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Panel One: Redesigning Work and the Benefits Related to It

AMERICAN UNIVERSITY LAW REVIEW
UNBENDING GENDER: WHY FAMILY AND WORK
CONFLICT AND WHAT TO DO ABOUT IT

PANEL ONE: REDESIGNING WORK AND
THE BENEFITS RELATED TO IT

Washington, D.C.

Friday, November 19, 1999

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* * * * *

PROCEEDINGS

PROFESSOR DAVIS: Good morning and welcome to our conference. I am Adrienne Davis, one of the co-directors of the Gender, Work & Family Project here at the Washington College of Law ("WCL"). It is exciting to see so many of you here whom I have worked with and whose work I admire. So, to those who have come from far and to those whom I see regularly, welcome and thank you for coming. I'd like to start by making a few introductions. First, my co-director, colleague, and mentress, Joan Williams, wrote *Unbending Gender*,¹ the book that sparked this Symposium. Professor Williams will be making some introductory remarks before each of the panels today. There are several people here today to thank and acknowledge. First, the *American University Law Review* has been an enthusiastic, highly organized, and creative partner in this event. Thank you to the Editor-in-Chief, Jonathan Hecht, and the Senior Projects Editor, Carlyn Carey, for contributing your enthusiasm and ideas to our joint venture. You have really done yeoman's work. At WCL, we are privileged to have several journals that publish excellent work. In addition, the *Journal of Gender, Social Policy & the Law* is here today, and has been an active partner with the Gender, Work & Family Project.² So thank you to both journals, which exemplify at the best level, students and lawyers of the future, the institutional commitment to feminism, and feminist theory. Also here are several of our colleagues, including Professor Ann Shalleck. Ann started the Women & the Law Program in 1984, which she has directed into one of the richest programs on law and gender in the country. It includes an L.L.M. in Gender Studies, Women & International Law Program, and a Women and the Law Clinic. Professor Shalleck has been instrumental in making WCL a feminist-friendly environment that nurtures both students and junior faculty interested in her field. We've invited her to say a few words about the diverse gender initiatives at the Law School.

1. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) [hereinafter UNBENDING GENDER].

2. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 J. GENDER, SOC. POL'Y & L. 13 (2000).

2000]

PANEL ONE

853

PROFESSOR SHALLECK: On behalf of the entire community at the Washington College of Law, and particularly our Dean, Claudio Grossman, who has been instrumental in helping us create the kind of place that Adrienne was just describing, I want to welcome everyone. At WCL, we have made the study of women and gender central to our project, fundamental to the way we see the study of law, scholarship about the law, and the development of our own and our students' identities as lawyers. This understanding of ourselves comes partly from our history. In addition, over the years we have assembled a remarkable group of faculty, staff, and students who are committed to the idea that you cannot teach about law and you cannot understand how law operates unless you think about gender in its complex and multifaceted forms

The Gender, Work & Family Project has become a critical piece of this overall endeavor—it addresses a central locus of feminist theory. It shows how the world of work and the world of family, compartmentalized in much of legal discourse, cannot be understood in isolation. In addition, it focuses on the tensions and the contradictions that individual women feel in the most concrete aspects of their day-to-day lives. What do I do about work? What do I do about family? The intersection of these two seemingly discrete worlds shapes women's relationships with children, intimate partners, co-workers, and friends. It affects the nature of the communities we construct. The Gender Work & Family Project has made these questions, which exist both at the level of theory and at the level of daily experience, a central part of our institution.

The focus on this project is part of a broader set of questions that, as an institution, we examine. Professor Davis mentioned the relationship of gender, violence, and the law. Some of the work of the Women & the Law Program concerns how state power, individual power, and women's agency in the world interact in developing an understanding of questions of violence in women's lives. We address these questions in our clinical program and in our classrooms. We have specialized courses that address violence against women. In addition, we have over twenty-five courses in which women or gender is not a part of the title, but where professors have integrated questions of violence against women into their classroom materials in significant ways.

We also focus on the international, comparative, and cross-cultural study of women and gender. In this work, we examine familiar tensions within feminist theory: universality and particularity; neutrality and partiality; authority and constraint. The activities of

our Women & International Law Program make questions of race, nationality, citizenship, ethnicity, and culture central to our intellectual project.

A third aspect of the work of the Women & the Law Program concerns pedagogy. Those of you who come from women's studies departments will say, so what? These programs have been examining pedagogical theory and practice for a quarter century. They have shown us that we cannot teach feminist theory unless we think about how to teach it and how students learn it. Thus, the impetus for our efforts to bring feminist pedagogies into legal education has come from the feminist experience in other parts of the academy. Within our various projects concerning women and gender, we have examined both the development of legal theory about gender and the development of pedagogies that are reflective of, and shape, the substance of the themes in our theoretical work.

A final aspect of our program, which permeates Professor Williams' book,³ is our attention to the relationship of theory and practice. Our theories, if they are not informed by practice and do not in turn inform practice, become simply artifacts of academic conversation. They might prompt interesting discussions, but they do not change the world. An important part of *Unbending Gender*⁴ is its attempt to foster change.

So I return to the importance of the Gender, Work & Family Project, to the overall work of the Women & the Law Program and to the identity of the Washington College of Law. Making "gender" the first word in the name of the project comes from the insight that we cannot understand either of the other two phenomena—work or family—without investigating the operation of gender. When I began teaching family law more than fifteen years ago, there were few materials about the interconnections among gender, work, and family. I had to assemble my own materials, which included mostly articles from bar journals about women lawyers who were frustrated by the tensions they faced in their lives. Today, we see both a coherent critique and a program for action concerning the tensions between family and work and the centrality of gender to the structure and dynamics of these conflicts. We see an examination of how gender shapes women's relationships to both family and to work and how family and work construct women's experience and understanding of gender. At the same time, the institutions of family

3. See generally UNBENDING GENDER, *supra* note 1.

4. See *id.*

2000]

PANEL ONE

855

and work interact with each other in ways that are shaped by gender and, in turn, shape the meaning of gender in our society. The Gender, Work & Family Project has helped to make these issues central to our institutional agenda.

In closing, I welcome you to this important moment in the development, not just of the Gender, Work & Family Project, but also of the law school's commitment to making gender integral to our vision of what it is to teach law, to understand law, and to change law.

PROFESSOR WILLIAMS: I know we're really eager to hear our panel members. I'm just going to spend ten minutes talking about some of the arguments in my book,⁵ because a lot of the panelists are going to be addressing issues in my book in some way. I want those who have not read the book to be informed about the subject.

