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ARTICLES

ERADICATING THE MOTHERING EFFECT:

WOMEN AS WORKERS AND MOTHERS, SUCCESSFULLY AND SIMULTANEOUSLY

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* Assistant Professor of Law, Duquesne University School of Law. I would like to express my deep gratitude and appreciation for my mother, Nechama Kaufman, and my grandmother, Etel Weinberg, for the exceptional mothering they selflessly provided to me and my family. Without their care and example, none of my accomplishments would have been possible. This article is, at its core, an affirmation of the value of their mothering. I would also like to thank my children, Naomi, Joseph, and Benjamin, for teaching me the value of mothering, for allowing me to realize that mothering is work, and for enabling me to understand the importance of being able to combine paid market work and mothering, successfully – simultaneously. I would also like to express my appreciation to my husband, Jimmy, for his unwavering love and support, without which I could not have written this article. Finally, I am grateful to my colleagues at Duquesne, especially Dean Ken Gormley and Associate Dean for Faculty Scholarship Jane Moriarty for their comments and support. I would also like to acknowledge the excellent research assistance of Rayna Kessler, Caitlin Gifford, and Lauren Oelrich.

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INTRODUCTION

Today, the United States is one of only four industrialized nations that fail to provide paid maternity leave.¹ Additionally, two-thirds of American mothers have no access to any federally protected job leave;² mothers earn approximately 30 percent less than their male counterparts;³ and following divorce, a mother and her children may face a 36 percent reduction in their standard of living compared with a 28 percent increase in the father's standard of living.⁴ With changes in the demographics of the American workforce, and middle-income families working longer hours than ever before,⁵ the need for legislation addressing the

1. Jody Heymann, Alison Earle & Jeffrey Hayes, *Work, Family, and Equity Index: How Does the U.S. Measure Up?* THE PROJECT ON WORKING GLOBAL FAMILIES & HARVARD SCHOOL OF PUBLIC HEALTH AND INSTITUTE FOR HEALTH AND SOCIAL POLICY, 1-2 (2007), <http://www.mcgill.ca/files/ihsp/WFEI2007FEB.pdf>. (“Out of 173 countries studied, 169 countries offer guaranteed leave with income to women in connection with childbirth; [ninety-eight] of these countries offer [fourteen] or more weeks paid leave. Although in a number of countries many women work in the informal sector, where these government guarantees do not always apply, the fact remains that the U.S. guarantees no paid leave for mothers in any segment of the workforce, leaving it in the company of only three other nations: Liberia, Papua New Guinea, and Swaziland. [Sixty-six] countries ensure that fathers either receive paid paternity leave or have a right to paid parental leave; [thirty-one] of these countries offer [fourteen] or more weeks of paid leave. The U.S. guarantees fathers neither paid paternity nor paid parental leave.”).

2. Gillian Lester, *A Defense of Paid Family Leave*, 28 Harv. J.L. & Gender 1, 2 (2005).

3. JOAN BLADES & KRISTIN ROWE-FINKBEINER, *THE MOTHERHOOD MANIFESTO: WHAT AMERICA'S MOMS WANT – AND WHAT TO DO ABOUT IT* 7 (2006) (“Non-mothers with an average age of [thirty] earn 10 percent less than their male counterparts; mothers earn 27 percent less; and single mothers earn between 34 and 44 percent less.”).

4. LESLIE BENNETTS, *THE FEMININE MISTAKE: ARE WE GIVING UP TOO MUCH?* 107 (2007) (citing Suzanne M. Bianchi, Lekha Subaiya & Joan R. Kahn, *The Gender Gap in the Economic Well-Being of Nonresident Fathers and Custodial Mothers*, 36 DEMOGRAPHY 195, 197 (1999)).

5. BLADES & ROWE-FINKBEINER, *supra* note 3, at 3; Joan C. Williams, Jessica Manvell & Stephanie Bornstein, “*Opt-Out*” or *Pushed Out?*: *How the Press Covers Work/Family Conflict*, CTR. FOR WORKLIFE LAW, UNIV. OF CAL. HASTINGS COLL. OF THE LAW, 28 (2006), *available* at <http://thecareerpartners.com/docs/emergingworkplace/OptOutPushedOut.pdf>.

Work-family balance has never been more pressing. As Ann Crittenden has stated, “We need to stop sentimentalizing mothers and other caregivers and start according their work the respect and material recognition that it deserves – and earns.”⁶ Mothers need the tools to succeed both at work and at home. They need increased family leave, flexible work schedules, and fair compensation for part-time work.⁷ Still, despite calls for legislative solutions, Congress has failed to act.⁸ Why has the United States failed to adopt federal legislation that would enable mothers to successfully combine paid work with their caretaking responsibilities?⁹ This article asserts that one significant cause of this legislative failure is the undervaluation of mothering.

While the work-family conflict is an inherently two-sided issue, equal legal attention has not been given to both sides of the dichotomy. Because of the common misconception that mothering consists of easy, delegable, unskilled labor, the legislative response to the conflict has focused predominantly on discrimination and gender bias in the workplace. Meanwhile, there has been insufficient legal theoretical focus on the significance of traditional mothers’ work. It follows that little legislation exists to ensure that mothers are able to mother their children while simultaneously

6. BLADES & ROWE-FINKBEINER, *supra* note 3, at 5 (quoting Ann Crittenden).

7. Mothers also need access to affordable, quality, year-round childcare, affordable healthcare, increased father participation and responsibility over childcare and family care work, tax reform, social security reform, and fair family court decisions.

8. See Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the “Maternal Wall” In the Legal Workplace*, 13 DUKE J. GENDER L. & POL’Y 55, 55-84 (2006); Joan C. Williams, Jessica Manvell & Stephanie Bornstein, *supra* note 6, at 36-43.

9. American children are still cared for primarily by their mothers. However, fathers, grandparents, other relatives, and other individuals who take on the role and responsibility of parent, also assume primary responsibility for the care of young children. According to the 2010 U.S. Census, there were 154,000 stay-at-home fathers who cared for 287,000 children under the age of fifteen. U.S. Census Bureau, *Parents and Children in Stay-at-Home Parent Family Groups: 1994 to Present (2010)*, available at www.census.gov/population/socdemo/hh-fam/shp1.xls. By comparison, in 2010, there were 5,020,000 stay-at-home mothers. *Id.* While only 2.6% of children were cared for by a stay-at-home father, this number represents an increase in the number of children being cared for by a stay-at-home father. *Id.* Moreover, this number continues to increase, indicating that the primary care of children is, to some extent, shifting away from being the exclusive domain of mothers. Nevertheless, as the overwhelming majority of primary caretakers are mothers and the overwhelming majority of young children are cared for primarily by their mothers, this article will use the verbs “mothering” and “caretaking” and the nouns “mother” and “primary caretaker” to refer to the work of caring for young children and families and the person who performs such work, respectively. Use of these terms, as opposed to the intentionally mother-neutralizing “parenting” is intentional, not meant to diminish or discourage the work of fathers and others who primarily care for children and home, but rather, to acknowledge those who continue to do the majority of such work and to suffer the majority of the resultant consequences. That being said, it is my great hope that the percentage of non-mothers who “mother” their families will continue to grow and that, over time, we will develop new verbs or adapt our understandings of verbs like “fathering” or “parenting” to encompass the entire spectrum of unpaid labor provided by those non-mothers for their children, partners, families, and homes.

earning a fair income in the paid labor market.¹⁰ Drawing on anthropological, psychological, and sociological studies, governmental data, popular books and articles, and legal scholarship, this article posits that mothering is of value and that acknowledging its value is of central theoretical significance to the legal discourse surrounding work, family, and gender.

Part I of this article will identify the substantial disconnect between the rhetorical praise bestowed upon mothers and the status they are accorded in law and policy. It will describe the “mothering effect” – all aspects of the financial penalization and professional marginalization of mothers in America – and discuss both its cause and its lack of federal remedy. Part II will provide a brief history of the feminist legal discourse surrounding the work-family conflict, and the call for additional scholarship focusing on the value of care. Part III will prove that traditional mothers’ work is of significant value to children, families, and communities. It will deconstruct the myth of mothering as a simple labor of love and reveal the real work entailed in mothering, discuss who performs the “mother’s share” of this work, and assert its individual and collective value.

I. RHETORIC V. REALITY

A. *Love of Mother*

There is no shortage of verbal praise for mothers in our society. American Presidents have repeatedly extolled their mothers’ virtues. George Washington said “All I am I owe to my mother. I attribute all my success in life to the moral, intellectual and physical education I received from her.”¹¹ Abraham Lincoln similarly credited his mother with his success. “All that I am or can be I owe to my angel mother.”¹² Much more recently, Barack Obama wrote of his mother, “I know that she was the kindest, most generous spirit I have ever known, and that what is best in me I owe to her.”¹³ While our leaders have credited their own mothers with their personal achievements, mothers as a group are given similar honor in poem and proverb. Ralph Waldo Emerson credited mothers with all that their sons become, stating “men are what their mothers made them.”¹⁴ George Herbert found that “one good mother is worth a

10. See generally The Family Medical Leave Act (FMLA), 29 U.S.C. §§2601-2654 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e to 2000e-17 (2006); The Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (2006); The Americans with Disabilities Act, 42 U.S.C. §§12101-12213 (2006); Heymann, Earle & Hayes, *supra* note 2, at 1-2.

11. *Get Inspired by Quotes About Motherhood*, KIRO TV, at <http://www.kirotv.com/holidays/655996/detail.html> (last visited December 13, 2010) (quoting George Washington).

12. *Id.* (quoting Abraham Lincoln).

13. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* xii (2004).

14. Cheryl Lavin, *Men Are What Their Mothers Made Them*, CHI. TRIB., Nov. 29, 1998, available at <http://articles.chicagotribune.com/1998-11->

hundred schoolmasters.”¹⁵ Similarly, a Spanish proverb notes, “An ounce of mother is worth a pound of clergy.”¹⁶ Finally, to emphasize the point, the ultimate compliment is bestowed by a well-known Jewish proverb: “God could not be everywhere, so he made mothers.”¹⁷ The rhetorical praise of mothers, while inspiring and heartfelt, is merely aspirational; as of yet, instead of being rewarded for their care work, mothers are systematically subjected to financial penalization and professional marginalization.

B. *The Mothering Effect*

“Having a child is now the single best predictor that a woman will end up in financial collapse.” - Elizabeth Warren¹⁸

It is important that mothers raise their children and earn a living, successfully and simultaneously. Due, in large part, to a lack of federal legislation surrounding the work-family conflict, many mothers are unable to do so. Even when mothers follow all the rules and do their best to be successful, they often find that the “game” was not designed for someone with caretaking responsibilities and, as a result, they face an often insurmountable disadvantage. Their mothering interferes with their ability to succeed as workers and their work interferes with their ability to succeed as mothers. In essence, they are subject to the “Mothering Effect.”

The “Mothering Effect” is the term I use to refer to all aspects of financial penalization and professional marginalization to which mothers are subjected as a consequence of fulfilling the mothering role. The “Mothering Effect” includes the overall effects of the various penalties imposed on mothers, including: less pay (the wage gap),¹⁹ less likelihood of professional success (the

29/features/9811290412_1_mae-west-mark-twain-wild-animal (quoting Ralph Waldo Emerson).

15. ORISON SWETT MARDEN, ARCHITECTS OF FATE OR, STEPS TO SUCCESS AND POWER: A BOOK DESIGNED TO INSPIRE YOUTH TO CHARACTER BUILDING, SELF-CULTURE AND NOBLE ACHIEVEMENT 421 (1895) (quoting George Herbert).

16. Jack O’Brien, *An Ounce of Mother is Worth a Pound of Clergy*, CREAMER MEDIA’S ENGINEERING NEWS ONLINE (Jan. 19, 2007), available at <http://www.engineeringnews.co.za/article/an-ounce-of-mother-is-worth-a-pound-of-clergy-2007-01-19>.

17. *Id.*

18. ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (2003).

19. See generally Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive?*, 26 J. HUM. RESOURCES 282 (1991); Eng Seng Loh, *Productivity Differences and the Marriage Wage Premium for White Males*, 31 J. HUM. RESOURCES 566 (1996); Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. ECON. PERSPECTIVES 137 (1998); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1786 (1986); Cynthia Lee Starnes *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1520 (2005); Stephen Benard, In Paik & Shelley J. Corell, *Cognitive Bias and the Motherhood Penalty*, 59

glass ceiling and the maternal wall),²⁰ comprehensive employment discrimination,²¹ (discrimination in hiring,²² work assignments,²³ promotions,²⁴ benefits,²⁵ and terminations),²⁶ heightened risk of poverty,²⁷ decreased power within marriage and over self-determination,²⁸ the caregiver conundrum,²⁹ and

HASTINGS L. J. 1359, 1359 (2008); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316 (2007).

20. See Debra Cassens Weiss, *Jack Welch: Women Take Time Off for Kids at Their Peril*, ABA Journal (July 16, 2009), available at http://www.abajournal.com/news/article/jack_welch_women_take_time_off_for_kids_at_their_peril/; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1, 6 (2000) [hereinafter WILLIAMS, UNBENDING GENDER]; LESLIE BENNETTS, THE FEMININE MISTAKE: ARE WE GIVING UP TOO MUCH? 45 (2007).

21. See Porter, *supra* note 8, at 56 (“The maternal wall affects women with children in many aspects of their jobs, including hiring, promotions, pay, and even terminations.”); see generally WILLIAMS, UNBENDING GENDER, *supra* note 20, at 70 (“New York and Harvard researchers repeatedly heard reports of mothers receiving less desirable assignments than they had received BC (before children).”).

22. Porter, *supra* note 8, at 56.

23. WILLIAMS, UNBENDING GENDER, *supra* note 20, at 73 (explaining that part-time workers often get less respect and less interesting work than their full-time counterparts.).

24. *Id.* at 72 (discussing the restriction of part-time working mothers’ prospects for advancement).

25. See Ayelet Lichtash, *Earning Dignity: Indirect Discrimination Against Women At Part-Time Jobs, Comparative View*, 26 WOMEN’S RTS. L. REP. 13, 13-14 (2005) (explaining that women account for a dramatic 70 percent of the total part-time workforce and part-time workers are less likely to receive fringe benefits, including health insurance, sick days, and life insurance.); BLADES & ROWE-FINKBEINER, *supra* note 3, at 72 (citing Sloan Work and Family Research Network, *Health Insurance Coverage Lower for Part-Time Workers than Full-Time Workers* (2003) http://wfnetwork.bc.edu/statistics_template.php?id=1718&topic=10 (explaining that in 2001, over 81 percent of part-time workers had no healthcare coverage, compared with 31 percent of full-time employees who had no healthcare coverage.)).

26. See generally Pamela Gershuny, *Family Values First When Federal Laws Collide: A Proposal to Create a Public Policy Exception to the Employment-At-Will Doctrine Based Upon Mandatory Parenting Duty*, 21 WIS. WOMEN’S L.J. 195 (2006) (citing examples of parents being fired due to absence to care for sick children).

