenges and Choices for a Changing World 69, 71 (Saroj Parasuraman & Jeffrey H. Greenhaus eds., 1997)

[113] *Id.*

[114] *Id.* at 70.

changing needs of its workforce reflects its capacity to identify inefficiencies in its work practices and to adapt and respond to changes in the market.[115] Mary Dean Lee et al., in their examination of the organizational learning capacities of corporations that permit reduced-load work, summarize their conclusions:

> [T]he way organizations respond to employee requests for reduced-load work is representative of more general organization-level variability in responses to change in the external environment or challenges to the status quo. More specifically, the emergent paradigms can be viewed as representing firms' proclivity to engage in organizational learning and to use individual cases of reduced-load work as a means of experimentation.[116]

Managing work and personal lives is not necessarily a zero-sum game, but innovative management approaches are required to see the link between meeting employees' personal needs and business objectives. Friedman et al. conclude:

> Managers who [continually experiment with the way work gets done] ... see experimenting with work processes as an exciting opportunity to improve the organization's performance and the lives of its people at the same time. They have discovered that conflicts between work and personal priorities can actually be catalysts for identifying work inefficiencies that might otherwise have remained hidden or intractable. That's because taking a new set of parameters into account can allow people to question ways of doing business so ingrained that no one would think to consider changing them otherwise.[117]

Requests for alternative work schedules can be used as an external stimulus for finding new ways to work.[118] One characteristic of companies that actively use such requests is the existence of "an underlying assumption that the organization must adapt and realign itself continuously."[119] Lee et al. conclude: "Reduced-load work arrangements

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[115] *See, e.g.*, Bailyn, *supra* note 10, at 140, 141-42; Lotte Bailyn and Rhona Rapoport, Relinking Life and Work: Toward a Better Future (1996); Mary D. Lee et al., Organizational Paradigms of Reduced-Load Work: Accommodation, Elaboration, and Transformation, 43 Acad. Mgmt J. 1211 (2000); Stewart D. Friedman et al., Work and Life: The End of the Zero-Sum Game, *in* Harvard Business Review on Work and Life Balance 1 (Harvard Business School Press, 2000).

[116] Lee et al., *supra* note 115, at 1220.

[117] Friedman et al., *supra* note 115, at 11.

[118] Lee et al., *supra* note 115, at 1218.

[119] *Id.*

become a springboard for thinking about new ways of defining and organizing work or rethinking career paths and reward structures for a changing workforce."[120]

This can be contrasted with companies at the other end of the organizational learning spectrum that only reluctantly permit a reduced-load arrangement and see each request as an individual or random event, rather than the source of insight or new ideas.[121] In such companies, studied by Lee et al., the arrangement was usually initiated by the individual employees, was permitted because of the peculiar skills or value of the particular employees, was structured so that these employees bore the primary responsibility for making the arrangement successful, and was likely to have marginalizing effects on their careers. The "employer posture was to try to contain and limit the spread of this different way of learning."[122]

Using employee requests as prompts for development of better work practices is one example of how corporations can rethink the link between employment and family responsibilities. Treating them as strictly separate spheres obscures the synergies between them. Bailyn and Rapoport, in a major Ford Foundation collaborative study with three corporations, found that organizations that relinked these supposedly separate spheres were able to use work-family issues "as a catalyst for creative, core innovations in work practices."[123]

These studies also confirm the value of diversity within organizations, a characteristic that is undermined by homogenized working time options. The studies represent evidence that developing diversity offers something more to employers than a sense of satisfying social or legal obligations. Diversity, when managed well, can prompt more experimentation by bringing different needs and capacities to a workplace, offering potential productivity benefits. By stifling diversity or simply not managing it well because of entrenched cultural requirements around working time, businesses fail to capitalize on these benefits.

Ultimately, experimentation with working hours challenges the assumption that time is an accurate measure of productivity and profitability. There may be some relationship between time and output, but this varies throughout the working day, is affected by many variables, and a focus on time obscures other measures by which contribution can be assessed. Apparent work-family conflicts over time can prompt new, more productive and rewarding ways of working.

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[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Bailyn & Rapoport, *supra* note 115, at 19.

C. Time Norms in Flux

Despite the predominance of full-time employment as the norm and a multitude of pressures to maintain this situation, working time norms are not uncontested. Norms about working arrangements are being questioned in various ways and sites. Prompted by poor retention, low morale, gender equity concerns, and changing market demands, many companies are engaging in debates about employment and family issues, and experimenting in the workplace with practices that question the traditional time norms. These companies are participating with and drawing on the work of a plethora of organizations that has emerged over the past decade focusing on examining and resolving employment and family issues. Academic and popular debates, independent research centers[124] and academic centers,[125] conferences,[126] work-life professional associations[127] and coalitions,[128] consultancies,[129] and journals[130] have all been established to explore, among other work-family issues, questions about working time and its impact on individuals, families, and society.

Empirical research suggests a trend toward alternative work schedules for employees. According to a 1985 population survey, over half of American workers worked a forty-hour workweek at that time and nearly three-quarters of the workforce worked these hours as a traditional five-day workweek.[131] However, between 1977 and 1989, the percentage of companies that reported having flextime doubled from fifteen to thirty percent.[132] Part-time work is also increasing, with approximately seventy-

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[124] For example, the Families and Work Institute, and Catalyst.

[125] For example, the Boston College Center for Work and Family.

[126] Recent conferences include OPM/Alliance of Work/Life Professionals conference on Work/Life Programs Feb. 6-7, 2001, Orlando, Florida.

[127] For example, The Alliance of Work/Life Professionals, *at* http://www.awlp.org/ (last visited Mar. 5, 2002)

[128] For example, The Work-Life Coalition of San Diego, *at* http://www.worklifesandiego.org/ (last modified Jan. 19, 2002).

[129] For example, New Ways to Work, *at* http://www.nww.org/history.html (last visited Mar. 5, 2002).

[130] For example, Community, Work, and Family, Carfax Publishing, and Working Mother.

[131] Stephen G. Wood & Alan B. Sevison, Flexible Working Hours: A Preliminary Look at the Phenomenon of Flexibility in the American Workplace, 38 Am. J. Comp. L. 325, 326 (1990). *See also* Raabe, *supra* note 63, at 134-36, for more on experimentation with alternative work schedules.

[132] Wood & Sevison, *supra* note 131, at 326. What this means for individuals is not entirely clear; the Changing Workforce Study noted that while many employees were able to choose when they began and ended their workdays, only a small proportion could change their schedules each day as needed. Changing Workforce Study, *supra* note 11, at 98.

eight percent of the companies surveyed in 1989 reporting that they had part-time workers (although half of these companies had five percent or less of their employees working this way).[133]

The types of alternative working arrangements offered by companies include flexible hours, part-time hours, job sharing, compressed schedules, telecommuting, and parental leave schemes. Flexible hours policies may involve flexibility in the daily, weekly, or even annual work hours. There may be flexibility over the schedule of hours, the number of hours, or both. Often couched as "family friendly" initiatives, the alternative schedules are offered along with a myriad of other programs such as child and elder care subsidies and referrals, on-site meal and shopping services, and concierge services.

There is a burgeoning academic and public policy interest in the work and family field which has raised the profile of these issues and provided a source of material on which corporations can draw. The reports by Catalyst advocating alternative work arrangements in order to improve gender equity have provided examples of alternative practices and tips on experimentation and handling difficulties that may arise.[134] Similarly, the Families and Work Institute has worked to develop connections between workplaces, families, and communities.[135] A multitude of academic centers has been established, with substantial support from the Alfred P. Sloan Foundation, to focus on employment and family, including the Boston College Center for Work and Family,[136] the Alfred P. Sloan Center on Parents, Children, and Work at the University of Chicago,[137] and the Center for Working Families at the University of California, Berkeley.[138] These centers conduct research for both the public and the scholarly community and work with organizations to help develop better work practices. Although the focus of each differs, a typical center, the Center for Work and Family at Boston College, describes itself as

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[133] Wood & Sevison, *supra* note 131, at 326.

[134] *See, e.g.*, Catalyst, Part-Time Teachers and How They Work: A Study of Five School Systems (1968); Catalyst, Flexible Work Arrangements: Establishing Options for Managers and Professionals (1989); Catalyst, Making Work Flexible: Policy to Practice (1996); Catalyst, Flexible Work Arrangements III: A Ten-Year Retrospective of Part-Time Arrangements for Managers and Professionals (2000).

[135] The Families and Work Institute, More About Us, *at* http://www.familiesandwork.org/about/index.html (last visited Sept. 21, 2001).

[136] *See* The Boston College Center for Work and Family, *at* http://www.bc.edu/bc_org/avp/csom/cwf/center (last visited May 7, 2001).

[137] *See* Alfred P. Sloan Center on Parents, Children, and Work at the University of Chicago, *at* http://www.spc.uchicago.edu/orgs/sloan (last visited May 7, 2001).

[138] *See* Center for Working Families at the University of California, Berkeley, *at* http://workingfamilies.berkeley.edu (last visited May 7, 2001).

> a research organization dedicated to increasing the quality of life of working families by promoting the responsiveness of workplaces and communities to their needs. The Center uses three core strategies to pursue its mission: research, workplace partnerships, and services.[139]

With evidence that many companies are now using alternative work schedules, and a wealth of research data to support their ongoing implementation and development, is there a need to be concerned? There are two broad concerns that revolve around whether the developments to date amount to or will lead to significant change in the working time norms of employment, and whether they will help address the problems these norms create.

The first concern relates to the nature and objective of many of the so-called "family friendly" benefits. Many employment and family initiatives can be described as human resource or time management focused. These are aimed at teaching workers how to be more efficient in using time (at work and at home) and minimizing employment and family conflicts. Many help to minimize conflicts by enabling employees to "outsource" their home and caring work with such benefits as child and elder care (provision and referral services), and concierge and on-site services like catering, dry-cleaning, banking, and shopping services. The availability of such benefits can significantly affect workers' lives by diminishing some of the non-employment pulls on their time and hence easing the feeling of employment and family conflicts. However, such initiatives do not necessarily put into question the need to work long hours or the way in which time spent at the workplace is used as a measure of employee value. In fact, by minimizing the demands of non-employment responsibilities in this way, such measures enable workers not only to work more efficiently, but to work longer hours. The benefit of easing conflicts should not be undervalued, but such benefits can obscure the way in which non-employment activities are subordinated and time norms are left unquestioned.

Under many such initiatives workers can work more efficiently, but the productivity gains are not necessarily shared between employers and employees. The efficiency benefits do not necessarily translate to a better balance between employment and non-employment demands. Bailyn warns that there needs to be an agreement that gains from such initiatives will be shared,[140] but it is very difficult to get such agreement, explicitly or implicitly. Others argue that the efficiency gains actually depend upon employee commitment and this will not be forthcoming if they do not see

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[139] Boston College Center for Work and Family, *supra* note 136.

[140] Bailyn, *supra* note 10, at 88.

their interests being taken into account,[141] but this assumes that employee desires are endogenous and not subject to influence by business objectives and incentives.

In analyzing these policies it is important to consider not only whether initiatives reduce employment and family conflict, but also what they reflect about the valuing of employment and non-employment activities, and how efficiency benefits of new work practices are distributed among different groups within a workplace. If the focus on time is simply on how workers can fit more into their limited time each day, then it leaves untouched our cultural understandings of time, how these reflect and reinforce values about the way in which time is spent, and how they might be challenged.

The second, closely related concern about the effectiveness of these alternative work arrangements is about whether they represent or promote a fundamental questioning of the traditional working time norms, or are little more than marketing tools that leave the existing norms intact. Companies are certainly increasingly aware that they must at least be seen to be offering what mothers want in employment, and this includes alternative work schedules. Inclusion in Working Mother's list of good places for mothers to work is now actively sought after by companies and advertised in their recruitment and marketing promotions.[142] Are the formal policies companies have put in place to earn this recognition really changing anything?

Alternatively, are the new arrangements little more than a way to get more out of a newly downsized workforce? Labor flexibility has been proposed by management scholars and business advisors as a solution to a host of business woes, not only the work-family conflict. "Flexibility" became a business buzz phrase over the past twenty years.[143] While businesses have not pounced upon flexible hours as a panacea, many

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[141] Lisa A. Perlow, Finding Time: How Corporations, Individuals, and Families Can Benefit from New Work Practices 134 (1997).

[142] "Working Mother," a part of the American publisher "Working Woman," annually assesses and ranks the top 100 companies on the basis of the companies' commitments to work/life balance. One of the five assessment categories is "flexibility,' along with childcare, leave for new parents, advancement of women, and a miscellaneous category of work/life benefits. Flexibility in this assessment primarily relates to flexible hours arrangements, such as part-time work and leave arrangements for workers and flexible workplace arrangements, such as telecommuting. The assessment considers how much such arrangements are used by employees and how well supported they are by the companies. Being included in Working Woman's "100 Best Companies for Working Mothers" and Fortune's "100 Best Companies to Work For" is now highly desired as a signifier of attention to these issues.

[143] Genevieve Capowski, The Joy of Flex, 85 Mgmt. Rev. 12 (1996); Barney Olmsted & Suzanne Smith, Creating a Flexible Workplace: How to Select and Manage Alternative Work Options viii (1989).

American employers have developed labor flexibility in two identifiable ways.[144]

One form of flexibility is associated with the downsizing of businesses to cut costs and an associated reliance on contingent workers to deal with demand fluctuations. Organizations became more "flexible" by paring back their workforce to a smaller core of workers who have ongoing employment with a range of benefits, and then simply engaging contract or contingent workers on an as-needed basis. Those who were made redundant suffered displacement, but a legacy of this process also appears to be a growing segment of employees who are involuntarily working part-time or irregular hours and could be considered under-employed. Such contingent or peripheral employees tend to have lower and fewer employment benefits than long-term or core workers.[145] Concerns about this kind of flexibility were identified by the Commission on the Future of Worker-Management Relations:

> The growing number of "contingent" and other non-standard workers poses the problem of how to balance employers' needs for flexibility with workers' needs for adequate income protections, job security, and the application of public laws that these arrangements often preclude, including labor protection and labor-relations statutes.[146]

Another way in which flexibility is used by corporations is in relation to internal practices for those core workers who survived the cutbacks. Many of these remaining employees would have experienced increased pressure and low morale in the downsizing wake. Widespread downsizing also arguably changed employee attitudes about loyalty and put in question employment motivations and compensation. However, these employees subsequently faced employers who were no longer willing to offer long-term job security and thus needed to consider other ways to compensate the employees who were going to keep the business going.[147] On this basis flexibility has been increasingly offered as an employment benefit to attract, motivate, and retain the best employees for the jobs, especially in a tight labor market. This sort of flexibility is generally

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[144] Helen Axel, The Conference Board, Building the Business Case for Workplace Flexibility 7 (1996); Olmsted & Smith, *supra* note 143, at viii-x.

[145] Kalleberg, *supra* note 59, at 782-85.

[146] Commission on the Future of Worker-Management Relations, U.S. Dep't of Labor, Fact Finding Report 22 (May 1994) (*quoted in* Jonathan P. Hiatt, Policy Issues Concerning the Contingent Work Force, 52 Wash. & Lee L. Rev. 739, 740 (1995)).

[147] Peter Capelli, The New Deal at Work: Managing the Market-Driven Workforce (1999).

presented as holding the most promise for workers with family responsibilities.[148]

Some benefits, however, have simply been added on to an otherwise unchanged workplace—an "add benefit and stir" approach. Others have been added, but with explicit or unstated disincentives to take them, prompting such terms as the "mommy track." Raabe queries the extent and understanding of family friendliness noting that:

> Particularly in relation to providing flexible, diverse and equitable work arrangements, even many of the organizations regarded as most 'family-friendly' have stalled in organizational development. In fact, valid assessments of 'family-friendly' organizations may need to deduct points for 'family-harmful' workplace practices such as work overloads, lack of equitable, flexible work arrangements, and not considering redeployment and training of workers before downsizing.[149]

Offering programs such as flextime, for example, might not really help workers to combine employment with family. Flextime is of little benefit if workers are still expected to put in long hours and are penalized for doing it under a flexible schedule because they are seen to be not as available or committed. Similarly part-time work may be offered, but at the cost of benefits or career advancement.

Companies can go through a series of developmental stages in addressing problems of employment and family conflicts. Bailyn suggests that many companies do not get past the first stage of providing benefits such as childcare referral services or flexible hours programs as a solution. Such benefits can be offered without fundamentally questioning how traditional attitudes about workers (including the notion of employment and family occupying separate spheres) impact the organization's ability to attract, motivate, and retain workers, and its ability to develop better ways of working.