My central argument is that good jobs are structured around an ideal worker who takes no time off for either child bearing or child-rearing and works full-time and overtime as the job requires.⁶ And as women lawyers know, that is often a lot of the time. Designing work in this way really means that a worker who is a parent will be away from home, for a full-time worker, say, eight to six or seven o'clock. For someone who is working substantial amounts of overtime, this really means you're going to be away from home from eight to eight or nine o'clock, which is a common law firm schedule in Washington, DC.

Now, most people feel that having both parents work this kind of schedule is simply inconsistent with our ideals of child-rearing. And I call this widely shared sense, this very uncontroversial sense that children need time with their parents, the norm of parental care.⁷ Women who leave the fast track good jobs often say, well, this was my choice; this was an expression of my own priorities.

But the problem of work/family conflict is really not an internal psychological problem within women. It's really a problem that involves the clash of two social ideals. The first, of course, is the ideal worker standard,⁸ and the second is the norm of parental care.⁹ In a less formal sense, it is a clash between what we feel we owe to our employers and what we feel we owe to our children.

My proposal is to restructure work around the values that people

5. *See id.*

6. *See id.* at 64-65, 113 (discussing the "Ideal-Worker Norm" and formulating a strategy for eliminating the economic marginalization of women).

7. *See id.* at 52-54 (analyzing the drawbacks and benefits of acknowledging the norm of parental care).

8. *See supra* note 6 and accompanying text.

9. *See supra* note 7 and accompanying text.

hold, very uncontroversial values that people hold about family life. This differs from the kinds of arguments that have been made in the work/family movement in several ways. The typical argument from work/family consultants is that employers should offer family-friendly or flexible policies, because such policies are actually better for the bottom line. And, incidentally, they are. Deloitte & Touche—and you would think that Deloitte & Touche could do the numbers—estimates that its flexible policies save it \$14 million a year. That estimate is from Peter Short, head of Human Resources at Deloitte.

I argue, instead, that the reason employers should implement flexible policies is because their current ways of doing business are inconsistent with our ideals of child-rearing.¹⁰ They are also, of course, inconsistent with our ideals of gender equality because if you design the ideal worker around someone who takes no time off for childbirth, well, who needs no time for childbirth? And if you design the ideal worker around someone who needs no time off for child-rearing, again, who needs no time for childrearing?

According to recent time-management studies—I think we are probably going to have some dialogue about this—women do eighty percent of the child care¹¹ and two-thirds of the housework.¹² At that point, what you really have is your work place designed around the bodies and biographies of men. That is simply, quite simply, pure discrimination against women.

So the first two arguments that I've made are really that the way that work places are designed involve a clash of social ideals; they're inconsistent with our ideals of child-rearing; and they also discriminate against women.

The answer lies in how do you change the work place. Obviously, changing a whole economy is a complex issue. Even I concede that. But I think an important principle is the principle of proportional work.¹³ I mean, for part-time work, the principle of proportional pay, proportional benefits, and proportional advancement.

Now, in my view, this is not a ceiling. This is a floor that's mandated by commitment to antidiscrimination principles. Again, this is a proposal that differs from much of the work/family literature and activism that is going on right now, because most large companies, as people might know, and in fact, most law firms, have

10. *See id.* at 55, 85-88 (citing polling data and the merits of flexible work schedules).

11. *See id.* at 2 (citing JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE 105, tbl. 3 (1997)).

12. *See id.*

13. *See id.* at 99-100 (detailing a system of restructured work).

2000]

PANEL ONE

857

flexible policies, or have part-time policies.¹⁴ But it's widely acknowledged that few people used them. According to one study, only about three to five percent of workers use them.¹⁵

Now, why do women not use these programs? It is not because workers prefer to be at work rather than at home. It's because very often, in many work environments, if you so much as express interest in using these policies, even if you decide ultimately not to use them, your career advancement is permanently over.¹⁶ So I would submit that it's not that people prefer work to home; it's people prefer not to get exploited. That's really what we have, that is the message here.

So what you have is, in many of the work/family policies, simply another way of marginalizing women who do not live up—and men too—who don't live up to the ideal worker norm. It's simply another way of discriminating against women. So as long as these flexible policies are linked with marginalization, in my view, they're merely another way of discrimination.

Now, the clash between the ideal worker norm and the norm of parental care is one of the major reasons, in my view, that gender has proved so unbending, and it's proved very unbending indeed. We often hear that most mothers now work. But if you look at how they work it's very instructive. Two-thirds of mothers between the ages of twenty-five and forty-five don't even work full-time, full-year.¹⁷ And that's in an economy where part-time workers are very rigorously marginalized.

If you look at the kind of mandatory overtime environment that law firms represent, and so do upper-level management jobs, only seven percent of those mothers work forty-nine hours a week or more.¹⁸ That means you basically have the elimination of mothers—not all, but virtually all mothers—from mandatory overtime jobs, and this is as true of elite blue-collar jobs—think of the GM strikes—as it is of elite white-collar jobs. Ninety-five percent of upper-level management and eighty-six percent of law firms are still men.¹⁹ And so what you have, basically, is a wipe-out because of the current design of the ideal worker, particularly in mandatory overtime environments.

14. *See id.* at 84-86 (discussing the implementation of flexible schedules and proportional work in the legal and corporate environments).

15. *See* UNBENDING GENDER, *supra* note 1, at 94.

16. *See* UNBENDING GENDER, *supra* note 1, at 74 (detailing one woman's experiences with full-time and part-time work).

17. *See id.*

18. *See id.* at 2.

19. *See id.* at 67.

This is a system that obviously hurts women. But it also is a system that hurts men. Under it, most men see very little alternative but to perform as an ideal worker in an environment where that often offers the supreme pleasure of a sixty-five-hour week.

In part, men feel so little choice because of economic pressures. The average American father still earns seventy percent of the family income,²⁰ so he cannot choose to go part-time. But partly it involves symbolic issues, the construction of masculinity. Studies suggest that if men are unemployed, the level of impotence goes up.²¹ The provider role is inscribed upon men's bodies in a very concrete way, so that, so long as the economic structures remain as they are, this sort of all-or-nothing, ideal-worker-or-wipe-out phenomenon, men have very little choice but to continue to perform as ideal workers. Studies suggest they don't really want to. One study suggested that half of men said they would sacrifice twenty-five percent or more of their salaries if they could only get more personal or family time.²² But because of the construction of masculinity and because men are still the breadwinners in most families, unless we change the structures of work, not much is going to change.