27. BENNETTS, *supra* note 4, at 119. (“Fourteen percent of women aged seventy-five and older now live in poverty—nearly double the 7.7 percent of men the same age living in poverty. The risks are particularly great for women who end up alone. ‘Only five percent of aged married women are poor; in contrast, twenty-two percent of divorced, twenty percent of never married, and eighteen percent of widowed women age sixty-five and older are poor,’ said Jane Ross, the deputy commissioner for policy at the Social Security Administration, in testimony before the Senate Special Committee on Aging in 1999.”); see also Alexandra Cawthorne, *The Straight Facts on Women in Poverty*, THE CENTER FOR AMERICAN PROGRESS (Oct. 8, 2008), available at http://www.americanprogress.org/issues/2008/10/women_poverty.html (“Eight in ten custodial parents are women, and custodial mothers are twice as likely to be poor as custodial fathers.”) (emphasis added).

28. See Michael Bittman, Paula England, Nancy Folbre, Linda Sayer, L., & George Matheson, *When Does Gender Trump Money? Bargaining and Time in Household Work*, 109 AM. J. SOC. 186 (2003).

all other penalties imposed upon mothers. The Mothering Effect also includes the inability to spend sufficient time caring for children and family as a result of needing to work long hours in order to make a living or attain professional success.³⁰ Every mother is impacted by at least some aspect of the Mothering Effect regardless of her marital status, work schedule, income level, educational attainment, race, religion, age, or participation in the paid labor market.³¹ The Mothering Effect may begin to impact a mother as early as her first pregnancy and often lasts the duration of her life.³²

Motherhood is expensive. The correlation of motherhood with reduced earning capacity is well established.³³ A 1975 study determined that the addition of each child depressed a woman's earnings by a full 10 percent.³⁴ In 1988, a study of the wage gap found that for women ages thirty to thirty-nine "hourly wages declined proportionately with the number of children in the

29. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 U. Kan. L. Rev. 355, 356 (2009) [hereinafter Porter, *Why Care About Caregivers?*]; Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real Workers"*, 39 STETSON L. REV. 777, 781 (2010) [hereinafter Porter, *Synergistic Solutions*].

30. The caregiver conundrum states that when a woman is forced to dedicate time to family, her position at work suffers, and on the other side of the coin, when a woman is forced to dedicate time to work, the family suffers. Porter, *Why Care About Caregivers?*, *supra* note 29, at 356 ("What is the caregiver conundrum? Simply put, it is the difficulty caregivers face when trying to balance their caregiving responsibilities with their work responsibilities. Caregivers face conflicts both at home and at work when work responsibilities clash with responsibilities at home. In many cases, these conflicts create serious hardships on the caregivers and their loved ones."). The caregiver conundrum includes "all of the workplace policies and norms that make it difficult for working caregivers to balance work and family successfully, especially those caregivers who are 'real' workers." Porter, *Synergistic Solutions*, *supra* note 29, at 777.

31. Williams, Manvell & Bornstein, *supra* note 8, at 9.

32. See generally Cawthorne, *supra* note 27 ("The economic costs associated with pregnancy are more significant for women than for men. Unplanned and mistimed pregnancies in particular can result in the termination of education and keep women from getting and sustaining solid employment.").

33. This wage penalty does not apply to similarly situated men. In fact, historically and presently, men enjoy a wage premium for each child they father. Loh, *supra* note 19, at 566; Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137 (1998) (citing Joyce Jacobsen & Wendy Rayack, *Do Men Whose Wives Work Really Earn Less?*, 86 AM. ECON. REV. 268 (1996)) ("Married men, most of whom have children, earn more than other men, with estimates of the marriage premium for men ranging from 10 to 15 percent."); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1786 (1986) (citing Solomon W. Polacheck, *Potential Biases in Measuring Male-Female Discrimination*, 10 J. HUM. RESOURCES 205, 216 (1975) (finding that a man's earnings increased by 3 percent with each child)); see Korenman & Neumark, *supra* note 19, at 282.

34. Weiler, *supra* note 33, at 1785-86 (citing Solomon W. Polacheck, *Potential Biases in Measuring Male-Female Discrimination*, 10 J. HUM. RESOURCES 205, 216 (1975)).

household.”³⁵ More recently, in 2004, it was found that moderately educated women “who were childless earned 58 percent of male earnings; those with one child earned 52 percent of male earnings; and those with two children earned 49 percent of male earnings.”³⁶ Similarly in 2001, it was reported that women earn “5 [percent] less per child than other workers, over and above any gender wage penalty.”³⁷ As a result, working mothers earn significantly less than working fathers.³⁸ Meanwhile, married men, most of whom are fathers, earn 10-15 percent more than other men.³⁹

Providing additional depth to the statistical evidence behind the wage gap, a Cornell sociological study found that mothers were offered \$11,000 less salary than equally qualified non-mothers for the same job.⁴⁰ The wage gap associated with motherhood was found to be due, in part, to “cognitive bias” or the stereotype that mothers are less desirable employees because of traits associated with their maternal role.⁴¹ Another explanation for this wage gap is the wage penalty associated with taking any time away from the paid labor market.⁴² As Sylvia Ann Hewlett has noted, “women lose an average of 18 [percent] of their earning power when they take an off-ramp.”⁴³ In some fields, the wage gap is even higher, averaging 28 percent in certain business sectors.⁴⁴ The longer a woman spends out of the paid market, the more extreme the wage gap, “[a]cross sectors, women lose a staggering 37 [percent] of their earning power when they spend three or more years out of the workplace.”⁴⁵ The wage gap persists for decades; even twenty years after a labor gap, women “still earn between 5 percent and 7 percent less than women who never left the labor force and have comparable levels of experience.”⁴⁶

35. Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1519 (2005) (citing VICTOR R. FUCHS, *WOMEN’S QUEST FOR ECONOMIC EQUALITY* 62, 147 (1988)).

36. *Id.* (citing Wendy Sigle-Rushton & Jane Waldfogel, *Motherhood and Women’s Earnings in Anglo-American, Continental European, and Nordic Countries*, available at <http://www.lisproject.org/publications/liswps/454.pdf> (last visited Nov. 18, 2011)) (on file with the Iowa Law Review)).

37. Benard, et al., *supra* note 19, at 1359 (citing Michelle Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 204 (2001)).

38. See Jane Waldfogel, *supra* note 33, at 143.

39. *Id.*

40. Correll et al., *supra* note 19, at 1316. The study also found mothers were 37 percent less likely to be hired than non-mothers with the same qualifications, resume, and experience. *Id.* at 1316.

41. See Benard et al., *supra* note 19, at 1360.

42. BENNETTS, *supra* note 4, at 79 (citing Sylvia Ann Hewlett & Carolyn Buck Luce, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success*, HARV. BUS. REV. 2, 46 (2005)).

43. *Id.*

44. *Id.*

45. *Id.*

46. Cynthia Lee Starnes, *Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership*, 13 WM. & MARY J. WOMEN & L. 203, 216 (2006) (citing

Mothers' decreased earnings impact families' financial stability.⁴⁷ The financial loss associated with having only one child can amount to \$1.3 million for a family who earns \$81,500 a year, and up to \$600,000 for a family earning \$45,000 a year.⁴⁸ The financial loss may push a lower-income family into poverty.⁴⁹ In fact, "a quarter of 'poverty spells' start[] with the birth of a baby."⁵⁰

Though the financial loss associated with having a child may be absorbed by families as a whole, the ramifications of this financial loss may be particularly severe for mothers, and in some instances, children. The financial loss attributed to motherhood may result in attendant consequences, such as a woman's loss of power within her marriage, and a decreased likelihood that family resources will benefit the children.⁵¹

During marriage, a mother's lost income may correspond with a loss of power.⁵² While co-chair of the Council on Contemporary Families, Barbara Risman explained:

Marriages are more male-dominated when women are not economic partners, which tends to decrease the quality of interaction. If your partner is also your paycheck, you're in a different position to make demands. If the husband controls her standard of living, there's a huge imbalance in power. Power is related to decision making – who gets the final call when you disagree. If you earn no money, or less money, you're going to be less likely to win when you have disagreements, and this decreases the quality of the marriage.⁵³

Moreover, lack of power in a marriage can have serious attendant consequences. This is because "dependency breeds vulnerability, inhibits open communication, and creates an unhealthy balance of power in which the

Joyce Jacobsen & Laurence Levin, *The Effects of Intermittent Labor Force Attachment on Female Earnings*, 18 MONTHLY LAB. REV. 14, 15 (1995).

47. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 89 (2001) (citing SHIRLEY P. BURGGRAB, *THE FEMININE ECONOMY AND ECONOMIC MAN* 61 (1997)).

48. *Id.*; According to U.S. Department of Agriculture estimates of parental expenditures on children, "a middle-income, husband-wife family with two children in 2000 could expect to spend about \$165,630 per child over eighteen years." This estimate, which does not take into consideration the value of time and energy devoted to child rearing or the cost of college education, can still amount to an overall loss of between \$545,284 and \$1.5 million for a family that raises two children. FOLBRE, *VALUING CHILDREN: RETHINKING THE ECONOMICS OF THE FAMILY* 65 (2010).

49. *See id.*

50. BLADES & ROWE-FINKBEINER, *supra* note 3, at 80.

51. *See* ANN CRITTENDEN, *supra* note 47, at 121-22.

52. BENNETTS, *supra* note 4, at 207 (citing Barbara Risman, co-chair of the Council on Contemporary Families).

53. *Id.* (quoting Barbara Risman).

subservient partner must always fear the loss of her meal ticket . . .”⁵⁴ As early as 1949, Simone de Beauvoir understood this to be true. In *The Second Sex*, she wrote:

[women’s] civil liberties remain theoretical as long as they are unaccompanied by economic freedom. A woman supported by a man—wife or courtesan – is not emancipated from the male because she has a ballot in her hand. . . . It is through gainful employment that woman has traversed most of the distance that separated her from the male; and nothing else can guarantee her liberty in practice.⁵⁵

The money/power connection is recognized as potentially significant by domestic violence professionals as well.⁵⁶ While lack of financial power is not a predictor of domestic violence, it is clear that economic control is a form of abuse used by domestic violence offenders and that lack of financial independence can limit a victim’s ability to leave an abusive relationship.

A mother’s financial power may also have a direct impact on her children’s well being. It is clear that where mothers have control over family income, children typically benefit. Studies conducted in countries throughout the world have consistently found that children tend to benefit when mothers have more control over income.⁵⁷ The benefit to children is documented through “considerable empirical evidence, across diverse cultures and income groups,” demonstrating that women are more likely than men to spend money “on goods that benefit children and enhance their capacities.”⁵⁸ Several of these studies were described by author Ann Crittenden, as follows:

- In Kenya and Malawi, researchers found that among sugarcane farmers, the more income controlled by women, the greater the household caloric intake, whatever the overall household earnings. The reason: in Malawi, female-headed households spend 25 to 50 percent less on alcoholic beverages than male-headed households.⁵⁹

54. *Id.* at 217.

55. SIMONE DE BEAUVOIR, *THE SECOND SEX* 679 (1952).

56. BENNETTS, *supra* note 4, at 220 (“One of the classic signs of a domestic-violence situation is economic abuse, where one partner exerts control over the other partner through economic means.” quoting Jennifer Friedman, a public-interest lawyer at Sanctuary for Families, an organization that provides services to battered women and children in New York City).

57. CRITTENDEN, *supra* note 48, at 120 (“Studies conducted on five continents have found that children are distinctly better off when the mother possesses enough income and authority in the family to make investing in children a priority.”).

58. *Id.* (quoting Judith Bruce & Cynthia B. Lloyd, *Finding the Ties That Bind: Beyond Headship and Household*, in *INTRAHOUSEHOLD RESOURCE ALLOCATION IN DEVELOPING COUNTRIES: METHODS, MODELS, AND POLICY* (Lawrence Haddad, John Hoddinott, & Harold Aldreman eds., 1997)).

59. *Id.* at 121.

- In Jamaica, female-headed households consume foods of higher nutritional quality and spend a larger share of their income on children's goods and a significantly smaller share on alcohol than male-headed households.⁶⁰
- In Brazil, \$1 in the hands of a Brazilian woman has the same effect on child survival as \$18 in the hands of a man.⁶¹
- In Guatemala, the higher the share of total household income earned by a child's mother, the better nourished the child is likely to be.⁶²

Crittenden points out that an example of higher maternal spending on children in the United States can be found by looking at how divorced parents pay for their children's higher education. She writes: "Divorced fathers are much less willing to finance their offspring's higher education than mothers—even though they are in a much better position to do so."⁶³ Thus, a mother's reduced income may have more fundamental impacts on the well being of mothers and children than one might anticipate from the simple financial consequences of a reduced family income.

The financial costs of mothering are even more pronounced after divorce and for never married mothers.⁶⁴ Single mothers are more likely to live at or near the poverty line, encounter difficulty succeeding in the paid market, and require assistance attaining child care and healthcare.⁶⁵ The consequences for single mothers unable to maintain employment in the paid market are especially evident in eviction data. In considering the disproportionate number of women who are the subjects of single-tenant evictions (children are not considered tenants), one scholar noted that "[t]he strain of providing for children presents a challenge, and single mothers likely fall short of their rent payments because they have less time to work and more expenses than others do."⁶⁶ The same scholar correctly identified single mothers' relative higher

60. *Id.*

61. CRITTENDEN, *supra* note 47, at 122.

62. *Id.* (citing JUDITH BRUCE, CYNTHIA B. LLOYD & ANN LEONARD, *FAMILIES IN FOCUS: NEW PERSPECTIVES ON MOTHERS, FATHERS, AND CHILDREN* 33 (1995); Thomas Duncan, *Intra-Household Resource Allocation*, 25 *JOURNAL OF HUMAN RESOURCES* 635 (1990); Judith Bruce & Cynthia B. Lloyd, *Finding the Ties That Bind: Beyond Headship and Household*, in *INTRAHOUSEHOLD RESOURCE ALLOCATION IN DEVELOPING COUNTRIES: METHODS, MODELS, AND POLICY* (Lawrence Haddad, John Hoddinott, & Harold Aldreman eds., 1997)).

63. *Id.* at 126.

64. *Births: Final Data for 2006*, 57 *NATIONAL VITAL STATISTICS REPORTS* 1, 11 (2009) available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf (In 2006, 1.6 million babies were born to non-married mothers. This accounted for 38.5% of all births during that year.).

65. Amy K. Glasmeier & Tracey L. Farrigan, *Rethinking Sustainable Development: Poverty, Sustainability, and the Culture of Despair: Can Sustainable Development Strategies Support Poverty Alleviation in America's Most Environmentally Challenged Communities?*, 590 *ANNALS AM. ACADEMY POL. & SOC. SCI.* 131, 145 (2003).

66. Michael D. Gottesman, *End Game: Understanding the Bitter End of Eviction*, 8 *CONN. PUB. INT. L. J.* 63, 94 (2008).

expenses as a factor in their financial distress. For example, while two-income married parents spend an average of nine percent of their household earnings on childcare, single parents spend an average of 16 percent of their earnings on child care expenses.⁶⁷ In 2001, 40 percent of single mothers spent over half their cash income on child care expenses.⁶⁸ The difficulties associated with single mothers maintaining a reasonable standard of living demonstrate the lack of support for mothers generally, when it comes to attempting to successfully combine paid market work with mothering.