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[148] In seeking to categorize types of flexibility in this way I do not want to suggest that they are unrelated or even clearly divided. First, the rationale for both types of flexibility may be the same—cost cutting and a drive for efficiency. Second, there is much debate, for example, about who is and who is not a contingent worker. See, e.g., Maria O'Brien Hylton, The Case against Regulating the Market for Contingent Employment, 52 Wash. & Lee L. Rev. 849 (1995). Whether a particular position represents one form of flexibility over the other will depend on context, not merely the specific number or schedule of hours the employee works. Part-time work, for example, may be offered as a genuine alternative to full-time work with the provision of commensurate benefits and the opportunity to convert to full-time work. Alternatively, a part-time position offered without consideration of the needs of the employee, without benefits, and without the scope to convert to full-time hours is the epitome of flexibility fall-out. It is difficult to argue that such involuntary part-time work provides a suitable solution to a caregiver's work-family conflicts.

[149] Raabe, *supra* note 63, at 129.

Bailyn argues that:

> [A]s long as the amount of time spent at work is seen as a prime indicator of commitment and productivity, the emphasis on long hours will remain. And this, particularly when rigidly prescribed, is a key element in the inability to meet conflicting responsibilities.[150]

Entrenched time norms and an inflexible working culture can thwart efforts to balance work and family even where there are formal work-family policies and an apparent openness to alternative arrangements. Lisa Perlow studied time norms at a Fortune 500 company to understand, and help the organization to understand, how work practices embodying particular time norms impact its ability to achieve business objectives and meet personal needs of the employees.[151] Assumptions about unlimited employee availability, for instance, allowed and even encouraged the group of workers to adopt inefficient work practices that hindered both the achievement of business goals and the balancing of employment and family. Perlow was able to work with the team to devise an alternative way of working, one which reaped personal and business benefits on experiment, but the company on its own was not able to sustain the new way of working, falling back into old patterns. This company was listed in Fortune's "100 Best Companies for Working Mothers," but there was a lot of pressure, at least in this division of the workplace, not to utilize the flexibility that was supposedly offered.

Alternative working arrangements are being utilized in some organizations in a way that represents a real change in time norms and potential for more gender-neutral work practices. Lee et al., in a study conducted of organizations that offer reduced-load work, categorized more than a third as good organizational learners.[152] In these organizations, the alternative work arrangement was used as a way to help the employees balance their employment and personal priorities, and to identify new ways for the organization to work. In this way, the individuals who chose alternative work arrangements were not penalized or disadvantaged, but were seen to be contributing to the organizations in a new way.

Similarly, a new breed of managers is emerging who are "trying a new tack, one in which managers and employees collaborate to achieve work and personal objectives to everyone's benefit."[153] Friedman, Christensen, and De Groot summarize the principles adopted by these managers:

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[150] Bailyn, *supra* note 10, at 81.

[151] Perlow, *supra* note 141.

[152] Lee et al., *supra* note 115 at 1216.

[153] Friedman et al., *supra* note 115, at 2.

> The first is to clearly inform their employees about business priorities and to encourage them to be just as clear about personal priorities. The second is to recognize and support their employees as whole people, not only acknowledging but also celebrating their roles outside of the office. The third is to continually experiment with the way work gets done, looking for approaches that enhance the organization's performance and allow employees to pursue personal goals.[154]

Based on their study of a variety of U.S. based companies, they identify a continuum in organizational practices around work and personal life, with the "trade-off" approach, in which either the work or personal life wins, but not both, on one end, the "integrated" approach, "in which employee and manager work together to find ways to meet both the company's and the employee's needs"[155] somewhere in the middle, and the "leveraged" approach, "in which the practices used to strike a work-life balance actually add value to the business"[156] at the other end of the spectrum.

These studies are only examples of a myriad undertaken by researchers into the ways in which organizations are trying to tackle the problems of meeting the needs of their changing workforces and the changing needs of the markets they face. The active participation in and funding of these research projects by companies demonstrates their interest in the issues. There is, however, an undeniable marketing bonus for the companies which advertise that they are addressing such issues, and, as Perlow's study shows, not all companies capitalize on the insights that researchers have provided.

One study, by Bailyn and Rapoport,[157] took an in-depth collaborative approach with three corporations. This enabled the research team to understand the paradigms of employment and family that were used in the three workplaces, and the way in which time norms reflected and reinforced them. It also enabled the companies to develop capacity to be able to see these issues, identify ways in which such conceptions impact business and personal objectives, and develop alternative ways of working. Benefits to employees and the businesses were realized in the course of the research project and were seen to be sustainable beyond its term.

We can conclude that in many different sites time norms are being questioned and reshaped. Companies are experimenting in response to workforce and market changes, and there is a developing body of research material that is being used to reshape wider public views. But what is needed is a major cultural shift and a significant change in the way work is

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[154] *Id.* at 26-27.

[155] *Id.*

[156] *Id.*

[157] Bailyn & Rapoport, *supra* note 115.

managed and evaluated. Such change requires commitment to the goals and resources for experimenting and retraining, both of which many corporations are not able to muster. The inertia and interests that work against such change are enormous. Experimentation in isolated sites needs support if it is going to be maintained and fostered. This warrants an examination of the role of public policy, and in particular law, in supporting or hindering such change.

II. THE ROLE OF LAW

This understanding of time norms and emerging challenges to them poses a question for legal scholars: How are cultural assumptions about the connection between time and worker value reflected, reinforced, or challenged by law? Put another way, how does the law impel or impede the development of the alternatives that are emerging? Further, does the law work to minimize the exclusionary effect of current time norms and deliver greater workplace equality?

My endeavor here is to examine these questions about the role of law in one particular arena of employment regulation—unemployment insurance. As noted above, this regulatory scheme has been chosen merely as an example or a means of exploring the various roles law can play in affecting workplace norms. U.I. law represents only one facet of employment regulation and primarily affects one point in the employment relationship, the termination. But the point of termination reflects generally on how time norms are used in the evaluation of employees in the workplace, and U.I. cases constitute a rich database that can reveal the various roles law can play.

Law is examined here in a multitude of ways. The focus is not merely on who wins or loses in U.I. cases—the prescriptive function of the law.[158] The mandates of doctrine may influence how employers and employees decide to terminate the employment relationship, but they do not provide the full picture of the role of law in regulating terminations, or their context. This article also examines the institutional role of law, meaning the role played by the process, structured by law, through which employers and employees are channeled in claiming or contesting unemployment benefits. The third role of law examined is the expressive or constitutive role of law—how the conceptual framework and language of the legislature and courts act to constitute the subjects and the time norms.

An overview of the significance and nature of the U.I. regulatory regime is first set out, followed by an analysis of the U.I. cases and recent legislative developments.

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[158] Kathryn Abrams, The Constitution of Women, 48 Ala. L. Rev. 861, 861-62 (1997).

A. Termination of Employment and Unemployment Insurance Regulation

1. Termination as Window on Workplaces

Termination of employment is one point in the employment relationship at which employer attitudes and assumptions about time can crystallize. At this point in the relationship views about time may be made most explicit when the employer in effect states: Unless you comply with this time demand, you are not worth retaining as an employee. One does not have to assume that every dismissal decision is a well-thought out and measured balancing of the employee's attributes in order to accept that dismissal decisions reflect management's views about employee value. Whether the decision is well reasoned or carried out on the spur of the moment with little formal reasoning, the employer makes some sort of assessment about whether it is in the organization's interest to retain the person in employment and this, by its nature, is an evaluation.

An examination of dismissal decisions can thus shed light on the way in which employers use time to evaluate employees. Examples abound of termination decisions based on explicit time demands—terminations for absenteeism or tardiness, refusal to work overtime or increased hours, refusal to change shift, or insufficient billable hours. Sometimes the relationship between the needs of the organization and the time demand is clear, for example, when a person responsible for opening the store or starting the machinery repeatedly fails to turn up or attends late, losing customers or production time. At other times, the relationship might be less clear, such as an employee being fired because he cannot work overtime without enough notice to make alternative childcare arrangements. In the latter case, in making a decision to terminate the employment, the employer might use the time demand as a proxy for other characteristics valued by the employer, such as commitment, obedience, or loyalty. One question raised by these decisions is whether time is an accurate and fair proxy for such characteristics. Another is whether the focus on time obscures the value of other traits the employee offers to the business.

Terminations may involve time demands that are not very explicit but rather involve assumptions about time that are built into work practices. In a way, this is the least *intentional* employer use of time. So, for example, an employee may be fired for not performing as a team player when he fails to attend meetings and social events scheduled outside of regular work hours. In such a case, no explicit time demand is made, and yet achievement of the desired trait, being a "team player" in the workplace, is dependent upon being totally available for work and even work related social events. In this way, although not expressed as a time demand, the employee with time constraints is going to be seen as deficient or deviant, and penalized.

2. The Unemployment Insurance Regime—Overview and Context

Today's workplace is affected by a variety of regulatory schemes, one of which is the unemployment insurance scheme. This scheme is particularly useful as a means of examining the role of law in affecting time norms in the workplace, because it moderates a critical point in the employment relationship—the termination—and it does so in a range of ways that can be seen through an examination of the cases. The U.I. scheme does not explicitly seek to regulate working hours, and yet, as with probably most legal schemes, its consequences extend beyond the law's explicit objectives.

The U.I. scheme affects the employment relationship in various ways. It does not restrict the employer's or employee's right to terminate the relationship, as wrongful dismissal regimes do. However, it does regulate the costs of termination to some extent, by compensating the employee and charging the employer so long as certain criteria are met. The U.I. scheme also requires regular payments of insurance "premiums" or taxes by employers, covering virtually all employees, and relies upon employer participation in assessing claimant eligibility.

A brief description of the scheme will provide context for this discussion. U.I. was introduced in the United States as a federal-state scheme under the federal Social Security Act of 1935[159] in response to high levels of unemployment during the depression of the 1930s.[160] The "scheme" is really a set of fifty-three separate schemes—one for each state, the Virgin Islands, Puerto Rico, and the District of Columbia. All but three schemes are funded entirely by payroll taxes.[161] In the year 2000, approximately ninety-seven percent of wage and salary workers were covered by the U.I. scheme, constituting eighty-nine percent of the civilian labor force.[162] The federal requirements with which each scheme needs to comply are minimal and thus the schemes can, and do, vary across the

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[159] Pub. L. No. 74-271, 42 U.S.C. § 301.

[160] The federal legislation does not actually establish a U.I. compensation system. Rather, it encourages states to establish their own U.I. systems by imposing a federal payroll tax and allowing states to credit most of this tax against the federal tax if their U.I. system complies with a list of requirements set out in the federal legislation. The Federal Unemployment Tax Act (FUTA) imposes a 6.2 percent tax on the first $7000 paid annually by covered employers to each employee, and states can credit 5.4 percentage points against the 6.2 percent tax rate, making the effective federal tax rate 0.8 percent. All states have now established valid systems.

[161] Each state's taxes are paid into trust funds that are administered by the states. Three states also require employee contributions.

[162] Staff of House Comm. on Ways and Means, 106th Cong., 2d Sess., Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means 280 (Comm. Print 2000) [hereinafter The Green Book).

country. The states, in turn, have set forth only general legislative requirements; the specifics have been established by rules, policies, regulations, or cases (administrative and judicial), leaving the courts to flesh out much of the details of each scheme.

All states utilize a mechanism of apportioning costs to employers that is unique among U.I. systems around the world, namely "experience rating."[163] Under this mechanism employer contributions are varied according to risk. Employers are required to contribute a percentage of their payroll, but this percentage is raised or lowered based on the termination experience of the employer. So, for instance, an employer who discharges an employee who is subsequently paid compensation out of the scheme will be charged a premium rate of tax. An employer who, in effect, produces fewer claimants in the scheme will have a better experience rating, and will thus be charged a lower rate. There are, however, upper and lower limits on the percentage that can be charged, so this incentive effect is only partial.

To be eligible for unemployment compensation, a claimant must have worked a specific number of hours or earned a specified sum of money over a base period of time prior to becoming unemployed.[164] In addition, although the wording of each scheme varies, in general, a claimant may be disqualified if it is shown that his employment separation was a discharge for "misconduct," or that he voluntarily quit without "good cause."

Subsequently, if the claimant does not continue to be able and "available" for "suitable" work,[165] he is also open to disqualification. The requirement to be "available for work" has in many states been interpreted to oblige the claimant to be available full-time.[166] This is generally the case

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[163] Katherine Baicker et al., A Distinctive System: Origins and Impact of U.S. Unemployment Compensation (National Bureau of Econ. Research, Working Paper No. 5889, 1997). Other schemes, including many in Europe, require employer contributions that are based on the number and type of employees, but not adjusted according to the employer's employment history. In further contrast, the Australian unemployment income support scheme is not insurance-based at all, with support being drawn from general tax revenue.

[164] On average, workers must have worked in two quarters of the year prior to becoming unemployed and earned at least $1,734 to satisfy the monetary eligibility requirements. The Green Book, *supra* note 162, at 286.

[165] *See, e.g.*, Or. Rev. Stat. § 657.155 (1999); N.M. Stat. Ann. § 51-1-5 (Michie 2000); Cal. Unemp. Ins. Code § 1253 (West 2000).

[166] *See, e.g.*, Martin Malin, Unemployment Compensation and Eligibility: Unemployment Compensation in a Time of Increasing Work-Family Conflicts, 29 U. Mich. J.L. Reform 131, 151 (Fall 1995/Winter 1996); Deborah Maranville, Theoretics of Practice: The Integration of Progressive Thought and Action: Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm, 43 Hastings L.J. 1081, 1090 (1992); George L. Blum, Annotation, Unemployment Compensation: Eligibility

regardless of whether the person was previously working part-time and regardless of the needs or desires that contributed to the person's decision to work part-time originally. So, while part-time employment may be sufficient to ensure that a worker accumulates credits for receiving unemployment compensation, in the event of unemployment the insured person is generally only eligible for compensation if he actively seeks full-time replacement work.

Most of the case law generated in U.I. litigation arises out of disputes over a claimant's eligibility for compensation. Employers are encouraged to challenge claimant eligibility because they risk the experience-rating tax premium if the claimant succeeds in being awarded compensation. Experience rating also provides an incentive for employers to modify their own behavior to minimize terminations, and to ensure that separations are of the type that disqualify claimants from benefits.

The point of most interest to employers is the initial claim rather than assessments of ongoing eligibility. A claimant must satisfy an initial assessment of eligibility, and then, in order to remain eligible, must continue to satisfy the requirements of being able and available for suitable work. The quantity of the tax penalty imposed on employers under the experience-rating regime is dependent on the amount of compensation claimants ultimately received from the fund. Once a claim has been granted, this is determined by the rate of payment, as well as the period for which the claimant remains eligible. However, it is only with respect to the initial assessment that an employer is likely to have sufficient connection with the claimant. Most employers, having unsuccessfully disputed initial entitlement, would not consider it worthwhile to monitor ongoing eligibility of a claimant. This is left to the administrative agencies and their variable resources. Approximately four million claimants were disqualified from eligibility in 2000, and, of these, more than one million were disqualified for voluntarily quitting without good cause, and almost three quarters of a million were disqualified for being fired for misconduct.[167] Not all disqualifications would amount to litigation, but most U.I. litigation that does arise involves employers disputing eligibility and doing so with respect to the initial separation.[168]

For the employee, the most obvious way in which the regulation seeks to moderate employee behavior is through limiting the circumstances under which claimants are entitled to receive compensation. As noted, generally claimants will be disqualified[169] if they have brought about their

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as Affected by Claimant's Refusal to Work at Particular Times or on Particular Shifts for Domestic or Family Reasons, 2 A.L.R. 5th 475.

[167] The Green Book, *supra* note 162, at 290.

[168] Baicker, *supra* note 163, at 5.

[169] Some disqualifications are only for a specified waiting period.

own discharge by misconduct, or have voluntarily quit their employment without good cause. Subsequently, in order to maintain eligibility, claimants must make themselves "available" for "suitable" work. Such requirements were built into the system to guard against the moral hazard of employees bringing about or prolonging their own unemployment.[170]

3. What Can We Learn From an Examination of Unemployment Insurance Law?

An examination of unemployment insurance law provides us with an insight into the subtle and not-so-subtle ways in which law can work to reflect, reinforce, shape, or challenge work practices and norms relating to time. Aspects of the workplace are structured by time norms and these norms are relied upon or utilized in many terminations. The U.I. system represents a legal intervention in such terminations, and, if we examine this system from different angles, we can see how law, playing multiple roles, bears upon these terminations and, in particular, upon the maintenance or development of underlying time norms. As noted above, the three interrelated roles examined are described as prescriptive, expressive or constitutive, and institutional.

Law-as-prescript provides a set of rules to which workplace actors must conform. Although the U.I. scheme does not limit management discretion in termination, the rules about eligibility for compensation may affect how employers choose to end the relationship. For example, in order to avoid incurring an experience rating penalty, an employer might try to ensure that a termination is framed as either firing for misconduct or quitting without good cause, which disqualifies the claimant from eligibility.

The effect of law-as-mandate on decision-makers depends partly on the extent to which the actor has knowledge of, and considers, the rules and consequences when making the decision to terminate. It is a question for empirical inquiry whether most managers with the power to terminate employment are acquainted with and take into account the U.I. consequences of termination. Unlike other legal obligations, such as compliance with civil rights laws, the U.I. penalty is a regular tax, and compliance may be outsourced. This separates employer decisions about termination from the impact under the U.I. rules and thus minimizes the effect of legal doctrine on the decision-making of managers.