So the system is not only bad for women it's also bad for men. But in many ways, it's worse for children, because what this system really is is a system for providing for children's care by marginalizing their mothers, by marginalizing the adults who are responsible for that care. Because children's economic fate is generally tied to their mothers—as we all know, in the event of divorce, it's the mothers who usually get custody²³—the predictable result of this system is very high levels of maternal and child poverty.²⁴

In dual-earner households, children also suffer in different ways. I do believe—and again, we might have dialogue about this—that children do spend less time with their parents than they did a generation ago. If you read Ellen Galinsky's recent book,²⁵ one of the worst effects of this system on children is that by the time dual earners get home, they are so stressed out that they communicate that, and that is what is really hurting the children most profoundly.

20. *See id.* at 115.

21. *See* LILLIAN RUBIN, FAMILIES ON THE FAULT LINE 119 (1994).

22. *See id.* at 59.

23. *See id.* at 126 (claiming that mothers are awarded custody in "nearly 90 percent of divorces").

24. *See id.* at 115 (discussing impoverishment of custodial mothers and their children after divorce).

25. *See* ELLEN GALINSKY, ASK THE CHILDREN: WHAT AMERICA'S CHILDREN REALLY THINK ABOUT WORKING PARENTS (1999).

2000]

PANEL ONE

859

Very briefly, I just want to show you what I've done, rhetorically. First of all, I've tried to invent a language to get Americans to talk about economic structures without turning it into a therapeutic issue. I do this by asserting that what's involved in work/family conflict is not an internal psychological conflict within individual women, but a clash of two social ideals, between the way we define the ideal worker and the way we define our ideals of child-rearing.

Second, I have very frankly tried to use the language of family values, with a very strong assurance that homophobia is not one of the family values I hold, and that women should be equally able to choose not to have children if that is what they want. With those two provisos, I think the language of family values is useful and appropriate here.

Third, I have tried, because we've done a lot of work in Latin America, to use what I think is the chief cultural resource we have for gender change in the United States, which is to use our strong self-image of a commitment to equality. We may not follow through, but we have the image of following through, and, believe me, that's far different than in Latin America, although they also have cultural resources that we do not have.

Finally, I've done two other things—I argue for women's rights using the language of children, and that's obviously a controversial move. Can't we claim rights for women without bringing children into it? We could, but in my view our gender system affects women and children in very closely linked ways. Our system of providing for children's care by marginalizing their mothers impoverishes children as well as mothers, and I think it is worth pointing this out.

Finally, what I've done is gone back to Ruth Bader Ginsburg's idea that gender arrangements are not only bad for women, they're also bad for men.²⁶ I do not think that's inconsistent with subordination theory, but I'm sure we'll hear more about all of these issues.

Thank you.

PROFESSOR SELMI: I want to thank all three of the speakers for getting us off to a great start with a very important topic. I am delighted to be here today and to participate in this conference discussing the many issues surrounding the topics raised by Professor Williams.

We have an excellent panel to get us started this morning. The format will be short presentations by each of the panelists initially,

26. See Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347, 358-62 (1971).

five to seven-minute presentations, and then I'm going to pose some questions to the panelists following their presentations. After that, we'll open it up for broader discussion among the audience.

Consistent with the short talks, I'm going to give short introductions for the individual presenters, and probably not do justice to any of them. Bob Drago is a professor of labor studies at Penn State, and his most recent book is called *Unlevel Playing Fields: Explaining Wage Inequality and Discrimination*.²⁷ Bob is very involved in the work and family area in a variety of aspects, including a great listserv that he runs.

Mary Louise Fellows is a professor at the University of Minnesota Law School, where she teaches trusts and estates, tax and feminist jurisprudence, and has written in all of those areas as well. She holds an endowed chair at the University of Minnesota.

Professor Heidi Hartmann holds a doctorate in economics. She's currently the director of the Institute for Women's Policy Research here in Washington, and is also a research professor of women's studies at George Washington University.

And then our final speaker—and we're going in alphabetical order, as you may have gathered here—is Deborah Maranville, professor of law at the University of Washington Law School, where she also directs the Unemployment Law Clinic and teaches a course on feminist legal theory.

So with that, I will open it up for the panelists.

PROFESSOR DRAGO: Thanks, Michael. Thanks to Joan and to Adrienne for having me down here.

I run the Work/Family News Group²⁸ and this week I reviewed Joan's book, which I called a masterpiece, and it is. It put a lot of things together for me. And we also just finished a three-year study of teachers, public elementary school teachers, mainly women, and how they balance work and family. We used time diaries to do that.

I want to talk about the part-time aspect of the book. The big proposal in the book, for a labor economist, is the idea of proportional benefits and redesigning the structure of work so that part-time work is not only acceptable, but is reasonable, is economically do-able.²⁹

I love this idea, because I came at the whole Work/Family Project

27. RANDY PEARL ALBELDA ET AL., *UNLEVEL PLAYING FIELDS: UNDERSTANDING WAGE INEQUALITY & DISCRIMINATION* (1997).

28. See Work/Family News Group (visited Mar. 17, 2000) <<http://www.la.psu.edu/lair/workfam>>.

29. See *supra* note 13 and accompanying text. See generally *UNBENDING GENDER*, *supra* note 1.

2000]

PANEL ONE

861

from the side of overwork. People like Juliet Schor and folks like that were saying we need to cut back on work.³⁰ So I'm always looking for ways that people can cut back on work, and that is very hard to find.

This possibility fits in with a whole body of literature: Mona Harrington's recent book;³¹ Arlie Hochschild's *The Time Bind*,³² which ends with a plea for reduced work hours; and Anita Garey's recent book,³³ which basically does the same thing.

But what Professor Williams did that was unique was thinking about a concrete way to make reduced hours possible, something that's reasonable, something you can sell to people. What you cannot sell to people is the idea of full-time benefits for part-time work, because employers will say, "Wait a minute, you expect me to pay somebody more to be in the work place twenty hours a week (on an hourly basis) than I'm going to pay somebody at forty hours." They will not accept it. It will not sell.

So it is a great idea. In Australia, they have proportional benefits already.³⁴ If an Australian employer—and this has been true since the mid-'70s—hires someone temporarily, they have to pay what is called a loading, which is the equivalent of the value of all the vacation and benefits that they would have built up were they a full-time, permanent employee.

So they have the proportional benefits for these temporary employees. Not surprisingly, most part-time workers are also temporary workers. Most temporary workers are also part-time. So you end up with proportional benefits.

The irony there, and the hope, is that it was the unions that fought for this proportional benefits package in Australia. And why? Because they argued that if firms want to hire temps—if firms want to hire part-timers—unions don't like this—then firms are going to pay for it.