Family Law courts do little to remedy the problems. Divorce decrees and support orders continue to reflect the illusion that stay-at-home and part-time working mothers can return to the marketplace, post-divorce, and earn what a similarly educated and trained woman would earn had she not spent years caring for her family.⁶⁹ Consequently, mothers often cannot rely on alimony,⁷⁰ a fair distribution of assets,⁷¹ or even child support payments⁷² to supplement their earning capacity so as to maintain their pre-divorce standard of living.⁷³ Similarly, mothers find no relief in the structure of the social welfare system or in the federal tax code.⁷⁴

What causes the phenomenon that this article has described as the mothering effect? There are multiple reasons for the mothering effect; however,

67. AFL-CIO, *Child Care and Early Childhood Education*, available at <http://www.aflcio.org/issues/workfamily/childcare.cfm> (last visited Nov. 18, 2011).

68. Richard Wertheimer, *Poor Families in 2001: Parents Working Less and Children Continue to Lag Behind*, CHILD TRENDS RESEARCH BRIEF (2003), available at <http://www.childtrends.org/files/PoorFamiliesRB.pdf>.

69. Starnes, *Mothers, Myths, and the Law of Divorce*, *supra* note 46, at 216.

70. While in the past lifetime alimony may have existed for some divorced women, today rehabilitative alimony is often the most a court will grant. BENNETTS, *supra* note 4, at 110 (rehabilitative alimony is limited to only a few years with the purpose of affording women time to get back to work, “as if in two or three years life will be just as it has been.”).

71. *Id.* at 111 (Often, the most valuable asset is the family home. While the mother may be awarded half the money from the sale of the home, she, and the children, now lose their home and the mother doesn’t have the income to replace it.).

72. *Id.* at 108-10. (Almost one out of every four custodial mothers did not even receive child support payments in 2003; The U.S. Department of Health and Human Services estimated that nearly seventy percent of child-support cases had arrears owed in 2005, up from fifty-three percent in 1999.).

73. *Id.* at 110.

74. Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict*, 34 PEPP. L. REV. 313, 327 (2007) (“the Temporary Assistance for Needy Families (TANF) welfare program . . . push[es] unmarried, low-income women with children into the workforce, often into low-paid, pink-collar, service-sector jobs.”). Kessler goes on to note that “[o]ur income tax system favors single earner couples who conform to the male breadwinner/female homemaker ideal and penalizes secondary wage earners in dual income married families—typically women.” *Id.* at 326-27; see WILLIAMS, *supra* note 20, at 112; see generally Lora Cicconi, Comment, *Competing Goals Amidst the “Opt-Out” Revolution: An Examination of Gender-Based Tax Reform in Light of New Data on Female Labor Supply*, 42 GONZ. L. REV. 257, 266-69 (2006-2007); Lester, *supra* note 2, at 19.

it is clear that the unpaid care work mothers routinely provide to their children and families – and the correlating challenge of fulfilling employer expectations – is a primary cause.⁷⁵ To craft and advocate for policies that will enable mothers to successfully combine paid market work with mothering, we must begin by recognizing that often employer expectations are inherently incompatible with the real life experiences of working mothers.⁷⁶

C. *The Ideal Worker and the American Workforce*

The ideal worker expectation is an important concept in books and articles that discuss the challenges of life as a working mother.⁷⁷ It was initially introduced by Joan Williams, who has described the ideal worker as

someone who starts to work in early adulthood and works, full time and full force, for forty years straight. That means no time off for childbearing. Or childrearing... It is an ideal framed around men living the traditionally masculine biography of a breadwinner married to a homemaker. This ideal was well suited to the workforce of the 1950s. It is not well suited to today's workforce, when 70 [percent] of households have all adults in the labor force.⁷⁸

75. See ARLIE RUSSELL HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT* xiii (2003); 58; Glasmeier & Farrigan, *supra* note 65, at 145 (single mothers have more difficulty maintaining employment due to their caretaking obligations).

76. BLADES & ROWE-FINKBEINER, *supra* note 3, at 14. (“While most mothers work in this country, we simply don’t have sufficient supports in place for parents and families. To suggest that mothers just need to find the proper balance between work and family is to profoundly misunderstand the issue. The truth is that our society hasn’t caught up to support the unprecedented diversity of roles modern women take on in a single day.”).

77. RACHEL HILE BASSETT, *PARENTING AND PROFESSING: BALANCING FAMILY WORK WITH AN ACADEMIC CAREER* 8-9, 125 (2005); PAMELA STONE, *OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* 82-83, 112 (2007); see BLADES & ROWE-FINKBEINER, *supra* note 3, at 7; WILLIAMS, *UNBENDING GENDER*, *supra* note 20, at 72.

78. Williams, Manvell & Bornstein, *supra* note 5, at 8. In fact, the idea that the Ideal Worker ever existed is a myth:

We tend to think of the [breadwinner father/homemaker mother combination] as the traditional family, but that is a misnomer. Before the nineteenth century, it would have made no sense to think of a breadwinner, with its connotation of someone who leaves the house to work for money. Inhabitants of small family farms throughout the country, and of the great plantations of the South, raised much of their own food. They produced not only their own bread but the yeast to raise it; made not only their own clothing but the thread to sew it; not only washed the clothes but produced soap and starch for laundering.

See WILLIAMS, *UNBENDING GENDER*, *supra* note 20, at 20 (citing JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* 10-20 (1990)).

Ideal workers do not have substantial personal commitments: they are unencumbered by family, caretaking duties, or other demands.⁷⁹ The ideal worker can completely devote himself to his career; he will continue to perform as an ideal worker throughout his adult life, free from distraction or interruption.⁸⁰ Because the ideal worker is either single or has a wife who fulfills all his family responsibilities, he can prove his commitment to his employer with 'face time,' leaving his office light on the latest and exiting the parking lot last.⁸¹ As summarized more bluntly by one female worker, an "unwritten requirement for success in corporate America is to be a corporate man."⁸² While the ideal worker is based on the model worker of the 1950s, the expectations placed on today's workers are even more stringent than those placed on workers sixty years ago. Today, an ideal worker is often expected to work a sixty hour week, travel on demand, and be available to work overtime with short notice.⁸³ While a 1950s man could have expected to be home for dinner with his family, today it is commonplace for both parents to return home well past the six-o'clock dinner hour.⁸⁴

The ideal worker expectation is not merely an academic concoction. Expectation of adherence to this standard is proclaimed regularly throughout corporate America. Former General Electric CEO Jack Welch, speaking to a Human Resource Management conference, plainly stated: "There's no such thing as work-life balance . . . There are work-life choices, and you make them, and they have consequences."⁸⁵ Welch justified passing women up for promotions if they took time off for family.⁸⁶ In this case, he said, they can still "have a nice career," but their chances of advancing are slimmer.⁸⁷ From an equity perspective, what Welch and other employers fail to recognize is that most often, only mothers are forced to make this "choice"; no one ever questions whether a man can have both a career and a family.⁸⁸ Even more important, however, on a societal level there is a need for recognition that when

79. BASSETT, *supra* note 77, at 125; STONE, *supra* note 77, at 82-83.

80. STONE, *supra* note 77, at 82-83.

81. *Id.* at 83; Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1449 (2001).

82. CRITTENDEN, *supra* note 47, at 29.

83. BLADES & ROWE-FINKBEINER, *supra* note 3, at 55.

84. Heather Mason Kiefer, *Empty Seats: Fewer Families Eat Together*, GALLUP, Jan. 20, 2004, <http://www.gallup.com/poll/10336/empty-seats-fewer-families-eat-together.aspx>.

85. Weiss, *supra* note 21.

86. *Id.*

87. *Id.*

88. Kathleen Kunkel Gilbert, *Northwestern University School of Law's Two Year Work Requirement and its Possible Effects on Women: Another Tile in the Glass Ceiling*, 12 AM. U. J. GENDER SOC. POL'Y. & L. 69, 72 (2004).

mothers “choose”⁸⁹ to fulfill their mothering responsibilities, society as a whole benefits; and, therefore, it is unreasonable to force mothers alone to pay the price.⁹⁰ Employees across socio-economic levels are intimately familiar with the ideal worker expectation. Indeed, recent studies reveal that many workers believe their employers have unreasonable expectations of them.⁹¹ Nearly 50 percent of employees are overwhelmed by employers’ growing expectations of job tasks and longer working hours.⁹² Similarly, according to a Families and Work Institute study, almost one-third of employees often or very often feel overworked or overwhelmed by how much work they need to accomplish.⁹³ Employee perception of longer hours is confirmed by statistics showing that a middle-class married couple works almost 250 more hours per year than it did ten years ago;⁹⁴ and parents in dual-income families work up to 520 hours more per year than in 1979.⁹⁵

Employers’ ideal worker expectations do not take into consideration that many employees have family care responsibilities. This conflict is especially prevalent for working mothers. Sociologist Arlie Russell Hochschild noted:

[T]he career system inhibits women, not so much by malevolent disobedience to good rules as by making up rules to suit the male half of the population in the first place. One reason that half the lawyers, doctors, business people are not women is because men do not share the raising of their children and the caring for their homes.

89. See generally LINDA R. HIRSHMAN, *GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD* (2006); STONE, *supra* note 77; Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAGAZINE, Oct. 26, 2003, at 42. The question of whether mothers really have a ‘choice’ regarding whether to work or stay at home is an important subject of much discussion, however it is outside the scope of this article.

90. Porter, *Why Care about Caregivers?*, *supra* note 29, at 387. Porter relies on Communitarianism, a theory that advocates societal responsibilities over individual liberty. *Id.* at 386; *Id.* at 387 (“Humans depend on each other for the formation of their personalities; therefore, the ‘highest priority of social policy is to reach to young children and provide them with new and better environments, new and better opportunities.’” (quoting Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 450 (1987))).

91. See, Sharon Gravesande, *Corporate America vs. Work/Life Balance*, June 10, 2006, http://www.hr.com/en/communities/corporate-america-vs-worklife-balance_eobm1yrf.html; Ellen Galinsky, Stacy S. Kim & James T. Bond, *Feeling Overworked: When Work Becomes Too Much*, FAMILIES AND WORK INSTITUTE (2001), <http://familiesandwork.org/site/research/summary/feelingoverworkedsumm.pdf>.

92. Gravesande, *supra* note 91.

93. Galinsky, Kim & Bond, *supra* note 91.

94. Gravesande, *supra* note 91 (“The typical middle income married couple works 3,885 hours per year, an increase of 247 hours or nearly one week more than their counterparts ten years ago.”).

95. BLADES & ROWE-FINKBEINER, *supra* note 3, at 3 (a study released in 2005, revealed that dual income families were spending sixteen percent more time at work than in 1979, amounting to an extra 500 hours at work each year); Williams, Manvell & Bornstein, *supra* note 8, at 28 (in 1992, dual-income families worked just over eighty hours/week, today they work over ninety hours/week.).

Men think and feel within structures of work which presume they don't do these things. Women who enter these traditional structures and do the work of the home, too, can't compete on male terms. They find that their late twenties and mid-thirties, the prime childbearing years, are also a peak period of career demands. Seeing that the game is devised for family-free people, some women lose heart.⁹⁶

The challenges of combining paid market work with caretaking can push many women to cut back to part-time work or leave the paid market all together.⁹⁷ Meanwhile, as employers have come to expect more from their workers, the number of families relying on two incomes or headed by a single parent has drastically increased.⁹⁸ As a result, the number of employees who must balance the demands of work and family has grown. Consequently, fulfilling employer expectations has become increasingly impossible for many employees. The recent demographic shifts of America's paid workforce help to illustrate this expectation/reality disconnect.

Over the past seventy years the demographics of the paid American workforce and the make-up of the typical American family have changed. Nicole Buonocore Porter noted that "[o]ne of the most dramatic changes . . . is the increased number of women in the workforce, especially women with young children."⁹⁹ While in 1940 only 28 percent of American women worked for pay, by 2009 over 59 percent of women aged sixteen and over were participating in the paid market.¹⁰⁰ As a result, women constitute almost half of the total American workforce.¹⁰¹ The increase in women's participation in the paid market necessarily accounts for a corresponding increase in mothers' participation in the paid market.

96. HOCHSCHILD, *supra* note 75, at xiii.

97. Cawthorne, *supra* note 27.

98. Micheal Selmi & Naomi Cahn, *Women in the Workplace; Which Women, Which Agenda*, 13 DUKE J. GENDER L. & POL'Y 7, 12 (2006) ("Single mothers also comprise a significant and growing portion of the labor market. In 2000, just over one fifth (21.9%) of families were headed by women, which was double the percentage in 1970, and upwards of 80% of those single mothers were working.") (citing Hanming Fang & Michael P. Keane, *Assessing the Impact of Welfare Reform on Single Mothers*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1, 53-55 (2004)).

99. Porter, *supra* note 8, at 57.

100. Katherine E. Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 5 (2002) (in 1998 sixty percent of American women worked in the paid labor force); U.S. Dep't of Labor, *Women at Work* (2011), available at <http://www.bls.gov/spotlight/2011/women/> [hereinafter *Women at Work*]; The Bureau of Labor defines the "labor force participation rate" as "the percent of the population working or looking for work." News Release, U.S. Dept't of Labor, *Employment Characteristics of Families 2010* (March 24, 2011), available at <http://www.bls.gov/news.release/pdf/famee.pdf> [hereinafter, *Employment Characteristics of Families*].

101. *Women at Work*, *supra* note 100.

In 2010, over 70 percent of all mothers with children under the age of eighteen participated in the paid market.¹⁰² The participation rate of mothers with infants is predictably lower, though 56.4 percent of this sub-category of mothers still work for pay.¹⁰³ If their children are under the age of six, almost 64 percent of mothers work in the paid labor force.¹⁰⁴ Meanwhile, if their children are between the ages of six and seventeen, over 76.5 percent are employed in paid labor.¹⁰⁵ Notably, the overwhelming majority of working mothers work full time, with only 24 percent working less than full-time hours.¹⁰⁶ With both parents working in over 70 percent of American households,¹⁰⁷ the popular story line of our 1950s, '60s, and even '70s television shows, featuring a stay at home mom and a working dad, is no longer at all representative of American families.¹⁰⁸ Richard Block has noted:

This increased labor force participation of women, combined with the traditionally high labor force participation of men, has changed the dynamics of the family. Because a female taking care of the family with a male breadwinner is no longer the standard model, and women as well as men both participate in the labor force at high

102. Employment Characteristics of Families, *supra* note 100, at 2; *see also* Sharon R. Cohany & Emy Sok, *Trends in Labor Force Participation of Married Mothers of Infants*, 130 MONTHLY LABOR REVIEW 9, 11 (2007) (over 67 percent of married women with children are employed. Mothers with older children participate in the paid workforce in even higher numbers with 75 percent of married mothers of school age children, aged six to seventeen, engaged in paid labor in 2006).