Even where the rules of eligibility are not consciously considered by an employer making decisions about termination, they still may shape the consequences of the separation for both parties if U.I. compensation is claimed. In claiming and challenging eligibility, the rules also provide parameters within which arguments can be made.

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[170] Malin, *supra* note 166, at 155.

Second, law plays a constitutive[171] or expressive role. While the prescriptive role of U.I. law has been investigated by a number of scholars,[172] the expressive or constitutive role has been relatively unexamined. The framework and language used by legislatures in setting out the U.I. rules, and by courts in interpreting and elaborating upon those rules, play a constitutive role. As a type of public statement, law provides a depiction of the baseline values and principles by which conflicts are resolved and consequences are to be borne, and in so doing gives shape or constitutes the subjects that it addresses. In this way, U.I. law provides a chance for a third party to the employment relationship, a legislature or legal arbiter, to comment on or challenge the claims made by employees and employers. Kathryn Abrams articulates the distinction between the prescriptive and constitutive roles of law:

> The law, in the course of fulfilling its prescriptive function, projects images of the groups appearing before the Court. These images then shape the way such groups are viewed by the larger society. Law in this sense performs a function analogous to that of political rhetoric or the imagery of popular culture: it characterizes groups in ways that ultimately filter into popular understandings and counteract, or reinforce, the assumptions and stereotypes that already exist. With respect to women, this second or constitutive function is at least as important as the prescriptive function, because by shaping perceptions of women, it fuels or hinders women's equality in contexts that have not yet been addressed by the Court.[173]

As a U.I. example, when a court states that a claimant is not entitled to U.I. compensation because he quit without just cause, it is performing a prescriptive function. However, the enunciation by the court of what is a reasonable employer demand and what constitutes "just cause," and the characterization, for instance, of the claimant's inability to get childcare

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[171] Terminology used by Kathryn Abrams. Abrams, *supra* note 158.

[172] *See, e.g.*, Malin, *supra* note 166; Maranville, *supra* note 166; Blum, *supra* note 166.

[173] *Id.* at 861-62 (footnotes omitted). Abrams provides a useful example of the distinction in discussing the case of Bradwell v. Illinois, 83 U.S. 130 (1872):

> When the Bradwell Court said that the state was authorized to deny women admission to the bar, it was performing the prescriptive function. But when Justice Bradley described women as being characterized by "proper timidity and delicacy" and being destined to "fulfil the noble and benign offices of wife and mother," he was performing the constructive or constitutive function by projecting an image of women that, in this case, both reflected and reinforced the "separate spheres" ideology that was prevalent in late nineteenth century American society.
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> *Id.* at 863.

quickly enough to change shift as being a "personal" problem, reflect and reinforce an understanding of employment and family as belonging to separate spheres.

Such judicial enunciations also reinforce the norm and identify the individual worker as "different" and responsible for bearing the cost of this difference.[174] As Martha Minow concludes:

> Law provides vivid contexts for studying the assignment of the label of difference, whether by traits of race, gender, disability, or other minority identities. Law uses categories. Judges and administrators identify traits and place people and problems in categories on that basis. Law also backs up words and concepts with power. The names given by law carry real consequences in people's lives. In law, the press of the past has a special weight. Judges deliberately maintain continuity with ideas and practices of the past in order to promote social stability and protect expectations. Even the judicial model of individualized hearings and individualized judgments preserves and reinvents categorical solutions and neglects the relational dimensions of problems of difference.[175]

In this way, while U.I. provides assessments of terminations that are financially significant for the claimant, arguably they are also socially significant in enunciating community values or standards about employment and about norms. This is particularly the case in the absence of a contractual or wrongful dismissal-type basis for contesting terminations. Given the very general nature of the U.I. legislative requirements, the agencies and courts applying and interpreting the legislation have great scope for exercising judgment about how the U.I. system should operate, and, in specific cases, what is the appropriate relationship between employment and family responsibilities.

The effect of the expressive or constitutive role of law depends partly on legal statements being disseminated and read in order to shape popular or cultural understandings. Unlike Supreme Court decisions, for instance, that get wide publicity and are examined at least by legal

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[174] Martha Minow outlines alternatives for individuals identified as different bearing the cost of this categorization:

> We can treat differences as the private, internal problem of each different person, a treatment that obviously depends on communal agreements and public enforcement. We can treat differences as a function of relationships and compare the contributions made by different people to the costs and burdens of difference. Or we can treat differences as a pervasive feature of communal life and consider ways to structure institutions to distribute the burdens attached to difference.
> Minow, *supra* note 97, at 11.

[175] *Id.* at 97.

readers,[176] the readership of each U.I. case would be miniscule in comparison, and the expressive significance afforded to these statements relatively minor. However, U.I. cases are issued in abundance and are heard or read at least by the parties and U.I. practitioners, and in significant doctrinal cases disseminated by human resource advisers and the like. The conceptual framework and reasoning used by judges impact upon the parties at hand, and the cases provide a rich database for scholars to plumb for a story of the development of working time norms and cultural understandings of the interaction between employment and family responsibilities.

The third related, but distinct, role of law is an institutional role. By establishing a process through which U.I. claims are made and challenged, the U.I. system represents a regularized opportunity for employer attitudes and employment norms to be reinforced or disrupted, and for organizations potentially to develop their institutional capacity with respect to problems that prompt terminations.[177] The regime prescribes a process that terminated employees must follow in order to claim compensation, and a process that the employer must undertake to challenge the claim. Once a termination has been effected, and a claim filed, employers are confronted with the options of accepting the potential increase in tax according to the experience-rating mechanism if the claim is successful, or challenging the eligibility. In order to challenge eligibility, the employer is forced to articulate reasons for termination and frame these reasons within the confines of the eligibility rules. Further, in the adversarial system of the adjudication, the employer is required to deal with the employee's arguments. It is this articulation and response arbitration process that enables a questioning of employment norms.

The U.I. law thus creates an opportunity for employers to be confronted with their decisions and compelled to articulate their termination reasoning. Even in an at-will engagement, where the employer has little legal restriction on its power to terminate the relationship, the U.I. process might still impact upon the employer by making it assess its own views about the reasoning and rightness of the termination. Each case represents an interaction an employer had with the U.I. system—an interaction that could encourage or even compel the employer to review and question its workplace practices. The impact of the law in this role is not dependent on

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[176] Cass R. Sunstein, Law, Economics, and Norms: On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2028 (1996) ("[T]he close attention American society pays to the [Supreme] Court's pronouncements is connected with the expressive or symbolic character of those pronouncements. When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments.").

[177] For elaboration on this role of law in assisting and hindering organizations in developing their institutional capacity to resolve problems see Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 520-22, 557-58 (2001); Carol A. Heimer, Reactive Risk and Rational Action 36 (1985).

the threat of large damages pay-outs or reputational risks, but as a day-to-day question arising out of each employment termination. By numbers alone, the system has the potential to affect a significant proportion of employers in managing their workplaces, and specifically their terminations, given that there were more than 14.8 million U.I. claims made in the year 2000, and 27.4 percent of these claimants were subsequently disqualified.[178] The pool of U.I. cases dealt with by courts represents a small but significant proportion of all employers in the U.S. who had more than a payment and reporting connection with the U.I. system.[179]

The process of challenging eligibility also creates a record, and collectively a database, of termination decisions. It turns the spotlight onto the circumstances of termination of employment in a way that enables information to be produced about workplace behavior, and for this behavior to be made public and examined. Given that a large proportion of employment in the United States is terminable at will and not protected by contract[180] or unfair termination legislation,[181] U.I. cases constitute one of the few legal records of employment termination stories. U.I. cases, as a database, provide useful material for an examination of how the notion of time factors into management attitudes toward employees. They can tell us, and potentially any interested employers, something about how employers use time as a measure of value, or as an attribute of the "ideal" employee. It is law as process that creates such a record.

B. Time Norms in Unemployment Insurance Cases

Looking at unemployment insurance regulation, and the cases as a window on the employment relationship, we can see law in these various roles affecting time norms in employment. Under the U.I. schemes, claimants who satisfy the monetary eligibility criteria are generally eligible for compensation unless they are disqualified. Although the schemes vary

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[178] The Green Book, *supra* note 162, at 290.

[179] It is important to keep in mind though that this pool is not necessarily representative of all employees, employers, industries, or regions. Some unemployed workers file claims; others do not, and factors influencing this include the level of unionization of the industry and the level of benefits available in that state. *See* Rebecca M. Blank & David E. Card, Recent Trends in Insured and Uninsured Unemployment: Is There Any Explanation?, 106 Q. J. Econ. 1157, 1157 (1991).

[180] Many state cases dealing with employment manuals have led courts to re-articulate employment at-will as only a presumption and one that can be ousted by evidence of a contract. *See, e.g.*, Continental Air Lines v. Keenan, 731 P.2d 708 (Colo. 1987).

[181] Unfair termination legislation is generally limited to government workers, and those covered by Montana's wrongful dismissal legislation. Other legislation does place some limits on termination of employment, by specifying impermissible grounds for dismissal. *E.g.*, civil rights legislation, the Family and Medical Leave Act, jury acts, and workers' compensation legislation.

in their wording, claimants generally can be disqualified either because they were fired for "misconduct" or they quit without "good cause" or, as some states require, "good cause attributable to the employer." Since the different state schemes generally share at least these two disqualifications, I have used them here as the basic structure for examining cases and the different roles of law.

With respect to the doctrinal role of law, the disqualification of quitting with good cause has mostly been interpreted to limit employee eligibility unless the claimant can prove fault or responsibility of the employer.[182] In contrast, the misconduct disqualification has generally only limited eligibility where there is proof of employee intention to hurt the business.[183]

Under this interpretation of good cause, many workers with family responsibilities that conflict with employment responsibilities not only lose their jobs, but are also denied unemployment compensation, because courts accept that it is the employee's responsibility to comply strictly with employer requirements, regardless of non-work obligations.[184] However, as discussed below, recent judicial decisions in some states have found that at least where it was the employer who brought about the conflict between employment and family responsibilities, by, for instance, changing the employee's schedule, the employee is found to have good cause to quit if he cannot comply.[185] Claimants are thus ruled eligible for compensation, and the employer's experience rating is adjusted accordingly.

The expressive or constitutive role of law emerges from a textual analysis of these cases. The way in which the courts frame their reasoning reflects, reinforces, or challenges the underlying assumptions about time norms and the relationship between employment and family. There is a persistent thread of moral hazard throughout many of the judgments, and this appears to be based on two key assumptions about workers and the relationship between work and family. The first is that employees would always choose to avoid work if given an opportunity or permission, and thus the U.I. administrator must be vigilant to guard against the risk that a compensation scheme could encourage or even allow employees to opt out of employment. Claimants are thus forced to show how they have actively tried to pursue the work and how the cause of unemployment was somehow

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[182] *See infra* Part II.B.2.

[183] *See infra* Part II.B.1.

[184] Many time-related termination cases can be characterized as conflicts between work and family responsibilities and Martin Malin, among others, has explored the availability of U.I. benefits to workers who lose their jobs because of such conflicts. Malin, *supra* note 166. *See also* Maranville, *supra* note 166.

[185] *See, e.g.*, Newland v. Job Serv. North Dakota, 460 N.W. 2d 118 (N.D. 1990) and White v. Security Link, 658 A.2d 619, 622 (Del. Super. Ct. 1994), discussed below, pp. 338-340.

beyond their control. Examples of this judicial vigilance are seen in cases discussed below.[186]

The second assumption is that employer and employee needs are inherently contradictory or competing, and the balancing of the two is thus a zero-sum game. These assumptions come through in the concern that if employees are permitted to make choices about balancing work and family commitments, and they choose to attend to a non-work demand, this necessarily conflicts with the employer's needs. This reflects and reinforces a notion that the realms of work and family are separate and that accommodation of one must be at the expense of the other, a notion that is increasingly questioned in practice.

A related theme expressed in the cases is that employers are seen as performing a vital economic function of harnessing labor for production, and that under a traditional view of management this requires direct surveillance and controlling employee time. Employers need the freedom, or even have the responsibility, of controlling or regulating their workers in order to run their business and sustain the economy. Workers who do not conform to the ideal of unencumbered workers pose a threat to the natural order required to run a business.[187]

This last theme is, in effect, "an assumption that the existing social and economic arrangements are natural and neutral."[188] This is one of the related, but unstated, assumptions that underlie Minow's difference dilemma, or the difficulty of overcoming the disadvantage of difference. She elaborates on how this assumption operates as a barrier to change:

> If workplaces and living arrangements are natural, they are inevitable. It follows, then, that differences in the work and home lives of particular individuals arise because of personal choice. We presume that individuals are free, unhampered by the status quo, when they form their own preferences and act upon them. From this view, any departure from the status quo risks nonneutrality and interference with free choice.[189]

In most cases, these assumptions about time norms and the relationship between employment and family lead the court to accept the employer argument that it should not be held liable for the fact that a time demand has posed problems for the employee resulting in a resignation.

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[186] *See, e.g.*, Prickett v. Circuit Sci., Inc., 518 N.W.2d 602 (Minn. 1994) and Menendez v. River Orchids Inv. Corp., 653 So. 2d 470 (Fla. Dist. Ct. App. 1995) and discussion below in text at n.201.

[187] *See* Arizona Dep't of Econ. Sec. v. Valdez, 582 P.2d 660 (Ariz. Ct. App. 1978), discussed below at p. 325.

[188] Minow, *supra* note 97, at 52.

[189] *Id.*

In contrast, there are a number of cases that consider whether it was the employer who brought about the work-family conflict and whether it was reasonable for an employee to resign in response.[190] As in California Federal Savings & Loan Association v. Guerra outlined in Part I.B.2 above, these cases can be interpreted as changing the baseline, or rejecting the ideal worker norm for a more balanced or whole, non-gendered view of the worker. In these cases, the court steps back from the simple question of whether the worker has complied with the existing norm, and instead, relying on public policy arguments, starts from the basis that workers should be able to fulfill dual employment and family roles. They hold out some promise of a shift away from the moral hazard of employees and the fault of employers, speaking of balance rather than fault. Rather than accept that those who do not conform to the norm are different and must bear the cost of their difference, they reflect a picture of how the norms might be developed and the costs apportioned differently.

In these cases, the court assumes that workers with non-employment responsibilities are entitled to meet those responsibilities, and, if employers treat them as unencumbered, then employers must bear some of the consequences. Calling on the remedial nature of the legislation, the cases speak from an employee's perspective of workers having multiple obligations in society other than merely employment responsibilities, and recognize that such responsibilities also need to be met. This requires employer accommodation, although such language is not used. In these cases, there is a perceptible shift in the underlying assumptions about combining employment and family, a shift that holds valuable expressive content for the cause of de-gendering the ideal worker norm.

The institutional role of U.I. law needs to be examined, although without empirical study this role can only be surmised. The unemployment claims that become reported cases represent the occasions where employers have chosen to challenge eligibility rather than just leave the assessment up to the agency and risk the experience rating consequences. These employers have been required to articulate how the employment separation occurred and why it should disqualify the claimant, and in this way provide an opportunity for employer practices to be questioned.

However, the effect of such opportunities on an organization's institutional capacity is not readily apparent or ascertainable. There is no guarantee or even accountability measure to ensure that employers will learn anything from the experience, or use what they learn in a way that is more gender neutral or developmental for the organization. What employers take from the experience depends partly on what involvement they have in the proceedings, and largely on the practice and culture of

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[190] *See, e.g.*, Newland v. Job Serv. North Dakota, 460 N.W. 2d 118 (N.D. 1990) and White v. Security Link, 658 A.2d 619, 622 (Del. Super. Ct. 1994), discussed below, pp. 338-340.

organizational learning within the workplace. One organization may use the experience to identify lessons it can learn from experimentation and ways in which the organization is not fully capturing the value of its resources, while another may simply take from it a lesson on how to avoid future liability or "bullet-proof"[191] its practices from further claims. However, in drawing attention to the situation, the litigation provides some form of external stimulus to the organization and thus opens up the opportunity for learning in a way that dismissal alone does not.

1. Misconduct

While an employer may legally be able to fire an employee for non-compliance with a time demand, such conduct does not necessarily amount to disqualifying misconduct under unemployment insurance schemes. Employer claims of misconduct in time-related terminations generally fail to disqualify a claimant when family responsibilities are the reason for the conflict.[192] The courts have interpreted the misconduct requirement as being more than merely whether the employee failed to satisfy an employer's demand. Generally, the courts have assessed the reasonableness of the employer's demand and whether the employee's response demonstrates a wanton or willful disregard for the interests of the employer,[193] and sometimes misconduct is defined in the legislation to require this.[194] Whether an employee had family responsibilities to attend

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[191] Susan Bisom-Rapp, Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice, 26 Fla. St. U.L. Rev. 959, 976 (1999).

[192] Malin, *supra* note 166, at 136.

[193] *See, e.g.*, Tilseth v. Midwest Lumber Co. (*In re* Claim of Tilseth), 204 N.W.2d 644, 646 (Minn. 1973):

> The intended meaning of the term "misconduct" is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct."