In the United States, we have the opposite situation, where the unions have largely excluded part-timers. The quality part-time jobs proposition could, and should, be sold to unions as a way to increase

30. See generally JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991).

31. See MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* (1999).

32. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997).

33. See ANITA ILTA GAREY, *WEAVING WORK AND MOTHERHOOD* (1999).

34. See P. Dawkins & K. Norris, *Casual Employment in Australia*, 16 AUSTRALIAN BULL. OF LABOR 156, 156 ("Casual employment, however, cannot be described as 'unprotected' employment as it is within the award system and casual employees usually receive a wage premium.").

membership. The AFL-CIO is very interested in getting women and people who have been marginalized in terms of race and income. And this proposal does that, and it's very hopeful now.

The forces of evil, however, are out there. Any time you come up with a good idea, you know the forces of evil will line up. And they have a lot of money. They paid a million dollars to get *The Bell Curve*³⁵ written. So they will do just about anything.

SPEAKER: Paid a million dollars for what?

SPEAKER: To get *The Bell Curve*—

PROFESSOR DRAGO: A million dollars to get *The Bell Curve* written. It came from the Bradley Foundation.³⁶

The forces of evil are the usual players: The American Enterprise Institute, the Heritage Foundation, and the Bradley Foundation. As soon as this idea gets out there, they will be lined up.

It's worth being ready for them, and here's what the arguments will be, because they are very predictable folks. The first argument is that the policy will be inflationary. That is, if you increase the expense that employers pay for part-time workers, that will raise the rate of inflation, and Wall Street will get unhappy, and it will throw us into a recession.

Second, and this will be the big one: Quality part-time work will hurt small businesses. Who wants to do that? Small businesses can't afford this. It's the same argument we hear when the minimum wage comes up, right?

The third argument is that the policy will hurt the very people it's designed to help, because they won't have any jobs. I'm just warning you, that argument is going to be out there. It's not true, but that's what they'll argue.

On the left, and I think this is the big challenge for the proposition, is the notion that proportional benefits for part-time work, in fact, legitimizes marginalization. And that's a concern that has to be taken seriously.

I would add that I don't think this policy should be sold as productivity-enhancing. There's a couple of good reasons why it's not. One reason is that there are, particularly at manufacturing firms, advantages to running long shifts. There are a lot of cases where it's just not going to make monetary sense to have part-time work.

The other objection concerns coordination problems. Any of you

35. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

36. See *id.*

2000]

PANEL ONE

863

who know people who have job-shared know it takes two people who are willing to both make phone calls late at night and get those phone calls late at night or first thing in the morning. It requires a lot of coordination, and it's not obvious that it's efficient. It's the right thing to do, and that's the way to make the argument.

I guess my basic feeling—and this is where Professor Williams' arguments just made sense for me—was as an economist, I've always thought if you change incentives, you'll change behavior, and then you'll change the way people think. That's basically the thrust of the book, if you want to reduce hours, if you want to allow parents to have more time with their children, both men and women, you don't just tell people to do it, you have to change incentives.

It solves the problem that some people want to work long hours. In our study of teachers, the people who worked the longest hours were those who are older, those who are in their fifties. Their kids are gone. They wanted to spend more time at work. They love doing the bulletin boards, hanging out in the coffee room, all that stuff. Who am I to stop them, to tell them that's wrong? I'm not the person to stop them, and this proposal doesn't either. It says if they want to do that, that's fine.

We need a little broadening of the theme of care and the ideal worker norm, the ideal of parental care. Parental care as a social norm is really a little broader than that. This is a very gendered notion itself. We found the average school teacher is being paid for six and one-half hours a day. She is working ten hours a day. Why? There's only one explanation. It's women who are expected to care for our kids, and care until they drop. If it was a bunch of men, everybody would say "Put in your eight hours and go home." But it's not. It's women, and it's caring work. So the ideology of parental care is a lot broader than that in terms of women's commitments.

Finally, in our work and other research, we find people really are geniuses. There are force fields out there that force us back into particular gender roles. But people find ways to use gender roles. And Joan talks a little about this, about the guy who says doing child care is like climbing Mount Rainier, so he can feel really macho about doing child care.

People do that. People find ways to twist gender and use it. In the case of our teachers, those who are doing at least two hours of child care per day on top of working full-time, for any time use category we looked at, there was a significant reduction in the category.³⁷ That is,

37. See Robert Drago et al., *The Time, Work & Family Project: A Study of*

they do less sleep, less eating, less leisure, less work, less commuting. They were just incredibly ingenuous about making time for their children.

What that suggests is that, if you make part-time work a viable option for men and women, people will use it. They will find ways to make it work for them. And that's very promising.

PROFESSOR SELMI: Thank you very much. Now we'll hear from Mary Louise Fellows.

PROFESSOR FELLOWS: Hello. It's very nice to be here. A lot of things have already been said to which I want to reply, but I'll stay on task here.

There are three themes that I'd like to focus on, going from the particular to a consideration of systems of practice and thought.

First, I want to talk about Joan's book with regard to how the structure of the ideal worker and the question of the flow of family work—which I think is coined exclusively by Joan, this language of flow of family work—is supported within our governmental public structure, and particularly by the income tax system. Let me just start with a couple of basic tax principles.

There is this idea in the tax law about taxable income versus imputed income. The notion is that if you do something for yourself, you stay inside your house, you don't go out to the curb, and you just produce for yourself, that which you produce is not taxable.³⁸ For example, if you grow a tomato in your garden and you sit there and you eat the tomato, that's not going to be taxable. That's imputed income. You did something for yourself.

The tax twist comes in this idea of flow from family work. Production is also imputed income if you do it for family members, which is to say you don't get thanked, let alone paid, for having done it. It's just what you do. So the whole tax structure about what is produced income versus what is unproduced income, the whole invisibility of the family flow of work, is organic to our idea of productivity, which is then measured, of course, by one's taxable income at the end of the year or April 15th or whenever one files.

That's one aspect of how Joan's work, I think, helps to reconsider the tax law, which then ends up reconsidering and coming back around and rethinking what we mean by work.

Teachers, Final Report for the Alfred P. Sloan Foundation, Work/Family Working Paper #00-02, University Park, PA: Penn. State University, Feb. 2000, p. 23 (on file with author).

38. See HENRY SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 51-52 (1938) (explaining imputed income from services).