103. Employment Characteristics of Families, *supra* note 100, at 2; *Fast Facts: Mothers in the United States*, NATIONAL ORGANIZATION FOR WOMEN, available at <http://www.now.org/issues/mothers/facts.html> (showing an increase from 2006, when 55 percent of mothers of infants participated in the paid labor force.).

104. Employment Characteristics of Families, *supra* note 100, at 2.

105. *Id.* at 2.

106. Judith Warner, *Part-Time Work for Parents*, WORKPLACE PROF BLOG (July 24, 2007), http://lawprofessors.typepad.com/laborprof_blog/2007/07/part-time-work-.html; *see also* Judith Warner, *The Full-Time Blues*, N.Y. TIMES, July 24, 2007 (“The reason so few [mothers work part-time] isn’t complicated: most women can’t afford to . . . Women on a reduced schedule earn almost 18 percent less than their full-time female peers with equivalent jobs and education levels, according to research by Janet Gornick, a professor of sociology and political science at City University of New York, and the labor economist Elena Bardasi.”).

107. Williams, Manvell & Bornstein, *supra* note 8, at 8 (citing Karen Kornbluh, *The Parent Trap*, 29 THE ATLANTIC MONTHLY 111, 111-14 (2003)).

108. *Father Knows Best* (CBS television broadcast 1954-1960); *Leave it to Beaver* (CBS television broadcast 1957-1958; ABC television broadcast 1958-1963); *Dennis the Menace* (CBS television broadcast 1959-1963); *Bewitched* (ABC television broadcast 1964-1972); *The Brady Bunch* (ABC television broadcast 1969-1974).

levels, all workers must now balance work and family responsibilities.¹⁰⁹

Despite the shift to a labor force comprised of workers with caregiving obligations, workplace norms and legal protection of workers have not adapted. Nicole Buoncore Porter posits that the law, along with society, only protects “ideal workers” rather than “real workers.”¹¹⁰ Porter explains that real workers face a “caregiver conundrum” as a result.¹¹¹ The “caregiver conundrum” affects “real work(ing)” caregivers in three primary ways:

First, some caregivers need and want more time with their families and are either unable to obtain that balance or are only able to obtain it through marginalizing their career. Second, parents and other caregivers in lower-income brackets might also enjoy more time with their children, but are financially unable to work less or take time off for caregiving needs . . . Finally, some caregivers experience the caregiver conundrum because, even though they are performing as ideal workers, their employers assume they are not.¹¹²

109. Richard N. Block, *Work-Family Legislation in the United States, Canada, and Western Europe: A Quantitative Comparison*, 34 PEPP. L. REV. 333, 334 (2007); Stone, *supra* note 77, at 7 (as the percentages of working married mothers has steadily risen over the years, so too has the percentage of families headed by a single parent. From 1970 to 1998 families headed by a single parent increased from eleven percent to twenty-seven percent.); *Births: Final Data for 2006*, *supra* note 65 (in 2006 the percentage of children born to unmarried mothers jumped to over 38 percent); Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, U.S. DEPT. OF HUMAN HEALTH AND HUMAN SERVICES (2009), <http://www.cdc.gov/nchs/data/databriefs/db18.pdf> (in 2007 births to unmarried mothers totaled 1,714,643).

110. Porter, *Why Care About Caregivers?*, *supra* note 29, at 357 (“Real workers are the caregivers who get the job done, probably very efficiently, but either do not put in as many hours as their non caregiver counterparts, or violate their employers’ attendance policies because they have children or other family members who need care. They are the parents to whom ‘life happens,’ and they are left juggling without a lesson, which inevitably leads to one or more balls falling on the ground.”).

[C]ourts only protect ‘ideal workers’, who never miss work because of caregiving responsibilities. But for many women who cannot conscientiously delegate all of their childcare, even if they have the financial means to do so, and for other women who do not have the means to delegate all or most of their childcare responsibilities, occasionally their work suffers because the laws of physics prevent them from being in two places at once.

Id. at 356-57. (citing *Phillips v. Martin Corp.*, 400 U.S. 542, 544 (1971); WILLIAMS, UNBENDING GENDER, *supra* note 20, at 64; Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561, 564-65 (2005)).

111. Porter, *Why Care About Caregivers?*, *supra* note 29, at 361.

112. *Id.*

Although “real workers” need protection, there is no federal statute that expressly prohibits discrimination against them.¹¹³ Moreover, the main pieces of work-family legislation are specifically tailored to meet the needs of “ideal workers,” exclusively.¹¹⁴ Legislation has failed to address the challenges associated with work-family conflict. President William Jefferson Clinton recognized the dilemma in 1993 when, in fulfillment of a campaign promise and as his first piece of legislation, he signed the Family and Medical Leave Act (FMLA) into law.¹¹⁵ Unfortunately, despite the clear legislative intent behind the FMLA, it failed to alleviate many of the challenges of combining paid work with parenting in general, or with mothering specifically.¹¹⁶

D. *The Family and Medical Leave Act’s Failure*

The FMLA’s stated purpose was to help America’s families balance the demands of work and family.¹¹⁷ It was further intended to “promote the stability and economic security of families” while “promot[ing] national interests in preserving family integrity.”¹¹⁸ To these ends, the FMLA provides eligible parents with job-protected leave for “the birth or adoption of a child, and [for] the care of a child . . . who has a serious health condition.”¹¹⁹ The drafters of the FMLA specifically acknowledged the importance of accomplishing its stated goals “in a manner that [would] minimize[] the

113. *Id.* at 370. (citing, Equal Emp. Opportunity Comm’n, Notice, Enforcement Guidance: Unlawful Treatment of Workers with Caregiving Responsibilities 1 (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>).

114. *Id.* at 370 -80; see, Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55-58 (1st Cir. 2000), Moore v. Ala. State Univ., 980 F. Supp. 426, 421 (MD. Ala. 1997); Trezza v. Hartford, Inc, No 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *3 (S.D.N.Y. Dec. 30, 1998); see also Porter, *Why Care About Caregivers?*, *supra* note 29 at 370 (citing, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Work-place Debate*, 86 COLUM. L. REV. 1118 n. 244 (1986)) (“Title VII only protects ideal workers because an employer is only required have equal treatment where women and men are “similarly situated.”); FMLA only protects a limited number of women, as 40% of employees and 33% of single parents and low income workers are not covered. *Id.* at 378 (citing Joanna L Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1983*, 15 WASH. U. J.L. & POL’Y 17, 40; Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1,43-45). Most importantly, the FMLA does not protect “the types of routine childcare obligations and contingencies that most commonly conflict with work requirements. *Id.* at 379 (citing, Peggie Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1444 (2001)); *But see*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (creating the sex plus theory, allowing a plaintiff to prove discrimination as long as the other person did not have the same “plus” characteristic).

115. Family Medical Leave Act, 29 U.S.C. § 2601 (2006).

116. Kessler, *supra* note 74, at 325 (“a close examination of the FMLA reveals that it does little more than provide job security to some employees in the case of childbirth”).

117. 29 U.S.C. § 2601(b).

118. 29 U.S.C. § 2601(b)(1).

119. 29 U.S.C. § 2601 (b)(2).

potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender neutral basis.”¹²⁰

Though the Act was passed with less protection for workers than was sought by many of its supporters, it was heralded as groundbreaking legislation in the quest to help Americans balance work and family.¹²¹ In the years since its passage, however, it has become clear that the FMLA cannot fulfill its ambitious promise of accomplishing work-life balance, because, as noted by the AFL-CIO, its “effectiveness is constrained by its limited coverage.”¹²² FMLA job protection is only available to parents who are employed by FMLA-covered employers and who have met specific employee eligibility requirements.¹²³ An eligible employee has a right to job-protected leave for certain enumerated reasons, including the birth or adoption of a child or to care for a child with a serious health condition.¹²⁴ Where an eligible employee has a qualifying reason for FMLA leave, covered employers must provide up to twelve weeks of unpaid leave per twelve-month period.¹²⁵

Covered employers are all public employers (regardless of how many workers are employed) and private employers with fifty or more employees within a seventy-five mile radius of the employer’s worksite.¹²⁶ Consequently, smaller employers are not covered by the FMLA; and, therefore, employees of smaller employers have no right to FMLA leave whatsoever. Likewise, FMLA is not available to full-time workers employed by multiple employers, but who do not work for any single employer for the requisite number of hours.¹²⁷ FMLA is also inapplicable to self-employed workers and independent contractors.¹²⁸ If an employee is employed by a covered employer, she must

120. 29 U.S.C. § 2601(2)(b)(4).

121. For an in-depth history of the purpose and passage of the FMLA, see Marcus D. Ward, *The Family Medical Leave Act of 1993: A Sound Investment, or an Expensive Lesson in Employee Benefits?*, 20 T. MARSHALL L. REV. 413, 415 (1995).

122. AFL-CIO, *Workers Need Paid Family, Medical and Sick Leave*, www.aflcio.org/issues/workfamily/fmla.cfm (last visited Nov. 10, 2010).

123. 29 U.S.C. § 2611(4)(A)(i) (2006) (defining covered employers); 29 U.S.C. § 2611(2)(A) (requiring an employee to work 1250 hours in one year to be covered).

124. 29 U.S.C. § 2612(a)(1).

125. 29 U.S.C. § 2612(a)(1). However, the employee must provide the employer with notice that the employee is taking FMLA qualified leave. *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781 (8th Cir. Aug. 25, 2009). Specifically, the employee must provide the specific FMLA qualified reason for the leave or that FMLA leave is needed. 29 C.F.R. § 825.303(b) (2009).

126. 29 U.S.C. § 2611(2)(b)(ii).

127. 29 U.S.C. § 2611(2)(A)(i)-(ii); *Pirant v. U.S. Postal Service*, 542 F.3d 202, 204 (7th Cir. 2008) (holding an employee who worked 1248.8 hours was not eligible for FMLA leave, employer was allowed to terminate employee for absence); see also, *Moldenhauer v. Tazewell-Pekin Consolidated Com. Center, et al*, 536 F.3d 640 (7th Cir. 2008) (holding that a company who shares employees with another company must share employees services or have control over those services to qualify as joint employer for FMLA).

128. 29 U.S.C. § 2611 (4)(A) (2006) (“The term ‘employer’ (i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or

have worked for that employer for at least 1,250 hours in the twelve months preceding the requested leave in order to be eligible for leave.¹²⁹ Therefore, many part-time workers do not fulfill the hour requirement for leave.

As a result, two-thirds of steadily employed mothers have no FMLA coverage at all.¹³⁰ Moreover, among those who do have FMLA coverage, “millions . . . cannot afford to take leave without pay.”¹³¹ Ultimately, only about one-fifth of covered employees even take family leave.¹³² Among those who do take family leave, “few [can afford to] take leave for more than a couple of weeks.”¹³³

FMLA has also received considerable criticism for its medical character. “[T]he FMLA’s disregard for the most common childcare demands vividly illustrates the extent to which it is ‘premised on a medical model rather than one that protects a broader concept of parenting.’”¹³⁴ Because the FMLA is based on a medical model, it may provide modest job-protected leave to the parent of a child with cancer, diabetes, or another “serious health condition,” while simultaneously excluding coverage to the parent who must care for her child when stricken with the flu, a stomach virus, or some other medical condition legislatively or judicially deemed “not serious.”¹³⁵ Similarly, because

more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”); *Nicholas v. All Points Transport Corporation of Michigan*, 364 F.Supp.2d 621 (E.D. Mich 2005).

129. 29 U.S.C. § 2611(2)(A); *see also*, *Erdman v. Nationwide Insurance Co.*, 582 F.3d 500, 506 (3rd Cir. 2009) (holding that work performed at home qualifies towards the 1250 hour requirement as long as the employer has actual or constructive notice of the work performed).

130. Lester, *supra* note 2, at 2.

131. AFL-CIO, *supra* note 122.

132. Kessler, *supra* note 74, at 326.

133. *Id.* at 326. (“Of those employees who need family or medical leave and do not take it, more than three-quarters cite being unable to afford it as the primary reason.”).

134. Smith, *supra* note 81, at 1452 *quoting* Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 149 (1998)).

135. *See Brannon v. OshKosh B’Gosh, Inc.*, 897 F.Supp 1028 (M.D. Tenn. 1995) (citing in dicta that cancer is an example of a “serious health condition”); *Beal v. Rubbermaid Commercial Products Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997), opinion aff’d without published op., 149 F.3d 1186 (8th Cir. 1998) (diabetes); *Mell v. Weyburn-Bartel, Inc.*, 1997 WL 626093 (W.D. Mich. 1997) (flu); *Brenneman v. MedCentral Health System*, 366 F.3d 412 (6th Cir. 2004) (stomach virus). One court provided a list of examples of serious health conditions including, but not limited to: “heart attacks, heart conditions requiring heart bypass of valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.” *Brannon*, 897 F. Supp at 1035. However, courts applying the FMLA have held that “serious health condition” does not include: *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994) (ear infection); *Joslin v. Rockwell Intern. Corp.*, 8 F. Supp. 2d 1158 (N.D. Iowa 1998) (allergies); *Godwin v. Rheem Mfg. Co.*, 15 F. Supp. 2d 1197 (M.D. Ala. 1998) (poison ivy).

the FMLA is a medical leave act, not a parental leave act, it also denies job-protected leave to allow parents to tend to non-medical childcare obligations (such as routine-child care, child-care emergencies, parent-teacher conferences, birthday celebrations, school events, and sporting events).¹³⁶

When the FMLA was enacted many expected it would address the challenges workers confronted when trying to balance the demands of work and family. However, due to its coverage limitations, its medical character, and lack of a paid-leave component, the statute ultimately leaves millions of American workers with no more job protection than they had prior to its passage; moreover, in practice, for those who are covered, few are able to take advantage of its leave provisions.¹³⁷ Though the FMLA is still commonly regarded as the primary source of federal legislative protection for working parents, Title VII of the Civil Rights Act of 1964 has recently gained renewed energy as potentially protecting working parents from discrimination in employment, in the absence of realistic protections under the FMLA.¹³⁸

E. Title VII of the Civil Rights Act of 1964

Title VII is anti-discrimination legislation that, among other things, prohibits employment discrimination on the basis of an individual's "race, color, religion, sex, or national origin."¹³⁹ Its proscriptions apply to all aspects of employment including hiring, firing, pay, promotion, work assignment, status, responsibility, benefits and any other term or condition of employment.¹⁴⁰ Traditionally, Title VII was not interpreted to constitute a broad prohibition of discrimination against mothers or caretakers. In fact, until recently, courts consistently rejected any view of Title VII as prohibiting discrimination against employees on the basis of their caretaking responsibilities.¹⁴¹ Specifically, courts have been reluctant to interpret "sex-

136. Smith, *supra* note 81, at 1452.

137. U.S. Department of Labor, Wage and Hour Division: FMLA Survey Chapter 3. <http://www.dol.gov/whd/fmla/chapter3.htm> (according to the year 2000 survey, only 10% of employers are covered by the FMLA and 58.3% of employees.); Kessler, *supra* note 75, at 326 (stating that many who are eligible for FMLA leave cannot afford to take the leave); Porter, *Why Care About Caregivers?*, *supra* note 30, at 378 (40% of employees and 33% of single parents and low income workers are not protected)

138. Joan C. Williams & Stephanie Bornstein, *The Evolution of FRED: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1342 (2008); Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. LAW. 293, 295 (2007) (citing Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities* 7 CENTER FOR WORKLIFE LAW, UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF THE LAW (2006), available at http://www.uchastings.edu/site_files/WLL/FRDreport.pdf).

139. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§2000e to e-16 (2006).

140. *Id.*; see also, Cynthia E. Gitt, Majorie Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. U. CHI. L.J. 723 (1977).

141. Williams & Bornstein, *supra* note 138, at 1342.

plus” claims under Title VII to cover discrimination on the basis of an employee’s childcare responsibilities.¹⁴²

Title VII’s “sex-plus” theory asserts that employers may not discriminate against an employee on the basis of sex “plus” some facially neutral characteristic.¹⁴³ In 1971, the Supreme Court recognized the “sex-plus” theory of Title VII in *Phillips v. Martin Marietta Corp.*¹⁴⁴ In *Phillips*, the Supreme Court held that an employer could not refuse to hire women with young children, even though it was willing to hire women without children, where it continued to hire men with young children.¹⁴⁵ Following *Phillips*, some believed Title VII’s “sex-plus” theory would offer fertile ground for the successful litigation of discrimination on the basis of childcare responsibilities.¹⁴⁶ While “sex-plus” has proven to be a viable legal theory in some circumstances, its success is dependent on comparator evidence – evidence of a similarly situated male – which can be difficult to offer.¹⁴⁷ For example, because men do not lactate, litigating a Title VII discrimination case on behalf of a breastfeeding mother does not fit neatly within the established parameters of litigation on a “sex-plus” basis due to the non-existence of a similarly situated male comparator.¹⁴⁸ “Sex-plus” theory suits may be equally unavailable to plaintiffs who work in sex-segregated jobs, like the majority of mothers, because typically there are no similarly situated males in their workplaces.¹⁴⁹

In 1978, Title VII was amended to prohibit discrimination on the basis of pregnancy as well.¹⁵⁰ The Pregnancy Discrimination Act (PDA) has generally been limited to cover only the “immediate, physical events of pregnancy and childbirth,” thereby excluding it as a basis for broad prohibition against caretaker discrimination.¹⁵¹ Specifically, following some unsuccessful early attempts to litigate the PDA as a general prohibition of discrimination against mothers, it was confirmed that the PDA “was not intended to include motherhood in general beyond pregnancy or potential pregnancy.”¹⁵²

142. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 400-12 (2001).

143. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

144. *Id.*

145. *Id.* at 544.

146. Williams & Bornstein, *supra* note 138, at 1342.; Williams & Pinto, *supra* note 138, at 299-303.

147. *But see*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (permitting a plaintiff to prove disparate treatment based on stereotype evidence, even without a similarly situated person).

148. Williams & Pinto, *supra* note 138, at 299-303.

149. *Id.*

150. The Pregnancy Discrimination Act, 42 U.S.C. §2000e(k)(2006) (amending Title VII to include pregnancy-based discrimination as a prohibited form of sex discrimination).

151. Kessler, *supra* note 74, at 324.

152. Williams & Bornstein, *supra* note 138, at 1342.

As the foregoing description of sex-plus and PDA litigation illustrates, for decades it was understood that Title VII would not protect employees from discrimination on the basis of their caretaking responsibilities. However, in recent years, due in significant part to Joan Williams and the work of the Center for WorkLife Law, that assumption has been challenged.¹⁵³ An emerging area of employment law known as Family Responsibilities Discrimination (FRD), has, in fact, been responsible for a dramatic increase in employment litigation on the basis of discrimination against workers for their childcare responsibilities.¹⁵⁴ Specifically, between 1996 and 2005 there was a 400 percent increase in FRD suits as compared with the prior decade.¹⁵⁵ Meanwhile, other discrimination claims only increased by twenty-three percent during that same period.¹⁵⁶

FRD lawsuits have been filed based on a wide array of legal theories. To date, seventeen unique legal theories under Federal and State law have been used to litigate such claims.¹⁵⁷ Title VII and state equivalents alone have been used to file caretaker discrimination suits on the basis of disparate treatment, disparate impact, sex and pregnancy discrimination, retaliation, harassment, and constructive discharge.¹⁵⁸ A principal basis of these claims is that employers who discriminate against employees on the basis of employees' childcare responsibilities are engaging in prohibited gender stereotyping.¹⁵⁹

The Supreme Court first established that gender stereotyping was unlawful in 1989 with its decision in *Price Waterhouse v. Hopkins*.¹⁶⁰ There, the Court acknowledged that assumptions or expectations based on gender stereotypes are unlawful, explaining "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"¹⁶¹ Importantly, in 2007 the Equal Employment

153. *Id.*; Williams & Pinto, *supra* note 139, at 299-303.

154. *See*, Trezza v. Hartford, Inc., No. 98 CIV. 2205, 1998 U.S. Dist. LEXIS 20206 at **11, 18, 23 (S.D.N.Y. Dec. 30, 1998); Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150 (8th Cir. 2003); Bergstrom-Ek v. Best Oil., 153 F.3d 851 (8th Cir. 1998); Washington v. Illinois Dept. of Rev., 420 F.3d 658 (7th Cir. 2005)

155. Williams & Bornstein, *supra* note 138, at 1342; Williams & Pinto, *supra* note 138, at 299-303.

156. Williams & Pinto, *supra* note 138, at 295.

157. Williams & Bornstein, *supra* note 138, at 1344.

158. *Id.* at 1342; Williams & Pinto, *supra* note 138, at 299-303.

159. Williams & Bornstein, *supra* 138, at 1344; Williams & Pinto, *supra* note 138, at 299-303.

160. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

161. *Price Waterhouse*, 490 U.S. at 251 (citing *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)).

Opportunity Commission (EEOC) affirmed the viability of FRD claims based on gender stereotypes when it issued its Enforcement Guidance summarizing the state of the law with regard to caregiver discrimination.¹⁶² Therein, the EEOC crystallized two key holdings from case law in regard to Title VII disparate treatment claims brought by caregivers: (1) where plaintiffs have evidence of gender stereotyping, they can make out a prima facie case of Title VII sex discrimination even without specific comparator evidence; and (2) settled case law on ‘unconscious’ bias applies to caregivers, too, so that even ‘unconscious’ or ‘reflexive’ bias against caregivers can amount to actionable discrimination.¹⁶³ Thus, Title VII is proving to be fertile ground for employees with childcare responsibilities to pursue discrimination suits against their employers.

Still, Title VII is framed in the context of addressing solely the market work aspect of the work-family dichotomy. Neither the FMLA nor Title VII reflect any true understanding of the family aspect of the conflict. Certainly, the emergence of FRD lawsuits is a hopeful sign that some aspects of the mothering effect are ripe for remedy through litigation. Nevertheless, it remains true that to eliminate the mothering effect, root and branch, in all its manifestations, it is necessary to reexamine and shift the mainstream mindset that holds mothering to be easy, unskilled, delegable, work of little value.

II. FEMINIST LEGAL DISCOURSE

The challenges of combining paid work with mothering are discussed in popular books, scholarly articles, the media, State Capitals, the United States Congress, and in homes across the country.¹⁶⁴ Moreover, leading feminist legal theorists are discussing the value of mothering in their writings. Still, there remains a shortage of legal scholarship that addresses the challenges of combining paid market work with mothering while simultaneously acknowledging, valuing, and advocating for the protection of mothering.¹⁶⁵ The

162. Williams & Bornstein, *supra* note 138, at 1316; *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*; EQUAL OPPORTUNITY EMPLOYMENT COMMISSION. May 23, 2007, available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

163. Williams & Bornstein, *supra* note 138, at 1316.

164. BENNETTS, *supra* note 4, at 107; CRITTENDEN, *supra* note 47, at 7, 89 (this book was a national bestseller); Smith, *supra* note 81, at 1445-47 (“Workers desperately need assistance finding sufficient time to attend to the many responsibilities that come with raising and caring for children.”), Smith also noted that “a piece of a larger solution that must ultimately encompass many diverse recommendations for change, including a shorter workday, *valuing caregiving and caregivers*, a redesigned school day and school calendar to better reflect work patterns, provision of affordable and quality childcare, improved public transportation and the restructuring of work.”) (emphasis added). *Id.* at 1445-47.

165. See Martha Farrell Erickson & Enola G. Aird, *The Motherhood Study: Fresh Insights on Mothers’ Attitudes and Concerns*, INSTITUTE FOR AMERICAN VALUES 10 (2005), available at <http://mothersforhumanfuture.org/attachments/article/60/themotherhoodstudy.pdf>. Mothers,

challenges mothers face when trying to successfully combine paid work with mothering have more often been considered from a perspective that is, at best, indifferent toward mothering.¹⁶⁶ Historically, scholars and activists often dismissed traditional mothers' work as an arduous burden. Betty Friedan, author of the 1962 *The Feminine Mystique*, depicted "housewifery as virtually a human rights violation, culminating in her famous analogy to a concentration camp."¹⁶⁷ Feminists of the 1960s and '70s ignored the value of mothering and sought to neutralize its gendered nature, equating "mothering" with "fathering" or "parenting." They emphasized the importance of mothers' participation in the paid market above all else.¹⁶⁸ Their prescription for success at work was to out-source traditional mothers' work.¹⁶⁹ They assumed that children could be raised by daycare centers and schools and that if mothers were able to work in market labor, fathers would do more of the family care work.¹⁷⁰ An unfortunate

motherhood, and mothering long have been the subject of academic research, conceptual writing, and public discussion and debate. In recent years, popular books on motherhood have proliferated (*see*, for example, Berry, 2004; 29 U.S.C. § 2612(a)(1), 2001; de Marneffe, 2004; Douglas and Michaels, 2004; and Warner, 2005).

Id. See also Smith, *supra* note 81, at 1445-47.

166. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (W.W. NORTON AND Co) (1963); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 111 (2010) [hereinafter WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*] ("the *feminine mystique* critiqued the house-wife role, as did much of feminism that followed."); LINDA HIRSHMAN, *supra* note 90.

167. WILLIAMS, *UNBENDING GENDER*, *supra* note 20, at 41.

168. *Id.* at 40.

169. *Id.*

170. CRITTENDEN, *supra* note 47, at 21.

Thus the standard feminist response to the fact that child-rearing marginalizes women is not to raise its status but to urge men to do more of it. Though this has been the cry for more than thirty years, almost 100 percent of the primary caregivers of young children are still women. This suggests that feminism needs a fresh strategy. . . . Instead of demanding that equal *value* be placed on women's work of child care and homemaking, many women's rights advocates began to challenge the traditional gender division of labor itself. American feminists began to describe work within the family as labor that women had to *escape*, if they were ever to achieve equality and freedom.

Id. at 7; see also MARTHA ALBERTSON FINEMAN, *NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 26 (1995).

[M]uch of feminist legal theory fails to place the family and the role of mother as central institutions for the development of theory. Rather the focus has been on prematernal or extramaternal concerns such as employment discrimination or gathering political power. When maternity has come into play, typically the 'dilemmas' raised have related to the presence of children and have been resolved on a theoretical level by resort to the need for shared parenting, the inevitable panacea being involving fathers with children. Theoretical work on the family is typically segregated and marginalized – when mentioned at all – in feminist legal theory collections or casebooks, and motherhood is hardly mentioned at all.

Id.

consequence of the great strides made by legal feminists and women's rights activists was the further devaluation of mothers' work and mothering. Because the primary goal of the legal feminist movement was, rightfully, to ensure that women and mothers could gain access to the traditionally male paid labor market, until recently, little feminist attention was given to the value of traditional mothers' work.

Undoubtedly, there are legitimate reasons for the traditional feminist focus, steeped in the overall goal of attaining legal and economic equality for women.¹⁷¹ Certainly, the easier and possibly the only way to move toward equal treatment in the eyes of the law was to argue that women were exactly the same as men.¹⁷² This made sense in the context of the historic battle for equality, especially given the backdrop of the civil rights movement and the American history of racial and sexual inequality.¹⁷³ Leading feminist legal scholar Martha Albertson Fineman observed that "[i]n general, it was clear to legal feminists in the 1960s and 1970s that the best way to ensure that perceived differences between men and women were not used to put women at a disadvantage was to refuse to recognize any differences as legally relevant."¹⁷⁴ Joan Williams echoed this sentiment a decade ago, stating more specifically that: "[t]he fear often expressed is that if feminists acknowledge the impact of women's load of family work, employers will say, 'See, we told you

171. For an in depth discussion of how legal feminists fought for equality see Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004).

172. FINEMAN, *supra* note 170, at 37; WILLIAMS, UNBENDING GENDER *supra* note 20, at 15; Arguing that women were the same as men was needed to overcome the historical legal protectionist basis for denying women's legal rights. In *Bradwell v. Illinois*, Justice Bradley of the Illinois Supreme Court justified upholding the Illinois ban on women practicing law by explaining that civil law as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

173. CRITTENDEN, *supra* note 47, at 58.

Instead of demanding that equal *value* be placed on women's work of child care and homemaking, many women's rights advocates began to challenge the traditional gender division of labor itself. American feminists began to describe the work within the family as labor that women had to *escape*, if they were ever to achieve equality and freedom. They began to imagine two-career marriages and schemes for cooperative housekeeping that would free women to earn an income and relieve them from the drudgery of housework. In other words, they began to sound like contemporary feminists in their assumptions that women could only avoid subservience and economic dependency by becoming wage earners.

Id.

174. FINEMAN, *supra* note 170, at 37.

so. That's why we don't want to hire women."¹⁷⁵ And so, to a large extent, the laws from which American women derive their right to equal treatment are based on the argument that men and women – and by logical extension, mothers and fathers – are the same.¹⁷⁶

In recent years, there has been a call to re-conceptualize the work-family dichotomy from a mother-valuing perspective.¹⁷⁷ In the Preface to her game-changing book, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, Joan Williams wrote that “[t]o end the marginalization of mothers that persists up to the present day, . . . we need to change the way we organize (market and family) work.”¹⁷⁸ In 2001, in her national bestseller, *The Price of Motherhood*, author Ann Crittenden plainly stated that:

[w]hat is needed is across-the-board recognition – in the workplace, in the family, in the law, and in social policy – that someone has to do the necessary work of raising children and sustaining families,

175. WILLIAMS, *UNBENDING GENDER*, *supra* note 20, at 15.

176. FINEMAN, *supra* note 170, at 26.

There are more and more empirical studies that indicate that mothers' relative positions have worsened in our new ungendered doctrinal world. Ignoring difference in favor of assimilation has not made the differences in gender expectations and behavior disappear. These differences operate women's disadvantage as the material implications of motherhood, for example, have negative consequences in the context of career development and opportunity.