[194] *See, e.g.*, § 443.036(26), Fla. Stat. (1993):

> MISCONDUCT.--"Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:

to, inhibiting his ability to comply with the demand, will factor into this assessment of the employee's response and militate against a finding of willfulness.[195]

This can be seen in the case of Prickett v. Circuit Science, Inc.[196] David Prickett, who worked the day shift, had temporary custody of his three-year-old son. He was told by his employer on a Friday that, as of the following Monday, he would temporarily be required to work the evening shift. He told his employer that he would not be able to report for that shift on Monday because of childcare responsibilities. Prickett made unsuccessful attempts over the weekend to arrange evening childcare with friends and relatives. On Monday, after consulting with his supervisor and being given the day off to find childcare, he inquired at childcare centers and with other friends. After further consultation with his employer about the situation on Tuesday, Prickett was suspended for three days and then discharged. The employer argued that the discharge was on the basis of misconduct. However, the court held that

> [g]iven the facts of this case, where the employee is given three days' notice of a shift change, where the shift change is substantial, and where the employee presents sufficient evidence of good faith efforts to obtain childcare, we hold that the employee's failure to report to a new shift assignment because of an inability to obtain adequate care for the employee's dependent child does not constitute misconduct justifying denial of unemployment compensation benefits. To hold otherwise would be to ignore significant facts about the world today. . . . If Prickett had left his child without supervision, he would have been subject to criminal sanctions. He also could have been sanctioned for failure to support [his child]. Under these limited circumstances, Prickett seemed to have no choice but to do as he did and we cannot hold that he engaged in "willful misconduct."[197]

Similarly, the nature of the employee's alternative time demand appeared to be significant in mitigating against willfulness in the unauthorized absence case of Menendez v. River Orchids Investment

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> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer had the right to expect of his employee; or
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

[195] Malin, *supra* note 166, at 138.

[196] 518 N.W.2d 602 (Minn. 1994).

[197] 518 N.W.2d at 605-06 (citations omitted).

Corp.[198] Maria Menendez had been employed for nine years as a room attendant by the Sheraton River House Hotel. Employees were required to notify the hotel of an absence prior to the beginning of their assigned hours of work. Months ahead of time, Menendez requested three weeks vacation in order to assist her daughter when she gave birth. Her supervisor agreed to this. On May 1, 1994, Menendez called the hotel, and told her supervisor's assistant that her daughter had given birth and that she would be absent from work. She was told to contact the supervisor directly, but forgot to do so until noon on May 5, and she was scheduled to start work at 8:00 a.m. that day. She was discharged as a result on May 6. While the employer argued that this failure to comply with the attendance requirements constituted misconduct under the legislation and thus should disqualify the claimant from benefits, the court held that

> [a] review of the record shows that the claimant's absence, without notice to the employer, was an isolated incident on an otherwise spotless employment record of nine years. Additionally, the employer knew that the claimant was going to take three weeks of vacation for the birth of her grandchild, and the only question was when it would commence. Admittedly, the claimant probably should not have relied on the supervisor's assistant to relay the message, regarding her absence, to the supervisor. However, we find, as a matter of law, that the claimant's conduct does not amount to a willful or wanton disregard for her employer's standards of behavior and that this isolated absence does not rise to the level of misconduct necessary for a denial of benefits.[199]

Under this interpretation, if an employee is unable to comply with an employer time demand because of family responsibilities and is fired as a result, the employee will not be disqualified from claiming U.I. compensation, and the employer's experience rating will be adjusted accordingly.

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[198] 653 So. 2d 470 (Fla. Dist. Ct. App. 1995).

[199] 653 So. 2d at 471-72 (citations omitted). *See also* Dickerson v. Florida Unemployment Appeals Comm'n, 646 So. 2d 261 (Fla. Dist. Ct. App. 1994) (Claimant with ten year unblemished employment record notified employer on Saturday and Sunday that she would not be able to work on Monday because of a childcare problem, but was discharged for the absence. Refusal to work because of family emergencies, in the face of an otherwise unblemished employment history, has been held not to constitute misconduct. Held that the conduct "does not exhibit an intentional disregard of her duties and obligations to her employer." 646 So. 2d at 262.); Williams v. Unemployment Appeals Comm'n, 608 So. 2d 572 (Fla. Dist. Ct. App. 1992) (Claimant refused to work one Saturday because he needed to take his ill father to the hospital or doctor. Held that "this type of temporary absence or refusal to work because of a legitimate family emergency does not constitute misconduct." 608 So. 2d at 573.).

What these cases reflect is the importance employers can place on compliance with hours policies. Menendez had an "otherwise spotless employment record of nine years" and yet the employer was willing to discharge her over what was, at most, a single four-hour delay in notification of absence, but, at the least, was poor judgment of the employee in relying upon her supervisor's assistant to relay a message. On the facts, both of these cases appear to be poor management decisions.

What we cannot see from the reported cases, and what the courts are not able to second-guess, is whether the termination was actually in the interests of the employer. The U.I. scheme imposes a tax on employers and, under the experience-rating mechanism, allows some scope for employers to alter their tax rate, but there is no aspect of the regime that calls upon employers to justify the business efficacy or even the fairness of their termination decisions. The courts' inquiry in U.I. proceedings is limited to the legislative question of whether the claimants disqualified themselves from eligibility for compensation under the scheme. In this way, the inquiry might provide stimulus to an organization to reconsider its practices with respect to terminations, but the potential for this is limited. Put another way, the fact that the system imposes no constraint on employer discretion means that it also offers little opportunity for the exercise of that discretion to be challenged and transformed by law.

The cases still provide a record of the facts of termination cases, allowing readers to gain some insight into employment practices and to surmise about the rationale for employer action. In each case the employer made the decision to terminate the relationship, and we can thus assume that, at least in the eyes of the employer, this was in the best interests of the organization. This does, however, assume a degree of quality and awareness on behalf of management that is not always justified. Assuming that the employer was not simply acting irrationally as it could appear, there are a number of possible explanations for the behavior in such cases. None of the following explanations would necessarily be challenged by U.I. law.

One possibility is that the time compliance policies were developed a long time ago and they have not been subjected to questioning, from a legal or business efficacy perspective. Many current workplace policies were established under different conditions of the market and the workforce and have simply become entrenched through time. Unless the culture or management style is one of active organizational learning, whereby new ways of doing things are regularly explored, the policy could simply be the way work is done, rather than necessarily the most efficient or fair practice. Under such a management style, termination and other employment decisions are not likely to capture the full value of each of the organization's resources, including its diverse human resources, and decisions may seem irrational to the outside observer.

Alternatively, the organizations may have assessed their policies and may have chosen to retain policies of strict compliance with time

demands for particular reasons, such as simplicity and fairness. Time, being easy to measure, is used as a criterion for assessment and can look objective, or gender and race-neutral, and thus fair. Applying a time demand uniformly across the board represents equal treatment of all employees. However, as we know from discrimination theory and jurisprudence, treating differently-situated individuals the same can amount to inequity in outcome. Further, if the rule in itself embodies a gendered norm, such as the unencumbered worker ideal, the impact will be disparate. If the norm itself is not free of bias then the application of it will not necessarily produce a fair outcome.

A related explanation for the terminations is that compliance with the time demand is being used as a signal or proxy for other traits that the employer values, such as reliability, commitment, or obedience. However, the use of time as a proxy measure relies upon a clear relationship between time and the relevant value. As noted above, such relationships are usually unstated, unquestioned, and may be biased against women in their assumptions.

Even where the assumption is tenable, the use of time as the measure might in effect lead to the valuing of that particular trait, such as obedience, over other traits a worker might bring, such as being attentive, dedicated, trustworthy, cooperative, or creative. Such alternative traits could be contrary to submissive obedience, may not be so easily evaluated or approximated with time demands, and may be obscured by the focus on time compliance. Again, the termination decision might thus reflect a practice that is inefficient in capturing the full value of each employee for the goals of the organization.

This practice of focusing on a trait and identifying non-conformers embodies an assumption about the very nature of difference, as Minow points out:

> [W]e often assume that "differences" are intrinsic, rather than viewing them as expressions of comparisons between people on the basis of particular traits. Each of us is different from everyone else in innumerable ways. Each of these differences is an implicit comparison we draw. And the comparisons themselves depend upon and reconfirm the selection of particular traits as the ones that assume importance in the comparison process. An assessment of difference selects out some traits and makes them matter; indeed, it treats people as subject to categorization rather than as manifesting multitudes of characteristics.[200]

[200] Minow, *supra* note 97, at 50-51.

This assumption that differences are intrinsic, among other things, inhibits questioning of how the environment has established the importance of particular traits over others.

While the cases do not reveal or even explore the motivations of the employer in the terminations, they do reveal the way in which time is the focus of the determination. They also reflect a concern by the courts to protect the U.I. scheme against the moral hazard of employees playing a role in their own dismissal. The courts are at pains to point out in the two cases outlined, for instance, that these particular employees are virtuous and worthy of compensation. They highlight the efforts to which each employee went in order to retain her job, in conjunction with each's need to meet her alternative commitments and each's unblemished employment records. In the Prickett case, the court also points out that the claimant's family commitments are not only moral but also legal obligations, for which he could be sanctioned for not fulfilling. On this basis, the court absolves Prickett of the willfulness element of misconduct as well as any suggestion of fault, going so far as to say that the claimant "seemed to have *no choice* but to do as he did."[201]

Other cases examining employment and family time conflicts have focused on the threat to business order posed by allowing employees to make such decisions about competing priorities. In such cases, sometimes the immediate needs of the employer win out over the family needs of the employee. This was the case in Arizona Department of Economic Security v. Valdez,[202] where the employee's decision to attend to problems in his marriage, rather than work overtime as ordered, disqualified him from U.I. upon discharge. The claimant, along with the entire warehouse crew, had been told one day that he had to work that evening. He informed the employer that he would be unable to work past the normal 5:00 p.m. end of shift this evening because of a personal problem to which he had to attend, although he did not go into details. The claimant left at 5:00 p.m. and was informed the following day that he had been discharged.

The court held that the claimant's refusal to obey the overtime order amounted to insubordination and was disqualifying misconduct under the legislation.[203] The claimant explained at the department hearing that he had been having marital problems and "wanted to go home right after work that evening and discuss the problems with his wife."[204] The employer stated that if Valdez had given a good reason why he could not work overtime on that day, he would not have been required to do so. Valdez felt that his

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[201] 518 N.W.2d at 606 (emphasis added).

[202] 582 P.2d 660 (Ariz. Ct. App. 1978).

[203] *Id.* at 661.

[204] *Id.*

reason "was really none of their business."[205] The court found the employer's order to be reasonable and went on to say "refusal of a reasonable order undermines the employer's authority and, thus, interferes with the functioning of the business."[206]

As with many of these cases, this case was not simply about conflicting time demands, but also about who had the power to decide the importance of each demand. Valdez did not go into details about why he could not work the overtime, but he did explain that it was for a personal reason. In denying the employer details, however, he denied the employer the opportunity to assess the legitimacy of his reason for not working. The employer admitted at the hearing that if a good reason had been given, Valdez would not have been discharged, but this is an admission that the company did not trust that Valdez had a good reason. In its eyes, it was up to the company to assess whether the employee's non-employment demands were worth attending to instead of the work-related demand. The company might have been willing to accommodate the employee's needs if he had explained them more specifically, but it was not prepared to let the employee decide what was important in the situation. In holding that this was legitimate, the court not only reinforced the right of employers to make demands on employees' non-employment time, but also supported the idea that it is disruptive to the authority needed for a business to operate for employees to be trusted to weigh the competing interests of their employers and their family commitments.

The Valdez case provides a good illustration of how a time demand can represent tension between an employer's desire for obedience in operating a business and an employee's need for flexibility in attending to non-employment needs. This tension is particularly prevalent in cases where employees are given little autonomy in managing their time and work. If the employer seeks to manage by controlling employee time, then regardless of the employee's reasons for not meeting a time demand, the employer could perceive it as simply not putting the interests of the business first or not showing sufficient commitment to the job. The employer's focus is on running the business and, although in some cases it might represent a short term and inefficient decision, attendance might be critical to the employer.

There is a move in many workplaces, as Bailyn notes, to promote greater productivity through empowerment, or "devolution of discretion and autonomy down to the level of those actually doing the work."[207] This mode of working offers opportunities for work-time flexibility. However, this requires a devolution of power to individuals from managers which is

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[205] *Id.*

[206] *Id.*

[207] Bailyn, *supra* note 10, at 88.

not necessarily consistent with traditional ideas about management—by "direct surveillance and control"[208]—and existing time norms. Bailyn argues that:

> [O]perational autonomy—discretion over the conditions of work—is critical to satisfactory and productive work as well as to the ability of employees to satisfy both work requirements and private demands. The most important aspect of this autonomy is the control over time. But if temporal autonomy is combined with demands for constant availability and a primary commitment to occupational work, its potential advantage is nullified. True flexibility of time flows from a basic belief in the legitimacy of a balance of commitments between the private and public spheres.[209]

In this way, Bailyn identifies the desire to harness the full potential of empowered work groups as one possible force for challenging time norms in the workplace. Employers that develop management techniques that require less direct control over employee time may reduce the tension between employer and employee demands and see benefits in terms of morale, employee satisfaction, and productivity. But the courts in cases such as Valdez do not provide any impetus for such change because they reinforce the legitimacy of managing by time control.

As can be seen in the Prickett and Menendez cases, the courts have generally been unwilling to accept that the employer's experience of employee behavior should be the sole determining factor in assessing eligibility. The U.I. scheme is set up to compensate workers who lose their jobs through "no fault of their own."[210] Thus the focus is on the moral culpability of the employee, and when it is clear that the employer initiated the termination, then this culpability is narrowly defined. So, if the employer has made the move to end the relationship, then, generally other than in extreme cases where misconduct is found, the claimant will not be disqualified, and the employer will incur consequential tax increases under the experience-rating mechanism.

In this way, although there is no direct challenge to the right of the employer to terminate the relationship, there is still, in effect, a challenge to whether the employer can do so without any consequential legal liability. By requiring the employer to articulate its argument and subjecting it to scrutiny in light of the limited disqualification provisions, the U.I. system can still play a role in questioning how the employer's discretion was

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[208] *Id.* at 94.

[209] *Id.* at 95.

[210] This phrase is taken from the preamble of the original U.I. model law, and has been included in the first section of many of the state schemes.

exercised and, in turn, in questioning the workplace values. Unlike a wrongful dismissal regime, the U.I. system does not explicitly assess the general fairness of a termination, since it is restricted to questions of disqualification. However, as we can see in these cases, the system does provide some scope for judicial comment on terminations and judicial direction on who should bear the cost.

2. Good Cause

The other main ground for disqualification, quitting without good cause, is treated quite differently. If a worker acts to resign rather than be discharged, even if it was for reasons or under circumstances that could have prompted a discharge, there is a greater chance that he will be denied benefits. The voluntary nature of the resignation is contrasted with the forced nature of discharge in how the courts weigh the moral culpability of the claimant, despite the fact that the distinction is often merely a formalistic one, because the line between resignation and discharge is so narrow and often almost indiscernible.[211]

In unemployment insurance litigation, whether employment termination is characterized as a discharge or a resignation is very significant. Having been set up as an employer-funded insurance scheme, the U.I. system is alert to the potential for moral hazard of employees acting to terminate their employment and still claim compensation. While courts have narrowly construed misconduct, they are more open to seeing the risk of moral hazard in situations where the employee is the party who terminated the relationship. In this way, claimants who are fired fare better under the U.I. scheme than those who resign.[212] With respect to family responsibilities, this affects women disproportionately because women are substantially more likely than men to leave their jobs for family-conflict reasons.[213]

Given the way voluntary quits are treated, employers seeking to minimize their U.I. liability are encouraged to frame terminations as resignations. In substance, a resignation might differ little from a discharge. There are many cases in which an employee, when faced with an apparently non-negotiable employer time demand, has resigned before or instead of

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[211] Malin, *supra* note 166, at 144.

[212] *Id.* at 153. Malin concludes that job losers fare better than job leavers, even when the distinction between discharge and resignation is a fuzzy one and merely a formal characterization, as is the case in many work-family conflict terminations.

[213] National Employment Law Project, Women, Low-Wage Workers and the Unemployment Compensation System: State Legislative Models for Change 13 (1997) [hereinafter Women, Low-Wage Workers] (Confirms that women are involved in the vast majority of "domestic quit" cases. "Indeed, 17 percent of women, compared to just over three percent of men, leave their jobs due to . . . family or other individual reasons.").

being fired. Typical work-family conflict cases revolve around orders to change the schedule or number of hours of work. An employee who is unable to comply with such an order might either refuse, and then wait to be discharged, or, feeling faced with no alternative, resign. The employer may also have decided that the employment must be terminated, but, in allowing the employee to articulate this first, the separation is characterized as a resignation instead of a discharge, and this weighs against the employee in a U.I. claim. It is up to the U.I. fact finder to assess the sequence of events and each party's intentions with respect to the separation in order to characterize it as either a discharge or a quit.