2000]

PANEL ONE

865

The other aspect, equally as crucial, I think in the tax arena—and I want to emphasize this, that the tax arena has both a cultural as well as economic as well as legal impact on our families—is this distinction between business and personal, is this distinction between a business expense and consumption. If you label an expenditure business, it's inevitably necessary. If you label it personal or consumption, it's always discretionary. And the whole idea of choice comes into it, that businesses do not make choices when they, for example, decide to buy a piece of artwork for the law firm, but it is a choice to have a child, and all of that then becomes a personal expense.

That all comes from a tax law, of course, that's built around the needs and wants of entrepreneurs as opposed to workers. And I think Joan's book helps us get further down this line of rethinking what it means to be an employer and what are one's responsibilities to one's workers.

Now there is a struggle around fringe benefits. Should they be taxable or should they not? The dilemma really comes out of a culture that assumes one's health care needs, one's child care needs, one's retirement needs, are personal problems and not the responsibility of an employer to an employer's workers.³⁹

To think about the question of production regarding the employer's responsibilities would lead us to appreciate that there is no business in the next generation unless businesses make it their responsibility to invest in that next generation.

So there are lots of ways to, I think, extend many of Joan's arguments. I'd be happy to talk more about those tax issues; I think that they very much interrelate. Questioning the tax structure is totally consistent with the path of analysis and the framework of analysis that Joan has provided to us.

There are two other points that I want to make. Joan explores the private-public dimension that gets intensified in the 19th century. In some ways, I would argue, it has been hyperintensified at the end of the 20th century. I think the next path for feminist theory is that we are going to rethink what we have said about the 19th century in terms of private-public and that we are going to rethink it as a framework of analysis.

What we're going to find is that which we thought to be private was really very much a public engagement. You can take something like the country homes in England. They were opened up to the public;

39. These ideas build on the theme found in Gwen Thayer Handelman, *Acknowledging Workers in Definitions of Consumption and Investment: The Case of Health Care*, in *TAXING AMERICA* 119 (Karen B. Brown & Mary Louise Fellows eds., 1996).

their purpose was a public show of what the occupants owned and what they did with what they owned. Their private ownership had public purpose; it was a performance.

So I think there's going to be a reconsideration of the overstatement of public-private. I think it's going to have a lot of effects about what we thought about gender then and what we are going to think about gender now.

Having said that, what does that mean for us in the 20th century? What I think we will see, once you break that down, is that what has turned out to be private right now is what employers do for their employees. Those are viewed as private decisions. There is this deep sense of appropriateness of private decision-making by employers. What we have deemed in the 19th century to be quite public—the marketplace and the flow of commerce, as opposed to the private—the parlor—no longer is operative.

What is public now? What's public now is what the government does to the employer, or what the government does to the employee. That becomes what we've constituted as public. Joan's book helps me to see that with greater clarity than I did before. I sort of put that forward to encourage us to explore further the question of whose responsibility is it to rear children in healthy, happy, and effective ways?

The third point that I would make, maybe it's answering the question, why will the "evil forces" go after Joan's proposals? On one level, and Joan suggests this, it seems like a modest proposal of proportionality. Now, why is it not going to be viewed as a modest proposal?

I think the answer is, or I'm going to suggest that the answer has to do with, what is our investment in the family versus work dichotomy. If you reconfigure the work place, you will necessarily—and I think Joan wants this—reconfigure family and what family means. Now, why is that a risky proposition, of rethinking family?

In my own work, I've started using the language of respectability, which for me encompasses the interrelationship of race, class, gender, sexuality, and disability.⁴⁰ I raise questions about who gets to be respectable and who does not. Family is deeply embedded in the idea of the master and the lady. It's deeply embedded in questions of class, race, sexuality, and disability. It tells us who is allowed to have families and who is not. Professor Williams' argument, I think, will

40. See Beval Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (1999).

2000]

PANEL ONE

867

lead us to rethink the family structure itself.

I'm going to burden you for just one more minute. When we went from the Edwardian era to the Georgian era, when we went from Victorianism to modernism, a lot of people were struggling with the changes of human relationships, the changes of relationships between wives and husbands, parents and children. At that modernist moment, there was a struggle to say that the old forms of productivity no longer provided the language upon which we needed to go.

Ultimately, I think that we find that as people struggled with that question and considered Freud and Freud's narratives, the modernist literature, most especially Virginia Woolf, Joyce, Forester, and Lawrence,⁴¹ they did not come up necessarily with an answer of what that family needs to look like. But they knew that the existing family structure that was there was not working.

And I think we find ourselves at the end of the 20th century in exactly that same place. The question is, can we reconfigure? What is it that we're holding on to so dearly? Why are we holding on so dearly?

I'll leave you with those ideas and hope you will find them worth pursuing.

PROFESSOR HARTMANN: I'm Heidi Hartmann. It's always a pleasure to come to the Washington College of Law and mingle with the outstanding feminist legal theorists that you have here. I have, in a sense, become a full-time policy wonk since my days as a feminist theorist, and sometimes I miss that sort of luxury of just bathing in ideas when you don't have to worry about their practical applicability.

The issues discussed today, however, are issues of practicality. And one of the things that I've come to appreciate in doing the policy work that I do full-time is that actually, there's a very important role for theory and scholarship, and I'm going to give you just one example of that.

One of the first studies we did at the Institute for Women's Policy Research ("IWPR") was called "Unnecessary Losses,"⁴² and it was about how, because women did not have the right to keep their jobs after they had babies, they lost money. Even if they went back to work, they had to have a period of unemployment very often, and they would not go back to a job as good as the one as they had

41. Virginia Woolf, *Mr. Bennett and Mrs. Brown*, in 1 COLLECTED ESSAYS 319, 320-21 (1966).

42. ROBERT M. SPALTER-ROTH & HEIDI I. HARTMANN, UNNECESSARY LOSSES: COSTS TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE (IWPR 1990).

before, necessarily.

Actually, we were able to calculate the amount of earnings that women lost. IWPR argued that even though the Family and Medical Leave Act⁴³ would provide only unpaid leave, it actually would bestow a very important right, which was the right to keep your job, which up until then—I know it's hard to believe—women didn't have.

As a result, it was particularly important for low-income women and women of color who tend to work more during their lifetimes in general and more especially after they've had children.

But when our study came out—and actually, I think it's the only time we actually managed to do a study in six months and get it done in time to testify in the Senate when the bill was actually being debated⁴⁴—it got a fair amount of publicity, and there was some negative publicity as well. And there was one columnist who wrote a column about how stupid can research be. The gist of the column was that the next thing you know they'll be calculating how much money you lose because you have to go to the bathroom and flush the toilet.