Id. The question of whether men and women are different due to biology or social construct remains unanswered and, while interesting and potentially important, will not be addressed in this article. This article does not consider whether traditional mothers' work must be performed by mothers; in fact, this author believes wholeheartedly that men are able to mother. The issue, however, is moot for purposes of this article by the simple indisputable fact that the majority of primary caretakers (or mothers) are still mothers. According to the 2010 U.S. Census, there are 5,020,000 mothers who are primary caretakers of their children as compared with approximately 154,000 fathers who are primary caretakers of their children. U.S. CENSUS BUREAU, PARENTS AND CHILDREN IN STAY-AT-HOME PARENT FAMILY GROUPS: 1994 TO PRESENT (2010), *available at* www.census.gov/population/socdemo/hh-fam/shp1.xls. While this article focuses on valuing traditional mothers' work so as to offer a motivator for federal legislative action, it also holds the hope that raising the value of traditional mothers' work would also result in an increase in fathers who mother their children. It seems certain that were fathers to mother their children; mothers, fathers, and children would all benefit.

177. BLADES & ROWE-FINKBEINER, *supra* note 3, at 5; CRITTENDEN, *supra* note 47; HOCHSCHILD, *supra* note 75; WILLIAMS, *UNBENDING GENDER*, *supra* note 20; Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405, 420 (2005); Smith, *supra* note 81, at 1447; Erickson & Aird, *supra* note 165, at 43 (the authors hoped their report would serve as “a catalyst for many more conversations in which mothers and those concerned about the well-being of mothers can express and explore their views and discover ways of working together to address shared concerns.”).

178. WILLIAMS, *UNBENDING GENDER*, *supra* note 20, at x (emphasis added).

and that the reward for such vital work should not be professional marginalization, a loss of status, and an increased risk of poverty.¹⁷⁹

Sociologist and author Arlie Russell Hochschild coined the term “second shift” to describe the family care work that parents must perform each day, after they complete their day jobs.¹⁸⁰ In 2003, in the new introduction to her book, Hochschild wondered “whether a deeper solution to the problem of the second shift doesn’t require a rollback of national work hours, paid parental leave, family-friendly workplace policies that people actually use, and a major cultural shift—a ‘second’ shift toward value on care.”¹⁸¹ In a more recent piece, Martha Albertson Fineman noted that:

[the] realization that motherhood is the real ‘gender issue’ also frames a conceptual and theoretical challenge in [] law for contemporary legal feminism [because] ... [i]t seems apparent that the solutions cannot be found in the family; we must begin to look beyond that institution by making demands for transformation in the workplace and the state.¹⁸²

Even more recently, Enola Aird, director of The Mothering Project, was quoted as saying, “America needs to recognize and appreciate the tremendous value mothers add to their children’s lives and, therefore, to the whole society. America needs to recognize the value of caring and nurturing, of instilling values, indeed of transforming the society.”¹⁸³

Unfortunately, the shift to engaging the work-family dichotomy from a mother-valuing perspective – as advocated by Williams, Crittenden, Hochschild, Fineman, and Aird, among others – has not yet successfully permeated work-family discourse or produced federal legislative results. Moreover, this shift in the discourse is unlikely to prove helpful in passing family friendly legislation, unless and until mothering is valued in some concrete sense by decision makers. The tools mothers want and need – including generous family leave, flex time options, and fair compensation for part-time work¹⁸⁴ – will not be made available unless Congress and the public it represents believe that mothering is worthy of protection. If the work of mothering and the individuals who perform that work are not valued, why will Congress create legislation to protect them? The answer is, quite simply, that it

179. CRITTENDEN, *supra* note 47, at 10.

180. HOCHSCHILD, *supra* note 75, at xxiii.

181. *Id.*

182. Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 255 (2001).

183. Erickson & Aird, *supra* note 165, at 16.

184. BLADES & ROWE-FINKBEINER, *supra* note 3.

will not.¹⁸⁵ This article argues that traditional mothers' work is of value to individuals, families, communities, and our country. Consequently, this topic must be injected directly into the legal discourse, furthering the argument that the rhetorical praise of mothers must be matched by federal legislative action that will protect traditional mothers' work and end the mothering effect.

III. THE VALUE OF TRADITIONAL MOTHERS' WORK

One afternoon a man came home from work to find total mayhem in his house. His three children were outside, still in their pajamas, playing in the mud, with empty food boxes and wrappers strewn all around the front yard. The door of his wife's car was open, as was the front door to the house and there was no sign of the dog. Proceeding into the entry, he found an even bigger mess. A lamp had been knocked over, and the throw rug was wadded against one wall. In the front room the TV was loudly blaring a cartoon channel, and the family room was strewn with toys and various items of clothing. In the kitchen, dishes filled the sink, breakfast food was spilled on the counter, the fridge door was open wide, dog food was spilled on the floor, a broken glass lay under the table, and a small pile of sand was spread by the back door. He quickly headed up the stairs, stepping over toys and more piles of clothes, looking for his wife. He was worried she may be ill, or that something serious had happened. He was met with a small trickle of water as it made its way out the bathroom door. As he peered inside he found wet towels, scummy soap and more toys strewn over the floor. Miles of toilet paper lay in a heap and toothpaste had been smeared over the mirror and walls. As he rushed to the bedroom, he found his wife still curled up in the bed in her pajamas, reading a novel. She looked up at him, smiled, and asked how his day went. He looked at her bewildered and asked, "What happened here today?" She again smiled and answered, "You know every day when you come home from work and you ask me what in the world did I do today?" "Yes" was his incredulous reply. She answered, "Well, today I didn't do it."¹⁸⁶

This humorous portrayal of a mother's day and the lack of appreciation she receives for her work merely offers a glimpse into the truth behind the misunderstanding of the care work mothers provide. In one 2005 study, in discussing the challenges of motherhood, the mothers interviewed often mentioned how relentless the work of motherhood is, "from sleepless nights

185. *Baba Dioum quotes*, http://thinkexist.com/quotes/baba_dioum/ (last visited Aug. 9, 2011) (quoting Baba Bioum) "In the end we will conserve only what we love. We will love only what we understand. We will understand only what we have been taught."

186. Bruce Reed, *What Did You Do All Day?*, THE REED FAMILY, <http://www.brucereed.com/Humor/AllDay.htm> (last visited Dec. 14, 2010).

with a newborn to helping with homework to seeking the best treatment for a depressed teen.¹⁸⁷ Nevertheless, no matter how hard mothers believe they are working, when asked to discuss appreciation of their work there is consensus that their work is undervalued.¹⁸⁸ Several mothers interviewed in this study said they felt they were being taken advantage of by their children and husbands.¹⁸⁹ Given this low regard for mothers' work, one researcher proposes three influential myths are generally accepted:

These myths are simple enough: mothering just happens, mothering is free, and mothering is for babies. Each of these myths has an innocent, child-like quality that contributes to its seductiveness. Yet these myths are far from harmless. Taken together, they ensure that the daily realities of mothers' work, the economic consequences of that work and its value do not receive serious attention.¹⁹⁰

Acceptance of the mothering myths is consistent with and perpetuates the reality of the mothering effect. It is important to debunk these myths and examine all aspects of mothering in order to find ways to end the mothering effect and establish a public policy in favor of enabling mothers to successfully combine paid market work with mothering. First, it is necessary to identify the "mother" – the individual who is doing the "mother's share" of mothering. Next, the work of mothering must be examined so as to determine what labor is actually involved, the time required, and the sacrifices that must be made. Finally, the value of mothering must be recognized. Consideration must be given to how children, husbands, and society are all beneficiaries of mothering.

A. *The Mother*

"There is no such thing as a baby. There is always a baby and someone."¹⁹¹

With so many of America's mothers in the paid labor force, one might assume that someone else was doing the mothering. Not so. According to Ann Crittenden, "almost 100 percent of the primary caregivers of young children are . . . women."¹⁹² The demographic shifts in labor market participation have not been met by correlating shifts in family caretaking. The U.S. Census reveals

187. Erickson & Aird, *supra* note 165, at 16.

188. *Id.* at 15. "In one mother's words, 'I'm like, 'Did you notice I did that today?' And he is like, 'Yeah, but isn't that what you're supposed to do?'" *Id.*

189. *Id.*

190. Starnes, *supra* note 46, at 204-06. Starnes discusses mothers' work and its accompanying financial marginalization in the family law context. Her article is a "[r]eexamination of the egalitarian model of marriage [beginning] with identification of three myths that support it." *Id.* at 204. She proposes a new model for marriage that reflects the realities of gender roles, embraces spousal equality, and recognizes the differences between equality in status and identity of contribution.

191. Darlene Kardatzke, *There's No Such Thing as a Baby* (2001) <http://www.iaimh.org/newsletter/byDKardatzke.pdf> (quoting Donald H. Winnicott).

192. CRITTENDEN, *supra* note 47, at 7.

that in 2010, of the over twenty-two million American families with children under the age of fifteen, over 99 percent of families with a stay-at-home parent had a stay-at-home mom.¹⁹³ In determining whether mothers who work in the paid market are delegating their caretaking responsibilities it is instructive to look to demographic and time-use studies. According to three leaders in the field:

[E]mployed moms spend almost as much time with their children as stay-at-home moms do. Studies have shown that children with working moms spend 86 [percent] as much time with their mothers as do children with non-employed moms, and that employed moms spend 82 [percent] as much time on childcare activities as do non-employed moms.¹⁹⁴

Thus, regardless of whether they work outside of the home, mothers are still mothering their children. To differentiate between their paid and unpaid labor, “working mothers” have come to be known as having a first shift, at their paid-market job, and a second shift, when they perform their job as mother.¹⁹⁵ As a result, though men log more hours at their paid jobs than women, women continue to work more overall hours than men.

Time use studies in the 1960s and 1970s showed that women worked an average of fifteen hours more than men each week, which, when calculated out over a year, amounted to an extra month of working twenty-four-hour days over their male counterparts.¹⁹⁶ Since then, little has changed. A recent time use study of married parents tracked the time parents spent on household and childcare activities. It revealed that mothers continue to spend significantly more time engaged in household and childcare work than their spouses.¹⁹⁷ Stay-

193. U.S. CENSUS BUREAU, PARENTS AND CHILDREN IN STAY-AT-HOME PARENT FAMILY GROUPS: 1994 TO PRESENT (2010), *available at* www.census.gov/population/socdemo/hh-fam/shp1.xls (specifically, in 2010 there were 5,020,000 stay-at-home moms as compared with 154,000 stay-at-home dads).

194. Williams, Manvell & Bornstein, *supra* note 5, at 12 (citing Suzanne M. Bianchi, *Maternal Employment and Time With Children: Dramatic Change or Surprising Continuity*, 37 DEMOGRAPHY 401, 406 (2000)).

195. HOCHSCHILD, *supra* note 75, at 4.

196. *Id.*

197. News Release, Bureau of Labor Statistics, Married Parents' Use of Time, 2003-06 tbl.1 (2008), *available at* <http://www.bls.gov/news.release/atus2.toc.htm>.

[W]hile men increasingly share housework and child rearing, the bulk of domestic work still falls on women's shoulders . . . in the United States married women devoted [nineteen] hours per week on average to housework in 2005, while married men contributed [eleven] hours. That's a huge improvement over 1965 numbers, when women spent a whopping [thirty-four] hours per week to men's five, but it is still a major inequity. And the situation looks worse when child care hours are added.

Alice H. Eagly & Linda L. Carli, *Women and the Labyrinth of Leadership*, 85 HARV. BUS. REV. 9, 10 (2007).

at-home mothers spend the most time on household and childcare activities with an average of 7.22 hours per day.¹⁹⁸ Part-time working mothers average 5.55 hours per day of household and childcare work.¹⁹⁹ Meanwhile, despite the hours they put in at their paid jobs, full-time working mothers still spend an average of 4.1 hours per day on household and childcare activities, which is just shy of the 4.29 hours a stay at home father spends on such activities.²⁰⁰ A full-time working father spends the least time, though a still significant average of 2.58 hours, engaged in household and childcare activities.²⁰¹ These statistics show that between 2003 and 2006, married mothers spent an average of 5.62 hours each day tending to their children and homes as compared with married fathers who spent an average of 3.43 on such activities.²⁰² Calculated out over a year – that’s an extra thirty-three, twenty-four hour days spent by mothers on children and home than by fathers.

B. *The Work: What Does She Do All Day?*²⁰³

*“The phrase ‘working mother’ is redundant.”*²⁰⁴ -Jane Sellman

Raising a child is an enormous responsibility. There is little doubt that the time, effort, and skill required to raise a child properly is often underestimated and disregarded. It is therefore especially important, when discussing the work of mothering, to give a detailed account of all that it entails. Such a discussion naturally begins with infancy. According to James J. McKenna:

Human infants need constant attention and contact with other human beings because they are unable to look after themselves. Unlike other mammals, they cannot keep themselves warm, move about, or feed themselves until relatively late in life. It is their extreme neurological immaturity at birth and slow maturation that make the mother-infant relationship so important.²⁰⁵

Mothering an infant is an especially all-consuming job. Nothing can be taken for granted – a baby needs inherently and incessantly. Hours of

198. BUREAU OF LABOR STATISTICS, *supra* note 193.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Chad Reinhold, a grown man still living with his mother, played by Will Ferrell in *Wedding Crashers* asked the question with less tact in a scene where he asks his mother to serve his friends some of her meatloaf: “What is she doing? I never know what she is doing back there... Ma, the meatloaf! Fuck!” *WEDDING CRASHERS* (New Line Cinema 2005).

204. *Mommy Quotes*, (May 2, 2008), <http://www.happyworker.com/supermom/mom-quotes> (last visited Jan. 5, 2011). (quoting *Jane Sellman*).

205. James J. McKenna, *Babies Need Their Mothers Beside Them*, THE NATURAL CHILD PROJECT, available at http://www.naturalchild.org/james_mckenna/babies_need.html.

mothering are spent feeding, bathing, dressing, and cleaning. The tasks of changing diapers, washing laundry, preparing meals, cleaning utensils, planning schedules, and timing activities are repetitive and often tedious. The challenging art of putting baby to sleep is the topic of countless parenting books.²⁰⁶ That it is even possible to state it so simply – “putting baby to sleep” – is deceptive beyond words as this one task alone may take years to master. Meanwhile, properly caring for an infant includes infinite acts of love and kindness²⁰⁷ – acts that seduce both the caretaker and observers to believe this “labor of love” isn’t labor at all. The kissing and hugging, nursing and soothing, cuddling and petting, holding and swaying, humming and singing and playing, while often of great personal fulfillment to the caretaker herself, is an extraordinary time and energy drain for a provider and certain to exhaust her physical and emotional reserves.

As children grow they continue to demand a high level of care and attention.²⁰⁸ This reality distinguishes young humans from other animals. “The young of most other mammals become independent of their parents within a year, whereas humans take [fourteen] to [seventeen] years to become fully developed physically, and usually longer than that to be fully independent.”²⁰⁹ Mothering a young child continues to include the basics of feeding, dressing, bathing, and cleaning and also encompasses additional activities including reading, story-telling, explaining, making purchases, mediating, disciplining, negotiating, and listening.²¹⁰ It is widely accepted that “[c]hildren need adult attention long after they leave preschool.”²¹¹ Anecdotal data offers a description of what a mother’s work may entail as children enter adolescence. These duties include “editing high school English papers, transporting children to ballet and swimming and soccer practice, raising money for football helmets, cleaning, laundering, tutoring, baking, shopping, and stocking underwear drawers.”²¹² It

206. ELIZABETH PANTLEY, *THE NO-CRY SLEEP SOLUTION* (2002); MARC WEISSBLUTH, M.D., *HEALTHY SLEEP HABITS, HAPPY CHILD* (2009); RICHARD FERBER, M.D., *SOLVE YOUR CHILD’S SLEEP PROBLEMS: NEW, REVISED, AND EXPANDED EDITION* (2006).