With respect to the good cause requirement of voluntary termination by the employee, some states simply require the claimant to show that the quit was for "good cause" in order for the claimant to still be eligible.[214] In such states, the arbiter's examination usually focuses on the severity of the family demand or situation that caused the resignation, and the outcome is determined by the reasonableness of the worker's actions in the circumstances.[215] However, about two-thirds of the states have a further requirement that the good cause be "attributable to the employer" or "connected to the employment."[216] This additional requirement has generally been read to mean that the cause must be related to the employment in contradistinction to a "personal" or "domestic" reason, regardless of whether the reason was a serious family demand.[217]

a. Good Cause Simpliciter

In a typical time-demand quit case, the employer has ordered a change in employment hours and the employee has responded by quitting. In a good cause state, when claimants assert that their reason for quitting was for family responsibilities and that this should constitute good cause, they are often faced with two objections by employers.

The first is that, despite the absence of the legislative requirement that the cause be "attributable to the employer," employers often argue that the reason cannot amount to good cause because it is a "personal" reason rather than an employment-related reason. In this way, the employer is saying that the reason was beyond its control and asking why it should be

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[214] *See, e.g.*, Ky. Rev. Stat. Ann. § 341.370(1)(c) (2001). Some states use an equivalent term, such as "compelling and necessitous" reason. *See, e.g.*, Mass. Gen.. Laws ch. 151A, § 25(e) (2001); 43 Pa. Cons. Stat. § 802(b) (2001).

[215] Malin, *supra* note 166, at 140.

[216] Women, Low-Wage Workers, *supra* note 213, at 13. Some states have at different times had both. Florida, for instance, initially only required good cause, but amended its code in 1963 to insert the requirement of "attributable to the employer." F.S.A. § 443.101(1)(a).

[217] Malin, *supra* note 166, at 142.

liable, to the extent that it is held liable under the scheme, when it was not the employer who terminated the relationship. This is based on an assumption that because the termination is characterized as a quit the employer had no volition in the matter.

The employer may, however, have played a role in the termination by initiating the change in hours. Even in cases where the change was in the employee's circumstances rather than the work hours, the employer usually had some control over whether the conflict resulted in termination or was resolved in another way. The employer might have been able to prevent the termination by working with the employee to accommodate the family obligations. For example, the employer could have allowed the employee to take leave to make alternative childcare arrangements or, alternatively, the employer could have allowed a new arrangement to be assessed after a trial period.

Although courts generally assess the seriousness of the family demand and whether the claimant's actions were reasonable in the circumstances, they do not delve into the reasonableness of the employer's demand, its alternatives, or its decision not to accommodate a worker's non-employment responsibilities. The existing economic arrangements are assumed to be "natural and neutral."[218] Employer discretion to operate the business as it so needs is assumed, rather than questioned. The court thereby reinforces the power the employer has in setting time expectations, and the norm that it is up to the employee to subordinate non-employment demands. To require otherwise would be seen as interfering with the natural order.

With this response, employers, in effect, are arguing that they hire the laborer, not the caregiver, and thus should only be responsible for the laborer. This translates to an expectation that employers have a high degree of discretion over how much and when they can ask their employees to work. The corollary of this expectation is that if employees cannot rearrange their other commitments to comply with the employment demands, then employers should not be responsible for that inability to perform. This highlights the way in which the time demand frames the expectation that workers either be unencumbered by non-employment responsibilities, or be disposable by employers.

A second line of argument employers have made to work-family good cause claims, is that a change in the schedule of work hours should not be seen as a significant change in employment conditions and is thus not a justification for quitting. Hours of the day for employees are often depicted as being interchangeable, as if it should make no difference to the employee whether he works eight hours during the day or eight hours on a night shift, and as if swapping between these options quickly should not

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[218] This is one of the assumptions underlying the Minow's "difference dilemma." Minow, *supra* note 97, at 52.

create any problems. Such arguments reflect employers' views about the expected availability of employees, and this norm is reinforced by the acceptance of the argument by the courts.

In Johnson v. Employment Division[219] the employer told Johnson while she was on vacation, that after seven years of working, most recently on the day shift, when she returned to work she was to work the evening shift at a different location. Johnson turned down the job because, among other reasons, her husband worked a day shift and she wanted to be on a similar work schedule. The court held that the claimant had voluntarily left work without good cause and was thus ineligible for unemployment benefits. The court described her need as one of convenience, and noted that a change in shift was not a new offer of work, as the conditions were substantially the same as those under which the claimant had previously worked.[220] The court essentially found that a change in the schedule of hours was not significant enough to be good cause to leave employment (at least not without some reason more compelling than marital companionship).

In such cases, judges are called upon to assess what is a "good" cause. Generally, this has been framed as whether it was reasonable for the employee to act as he did. As Malin notes, this has allowed judges to impose their own values about caring responsibilities,[221] such as whether or not the available alternative care for the claimant's dependent is adequate.[222]

Some states, at times, have tried explicitly to exclude family responsibilities from counting as good cause. The Pennsylvania legislation, for instance, specifically excluded "marital, filial and domestic reasons," but this was ultimately deleted after it had been held to be unconstitutional.[223] The deletion prompted a clear declaration that family

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[219] 570 P.2d 425 (Or. Ct. App. 1977).

[220] 570 P.2d at 426.

[221] Malin, *supra* note 166, at 141.

[222] *See, e.g.*, Cain v. Unemployment Comp. Bd. of Review, 76 A.2d 223 (Pa. Super. Ct. 1950). (The court affirmed the agency's findings, including that "the arrangements available for the care of claimant's child [a fourteen year-old student caring for claimant's four-year-old child each afternoon for four hours] and the coordination of her work with her household duties were adequate and did not necessitate leaving her employment. . . . The Board conclud[ed] that there was no necessitous or compelling reason for leaving her employment either because of her domestic situation."); Imre v. Catherwood, 279 N.Y.S.2d 213 (App. Div. 1967) (Claimant quit instead of changing shift because of the need to care for her mentally ill brother who was periodically released from hospital. Court affirmed Board's finding that this did not amount to good cause because claimant had a sister living nearby and there were other siblings who could assist in the care of brother.).

[223] The Pennsylvania U.I. legislation has gone through a number of amendments in relation to this point. For a summary of these developments, see Stevens v. Commw. of Pa. Unemployment Comp. Bd. of Review, 473 A.2d 254, 255 (Pa. Commw. Ct. 1984).

responsibilities can amount to good cause, or, in the words of the Pennsylvania legislation, can constitute reasons of a "necessitous and compelling nature" for quitting.[224] What is interesting about Pennsylvania is the sheer number of family responsibility cases, many of which revolve around time demands and are decided favorably for claimants.[225] The multitude of cases in this jurisdiction paints a picture of the ongoing prevalence of terminations over time disputes and family responsibilities. They also suggest that even where the prescriptive role of law has developed in favor of claimants and a balancing of work and family responsibilities, it is not clear that the potential expressive and institutional roles of law have effected change in workplaces.

b. Good Cause Attributable to the Employer

In the majority of states, the claimant must show that the reason for quitting was a "good cause attributable to the employer," or words to that effect. The jurisdictions with this requirement have split in their interpretation of this additional requirement. The traditional (and majority) view has been that a family conflict could not constitute a cause attributable to the employer, even if the conflict was brought about by an employer change in schedule or demand to work overtime.

Florida takes the traditional view. In Beard v. State Department of Commerce, Division of Employment Security,[226] the employer ordered the employee to change from a day shift to a night shift (and a new location), with two days' notice. Beard, a correctional officer, had been working the day shift for a year and when told of the change, requested accrued vacation leave to make new childcare arrangements. The leave request was denied and Beard quit. The employer then argued that Beard had quit voluntarily and with cause that was not attributable to the employer. The argument, in effect, was that employees are expected to be able to change shifts, and to do so quickly; if an employee cannot do so, then the employer should not be held responsible. The Florida legislature had recently added the requirement that the cause be "attributable to the employer," and the court interpreted this amendment to be aimed at removing "domestic obligations" as a good cause for voluntary termination. The court went on to explain that:

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[224] *See, e.g.*, Kleban v. Commw. of Pa. Unemployment Comp. Bd. of Review, 459 A.2d 53, 56 (Pa. Commw. Ct. 1983).

[225] The numbers may be explained partly by the active work of the legal-service organizations in Pennsylvania in appealing unemployment compensation actions. Smith, *supra* note 28, at n.169.

[226] 369 So. 2d 382 (Fl. Ct. App. 1979).

> [I]n cases where such a requirement [referring to qualifying phrases such as "attributable to the employer" or "connected with employment'] exists in the unemployment compensation law, the courts have consistently held that domestic obligations are personal reasons rather than reasons attributable to the employer or to the work.[227]

Similarly, in Louisiana, the courts have focused on whether the conflict was posed by a "personal" demand. In the case of Rogers v. Doyal,[228] the situation also involved a change of shift and the conflict this created with family responsibilities. Rogers had been employed as an assembly line worker in a shift-work position. After working the day shift for a year, she was assigned the night shift. She worked on the night shift for approximately four months, at which time she asked to be reassigned to the day shift so that she might be at home more with her school-age child. Upon the company's refusal, she resigned.

The cause of Roger's termination was found to be a "childcare problem" and this was held to be "a personal reason" and not a resignation for "good cause connected with her employment." In this case, there was no issue about the amount of notice the employee was given of the change of shift. The employee complied with the shift change order and worked the new shift for some months. After trying to make it work she requested the change, but was not accommodated in any way by the employer. She was told that unless she could work the night shift as she had been ordered to do, she could not be retained by the company.

Such cases do not challenge, and thus arguably legitimate, the traditional employers' view about their power to make time demands of their employees or about their responsibility for employees as whole people rather than merely unencumbered workers. In fact, they highlight the way in which courts have interpreted the unemployment insurance regulations so as not to require employers to take into account competing demands on an employee's time. Employer reasoning and articulation of this view can be traced in the case of Sonterre v. Job Service North Dakota.[229] United Hospital employed Peggy Sonterre to work a day shift. After approximately five years of work, she was informed that in a fortnight's time her shift would change to end at 6:30 p.m. each day, instead of 4:30 p.m.. The total hours were not changed. Sonterre discussed her objections with her supervisor and asked that either her current shift be continued or that she be changed to the night shift. These requests were denied and she quit, giving three reasons:

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[227] 369 So. 2d at 385 (citations omitted).

[228] 215 So. 2d 377 (La. Ct. App. 1968).

[229] 379 N.W. 2d 281 (N.D. 1985).

> (1) Her shift was changed which would require her to get a baby-sitter and her request to have the night shift, which would have alleviated the problem, was denied.
>
> (2) She was not given enough time to find a baby-sitter.
>
> (3) She felt she had been demoted.[230]

In determining whether Sonterre left her employment because of "good cause attributable to her employer" the court held:

> We do not question that Sonterre may have been *inconvenienced* because the change in shift required her to find a baby-sitter. Such an inconvenience, however, does not empower an employee to leave employment and attribute the leaving to the *fault* of the employer. While parental obligations may be good *personal reasons* for leaving employment, they are not causes that are attributable to the employer.
>
> Likewise, a change in one's working shift when there is not an increase in total hours worked does not constitute good cause attributable to the employer for leaving employment.[231]

The case tells us something about employment practices at United Hospital. There appears to have been no consultation about the change in hours, as the employee was simply notified in writing with two weeks' notice. The court noted that the hospital had actually been generous, since its policy only required one week's notice. Compliance with this time demand was clearly a paramount requirement, since there appears to have been no questioning of her competence and no suggestion of misconduct. The hospital was not able to accommodate the alternative shift requests Sonterre made, although we are not told its reasons. We can conclude from the facts that the hospital made the decision that either form of accommodation would not be in its interest, and that it was preferable to let this employee leave (and then, presumably, hire someone else). Compliance with this time demand was ultimately critical to Sonterre's employment, and she was not valuable enough to retain if she could not change shifts.

There are two interesting aspects of the court's examination of whether the resignation was for "good cause attributable to the employer." The first is the question of what caused the termination, and the court finds

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[230] 379 N.W. 2d at 284.

[231] *Id.* (citations omitted) (emphasis added).

that the cause was Sonterre's "parental obligations." The reasoning is that because it was the parental obligations that prevented her from working the alternative hours, the parental obligations were the cause of the termination.

However, the parental obligations in and of themselves did not pose a problem for Sonterre's employment; she had already been working compatibly with these responsibilities for the past five years. These responsibilities were now in conflict with the work hours because the hospital had unilaterally changed those hours. Having family responsibilities was, until this time, one of a myriad of Sonterre's traits, but one that had only now been identified by the employer and the court as important and different from the norm expected by the employer.

If two time demands conflict, there are alternative ways in which the cause can be identified. One basis would be to ask how the conflict came about or which demand changed to bring previously compatible demands into conflict. The focus would then be on which party initiated the change and, in Sonterre's case, it was the employer. This is not how the court interpreted cause.

Another way of understanding cause in a situation of conflicting demands is to prefer one of those demands over the other. One demand, such as work, would then be considered a primary demand, and the other, such as family obligations, would need to be subordinated to it. Only if the secondary demand could not be sufficiently subordinated would a conflict arise. The cause of the conflict could then be seen as the inability to subordinate the secondary demand. This is the underlying reasoning of the Sonterre court as seen by the finding that the cause was "parental obligations," despite the fact that the employer unilaterally initiated the schedule change.

Viewed as a question of "difference," the unstated norm was the ability to comply with such time demands, and Sonterre was characterized as being different because she could not comply. The court did not question the workplace structure that was responsible for constructing Sonterre's alternatives as being either employment *or* family caring work.[232]

The characterization of parental obligations as "personal reasons" for quitting is an act of line-drawing between the claimant's employment and non-employment demands. It is a constitutive act: the court characterizes the reason as being "personal" and, in effect, draws a divide between the sphere of employment and the sphere of family. This view reinforces the idea of employment and family as separate spheres and of ideal employees being the ones who can best free themselves of the

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[232] Minow proposes this critique of a similar case, Wimberly v. Labor and Indus. Relations Comm'n of Missouri, 479 U.S. 511 (1987), in which the Supreme Court affirmed that a state statute which denied unemployment benefits to a woman out of work because of pregnancy did not fall afoul of federal sex discrimination legislation because the statute "also denies benefits to others who leave their jobs 'voluntarily' or for reasons unrelated to the employer's action." Minow, *supra* note 97, at 41-42 and 42 n.67.

demands of the family sphere. The courts often remark in these cases that they acknowledge and even support the particular claimant's desire to tend to his "personal" life of caring for his family but that this does not enter into the determination of whether the employer *caused* the termination. Describing the conflict as creating merely "an inconvenience" reinforces the view that non-employment demands are not as important as the employment demand, and should be subordinated. The label of "inconvenience" also suggests that the employment norm and Sonterre's difficulty conforming to it are given, or natural, rather than constructed by the work environment.

The underlying reasoning of the court can be seen more clearly in the court's assessment of whether the cause was "attributable to the employer." In turning to the attribution question, the focus in Sonterre clearly shifts to a question of employer fault or responsibility. As in this case, U.I. legislation generally does not explicitly require a finding of fault. However, in cases such as Sonterre, the determination of whether the cause for quitting was "attributable to the employer" has been interpreted as a question of whether the employer was "at fault." Having acknowledged that Sonterre may have been inconvenienced by the shift change, the court notes, "such an inconvenience, however, does not empower an employee to leave employment and attribute the leaving to the *fault* of the employer."[233]

In interpreting attribution as a question of "fault," the court has framed the issue as one of moral responsibility, not merely of strict causation. Fault is a moral notion of responsibility. Having characterized the cause as a "personal" reason of parental obligations, the court held that the employer was not at "fault" in the termination, or, in effect was not responsible for addressing the employee's personal needs. On this basis, the cause was not "attributable to the employer."

Finding an employer at fault is particularly difficult in the context of employment at-will. The very nature of at-will employment is that employers legally have almost absolute discretion to terminate the relationship for any reason or no reason at all.[234] Employers are seen to be free to change employee hours as needed, because, in effect, a new arrangement is being offered each day and the employee is "free" to take it or leave it. Under an at-will regime, employers are arguably not imposing

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[233] 379 N.W.2d at 284 (emphasis added).

[234] The at-will nature of the relationship removes many parameters that the employment relationship might otherwise have. In other jurisdictions, a contract of employment that is not terminable at will contains terms of employment, implied if not express, such as the number and schedule of hours to be worked. Unless employer discretion to change these hours unilaterally is stated in the contract, an attempt to do so, if significant enough, would be considered a repudiation of the existing contract and a basis for claiming constructive dismissal. Changing hours of employment is nearly always considered a significant change of the terms of employment. It is only under an at-will regime that the employer is seen to have unlimited discretion over the hours it requires of employees.

demands, but offering alternative arrangements. The focus on employer fault thus reinforces the freedom of the employer but, by threatening the employee with disqualification from benefits, economically undermines the real freedom of the employee to not accept the alternative conditions and to terminate the relationship.