I was sort of upset by this column, and I thought that there were some parallels, a normal bodily function about which you really have little control. You have to go to the bathroom. You have to have children. Not necessarily you, but somebody does. And I realized that it really didn't get picked up at all. That kind of critique, that this is silly to be talking about the money that women lose when they have babies, didn't get picked up at all, whereas just thirty to forty years before, even twenty years before, the idea that women lose money when they have babies would have been laughed out. It would have been a laughingstock: "Of course, women lose money when they have babies. What do you think having babies is all about?" We have created a kind of expectation through, I think, our research and our writings and our theory that women are earners; that if they're earning, they have a right to continue to earn; and that not being able to earn when you have children is actually a significant problem. It isn't just the way it is. And before that time, it was the way it is.

Martin O'Connell, a demographer at the Census Bureau who does

43. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994 & Supp. VII 1997); Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 1993 U.S.C.C.A.N. (107 Stat.) 6 (codified as amended at 29 U.S.C. §§ 2601-2654 (1994 & Supp. VII 1997)).

44. See Costs to Women and Their Families of Childbirth and Lack of Parental Leave, Testimony by Roberta M. Spalter-Roth and Heidi I. Hartmann before the Subcommittee on Children, Families, Drugs and Alcoholism, Committee on Labor and Human Resources, U.S. Senate, Oct. 29, 1987.

2000]

PANEL ONE

869

a lot of work on fertility, provided another example of this. He was looking at questions from the Survey of Income and Program Participation⁴⁵ about when women go back to work after having children, and he discovered that in the late 1970s and early 1980s, there was a huge increase in the number of women reporting that they returned to work after they had children.⁴⁶ And he was completely puzzled. He had no idea what this could possibly be due to.

I said, "Oh, that's the Pregnancy Discrimination Act." In 1978 we as a society said that if you're the kind of employer that provides sick leave if someone becomes temporarily unable to work—heart attack, car accident, broken leg skiing, whatever reason you can't work—you can't exclude pregnancy. Well, that was a really new concept, because most women reported that they never thought to ask if they could keep their jobs. They just knew that when you had a baby, you didn't keep your job, because you would be out so long, six or eight weeks, employers wouldn't keep the job open. So you never asked. In other words, the employer never even had to fire you. In many places—not all places, but in many places—the employer didn't have to bother to fire you, because you just never went back. They had a party for you when you were having your baby, and that was it.

So these things that are so accepted have really changed because of feminist legal theory, feminist scholarship in women's studies, and the practical policies that grow out of them, like the Pregnancy Discrimination Act⁴⁷ and the Family and Medical Leave Act.⁴⁸

Today I want to respond a little bit to Joan's idea of basically creating quality part-time work, which I actually support very much, and then move on to talking about paid family leave, which I think is now also very hot on the policy horizon, and we should be talking about it.

One of the things we try to do at IWPR which, I think, fits in very much with Joan's legal theory discussion is develop the concept of the encumbered worker. The old concept of the ideal male worker is obviously the unencumbered worker. He has no problems, because

45. See Martin O'Connell, *Maternity Leave Arrangements, 1961-1985*, Work and Family Patterns of American Women, U.S. Bureau of the Census, Current Population Reports, Special Study Series, P-23, No. 165 (1990).

46. See *id.*

47. See 42 U.S.C. § 2000e(K) (1994 & Supp. 1996) (amending Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy); see also 123 Cong. Rec. 21,422 (1978) (statement of Rep. Burke citing practical statistics in support of the Pregnancy Discrimination Act).

48. See generally 29 U.S.C. § 2601 *et seq.* (1994 & Supp. 1996) (stating that the Act is intended to provide balance and equity between men and women).

his wife is doing everything back at the ranch.

Instead, what we argue is that all workers are encumbered, men as well as women, single workers as well as married workers, nonparents as well as parents. You may not know what their encumbrance is, but if you scratch the surface a little, you will find it.

Right now at IWPR, we have several young single women adopting puppies from the pound, and at least for a period of weeks, until the puppy becomes a little better socialized, this actually does cause them to reduce their hours, because you have to get home before the dog destroys everything. So people have many kinds of encumbrances. Single women often take care of elder parents or ill parents, yet employers tend to think it's just married women of child-bearing age who have encumbrances, but that's really not true. I think that the women's movement has succeeded in making men more encumbered, which is what we want: We want men to become more encumbered as workers. I think we've succeeded in doing that simply by voting with our feet and going to work, because the more we go to work, the more likely it is that Bob has to stay home next time the kid is sick, that it won't be me, it will be him, because we'll just look at our schedules for the day and say, well, who's the most free? Who's the one that can get out of work the most today to deal with the situation? The more women do that, the more encumbered the men become, and the more universalizing this phenomenon is. So I think we've made progress in that direction.

Well, before I go on to Joan's points, let me just say that I think what I like about the Family and Medical Leave Act is that, in a sense, it embodies this concept of every worker being an encumbered worker, and it covers many reasons why you could be out of work, such as your own illness, in addition to the family-care reasons.⁴⁹ By coupling it with one's own illness, it makes it very likely men will be using this Act just as much as women.⁵⁰

In fact, men do use it a lot.⁵¹ It gives you the right to keep your job

49. See 29 U.S.C. § 2612(a) (1994) (delineating four gender neutral reasons one would be entitled to employment leave). These gender neutral reasons are: the birth of a child and in order for the employee to care for the child, the placement of a child with the employee for adoption or foster care, to care for an immediate family member with a serious health condition, and the employee is unable to perform at work due to a serious health condition. See *id.*

50. See *id.*; see also Armin Brott & Ross Park, *Tips for Better Parenting*, THE PRESS-ENTERPRISE, Apr. 8, 1999, at E4 (reminding readers that the Family and Medical Leave Act provides "father friendly employment practices").

51. See, e.g., Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1078 n.194 (1994) (citing the results of a survey that showed increased use of the Family and Medical Leave Act in the context of parental leave when paternity leave policies became more usable and corporations began to sanction them).

2000]

PANEL ONE

871

even if you have cancer, for example.⁵² If you're going to be out for treatment, you can at least keep your job twelve weeks, and that will give you a chance to get back to your job.⁵³ Many workers who have cancer, for example, don't even tell anybody at work, because they are so fearful that it will be found out and they will lose their jobs. With the Family and Medical Leave Act, there is now some basic protection.

So what the Family and Medical Leave Act did was acknowledge that every worker is an encumbered worker, and assigned to the worker an individual right to take care of both their own problem and their family problem. So you have built into the law the concept that the family obligations, the ability to meet those family obligations, is an individual right of every worker. And I think that is a very valuable thing about it.