207. Maxine Eichner *Families, Human Dignity, and State Support for Caretaking: Why the United States’ Failure to Ameliorate the Work-Family Conflict is a Dereliction of the Government’s Basic Responsibilities*, 88 N.C. L. REV. 1593, 1597-99 (2010); Starnes, *supra* note 46, at 298-99; *see generally*, ARMIN A. BROTT AND JENNIFER ASH, *THE EXPECTANT FATHER: FACTS, TIPS, AND ADVICE FOR DADS-TO-BE* (2ND ED. 2001); WENDY MOGEL, *THE BLESSING OF A SKINNED KNEE* (2001); LA LECHE LEAGUE INTERNATIONAL, *THE WOMANLY ART OF BREASTFEEDING* (6TH ED. 1997); VICKI IOVINE, *THE GIRLFRIENDS’ GUIDE TO SURVIVING THE FIRST YEAR OF MOTHERHOOD* (1997); BETTER HOMES & GARDENS, *BABY BOOK* (1948).

208. McKenna, *supra* note 205.

209. *Id.*

210. HEIDI MURKOFF, *WHAT TO EXPECT THE FIRST YEAR* (2d ed. 2003); HEIDI MURKOFF, *WHAT TO EXPECT THE SECOND YEAR: FROM 12 TO 24 MONTHS* (2001); ARLENE EISENBERG, HEIDI EISENBERG MURKOFF, SANDEE E. HATHAWAY, *WHAT TO EXPECT THE TODDLER YEARS* (2d ed. 1996).

211. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 166, at 51.

212. Starnes, *supra* note 46, at 225.

has been noted that the best mothers are able to accomplish their tasks without anyone knowing – the best mothers leave a trail of evidence of their labor without anyone noticing them laboring.²¹³ Such a self-deprecating goal adds to the invisibility of mothers' work and lends to its devaluation. One legal scholar notes:

When I was a child, evidence of my mother's labor was everywhere: underwear in drawers, milk in the refrigerator, dinner on the table, and sometimes when I came home from school oatmeal crisps made with real butter. Yet it never occurred to me that any of these things required much effort or time. These were simply my entitlements, dependably appearing, of mysterious and unimportant origin. Underwear in drawers just happened.²¹⁴

Another aspect of the invisibility of mothers' work is that a mother's attention is more evident in its absence than in its presence. For example, it is when children are not supervised, typically between the hours of three and six in the afternoon that most teen violence occurs.²¹⁵ Similarly, the after-school hours are when most teen pregnancies are conceived.²¹⁶

Conceptually, the work of mothering also includes a so-called 'third shift,' also known as the care aspect of her labor. Sociologist J. Mason began research on the care aspect of labor after finding that the sociological studies on care focused too much on the labor itself and too little on the thoughtfulness involved in the labor.²¹⁷ By way of example, Mason might distinguish between the labor involved in preparing a child's meal- buying the food, cooking the food, feeding the food to the child; and the care work involved in preparing a child's meal- thinking about what the child would like to eat, ensuring that the meal has the requisite nutritional value, and making the child's feeding a positive experience.²¹⁸

An additional aspect of mothering that rarely receives attention in scholarly work is the accompanying sleep sacrifice. For mothers, the lack of sleep is often cited as one of the most painful sacrifices.²¹⁹ Indeed, the night-time care work provided by mothers has identifiable consequences: lack of

213. *Id.* at 207-16 (2006) (citing to Ann Crittenden's observation that the "more skillful the caregiver, the more invisible her efforts become. Ideally, the recipients themselves don't even notice that they are being cared for . . .").

214. *Id.* at 207.

215. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 166, at 51.

216. *Id.*

217. Jennifer Mason, *Gender, Care and Sensibility in Family and Kin Relationships*, in *SEX, SENSIBILITY AND THE GENDERED BODY* (Janet Holland & Lisa Adkins eds., 1996).

218. *Id.*

219. HOCHSCHILD, *supra* note 75, at 10.

sleep may affect judgment, physical health, and mental and emotional health.²²⁰ In her study, Hochschild found that sleep was a focal point of concern for many mothers.

Many women I could not tear away from the topic of sleep. They talked about how much they could “get by on” . . . six and a half, seven, seven and a half, less, more. They talked about who they knew who needed more or less. Some apologized for how much sleep they needed- “I’m afraid I need eight hours of sleep”-as if eight was “too much.” They talked about the effect of a change in baby-sitter, the birth of a second child, or a business trip on their child’s pattern of sleep. They talked about how to avoid fully waking up when a child called them at night, and how to get back to sleep. These women talked about sleep the way a hungry person talks about food.²²¹

In a recent sleep study, British sociologists built on Hochschild’s research and proposed an additional ‘fourth shift,’ the night shift, where sleep deprivation as well as gender-based care are central.²²² Their research revealed that both physical and emotional care of young children during the night is almost always provided exclusively by mothers.²²³ This remained true even after mothers returned to work outside of the home.²²⁴

The following diagram summarizes the efforts of researchers to distinguish between the paid and unpaid work mothers perform and to categorize the nature of the work and time spent. The first shift is the day job, where the mother works for pay based on an identified market value.²²⁵ The second shift, sometimes known as the evening shift in paying jobs, is the job the mother moves into at the end of her paid workday.²²⁶ In this unpaid position, her mothering role is the primary job, encompassing the physical labor she does in performing services and providing attention for children and family as well as performing household chores.²²⁷ Providing less tangible, but no less valuable work on the mother’s part, the third shift distinguishes the

220. Susan Venn, Sara Arber, Robert Meadows & Jenny Hislop, *The Fourth Shift: Exploring the Gendered Nature of Sleep Disruption Among Couples With Children*, 59 THE BRITISH JOURNAL OF SOCIOLOGY 80 (2008).

221. HOCHSCHILD, *supra* note 75, at 10.

222. Venn, Arber, Meadows & Hislop, *supra* note 220, at 81.

223. *Id.* at 86-87.

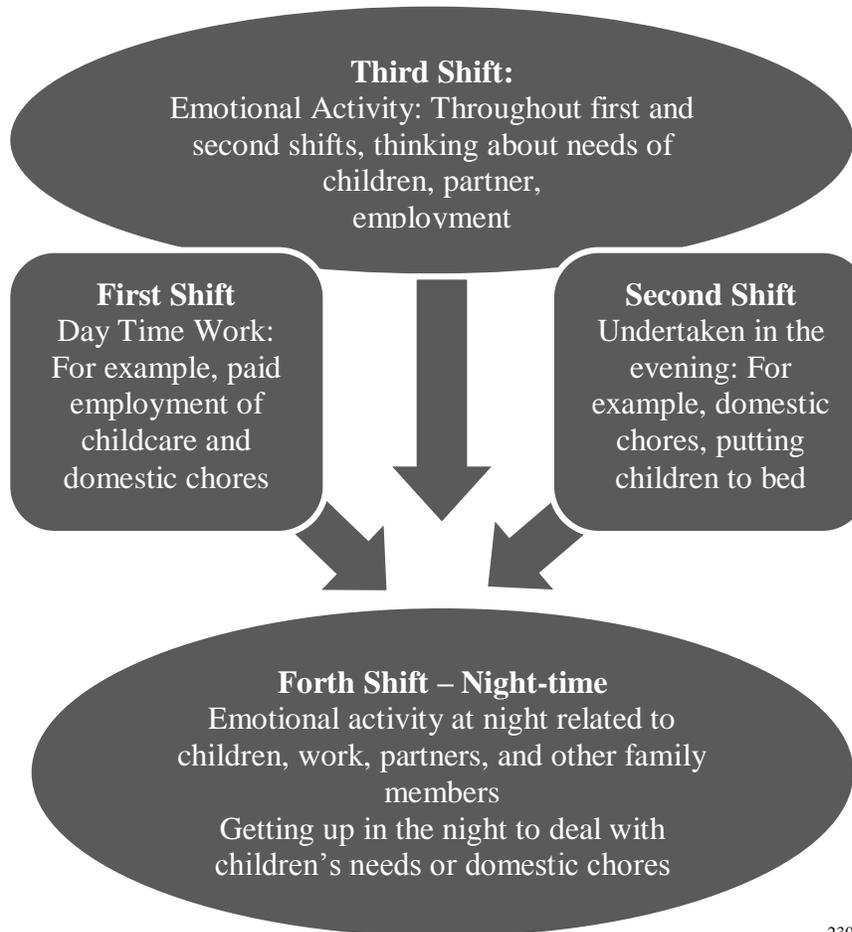
224. *Id.* at 91. Fathers, perhaps due to their self-identifying role of family protector, typically worried about their older children when the children were out during the night. *Id.* at 91.

225. HOCHSCHILD, *supra* note 75, at 7; Venn, Arber, Meadows & Hislop, *supra* note 220, at 80-81.

226. HOCHSCHILD, *supra* note 75, at 7; Venn, Arber, Meadows & Hislop, *supra* note 220, at 80-81.

227. HOCHSCHILD, *supra* note 75 at 7; Venn, Arber, Meadows & Hislop, *supra* note 220, at 80-81.

emotional investment, the thought and care mothers contribute to the well-being of family members.²²⁸ The fourth shift, known as the night shift in paying jobs, is often the most difficult shift to manage, both physically and emotionally. For working mothers, the fourth shift, again unpaid, is characterized by sleep deprivation caused, for example, by getting up during the night to care for children or sacrificing sleep to accomplish unfinished tasks.²²⁹



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228. Mason, *supra* note 217.

229. Venn, Arber, Meadows & Hislop, *supra* note 220, at 81.

230. Susan Venn, Sara Arber, Robert Meadows & Jenny Hislop, Figure I: The Four Shifts in *The Fourth Shift: Exploring the Gendered Nature of Sleep Disruption Among Couples With Children*, 59 THE BRITISH JOURNAL OF SOCIOLOGY 79, 81 (2008)(recreation).

Of the four shifts of working mothers, currently only the first shift, what we would informally call her “day job,” represents paid employment. The other three shifts cover her additional job, mothering, which is unpaid work, viewed as having no intrinsic monetary value, despite the obvious time and effort invested. However, there is a growing body of research and scholarly work that debunks the myth that mothers’ work has no value.

C. *The Value*

For purposes of “valuing” mothering, an initial approach is to assign it a basic economic worth. It is clear that if mothers did not provide caretaking labor for free, obtaining such labor would require a bargained-for exchange with the laborer compensated. This “replacement-cost” value is one method of valuing mothering.²³¹ Salary.com used this method when it surveyed over 28,000 mothers and determined that “the time mothers spend performing 10 typical job functions would equate to an annual salary of \$115,432 for a stay-at-home mom.”²³² Working moms’ “at-home salary” is \$63,472 in 2011.²³³ In calculating these salaries, Salary.com looked to the typical pay for various specific duties performed by moms including: housekeeper, day care center teacher, cook, computer operator, laundry machine operator, janitor, facilities manager, van driver, CEO, and psychologist.²³⁴ A different method for assigning an economic value to mothering is to determine its “opportunity-cost.”²³⁵ Economics Professor Nancy Folbre explains how this method works:

If a woman gives up an hour of paid employment to spend an hour with a child, she must value that hour at least as highly as her hourly wage after taxes. The total value of the time she devotes to children can be measured by her forgone earnings.²³⁶

Because opportunity-cost value is contingent on the mother’s earning potential, it will differ from family to family. Thus, “[h]igher-earning women pay a higher opportunity cost, and their career trajectories are often more adversely affected by taking time out.”²³⁷

231. FOLBRE, *supra* note 47, at 130.

232. *What is Your Mom Worth?*, http://swz.salary.com/momsalarywizard/htmls/mswl_momcenter.html (last visited Nov. 22, 2011).

233. *Id.* But see Ramesh Ponnuru, *Mothers Don’t Go on Strike*, NATIONAL REVIEW ONLINE (May 12, 2006), <http://www.nationalreview.com/articles/217587/mothers-dont-go-strike/ramesh-ponnuru>.

234. *What is Your Mom Worth?*, *supra* note 232. See also Nancy Folbre, *Mothers’ Pay*, ECONOMIX (May 11, 2009), <http://economix.blogs.nytimes.com/2009/05/11/mothers-pay/> for a more in-depth discussion of the salary.com calculation.

236. FOLBRE, *supra* note 47, at 123-124.

237. *Id.* at 124.

238. *Id.* at 125.

Another aspect of economic value created by mothering is evident by looking at the husband's earnings and professional success. Joan Williams points out:

The notion that mothers' family work is not 'work' serves to gloss over the fact that mothers at home not only care for the kids but clean the shirts. When a wife stays home full or even part time, her husband's contributions to family work typically decrease. As a result, husbands of homemakers earn more and get higher raises than similarly educated men whose wives do market work.²³⁸

Additionally, a working father is more likely to reach the highest levels of professional success if his wife stays home. Ann Crittenden noted that a "survey of chief financial officers in American corporations found that [eighty] percent were men with stay-at-home wives. Another survey of managerial employees revealed that [sixty-four] percent of the male executives with children under age thirteen had nonworking spouses."²³⁹

In addition to the economic value it creates, mothering provides a less-quantifiable qualitative value to families as well. Crittenden describes this stating, "[u]neducated married mothers . . . calculate . . . their presence at home can create more value, and be more satisfying, than much of the (under)paid work they could find."²⁴⁰ This view is shared by families of college-educated women: "The college-educated stay-at-home mother is a fixture in American business and professional circles. With sixty-plus-hour work weeks the norm at the higher levels of the economy, a full-time 'wife' is often the only thing that makes family life possible."²⁴¹ Having a parent available provides a panacea for a variety of family needs, from the most mundane to those related to emergency and tragedy. Examples of some of the benefits that flow from having a parent at home full or even part-time include:

- the avoidance of childcare gaps when a child is sick, childcare arrangements fall through, or school is closed;
- the security of knowing that a parent is available to tend to the daily needs of children and home in a manner consistent with the family's personal values;
- the relaxed home atmosphere that comes along with having a parent who does not need to rush off to work;
- the ability to enjoy weekends as a time for leisure, quality family time, and relaxation as opposed to the only time to complete needed household errands and tasks, such as cleaning, grocery and household shopping, dry-cleaning pick-up, and laundry;

238. WILLIAMS, UNBENDING GENDER, *supra* note 20, at 33.

239. CRITTENDEN, *supra* note 47, at 17-18.

240. *Id.* at 17.

241. *Id.* at 17.

- the opportunity to have someone plan and prepare family meals so as to enable the family to eat nutritiously and share meals on a regular basis; and
- the availability of a parent to deal with family members' physical and emotional well-being during times of tragedy, serious illness, or death.