This interpretation of good cause attributable to the employer is stacked against a balancing of employee work and family demands. The combination of reading work and family conflicts as the inability to subordinate secondary responsibilities of family to the primary demands of work, and only finding attribution where the employer is at fault, works against the claim that employees have a multitude of obligations in society and should be permitted and even encouraged to meet those obligations, rather than be penalized when they do not conform to the employer ideal. The separation of work and family and the employer's right to make time demands without regard to other commitments of employees are reflected and reinforced in this interpretation.

An alternative line of cases, however, has developed in a number of jurisdictions. Rather than asking whether the alternative demand is a "personal" one and is hence beyond the scope of employer responsibility, the courts have asked: What brought about this conflict? Under this interpretation, employment is not given primary status. If the employer is the one to have brought about the conflict by changing the hours in a way that is more than merely inconvenient for the employee, then the cause is held to be attributable to the employer. In order then to minimize the risk of moral hazard—employees seeing the change as an opportunity to leave and still claim benefits—the courts have examined whether the employee took measures to try to retain his job by, for example, requesting notice or leave in order to make alternative childcare arrangements.

This alternative way of interpreting "attributable to the employer" was summarized by the North Carolina Court of Appeals:

> Our Supreme Court has defined "good cause" as "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." Additionally, "attributable to the employer" has been defined as "produced, caused, created or as a result of actions by the employer."[235]

The Supreme Court of North Dakota has also adopted this alternative interpretation of "attributable to the employer," contrary to its earlier focus

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[235] Couch v. North Carolina Sec. Comm'n, 366 S.E.2d 574, 577 (N.C. Ct. App. 1988) (citations omitted). The employee's hours had been reduced unilaterally from twenty-five hours to fifteen hours per week. The employee quit, because "her hours were cut and she did not feel that her pay justified the commute." *Id.* at 576. The court held that "a unilateral, substantial reduction in one's working hours by his employer may permit a finding of good cause attributable to the employer." *Id.* at 578.

on employer fault in Sonterre. In Newland v. Job Service North Dakota,[236] the claimant's hours of work were fixed from 7:30 a.m. to 4:30 p.m., when her employer changed them to a new shift which would run "from at least 4:30 p.m. until 8:30 p.m. or later, as required to complete the work." The "time when work was to begin or end each day was unpredictable and uncertain." Newland had worked her fixed hours for one-and-a-half years. She could not comply with the change and gave three reasons for quitting:

1. A substantial change in work hours;

2. The unavailability of childcare in her community after 7:00 p.m.; and

3. The prohibitive cost of childcare.[237]

Reflecting the reasoning in Sonterre, the agency denied Newland benefits because it found that she quit because of her parental obligations, which it held "were personal reasons that lacked an objective nexus with employment so as to constitute good cause attributable to the employer."[238]

On appeal, however, the North Dakota Supreme Court eased back from this hard-line division between personal and employment related reasons. It stated that the legislature

> [I]n enunciating a public policy to provide unemployment compensation, intended to strike a balance between the rights of the unemployed worker who genuinely wants to work, . . . and the protection of the former employer from quits that have nothing to do with the employer or the employment. . . . Job Service, in determining eligibility for compensation, must be attuned to that balance, and so must we. However, because unemployment compensation laws are remedial legislation, the balance should be struck in favor of the employee.[239]

The court went on to say that "[a]lthough childcare may not by itself be a condition attributable to the employer, it may in combination with other factors constitute good cause for quitting attributable to the employer."[240] The court implied that one such factor would be insufficient notice to

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[236] 460 N.W.2d 118 (N.D. 1990).

[237] 460 N.W.2d at 122.

[238] *Id.* at 120.

[239] *Id.* at 121.

[240] *Id.* at 122.

arrange childcare,[241] a comment on the employer's freedom to impose time demands without consideration for the employee's alternative obligations.

The court aimed its focus not on the employer or on the scope of employer responsibility, but on whether the employee had done anything to disqualify herself. In determining whether Newland had good cause to quit, the court held:

> We did not mean to imply in Sonterre that an increase in hours is the sine qua non for finding that a shift change constitutes good cause. Where the change in hours is substantial, even if there is not an increase in total hours worked, it may constitute good cause attributable to the employer. . . . [W]e hold as a matter of law that the change was substantial.[242]

Further, in determining whether a change that results in a conflict with family responsibilities can be attributable to the employer, the court held:

> [O]rdinarily, the prohibitive cost of childcare, like the need to arrange childcare so one may work, is not, under our law, the employer's responsibility. However, a change in one's work hours is attributable to the employer. "Attributable to the employer" means "produced, caused, created or as a result of actions by the employer." A change in work schedule is "produced, caused or created" by the entity which drafts the new schedule and imposes it. Because it was Newland's employer which set the new work schedule, the change in Newland's hours is attributable to the employer.[243]

The court then framed the issue to be whether Newland had made a good faith effort to preserve her employment in the face of the substantial shift change. The case was remanded on this point.[244]

The Newland reasoning has been adopted by the Delaware Supreme Court. In White v. Security Link,[245] the claimant, after working daytime hours for five-and-a-half years, was ordered on a Friday to start on the following Monday a schedule that finished at 7:30 p.m. each day. When she explained that she could not work these hours because she could not arrange alternative childcare, and certainly not within seventy-two hours, the claimant was told that she had no choice. White resigned and was

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[241] *Id.*

[242] *Id.* at 123-24.

[243] *Id.* at 122-23 (citations omitted).

[244] *Id.* at 124. The court distinguishes this case from Sonterre, noting that Sonterre "made no effort to find childcare to accommodate her new schedule but quit soon after learning of the shift change."

[245] 658 A.2d 619 (Del. Super. Ct. 1994).

initially denied U.I. compensation on the ground that her reason for quitting—to care for her daughter—was "personal" and thus not "good cause attributable to the employer." However, the court found

> . . . unpersuasive the line of cases which hold that an employee who quits his or her job because a shift change conflicts with parental obligations is disqualified from receiving benefits. These cases fail to recognize that one who quits employment in response to a shift change imposed by his or her employer quits for a reason attributable to the work. The relevant question under 19 Del. C. § 3315(1) is whether such an employee quits for "*good* cause attributable to such work." (Emphasis supplied). The good cause determination should take into account that under Delaware law it is the primary duty of parents to provide for the "care, nurture, welfare and education" of their children under the age of 18. Additionally, it should be recognized that unemployment compensation funds are "to be used for the benefit of persons unemployed through no fault of their own."[246]

Thus the court took into account that it was the employer that initiated the change and that, in providing only seventy-two hours to respond, the employer had acted unreasonably in ignoring the parental obligations of its employee. Although there was no evidence that the claimant had tried to arrange alternative childcare, the employer was penalized, in effect, for not providing the employee with at least a reasonable opportunity to do so. By imposing this reasonable notice requirement on the employer, the court is clearly challenging the employer's right to expect its employees to be able to subordinate all other responsibilities and work on demand.

The approach of the Newland and subsequent courts eliminates the explicit examination of "fault" of the employer, but essentially holds employers to a greater level of responsibility. In effect, the employer is being held responsible for constructing the choices for the employee in such a limited way. Under this jurisprudence the employer cannot simply make changes to an employee's schedule and expect no consequences if the employee is unable to comply. The worker's "personal" responsibilities are given greater weight and the employee is not viewed merely as an unencumbered laborer. The combined effect on employers of having their reasoning questioned and rejected, and of being held liable through the experience-rating system for treating workers as unencumbered, holds some potential for prompting change in work practices in relation to time norms.

Most of the cases discussed so far concern employer-initiated change that has brought about a conflict between the worker's employment and family responsibilities. Such cases provide the clearest examples of

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[246] 658 A.2d at 623-24 (citations omitted).

time demands that reflect employer expectations that employees be unencumbered. There are, however, many time demand cases where the change is not employer-initiated. In these cases, workers are either unable to sustain working arrangements because of strains caused by competing demands,[247] or a change in the worker's family circumstances has lead to a conflict with employment.[248] Such conflicts may also reflect difficulties imposed by working time expectations, with long hours or inflexible schedules inhibiting adjustment to changing family circumstances. In these situations the onus is on the employee—who usually occupies the less powerful position in employment—to seek and negotiate a new arrangement.

As can be seen in this overview, the employer practice of treating employees as unencumbered in initiating changes is only challenged under U.I. law in a few jurisdictions. Unless courts question this practice, there is in effect a legitimization and thus no impetus from the law to change. Employers are seen as being within their moral and legal rights to change conditions at will and not bear the cost of consequences on workers. If there is no impetus from the law for employers to at least consider and address employees as whole people when considering or imposing changes in conditions, there is even less support for encouraging employers to be more receptive to employee-initiated change. The weakness of these cases under U.I. law highlights the way in which the system generally does not support the combining of employment and family obligations, but instead reinforces employer power to impose time demands.

It can be seen that while the U.I. scheme was set up as a progressive social measure to aid the unemployed,[249] with narrow and minimal disqualifications, the way in which it has been interpreted mostly reinforces employer power and the capacity of employers to demand conformance with ideal worker norms. The unstated assumptions underlying the difference dilemma as identified by Minow—that differences are intrinsic,

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[247] *See, e.g.*, In re McCaffery, 696 N.Y.S.2d 245 (App. Div. 1999). (Claimant resigned due to child-care problems, was found to have voluntarily left her employment without good cause and thus was disqualified from receiving unemployment insurance benefits, though claimant continued to work on part-time basis until replacements were hired and trained.)

[248] *See, e.g.*, In re Vitale, 692 N.Y.S.2d 850 (App. Div. 1999). (Claimant resigned from her full-time position immediately following her maternity leave because her mother could only provide childcare three days a week. She was found to have left her employment without good cause, for unemployment insurance purposes, disqualifying her from receiving benefits. Employer was unable to accommodate her request to change her hours to a part-time schedule.)

[249] The two primary objectives of the scheme are: "(1) to provide temporary and partial wage replacement to involuntarily unemployed workers who were recently employed; and (2) to help stabilize the economy during recessions." The Green Book, *supra* note 162, at 279.

that an entrenched norm forms the basis of defining difference or deviance, and that the existing social and economic order are natural[250]—are evident in those U.I. cases that deal with time expectations. A few jurisdictions offer some hope that focus might turn to the way in which options for workers are constructed by the work and cultural environment, and that a way out of the dilemma is to take into account the fact that workers have alternative, non-work responsibilities that they should be able to fulfill in conjunction with employment. At this stage, however, these cases are limited to a few jurisdictions and to the situation in which the work-family conflict is clearly brought about by an employer-initiated change.

C. Comment on Legislative Provisions

In addition to cases, it is worth considering the impact or potential impact of legislation on time norms and, in turn, gender equity in the workplace. In some ways, legislation is more significant than cases because it is, at least theoretically, a better reflection of public policy. It is the output of the state's elected representatives and should, as a general law rather than law developed by resolution of a dispute, reflect more fundamentally the public view on the issues. In this way, legislation may also have a greater expressive role in reinforcing or altering norms of behavior. However, the extent to which any legislation reflects a democratic process should not be overstated, given the scope in the process for lobbying, compromises, and political deals. As for its expressive value, while legislation may be publicly available, this does not mean that it is widely accessed or understood; in relatively obscure or technical areas such as unemployment insurance, the readership would presumably be very limited. Advocates of business (and claimant) interests would, however, be more likely to be aware of, and even involved in, crafting any new legislation in a more significant way than in the development of case law.

There are two particular types of provisions relevant to the discussion here, both of which have been advocated for their prescriptive as well as their possible expressive roles in assisting U.I. claimants. The first type of provision is one that exists in the legislation that explicitly or implicitly includes domestic responsibilities as a good cause to quit employment (and thus not be excluded from eligibility). The second is a proposal to allow U.I. funds to be used by states to finance family and medical leave.

1. Not Disqualified for Domestic Responsibilities

A number of state schemes provide that leaving work for specific types of domestic responsibilities will not amount to voluntarily quitting

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[250] Minow, *supra* note 97, at 50-52.

without good cause and thus will not disqualify a claimant from compensation. Alternatively, the legislation achieves the same end by affirmatively defining the specific domestic responsibility ground as constituting good cause for quitting. Such provisions include leaving work because of the sickness or injury of a dependent for whom the worker must care,[251] or relocating for one's spouse's employment.[252] Other states have experimented with more general domestic responsibilities provisions, as has, for example, North Carolina, which permits employees to leave in cases of "undue family hardship."[253]

These provisions provide a significant prescriptive benefit to claimants who are faced with work and family conflicts, possibly qualifying them for unemployment insurance compensation in situations where they

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[251] *See, e.g.*, Wash. Rev. Code § 50.20.050 (2001):

> (2) An individual shall not be considered to have left work voluntarily without good cause when:
> ...
> (b) The separation was because of the illness or disability of the claimant or the death, illness, or disability of a member of the claimant's immediate family if the claimant took all reasonable precautions, in accordance with any regulations that the commissioner may prescribe, to protect his or her employment status by having promptly notified the employer of the reason for the absence and by having promptly requested reemployment when again able to assume employment...;
> Wis. Stat. § 108.04 (2000):
> [Claimant not disqualified where she terminated employment but had] no reasonable alternative because the employee was unable to do his or her work or because of the health of a member of his or her immediate family.

[252] *See, e.g.*, Wash. Rev. Code § 50.20.050 (2001):

> (2) An individual shall not be considered to have left work voluntarily without good cause when:
> ...
> (c) He or she has left work to relocate for the spouse's employment that is due to an employer-initiated mandatory transfer that is outside the existing labor market area if the claimant remained employed as long as was reasonable prior to the move.

[253] N.C. Gen. Stat. § 96 (2000):

> 8 (10a) "Undue family hardship" arises when an individual is unable to accept a particular shift because the individual is unable to obtain (i) childcare during that shift for a minor child under 14 years of age who is in the legally recognized custody of the individual or (ii) elder care during that shift for an aged or disabled parent of the individual.
> ...
> 14 (1g) . . . separation or discharge solely due to an inability to accept work during a particular shift as a result of an undue family hardship shall constitute good cause for leaving work. ...

Both of these provisions expired on June 30, 2001.

otherwise might have been ruled ineligible for leaving due to merely "personal" reasons. They would not directly prevent the termination but would provide a greater chance for the employee to claim U.I. compensation and thus moderate the hardship of unemployment. Many of the cases covered by such provisions could be characterized as incidents of conflicting time demands.

Such amendments also represent an expressive role for law to change norms about the combination of work and family responsibilities. By specifically stating that these types of domestic responsibilities are a good cause for leaving employment, these laws help to legitimate the right of employees to have and attend to at least some family responsibilities while also being considered part of the workforce. As public policy statements these laws may prompt a revision of the assumption that workers must be unencumbered or at least prepared to subordinate all non-employment demands in order to be considered part of the workforce.

However, there are a number of concerns about such provisions. First, they are very limited. Leaving work or being unable to accept a change in shift because of a sick child would not encompass many of the more general, day-to-day demands of caring for children or other dependents. Where the primary or general responsibility is to provide care for a dependent, there may be many disruptions apart from sickness that could conflict with employment requirements. A change in a child's needs, the disruption of alternative care, or a demand from the employer that conflicts with existing arrangements could all lead to domestic responsibilities conflicting with work, but not in a way that is necessarily covered by the specific exceptions in the legislation. The need to take extended leave or a career break for child rearing, for instance, would certainly not be covered by these provisions, or by the U.I. system generally. These are the day-to-day types of family demands, not the exceptional ones.

These exceptions thus have a prescriptive effect of assisting only a limited group of claimants in limited circumstances, and may also have the expressive effect of inhibiting a more general understanding of the needs of employees with family responsibilities. By focusing on a child's sickness, or even the demands of a spouse's employer, such legislation clearly tries to limit the circumstances to those that are somehow beyond the control of the claimant. While minimizing the risk of moral hazard, they reinforce the notion that employees cannot or should not be trusted to balance and assess competing priorities of work and family.

Second, such provisions (both existing and proposed) have been grouped together, at least by some commentators, with developments to recognize domestic violence as a good cause to leave employment.[254]

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[254] *See, e.g.*, Maurice Emsellem, National Employment Law Project, State Legislative Highlights (1996-2000): Expanding Unemployment Insurance for Low-Wage, Women, and Contingent Workers 3-4 (2000).

Domestic violence has been recognized as a good cause for leaving work in at least twelve states.[255] While both domestic violence and domestic responsibilities primarily affect women, the grouping together of these as domestic circumstances is problematic.

In relation to termination of employment, only in very limited cases are the circumstances of domestic violence analogous to those of domestic responsibilities. In many domestic violence cases, the employer really does have little control over what is happening to the employee, and the issue is not whether the employee's needs can be accommodated. Generally the threat is from the outside and the employee quits in order to flee the jurisdiction.[256] This may be analogous to a domestic responsibilities case of an employee leaving employment to follow his spouse to another state, but this is only one of many different possible domestic responsibilities scenarios. In most domestic responsibilities cases the cause for termination is generally one of conflicting time demands and, in such cases, the employer does have a role to play in dealing with the situation. In many cases it might be within the employer's power to manage the situation differently and negotiate an alternative arrangement with the employee to avoid or minimize the particular conflict.