What is attractive about Joan's proposal is that it essentially amounts to giving workers a right to choose the hours of work they want to have. Right now, they really do not have that right. Because of the structure and the custom, you have a right to have a full-time job or an overtime job or a really crappy, marginal part-time job, which isn't really a choice.

The ironic thing about economic theory is that the whole theory of the labor market is based on the idea that you choose the number of hours you want to work, which is completely bogus. But the whole thing is, you know, we're trading. As a worker, I would say, "Oh, I'm not going to go work for you, because I can get a little bit more over here. Do I feel like working ten hours this week? No, fifteen. When I work fifteen, will you pay a little more?"

None of that goes on. That's just not the way the labor market is structured, but that's what a free-market theory would be. How many hours do you like working? You go around and you find somebody who wants to give you those hours. Well, this is ridiculous. It doesn't work that way. The hours you must work are built into the institutional structure which, I also agree with Joan, is very much based on the concept of the ideal male worker.

Up until recently I would have taken the "feminist position" that we shouldn't do anything to make part-time work better, because it will just become a female ghetto. I don't believe that anymore. I think

52. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (1994 & Supp. VII 1997) (allowing an eligible employee to take at least 12 work weeks of leave "because of serious health conditions that makes the employee unable to perform the functions of the position of such employment").

53. See *id.* (allowing eligible employees to keep their jobs for almost twelve work weeks because of a serious health problem).

that we've succeeded in encumbering enough men that they will also want to take these part-time hours; that basically both men and women are feeling very hassled and very overworked, and if they could have good part-time jobs, they would take them.

In a recent study of professionals and managers, funded by the Sloan Foundation,⁵⁴ we did just a very simple graph of age and the percentage of workers working part-time. When you examine the proportion of professionals and managers using part-time work, it is fairly high at young ages. We assume that it is people studying to be lawyers or whatever. Perhaps they are working as a manager at a fast-food place while they're in graduate school, so they're counted as a managers.⁵⁵ There is a high proportion working part-time at the young ages, in the teens and twenties, and then it drops in the main years of your career, in your thirties, forties, and early fifties. And then, of course, it goes up again. In their late fifties and sixties, more and more professionals and managers want to work part-time. Well, interestingly enough, the curve for men and women is exactly the same shape, with one minor exception. It's a U-shaped curve: Less part-time work in the "go-go" career years, because these are all professionals and managers, and more part-time work at both ends.

But, of course, the women have a little rise right here, in their thirties, for child-bearing, which the men don't have, but the peak of this rise is still below where the percentage is for young managers and older managers. So you can view part-time work as a universal lifetime, life-cycle kind of thing, with some increase for women around child-rearing.

Seeing it this way made me realize that part-time work really is something that men desire, I think, very often as much as women. Now, unfortunately they might not do the same thing with their time off. We probably will be taking care of kids, and I have a feeling they are going to be climbing mountains or something like that.

I want to move on for just a couple of minutes to talk about paid family leave. I want to mention this because it is a hot policy issue right now, and people are talking about different ways that we could provide pay for family leave.

The reason that we do not have paid family leave already is very much the concept of the ideal worker. The male certainly does not need paid family leave. He has his wife taking care of family needs. We also in this country do not have paid sick leave, which is very

54. Heidi Hartman et al., Part-Time Opportunities for Professionals & Managers: Where Are They, Who Uses Them & Why, IWPR, Jan. 2000.

55. *Id.*

2000]

PANEL ONE

873

unusual. Most other countries, of course, not only have paid family leave, but have paid sick leave, which tended to come first. I suppose one of the reasons why we do not have paid sick leave is that, if you assume the woman in the family isn't working, she can always go to work and take care of family income when the man is temporarily ill. So we do not have a social insurance system for this.

One of the great things about temporary disability insurance (TDI) is that it is a social insurance system for people's sicknesses. But there are only five states that have it: New York, New Jersey, California, Rhode Island, and Hawaii.⁵⁶ Many of these laws were passed right after World War II⁵⁷ when there was a surplus in unemployment insurance funds, because the big recession that everybody expected after the war didn't happen, and these programs were started with these surplus funds. In the states that have it, the employer or the worker pays a premium. Sometimes they both pay; sometimes only the employer. In California, it's only the worker that pays for the entire program.⁵⁸

It works just like unemployment insurance. Instead of being out of work because you're unemployed, you're out of work because you're sick. You register for the program and receive partial-wage replacement. One of the interesting things is that these temporary disability insurance programs, which came into place after World War II, didn't fully cover pregnancy disability or child-bearing initially. The 1978 Pregnancy Discrimination Act changed that.⁵⁹

After 1978, when you look at who gets the dollars from temporary disability insurance, it's women. About sixty percent of the dollars of benefits are going to women. Well, you know that even with a lot of women working, women are only making seventy-five percent of what men earn, so you know at the most, women cannot possibly be putting in more than perhaps approximately one-third of the dollars into the system, but they're getting sixty percent of the dollars coming out of the system. So this happens to be a system that transfers money from men to women, and this is why, I believe, it

56. Cal. Unemp. Ins. Code § 2626 (West 1986 & Supp. 2000); Haw. Rev. Stat. § 392 (Lexis 1988 & Supp. 1999); N.J. Stat. Ann. §§ 43:21-29 (West 1991 & Supp. 1999); N.Y. Work. Comp. Law. §§ 200-242 (West 1994 & Supp. 2000); R.I. Gen. Laws § 28-41-8 to 28-41-32 (Michie 1995 & Supp. 1999).

57. Heidi Hartman et al., *Temporary Disability Insurance: A Model to Provide Income Security for Women Over the Life Cycle*, presented at the Women's Lives & Economic Participation 1995 Annual Meetings of the American Economics Association & Allied Social Science Associations, Jan. 8, 1995.

58. Cal. Unemp. Ins. Code § 2626 (West 1986 & Supp. 2000).

59. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1994 & Supp. 1996).

never got anywhere. It just hasn't multiplied in all the states the way other benefits usually do.

Interestingly, today I am working on Social Security, the retirement program for most people, and again, the same thing happens there. Women are sixty percent of the beneficiaries, because they live longer, and they probably put in over their lifetimes only, on average, about twenty-five percent of the total premiums. And yet they're getting not necessarily the majority of the dollars, but a lot of them. Because women earn less, they tend to get fewer benefits than men, but nevertheless it's another social insurance program that transfers money from men to women.