Mothering provides an often intangible, yet incredibly important, value to children, specifically. The value of mothering to a child is recognized as so significant and inextricably linked to the quality of the child's life that Save the Children has established, as part of its mission, the improvement of mothers' lives.²⁴² Simply stated, "[t]he quality of children's lives depends on the health, security, and well-being of their mothers."²⁴³ Though children continue to need mothering for proper development for many years after birth, the need for mothering is especially acute during infancy.²⁴⁴ Jane Waldfogel points out that "[h]uman newborns are heavily dependent on their parents to meet their basic needs and protect them from harm."²⁴⁵ Infants' immediate physical needs are primarily to be kept warm, clean, and fed; but for proper development, children require much more.²⁴⁶ For infants' psychological and neurological development, they must receive sensitive and responsive care.²⁴⁷ In order to ensure proper cognitive development, infants must be exposed to language, and "[t]he amount and quality of the language children are exposed to matters as well."²⁴⁸ For infants to thrive socially and emotionally, they must develop "secure attachments to adults who care for them."²⁴⁹ Parent-infant bonding provides distinct benefits for the parent in addition to the child. For the parent, bonding may result in "a sense of personal achievement and intimacy," while resulting in "improved health for the infant."²⁵⁰ Anthropologist James J. McKenna explains the importance of co-sleeping to infant-mother bonding:

Our scientific studies of mother and infants sleeping together have shown how tightly bound together the physiological and social aspects of the mother-infant relationship really are. Other studies have shown that separation of the mother and infant has adverse consequences. Anthropological considerations also suggest that

242. Save the Children, *State of the World's Mothers 2007: Saving the Lives of Children Under 5*, 46 (2007), <http://www.barnaheill.is/barnaheill/images/stories/skjol/state-worlds-mothers-report-2007.pdf>.

243. *Id.*

244. Maxine Eichner, *supra* note 207, at 1597-98 ("Children are born completely dependent, and live in near total dependence on others for roughly the first decade of their lives. They spend their next decade requiring considerable assistance from others, although generally to a decreasing extent.")

246. Jane WALDFOGEL, *WHAT CHILDREN NEED*, 37 (2006).

247. *Id.* at 37-38

248. *Id.* at 38-45.

249. *Id.* at 40-41.

250. *Id.*

250. Lester, *supra* note 2, at 18.

separation between the mother and infant should be minimal. Western societies must consider carefully how far and under what circumstances they want to push infants away from the loving and protective co-sleeping environment. Infants' nutritional, emotional and social needs as well as maternal responses to them have evolved in this environment for millennia.²⁵¹

Waldfoegel's review of social science research on parent-infant bonding revealed that "[c]hildren's early attachment experiences lay the groundwork for how they approach future relationships and learning experiences. Although early attachment experiences are not deterministic, secure attachments in infancy make it easier for a child to form healthy relationships with others, while insecure attachments make it harder."²⁵²

Post-infancy, quality mothering provides the guidance and care necessary to raise conscientious adults. Especially in the new global economy, raising capable, productive adults is critical to our nation's future when "[h]uman capital is more important . . . than it has ever been. Skilled human beings are the raw material of the new economy, the key ingredient in the recipe for prosperity in the post-industrial age."²⁵³ The labor and care provided by mothers is integral to ensuring our collective future prosperity and success. It has been repeatedly confirmed that when mothers spend quality time with their children, children experience improved health, academic achievement, and more positive emotional development.²⁵⁴

In 2007, the Institute for Health and Social Policy at McGill University released the results of a global research project devoted to understanding and improving the relationship between working conditions and family health and well-being.²⁵⁵ The research team conducted research for over a decade, studying and documenting the experiences of working families on five continents and analyzing household survey data, interviews, socio-economic statistics and public policies around the world.²⁵⁶ Ultimately, the team concluded that paid leave for childbearing and childrearing had important positive implications for children's physical, mental, and emotional health, financial well-being, and educational and developmental outcomes.²⁵⁷ The researchers specifically noted that:

[p]aid leave for childbearing and childrearing improves children's health outcomes by making more time available to parents to provide essential care for children, . . . and by increasing the likelihood that

252. McKenna, *supra* note 205.

253. WALDFOGEL, *supra* note 245, at 42-43.

253. CRITTENDEN, *supra* note 47, at 72.

254. Heymann, Earle & Hayes, *supra* note 1, at 6-8.

255. *Id.* at 6-8.

256. *Id.*

257. *Id.*

children will receive necessary immunizations, all of which contribute to lower infant mortality and morbidity rates. More time for parents also allows for the formation of bonds between parents and children, fostering positive emotional development of children.²⁵⁸

The team further concluded that paid leave facilitates breastfeeding, a practice which “reduces the risk of infections,” and “results in lower infant and child mortality, with studies finding a 1.5 to 5-fold lower relative risk of mortality among breast-fed children.”²⁵⁹ The study also reported that availability of leave had significant effects on parental involvement, which is a barometer of children’s success.

Parental involvement is critical to children’s educational, developmental and health outcomes. When parents are involved in their children’s education, children achieve more in elementary school, junior high school and high school. Parental involvement is particularly important for children who are at risk educationally, including children living in poverty and children with learning disabilities. Yet, one out of two low-income working parents in the U.S. faced barriers to becoming involved in their children’s education. Thirty-nine percent faced barriers to participating in school meetings, school trips, or school events. Eighteen percent of the low-income parents interviewed had little or no time with their children during the week.²⁶⁰

These results are consistent with child development studies that attribute positive maternal involvement with beneficial consequences for children.²⁶¹ Specifically, a mother’s sensitive, responsive caretaking has been linked with less aggressive, less anxious, less hyperactive behavior, and more social competence in children.²⁶² Similarly, positive maternal engagement, such as praising a child and laughing with a child, is linked to the child’s prosocial behavior and a decreased likelihood of overall socio-emotional problems.²⁶³ Crittenden noted that scientific research supports the claim that positive child development is dependent on quality caretaking, as well:

258. *Id.*

259. *Id.*

260. *Id.*

261. Kei M. Nomaguchi, *Maternal Employment, Nonparental Care, Mother-Child Interactions, and Child Outcomes During Preschool Years*, 68 J. MARRIAGE & FAM. 1341, 1342-43 (2006).

262. *Id.* at 1343 (internal citations omitted).

263. *Id.* (internal citations omitted).

A large and growing body of research in child development has shown that care and guidance of the young child lays the essential groundwork for the formation of human knowledge, skills, creativity, and entrepreneurship.²⁶⁴

The value created by quality mothering is not limited to the development of human capital in a vacuum. Quality mothering provides special value to a democratic society that relies on civic participation. Professor and scholar Deborah Stone, in calling for a care movement, wrote:

Caring for each other is the most basic form of civic participation. We learn to care in families, and we enlarge our communities of concern as we mature. Caring is the essential democratic act, the prerequisite to voting, joining associations, attending meetings, holding office and all the other ways we sustain democracy. Care, the noun, requires families and workers who care, the verb. Caring, the activity, breeds caring, the attitude, and caring, the attitude, seeds caring, the politics.²⁶⁵

Finally, there is a rarely discussed economic aspect to the societal value created by mothering. The value that children who were raised well offer to society as adults is, quite possibly, the greatest economic value created by mothering of all. As Paula England and Nancy Folbre have written:

Children who grow into responsible adults do not benefit only their parents (let alone only their mothers, who in most instances make the greatest investment in them). Children become taxpayers (thus benefiting all who live in the country) when they are adults. We all benefit by a new generation of workers as we age, people able to collect the garbage, empty our bedpans, and keep the wheels turning. We all benefit from friends, coworkers, spouses, though we did not raise them. These benefits- enjoyed by those who have not invested in the child -are ‘externalities.’ Unless non-market mechanisms are used to spread the costs of raising children, people will be allowed to ride free on the investments of others.²⁶⁶

The “external” value created by mothers is dramatically illustrated by Crittenden through the story of Anthony “Tony” Williams. Tony was adopted

264. CRITTENDEN, *supra* note 47, at 71.

265. Deborah Stone, *Why We Need a Care Movement*, THE NATION, 13, 15 (Mar. 13, 2000).

266. Mary Becker, *Care and Feminists*, 17 Wis. Women’s L.J. 57, 74 (2002), quoting Paula England & Nancy Folbre, *The Silent Crisis in U.S. Child Care: Who Should Pay for the Kids?* 563 ANNALS AM. ACAD. POL. & Soc. SCI. 194, 195 (1999).

at the age of three by Virginia and Lewis Williams.²⁶⁷ Prior to his adoption, he resided in a foster care home and – “although he was three years old, he hadn’t said a word yet.”²⁶⁸ The foster father was planning to send Tony to a “home for retarded children,” but Virginia Williams was certain that the child “wasn’t retarded.”²⁶⁹ Virginia was counseled not to adopt Tony. She and her husband already had two young children, and Virginia was pregnant again.²⁷⁰ Still, Virginia believed she was meant to be Tony’s mother and her husband agreed that if she could find the money, she could adopt Tony.²⁷¹ Soon after Tony joined the Williams family, Virginia began to understand what he had been through.

‘I was changing the bed with the kids and the phone rang,’ she said. ‘I told them all to wait a minute in the hall, and I went to talk, and when I finally got back, about an hour later, the other two were long gone, but Tony was still standing there, alone, in the hall. That’s when I knew that someone had abused that child. I got down on my knees and held him and cried.’²⁷²

It turned out that Tony was much more gifted than anyone had anticipated. After high school graduation, Tony attended both Yale and Harvard.²⁷³ Tony graduated magna cum laude with his bachelor’s degree from Yale and went on to earn his J.D. from Harvard Law School and a Master of Public Policy from Harvard’s John F. Kennedy School of Government.²⁷⁴ Tony later served in the U.S. Air Force.²⁷⁵ He also served for two terms as the Mayor of the District of Columbia from 1999-2007.²⁷⁶ Quantifying the “value” Virginia Williams’s mothering created for her child and society as a whole is an impossible task. The impossibility of quantification, however, certainly cannot justify the mothering effect. Tony Williams’s story, though especially moving, is not unique. Where would any child be without the love and care he or she received from his or her mother?

CONCLUSION

In 2011, American mothers are often forced to choose between caring for their children and families, and ensuring their families’ financial security.

267. CRITTENDEN, *supra* note 47, at 68-69.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 70.

274. Mayor Anthony A. Williams, COUNCIL OF THE DISTRICT OF COLUMBIA, <http://www.dccouncil.washington.dc.us/mayoranthonyawilliams> (last visited Jan. 3, 2011).

275. *Id.*

276. *Id.*

There are multiple suggestions for the type of legislative action needed to eliminate the mothering effect. A work-family agenda that focuses on mothers' economic security and supports their caregiving work has been advanced by feminists and progressives alike. For years, the National Organization of Women (NOW) has pushed for equal pay for women and paid parental leave.²⁷⁷ Mothers Ought To Have Equal Rights (MOTHERS) advocates for paid parental leave, a refundable caregiver tax credit, re-evaluation of social security benefits for mothers and other unpaid caregivers, calculation of the unpaid care work that takes place in the home and inclusion of it in the National Gross Domestic Product, guaranteed flex-time and a shorter work week for either or both parents of infants and toddlers, proportionate pay and benefits for part-time wage earners, elimination of the Marriage Tax Penalty through individual taxation rather than joint taxation of married couples, assured child support for all children of divorce, establishment of federal guidelines for post-divorce income-sharing, availability of quality universal preschool programs for all American children, and living wages and improved professional training for paid caregivers and early childhood teachers.²⁷⁸ Moms Rising argues for paid maternity and paternity leave when a new child enters a family, quality healthcare for all children, the availability of quality, affordable childcare for all parents who need it, realistic and fair wages to ensure dual income families can support themselves and that women get equal pay for equal work, and paid sick leave for all workers.²⁷⁹ The Center for American Progress supports legislative solutions to work-family conflict including workplace flexibility; short-term, episodic, and extended time off; childcare, after-school care, and adult care; and addressing family responsibilities discrimination.²⁸⁰ Over the years, some of these issues have received congressional attention. Proposals for equal pay, paid parental leave, paid sick days, and higher wages have been sponsored by members of Congress and introduced as bills in either the Senate or the House of Representatives.²⁸¹ None, however, have actually become law.

277. NATIONAL ORGANIZATION OF WOMEN, <http://www.now.org/issues/economic/> (last visited Jan. 3, 2011).

278. MOTHERS OUGHT TO HAVE EQUAL RIGHTS, <https://www.mothersoughttohaveequalrights.org/about-us.html> (last visited Jan. 3, 2011).

279. MOMSRISING, <http://www.momsrising.org/aboutmomsrising> (last visited Jan. 3, 2011).

280. Joan C. Williams & Heather Boushey, *The Three Faces of Work-Family Conflict: The Poor, The Professionals, and the Missing Middle* (January 2010) available at <http://www.americanprogress.org/issues/2010/01/pdf/threefaces.pdf> (last visited Dec. 16, 2011); see CENTER FOR AMERICAN PROGRESS, <http://www.americanprogress.org/>

281. The Paycheck Fairness Act was introduced by then-Senator Hillary Clinton in January 2009. Paycheck Fairness Act, S. 182, 111th Cong. (2009). The Balancing Act was introduced by Congressman Woolsey of California on June 25, 2009. Balancing Act, H.R. 3047, 111th Cong. (2009). The Equal Rights Amendment was reintroduced by Senator Edward Kennedy on March 27, 2007 in the Senate and was reintroduced in the House of Representatives on July 21, 2009 by Congresswoman Carolyn Maloney. S.J. Res. 10, 110th Cong. (2007) H.R.J. Res. 61, 111th Cong. (2009); My next article discusses all legislation

The problem is not that no one knows there is a problem. The struggles associated with the work-family conflict are of such great concern to so many million Americans that they are widely discussed in books, newspapers, and magazines. Work-family conflict is a primary conversational topic for mothers at the bus stop, during play dates, at children's school and sporting events, and at work. Work-family conflict has been discussed on the floors of the U.S. Senate and House of Representatives, as elected officials have introduced legislative solutions. Work-family conflict is discussed within families on a daily basis as schedules are managed and childcare is arranged. There is certainly no lack of legal or political discourse identifying the difficulties of combining paid market work with parenting. Nor is there a lack of discussion and identification of the various solutions to the problem. Advocating for increased and paid family leave, equivalent pay for part-time workers, equal pay for women, universal health care, subsidized quality child care, anti-discrimination laws that protect working parents, flexible work schedules, paid sick leave, and reform of social security and tax policies are also not lacking. What is lacking, is the consensus that mothering is of value and therefore worthy of legislative protection. An acknowledgement of the value of mothering is needed in order to build the political fortitude necessary for new policies. Currently, there is not enough support among lawmakers to pass legislative solutions to the problems associated with work-family conflict. To the extent that this colossal legislative failure is the result of the undervaluation of mothering, this article seeks to establish that mothering is valuable, necessary work that deserves and needs protection. Protection of motherhood requires legislative action that would enable women to attain economic security through work in the paid labor market while simultaneously mothering their children.

introduced during President Obama's first term and the extent to which such legislation would implement the progressive agenda for work and family.