Domestic responsibilities also potentially affect many more workers than the number affected by violence in the home. Domestic violence is more widespread than it is generally acknowledged to be, but even at realistic estimates of its prevalence it does not equate to the level of domestic responsibilities of workers. It is also a crime that we, as a society, are trying to prevent and address. Domestic responsibilities are not a crime or an anomaly that we are trying to eliminate. To lump these together suggests otherwise and speaks against the valuing of domestic caring work. Most workers are parents or will have such parental or other caring responsibilities at some stage of their lives, and the challenge is to work out how to enable these responsibilities to be met in conjunction with those of employment.

A third concern about the specific domestic responsibilities provisions is their possible effect on the employment or wages of those whom the provisions were meant to assist. In a recent article Christine Jolls explores the effect of employment mandates that are directed to "discrete, identifiable groups of workers," such as women.[257] She includes as

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[255] *Id.* (California, Colorado, Connecticut, Maine, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon (by regulation), Wisconsin, and Wyoming. Note that many states, while not specifically referring to domestic violence, recognize that it could constitute a good cause for leaving work if it is a "compelling and necessitous circumstance." *Id.*)

[256] Maine, however, also protects workers who are fired from their jobs for absenteeism related to domestic violence. *Id.* at 3.

[257] Christine Jolls, Accommodation Mandates, 53 Stan. L. Rev. 223, 224 (2000).

examples of such mandates the "FMLA's requirement that employers permit their employees to take unpaid leave in the event that they have a newborn or newly adopted child or an immediate family member who is seriously ill," suggesting that such a mandate accommodates the special needs of women, although it may also accommodate the needs of others. Similarly, U.I. provisions that enable workers to attend to family responsibilities are arguably a mandate targeted to accommodate female workers. Jolls specifically looks at the way in which antidiscrimination laws place restrictions on the economic pressures created by such mandates, and considers whether these restrictions limit the potential effect on decreasing the group's employment or wage levels. She concludes that, despite their protective goals, under various circumstances such accommodation mandates are likely to have a negative impact upon the target group's prospects of employment, level of wages, or both, when the antidiscrimination measures are not fully effective.[258]

According to Jolls, in relation to accommodation mandates targeted at women, unless restrictions, such as antidiscrimination legislation, are effective in limiting the capacity of employers to respond by lowering wages or hiring fewer women, the imposition of the mandate is likely to lower women's wages. And in Jolls' view, this will be the case because antidiscrimination restrictions are not sufficiently effective. Whether these specific U.I. provisions would have such an effect on workers with domestic responsibilities is open to empirical assessment. One reason why they might not be affected in this way is that the target group for the mandate might not be sufficiently discrete and identifiable to be affected in this way. Caregiving is not an immutable characteristic, but one which is often chosen. It is also generally temporary, with the majority of workers passing in and out of caregiving roles throughout their working lives. It primarily or disproportionately affects women, but, as noted above, this is changing as family and work roles change.

2. Paid Parental Leave Under the Unemployment Insurance Scheme

The second legislative item of interest is the proposed use of unemployment insurance funds to finance parental leave. In May 1999, President Clinton raised the idea of states being able to use "the Unemployment Insurance . . . system to support parents on leave following the birth or adoption of a child" and directed the Department of Labor to develop regulations to enable this.[259] The Department was also directed "to develop model State legislation that States could use in following these

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[258] *Id.* at 227.

[259] President's Memorandum on New Tools to Help Parents Balance Work and Family, 35 Weekly Comp. Pres. Doc. 978, 979 (May 31, 1999), *available at* 1999 WL 12654559.

regulations."[260] The proposed rulemaking for the initiative, dubbed "baby U.I.,"[261] was issued in December 1999,[262] and the "Regulations for Birth and Adoption Unemployment Compensation" were promulgated in June 2000.[263]

These regulations allow the states under their schemes to provide partial income replacement to parents who take authorized leave or leave their employment in order to care for a newborn or newly adopted child. The important thing to note is that the regulations are permissive, meaning that states have full discretion as to whether to amend their schemes in this way. While well over a dozen states introduced bills to give effect to this proposal,[264] to date only one bill has come to fruition,[265] while others have already died.[266] Given the comprehensive and staunch opposition that worked to delay and dilute the Family and Medical Leave Act during its long birth, it is not surprising that this proposal is also facing strong opposition.[267]

Providing even partial income replacement for workers taking family leave would be a significant step toward enabling workers to better cope with work and family conflicts. The unpaid nature of leave under the FMLA is one of its greatest weaknesses; in a federal review of the Act, among those workers who reported that they needed leave but did not take

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[260] *Id.*

[261] The Green Book, *supra* note 162, at 290.

[262] Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (proposed Dec. 3, 1999) (to be codified at 20 CFR Part 604).

[263] Regulations for Birth and Adoption Unemployment Compensation, 20 C.F.R. § 604 (2001).

[264] For a list of state legislative proposals, as at July 6, 2001, *see* http://www.workingforthefuture.org/in_the_states.html (last visited Sept. 29, 2001) (copy on file with author). Note that this list was prepared by the Unemployment Insurance Working Group, a coalition established to lobby against the introduction of legislation or regulation that allows U.I. funds (or other benefits, such as accrued sick leave) to be used for paid family leave.

[265] 2001 Or. Laws 646.

[266] For example, H.R. 933, 415th Sess. (Md. 2001) (Unfavorable Report by Economic Matters, died 3/22/01). One state, Massachusetts, which held out some hope of making use of the regulation has now turned to an alternative proposal that uses a Medical Security Trust Fund to provide means-tested income replacement for family leave. *See* Paid Leave Politics Proposals Raise Specter of Nanny State, Sunday Telegram Worcester, Aug. 26, 2001, *in* Insight, *available at* C12001 WL 6253306.

[267] The federal regulations were quickly challenged by the National Chamber of Commerce which filed a suit in the District Court for the District of Columbia on June 26, 2000 (LPA, Inc., Soc'y for Human Res. Mgmt., Chamber of Commerce of the United States, et al. v. Herman, No. 1:00CV01505). The decision is pending. The complaint is available from the National Chamber of Commerce Litigation Center *at* http://www.uschamber.org/NCLC/default.htm (last visited Sept. 29, 2001).

it, sixty-three percent said this was because they could not afford to.[268] Over 120 nations in the world provide for parental leave, and the U.S. is one of only three industrialized nations that does not.[269]

One significant aspect of the proposal is that it allows the states to socialize the costs of compensation under this provision across the whole scheme rather than placing it on the claimant's last employer. This would mean that the granting of eligibility and the amount of compensation paid out to working parents would not affect their previous employers' experience ratings, and thus that such claims would not directly impose extra tax costs on particular employers. This should have at least two effects. First, it should mollify the concerns of small businesses in particular, who fear that they will most harshly bear the costs of parental leave mandates. However, judging by the opposition that has been mounted to the various state proposals, few employers of any kind appear willing to accept the proposal in any form.[270] Second, it should, among other things, have the effect of minimizing the risk suggested by Jolls of such measures being seen as an accommodation mandate for a specific group of workers, that is workers with family responsibilities. Such a proposal should not influence the employment decision of businesses, assuming rational, informed employers.

III. LESSONS FROM THE ANALYSIS

This review of the unemployment insurance system provides an insight into the way in which law in this field of regulation can reflect and shape workplace practices, and, more generally, it offers an approach that can be used to analyze other areas of regulation for their potential impact.

In this part I first take a broader look at the U.I. system. The above analysis of U.I. cases and legislative provisions shows, with specific examples, how the treatment of claims by the courts can reinforce employer characterizations of difference in the workplace and of the appropriate relationship between employment and non-employment demands on workers. A broader questioning of the U.I. system, again using the method

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[268] Commission on Family and Medical Leave, A Workable Balance: Report to Congress on Family and Medical Leave Policies (1996), *available at* http://www.dol.gov/dol/esa/fmla/htm (last visited Feb. 10, 2002).

[269] Press Release, International Labor Organization, More Than 120 Nations Provide Paid Maternity Leave (Feb. 15, 1998), *at* http://us.ilo.org/news/prsrls/maternity.html (last visited Sept. 29, 2001). Note that five states (New York, New Jersey, California, Rhode Island, and Hawaii) provide partial income replacement for maternity leave under Temporary Disability Insurance schemes.

[270] One example of lobbying opposition is the Unemployment Insurance Working Group, *supra* note 264. *See also* Press Release, Employment Policy Foundation, Who Really Foots the Bill for "Paid" Parental Leave?: A $28 Billion Question, (Jan. 26, 2000), *at* http://www.epf.org/media/newsreleases/2000 (last visited Sept. 29, 2001).

of analysis that assesses the regulation from three different angles or distinct roles of law—prescriptive, expressive, and institutional—reveals the multiple ways in which law can act to maintain or effect change in workplace norms and practices.

In the second section of Part III I offer a few brief suggestions about other areas of employment regulation that might prove fruitful using such a method of analysis.

While law may be a force for change, it does not act in a vacuum: law may be one of a myriad of forces that reinforces behavior or brings about change in a particular situation. Nor does law act on its own: it must be interpreted and applied, requiring legal and non-legal actors to give effect to the bare legal provisions of legislation or doctrine. Employers, for instance, may be prompted to change their management practices through their own thinking and learning about good management, through advice from human resource managers about better management practices or systems requirements, or through advice from insurers or legal counsel about how current practices pose risks of liability or reputational damage. The roles of law must always be interpreted in the context of these multiple forces and complex array of actors in any given situation.

I have adopted this particular method of analysis—looking at the regulatory system through the lens of three different roles of law—because I believe that it enables us to see different ways in which law can act to sustain and reflect cultural assumptions and challenge or effect change in these assumptions and practices. As noted above, law can play a prescriptive role, directly mandating restrictions or obligations and setting out legal consequences for non-compliance in terms of penalties or liability. We look to legislation and doctrine to understand what the law requires of parties and who might win or lose in the event of a dispute. Understanding the legal requirements and potential legal consequences may prompt parties to change their behavior.

In its expressive role, law may bring about change in behavior by altering norms of what is socially acceptable. In this way law is working as a public policy statement which can prompt or provide support for changing public assumptions or values. In reflecting or shaping social norms, law can have a far greater effect than simply imposing financial liability on parties. For example, an employer who breaches a norm about employee treatment that is embodied in law risks not only legal liability, but may also risk damage to morale and loyalty among the existing workforce and damage to the organization's reputation among consumers or potential employees, as discussed further below. Breaching norms can have more serious consequences than breaching law, so it is important to think about the ways in which law shapes norms.

The third, or institutional, role of law is the one that puts an actor, such as an employer, into a position that prompts it to question its existing practices and potentially develop its institutional capacity for identifying

and resolving future problems. Does the law encourage or compel the party to review its practices or the underlying assumptions and look to ways in which the particular problem might be merely indicative of other, more general, problems?

U.I. regulation provides a fruitful illustration of how law operates in these various ways and hopefully is an example that prompts similar analysis in other fields.

A. The Unemployment Insurance System

In considering the example of the unemployment insurance system, this three-pronged approach allows us to look beyond the simple question of who wins and who loses in U.I. cases involving time and to assess how the law in its multiple roles may shape the development of norms and practices about working time and work-family balance.

There are some fields of workplace regulation, such as antidiscrimination, where it can be seen quite clearly that the law has acted to alter behavior by prohibiting particular conduct and by also working to change the social norm about the particular behavior. Legislation such as the Civil Rights Act of 1964 prohibited termination of employment on specified grounds, such as sex or race. Although such legislation has not fully eradicated workplace discrimination, it has arguably at least helped to eliminate its most blatant forms,[271] and even to raise expectations generally about fair treatment in the workplace.[272] Its effectiveness in these regards can be attributed partly to the fact that the legislation was clearly designed to change particular behavior seen as no longer acceptable and, to this end, to set out explicit prohibitions. The legislation thus represented a significant infringement on managerial discretion, in relation to termination and other stages of employment. Further, it allowed for civil actions to be brought by complainants for non-compliance, with remedies both in equity and law. The possibility of very high damages liabilities being found by juries has acted as a significant agent for change in workplaces.

Discrimination actions now pose a significant financial and public relations threat to organizations, highlighting the prescriptive and expressive roles played by these laws. Suggest to an employer that its actions might prompt a discrimination action, and this is likely to cause a reaction and warrant a careful response. Consequently, there has been a burgeoning over the past thirty-five years of both internal policies to address discrimination and advice to companies on how to modify their

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[271] Sturm effectively argues, however, that while the legislation has worked to deter blatant or first generation-types of discrimination, it has not and will not as it stands be effective in addressing second generation discrimination and other forms of detrimental bias in the workplace. Sturm, *supra* note 177, at 468.

[272] Bisom-Rapp, *supra* note 191.

behavior in order to eliminate discrimination and minimize their exposure to liability.[273] Internal and external legal advisors have in many workplaces played at least a limited role in transforming legal risks into a force for positive change in workplace behavior (although there is also evidence of legal advisers acting to promote primarily defensive rather than positive behavioral change).[274]

Does the U.I. system play any similar sort of role in altering behavior? Obvious similarities are limited. The transformative capacity of the U.I. system is significantly lower for a number of reasons. While one objective of the U.I. scheme has always been to modify employer behavior in order to minimize unemployment, it does not mandate a limit on managerial discretion in relation to terminations. Unlike civil rights legislation, or unfair dismissal legislative schemes, U.I. legislation does not prohibit discharge on any basis. This means that under the U.I. scheme management decisions to terminate employment can not be examined in the courts for their legality. The scheme also does not provide for actions for damages or reinstatement. With this minimization of financial and reputational risks, the U.I. scheme has not spawned high profile cases or an industry of risk management advisors.

The experience-rating mechanism is the only clear way in which claims by terminated employees are translated into financial risk for employers. The experience-rating mechanism provides for employers to incur some penalty for particular terminations, but this mechanism imposes very mild and limited incentives to modify management behavior, in contrast to punitive or even compensable damages. As a social insurance scheme, U.I. claims are not for damages, but for weekly insurance pay-outs, the amount of which are modest and fixed under each state system. Even the insurance payments are only partially related to the loss incurred by the employee, in that pay-outs are calculated as a percentage of the employee's previous remuneration but are capped at a modest level and for a maximum period of time.[275] Further, under the experience-rating mechanism upper and lower limits are set on the percentage that can be charged,[276] so the punitive or penalty effect is only partial. This means that the experience

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[273] *Id.*

[274] *See* Sturm, *supra* note 177, at 420.

[275] For a summary of the amount and duration of weekly benefits across the country, see The Green Book, *supra* note 162, at 293-94 ("The maximum weekly benefit amounts range from $133 in Puerto Rico to $646 in Massachusetts.").

[276] *Id.* at 306. ("Although the standard State tax rate is 5.4 percent, State tax rates based on unemployment experience can range from zero on some employers in 16 States up to a maximum as high as 10 percent in 2 States.")

rating is not absolute and employers thus end up paying only a proportion of the compensation paid to their previous employees.[277]

Even this weak link between employer behavior and employer responsibility is being altered in some states by the expansion of coverage that is not linked to experience rating. Domestic violence, and some domestic responsibilities grounds are examples of such expansions that shift the cost or financial risk of termination off the individual employer and socialize the cost across the scheme as a whole.

De-linking termination from individual employer cost undermines the power of the U.I. system to compel or even encourage employers to change their views or practices that bring about such terminations, and may thus undermine the schemes' potential to achieve social change. So, for instance, if employers are not to be held liable under the experience-rating mechanism for dismissing an employee for, say, being unable to subordinate his family responsibilities quickly enough for a shift change, this removes a pressure on the employer to alter this practice and question its model of the ideal worker.

On the other hand, as noted in Part II.C above, de-linking the costs of family conflict terminations from the individual employer and thus socializing such costs across the whole scheme has potentially positive effects on changing views and practices in relation to work and family. First, it eliminates the potential for workers with family responsibilities to be seen as greater employment risks to an individual employer under the scheme and thus eases one basis for discrimination against them as a group. Second, the socialization of work-family costs may serve an expressive function of asserting or reinforcing the social benefit of supporting families. The message is that while individuals may choose to have children, not all caring responsibilities are a matter of choice and, in any event, the cost of care of dependents should be shared by society as a whole.[278]

As minimal as the costs of U.I. claims are to employers, findings of eligibility still hold out some potential for effecting change in the workplace. All businesses need to be attuned to the costs of doing business and the U.I. taxes, as adjusted under the experience-rating mechanism, are a

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[277] In some ways, the payments required of employers under the U.I. scheme are similar to those made under an unfair termination type of scheme that limits remedies to pay-outs either explicitly or *de facto*. Under both schemes the termination merely a capped financial risk because employers are in effect liable for a maximum amount of liability and not subject to any mandate to reinstate the terminated employee. While the U.S. experience-rating mechanism is unique among U.I. schemes, in this way it is similar to the individualized nature of payments made under such unfair termination schemes whereby employers can be held directly liable for at least some of the costs of terminating employees.

[278] Nancy Folbre argues very forcefully that the cost of caring for dependents should be shared across society. *See* Nancy Folbre, Who Pays for the Kids? Gender and the Structures of Constraint (1994) and Nancy Folbre, The Invisible Heart: Economics and Family Values (2001).

cost of doing business. Legislation and jurisprudence will play a prescriptive role in determining eligibility or in determining who wins and who loses each claim.

Court rulings and legislative provisions can also shape or reshape the way in which particular situations are understood, including the notion of difference and the expectation of employees to be able to combine work and family. A ruling that declares child caring responsibilities as a good cause for not complying with a time demand has the prescriptive function of enabling the particular claimant to receive benefits, but it also serves an expressive role of declaring a baseline presumption that employees should be able to combine work and family without being unduly penalized.

Potential for such prescriptive and expressive transformative roles for the courts is limited, however, by the scope for judicial review under the scheme and the very nature of judicial review. With few grounds for disqualification, a U.I. assessment does not provide the same sort of scope for judicial creativity that a more open discretion would, such as "fairness" in an unfair dismissal regime.

Further, the common law system itself is inherently conservative, relying on precedent to guide and constrain judicial decision-making. Whether the termination was brought about by discharge or resignation, the scope for employer views about time norms to be challenged or transformed by the U.I. encounter is limited. The role of precedent forms an important barrier to new or creative thinking in how judges understand and assess the scenarios before them. Further, the adversarial system trains the mind of the judge on the arguments made by the parties, and in U.I. cases many claimants might not be represented, leaving the employer's view to stand largely unchallenged by the opposing party. Judges who are able and willing to reconsider precedent or question the way in which arguments are being framed by the parties are still limited by ideas made available through discourse in the field. Further analysis of the ways in which management practices, leading to termination or otherwise, inhibit a more gender-neutral and family-friendly balance of work and family may provide advocates and judges with more options in this regard.

Finally, any assessment under the scheme of such things as reasonableness, willfulness, or justness requires a value judgment to be made, which will be made in the context of the arguments put forth and the values and experience of the judge. As has been noted by many commentators of the Lochner era, an alignment of interests or simply experiences between employers and judges can play a very significant role in such assessments. Until the judiciary is representative of the diversity within the population it sees before it, or has at least developed an awareness well beyond its own experiences, these value judgments may not reflect the changing desires in the public at large.

The potential institutional role of U.I. law can be seen in the way the claim procedure offers an opportunity for employers to question their

own behavior. The adversarial claim procedure can provide an external stimulus to organizations as they engage with the system. However, this institutional role is limited in a number of ways. First, many employers do not challenge U.I. claims, and hence may effectively be eschewing this potentially transformative function of the system. Reasons for not challenging eligibility might be policy-based in that the employer wishes to support the employee's claim. Or it might be a question of efficiency or cost, where it is assessed to be less expensive simply to accept the tax consequences of a successful claim than to challenge the claim. The employers who stay out of the system might be the better employers or possibly simply the bigger ones. These are all empirical questions, answers to which would help us better to understand the roles served by the regulatory scheme in affecting employer behavior.

The institutional role of law is further limited by the fact that only a small proportion of unemployed workers even claim U.I., hence minimizing the potential for employers to be challenged by the U.I. scheme about their work practices. Only about one third of employees claim U.I. successfully,[279] and this is partly because many employees simply do not even apply.[280] Of those who do apply, those employees who are least likely to be successful are "contingent" workers, because they are likely to be ruled ineligible under the monetary requirements of the scheme, having not worked sufficient hours or earned sufficient money in the year. Contingent employment relationships may represent poor worker treatment, with employers using such arrangements primarily to avoid the costs of providing benefits or conditions comparable to full-time and permanent workers.[281] Thus those employers with the highest levels of contingent

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[279] Blank & Card, *supra* note 179, at 1157 ("Although almost 90 percent of employed workers hold jobs that are covered by the unemployment insurance system, less than 30 percent of unemployed workers currently receive unemployment insurance benefits."). The Green Book provides similar figures: "Although the UC system covers 97 percent of all wage and salary workers, . . . on average only 38 percent of unemployed persons were receiving UC benefits in 1999." The Green Book, *supra* note 162, at 283.

[280] Blank & Card, *supra* note 279, at 1158. (The authors explore the post war and especially the 1980s decline in the proportion of unemployed who receive unemployment benefits and conclude that the decline is almost entirely due to a decline in the take-up rate or the rate at which those who are eligible actually lodge a claim.) Others, such as Katherine Baicker, argue that the decline in recipiency is because eligibility criteria have not changed sufficiently to suit the new workforce: "The requirements may have suited the labor force of the 1920s and 1930s, but with a larger share of the work force employed part-time and discontinuously, a lower fraction of the covered work force is now eligible for benefits once unemployed." Baicker, *supra* note 163, at 5-6. The Green Book also notes declining recipiency and refers to another analysis, carried out by the Mathematica Policy Research Inc. in 1988, that proffers five factors for the decline, including a decline in the proportion of workers from manufacturing industries, and geographic shifts in composition of the unemployed among regions of the country. The Green Book, *supra* note 162, at 283.

[281] The categorization of a job as contingent employment and, more importantly, the question of whether it is "good" or "bad" employment is highly contentious. While there

workers might be the employers who most need help improving their work practices and yet are the least likely to feel pressure from the U.I. scheme or to have their practices challenged.

Finally, the potential institutional role of U.I. law is curtailed by the way the scheme is publicly run and requires only minimal involvement of employers, almost shielding them from any challenge of management decisions. The scheme is an insurance scheme, but its public rather than private nature fundamentally limits the potential for the insurer to step in and question the risks an employer's behavior poses to the scheme. Under private insurance, which is now available for many workplace management risks, such as civil rights actions, we are increasingly seeing insurers taking an active role in trying to influence management practices in order to reduce the risk of liability.[282] However, the state as the insurer in the U.I. scheme has no such power. The state (or more specifically the fund administrator) has no mandate to identify which employers are imposing the greatest costs on the scheme or which practices produce the greatest (or most socially problematic) number of claims.[283] Nor does the state actively work to influence employer behavior to minimize claims. While the schemes could be modified to permit the state insurer to audit and improve management conduct to minimize liability, any such action would likely be strongly opposed as unwelcome state interference in the running of businesses.

The state insurers also lack a profit motive, holding only a mandate to ensure that the schemes are run in a fiscally sound way—retaining solvency of the fund. Most of the costs of a compensation pay-out are covered by the last employer (and the rest are socialized across all employers in the state). In this way, any pressure to reduce pay-outs would come, not from the insurer, but from the employers who are paying the "premiums," or taxes. Even those employers who are proud of their employee management practices would be reluctant to advocate for the state to play a role in auditing and directing their practices. Considering these multiple roles of law, we can see that the U.I. regime offers some, but limited, scope for questioning and changing time norms in the workplace.

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is little doubt that for employers such arrangements might mean lower employment costs, because benefits and conditions equivalent to full-time or permanent employment are not provided, the arrangements might be suitable to particular employees who need short term or casual engagements due to other life commitments. The suitability, however, might be in light primarily of no job at all, rather than of a short term or casual job with pro-rated pay and benefits, an alternative that is generally not available.

[282] *See* Sturm, *supra* note 177, at 535.

[283] Some information is collected in order to determine experience-rating, but this would be limited simply to figures on successful and unsuccessful claims, rather than any detail about reasons for termination or how termination came about.

B. Future Research

This approach might prove fruitful in revealing the role of other fields of law in reinforcing or reshaping workplace norms. Relative to all other industrialized countries, American employment practices are not heavily regulated. However, as can be seen with this analysis of unemployment insurance law, even with minimal regulation the law can still play multiple roles in shaping the workplace behavior and culture. It is likely that other areas of employment regulation also work to reflect, reinforce, and even encourage traditional time norms, especially those of long and fixed working hours.

A few areas that appear particularly promising for such analysis are collective agreement dismissal arbitrations; Fair Labor Standards Act litigation; Family and Medical Leave Act litigation; and workers' compensation disputes. All of these areas raise questions of prescriptive, expressive, and institutional roles of law in influencing workplace practices.

As in U.I. disputes, work and family conflicts arise in the context of just cause dismissals that are covered by collective agreements.[284] The contractual regulation of termination under collective agreements and the resolution of dismissal disputes by arbitration pose questions about the prescriptive role of law in allocating rights and regulating conduct in the relationship, and the expressive role of law in how these disputes are framed and understood. The nature of the actors involved and the context in which these disputes arise and are resolved could work to shape the cultural norms of the workplace in different ways from the way in which they are influenced by U.I. litigation. For instance, the role of the union in such disputes would factor significantly into the way in which the disputes are perceived and handled. In collective-agreement disputes the union has a stronger, more significant role than an individual claimant under the U.I. regime. However, having negotiated the agreement in the first place, and having the dual role of representing the individual plaintiff as well as looking after the interests of other members covered by the agreement, the union's role could be less focused on the individual's interests alone. Something that is in the interests of the individual employee, like the discretion to take leave or not to take a night shift because of family responsibilities, might not be welcome by his colleagues who might have to cover for the absence. Unless the advocate is able to see the issue and frame it as one of importance to all employees in balancing employment and non-employment commitments, the particular employee can be cast as the one who is different and responsible for bearing the costs of his non-conformance.

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[284] See Julie Glass, Note, Rethinking the Work-Family Conflict in the Labor Arbitration Context, 19 N.Y.U. Rev. L. & Soc. Change 867 (1992); Michael Marmo, Work Versus Family Obligations: An Arbitral Perspective, Arb. J., Sept. 1991, at 14.

The nature of the arbitration system could also influence the way in which just cause dismissals are understood and resolved. The fact that the arbitrator is hired jointly by the parties, and presumably has an interest in being hired in the future, differentiates the arbitrator from the ideally disinterested judge in court litigation. This interest in retaining the respect of both parties could restrain the arbitrator from being too adventurous in exploring new ways of looking at time norm disputes and the work and family balancing rights of employees. Alternatively, however, the arbitrator is not bound by precedent in the way a judge is under the common law, giving the arbitrator much greater scope to view and handle disputes with a fresh perspective each time. This means the conservatism or cultural lag that is built into the common law system is formally absent from such arbitrations. Thus such decisions might more clearly reveal and contribute to the flux in time norms and the ideal worker assumptions.

A second area that appears promising for this type of analysis is litigation under the Fair Labor Standards Act of 1938 (FLSA).[285] This Act explicitly attempts to regulate working time for particular groups of employees by requiring employers to pay overtime compensation at a premium rate. The Act adopts the forty-hour week as the standard week for determining and rewarding overtime. Under the FLSA, if covered employees work more than forty hours in a week, employers are required to pay them for the additional hours at a rate of 1.5 times their regular rate of pay.[286] This arguably reinforces the belief that the forty-hour week is the norm, or that the ideal worker works a full-time job. One effect is that employee time need only be paid at a premium if it exceeds this standard. This means that employees who are scheduled to work fewer hours are not eligible for premium pay on their overtime under this Act. While an employer and employee may agree on part-time hours, the FLSA does not discourage the employer or compensate the employee for exceeding those hours. The FLSA is designed to protect workers from excessive hours, but the benchmark for determining what is excessive is the traditional full-time week.

Another way in which the FLSA acts to reinforce the time norm of a standard forty-hour week is that there is no scope under the Act for allowing employers and employees to agree to flexible hours whereby the employee may work more than forty hours one week, but less in the next week without incurring the overtime penalty. The period of assessment is the week, not the pay period, and the weekly hours cannot simply be averaged out over a longer period. Nor is there scope for allowing employees to take compensatory time off in lieu of overtime pay. It is difficult under such restrictions to implement flexible or compressed hours

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[285] 29 U.S.C. §§ 201-19 (1994).

[286] 29 U.S.C. § 207(a)(1) (1994).

arrangements for workers covered by the Act and, therefore, this Act which was established in another era to protect workers may be limiting the development of arrangements more appropriate for today's workforce. Employee advocates have opposed the amendment of such restrictions, arguing that it would remove protection for employees and would threaten the forty-hour work week. Questions raised by this debate are: Which employees are being "protected" by this Act and in whose interest is it to maintain the forty-hour work week as the standard?

Further, under the FLSA the exemption of particular workers from overtime provisions reflects a notion that some workers should be available to work whatever hours are required by the employer. Exempt workers include those who are engaged in a "bona fide executive, administrative, or professional capacity,"[287] a category that is imprecise and subject to expansive interpretations. The exemption encourages employers to work such employees for longer hours, because such work apparently comes at no extra cost to the employer. The basis for the dividing line between exempt and non-exempt workers, the effect of this exemption on management practices, and the litigation over who falls within the covered group are all areas of research that promise insight into the roles of law in maintaining or shaping cultural assumptions underlying working time norms.

Litigation under the Family and Medical Leave Act presents a rich area of inquiry about law and the shaping of cultural assumptions about the balancing of work and family demands, and particularly about the legitimacy of leave to attend to the family demands. As noted above,[288] the Act has been heralded as a significant step in U.S. public policy for supporting workers with dependent care responsibilities and for addressing some of the specific needs of women in child bearing and rearing. However, there are a number of eligibility criteria for the leave that clearly raise questions about the prescriptive and expressive roles of law in reinforcing working time norms. For example, the restriction of leave to only those employees who have worked for the particular employer for at least a year, and have worked at least 1,250 hours in that year, limits eligibility and reflects and reinforces an assumption that employees should earn benefits based on the hours they put in, and that only those who work full-time hours are worthy of such rewards.

One aspect of the leave that warrants analysis is the fact that the employer may choose, or the employer is permitted to require the employee, to first take his accrued vacation or sick leave as leave under the Act; that is, accrued leave can be substituted for FMLA leave.[289] This

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[287] 29 U.S.C. § 213(a)(1) (1994).

[288] *See supra* Part I.A.3.

[289] *See* 29 U.S.C. § 2612(d)(2)(A) (1993) ("An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave,

means that the Act does not guarantee twelve weeks of leave in addition to the employee's existing leave entitlements, but rather sets a minimum standard of leave. Many employees may be unable to afford to take leave under the Act other than by using their accrued paid leave. However, the discretion for employers to substitute accrued and FMLA leave is based on an assumption that a worker who gets twelve weeks of leave for family or medical reasons under the Act would not need or should not expect to also have vacations, personal leave, or general sick leave. Twelve weeks might be quite adequate for dealing with a personal injury or illness, but workers who use their leave to attend to the birth, injury, or illness of a dependent may be left without sufficient leave for their own needs of rest and recreation, or sickness recovery.

IV. CONCLUSION

Many work practices have been established on the basis of a traditional worker who is unencumbered by non-employment responsibilities, and this is reflected in time norms in the workplace. Until these norms are challenged and reshaped, enabling part-time employment and other flexible working time options to be offered in a legitimate way as alternatives to the traditional long and fixed hours work week, workers with family responsibilities or other non-employment responsibilities will not be able to participate in the workforce equally, and those in the workforce will not be able to participate fully in family life. Until there is a shift away from the focus on hours as the key measure of worker contribution, loyalty, and productivity, organizations will fail to tap the full value of their human resources, and families will continue to be deprived of the participation of caregivers. Individuals will continue to work hours not of their own choosing and will struggle to balance work and family as competing demands.

Working time norms are being challenged and reshaped in various workplaces and in public debates. This analysis, using unemployment insurance law as an example, reveals how law in various roles largely reflects and reinforces, but also to some extent shapes and challenges, those norms and the cultural assumptions underlying them.

U.I. law does not explicitly limit employer discretion but can still affect employer (and employee) behavior in other ways. Many terminations revolve around time norms, and, in determining eligibility for insurance in such cases, the law acts to apportion costs of the termination between the employer and employee. Importantly, U.I. law also establishes a process through which termination circumstances are examined and judgment is passed on the reasonableness of employer and employee claims in relation

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personal leave, or family leave of the employee for leave provided under [the Act] for any part of the 12-week period of such leave.").

to the time dispute, and, in turn, to any underlying conflict between work and family commitments.

The courts have generally been sympathetic to employers in working-time disputes, accepting their need to manage and evaluate employees on the basis of time norms. In doing so, they have also accepted employer depictions of work and family as occupying separate spheres, with employers only responsible for the work sphere. The courts, in this way, have reflected and reinforced a gendered view of the worker as unencumbered by family caring and household responsibilities. There are, however, signs of change; the separate spheres view is being challenged. In holding, for instance, that an employer who fails to give adequate notice of a change in shift may provide the employee with good cause for quitting, the courts are challenging the employer's right to ignore any other commitments the worker might have. Employers are forced to bear a cost if they choose to treat the worker as unencumbered. Such cases represent disruption to traditional time norms that construct an homogenized, "ideal" worker. They hold out some promise of a de-gendered norm that enables people to have and meet dual commitments to work and family

By revealing the ways in which law acts in prescriptive, expressive, and institutional roles in this field, the aim has been to arm policymakers and other advocates for change in work-family and gender equity causes with new insights and material, and to prompt similar analysis of other fields of regulation.