As a society, we can use these social insurance programs to make income transfers to those who need them—for example, to those doing family care. What is being talked about now is, in the states that have temporary disability, adding to it a right to get that partial pay for family care, as well as actual disability. Other states are talking about using employment insurance, and the President has made that an initiative of his administration,⁶⁰ to encourage states to use their unemployment insurance system to pay benefits if the reason you're unemployed is a family-care reason, specifically, to care for a new baby or newly adopted child.

I actually prefer the TDI approach, because I think that we would have a lot more men using it because, no matter what, men do get sick. They are doing less family care than women, so if we have a benefit that is limited only to family care, especially baby care, I think it will be used a lot more by women. Therefore, I would like to see illness included in the issue of family care, not because they are particularly related, but because with the Family and Medical Leave Act we put them together. Keeping them together has a real usefulness in making that benefit something that men want and will use as much as women will.

Thus, I am in favor of the idea of quality part-time jobs now, because I think men will use them nearly as much as women do, but I'd like to see us go beyond that. Certainly, part-time jobs will make family care more possible for people. But, for those who want or need to work full-time, we have to go beyond quality part-time jobs to develop something like paid family leave, so that, whether you are working full-time or part-time, when you can't work because of illness

60. See Dep't of Labor's Proposed Rule Regarding A Voluntary Experimental Program (BAA) to Allow States to Use Unemployment Insurance (UI) Monies for Partial Wage Replacement for Parents of Newborns or Newly Adopted Children (64 Fed. Reg. 67,971, Dec. 3, 1999).

2000]

PANEL ONE

875

or family care, you can get partial salary replacement.

PROFESSOR MARANVILLE: It's a pleasure to be here, and difficult to try to stay focused on what I was going to say in light of the very interesting remarks of the people who have preceded me.

I'm going to speak on three points. One is to talk a bit about the point that Joan Williams makes—suggesting that instead of a shift to equality, we have had a shift to an ideal worker/primary caretaker—particularly in the context of upper middle-class professionals. I'm going to talk then just a bit about the whole question of part-time workers and whether we can avoid marginalizing them, and finally talk a little bit about some of the concrete structural things that remain to be done.

I found that the comments about the ideal worker/primary caretaker shift really spoke to me. Specifically, looking at my life and the lives of my colleagues and friends, the comments spoke to me very strongly. I happen to be the middle of three sisters, the doctor, the lawyer, and in keeping with the end of the 20th century, the HMO manager. We have made different choices, but all of our choices have caused us to struggle with that balance and the structural constraints around how to manage professional work and family.

My two sisters both chose to work part-time. Of course, in the context of the sister who's the doctor, part-time means normal full-time, but she took off Fridays to make up for all the "on-call" weekends. In the context of my younger sister, she worked nominally part-time, but in a job that, in its intense phase, was periodically probably eighty or ninety hours a week. I chose to work full-time, having initially planned to work part-time. My now ex-husband and I had both planned to work two-thirds to three-quarters time. I shifted into academia and did not feel that it was politically possible to work part-time. I had my second child and did not take additional time off. Fortunately, she arrived on July 5th, so I took the summer off, but took no additional time.

I think that those kinds of choices that we make, acknowledging the political realities, they are choices, but they are very much constrained choices. At the dinner of panelists last night, we had quite a conversation about different people's choices in terms of the tenure clock and taking time off and what the actual policy said, versus what the political realities were in terms of taking advantage of those policies. I think when we think about trying to avoid marginalizing part-time workers, we really very much do face the question what are the possibilities, and then the question what are

the political realities in terms of avoiding marginalization?

I am very much in support of the proposal that Joan makes of trying to develop good part-time jobs. In addition, I am convinced that it can be done. I have some friends who have managed to work that out, and I'm convinced that it's possible.

But the opposition is clearly very great. I worked with our local Seattle-King County Bar Association on a gender equality task force and worked on parental leave policies and part-time work policies for law firms. The universal reality within the law firms seemed to be, "yes, we've got the policies, but no, you can't use them." Particularly, men cannot use them.

I am struck, not surprised, but certainly struck, looking around this room. This is an audience of women. It is the women who are fighting these issues and acknowledging that we will have to address them in our lives, whereas most of the men still recognize, I think, that they can avoid addressing the issues to a significant extent and can avoid pulling away from being ideal workers. Whether they're not in this room because they're sticking their heads in the sand or because they really don't think that it is their issue, the men, certainly in the law firms that I've been hearing about, are not taking the risk of trying to take advantage of the parental leave and part-time work policies.

There are a combination of factors that we have to address in order to make part-time work nonmarginal. There are legal structures that make it easy to have bad part-time work. Certainly, because we link health care to paid work in our society, the cost of a worker is typically very high beyond the simple hourly rate, and the incentive for employers to simply work the existing work force harder is very great. It is not simply in the manufacturing industries where there are costs of shift changes. In the law firms, where the overhead costs of maintaining an office are viewed as sufficiently high, the law firms want those offices to be occupied for a very high percentage of hours.

Thus, there are both legal and practical economic structures, plus the ideologies of gender and family that are very powerful, which the other panelists have talked about. I'm not at all optimistic that we can end up with part-time work that's not a pink ghetto unless we can succeed in changing the underlying allocation of care work. Doing that is certainly a project that involves a great many pieces and major challenges.

I would like to take just a moment now to talk about changing the structures. I tend to be a believer in changing the material and hoping that the rest will follow. But with respect to gender

2000]

PANEL ONE

877

structures, I think that is an open question. I am not certain that is the case, but there certainly are many specific changes that we can work on. They are changes that, I think, range from the ones that many of the people in this room will face in terms of policies and structures within law firms to the very concrete ways that we structure our public-benefit programs. Heidi Hartmann has talked about many of those.

I have done a fair amount of work in the unemployment compensation system. I run a clinic in which my students handle unemployment cases. Although we do not handle a high volume of cases, over the years we have seen a number of cases involving eligibility for unemployment benefits where an individual wants to do part-time work in order to accommodate care. We have seen a number of cases just recently involving situations where people are being pressured to engage in off-the-clock work and choose to quit their job rather than succumb to that pressure.

There are a variety of very concrete contexts in which we can change the structure of our societies and change the structure of the available legal benefits that cumulatively, I think, could have a considerable effect. It may be that we are not going to see a detaching of health care benefits from employment in my lifetime. I hope I am wrong about that, because if we were able to attack that problem sufficiently, it could have significant positive impact in terms of job creation and in terms of incentives to permit more flexibility in working hours.

I also am going to throw in, just to close, one of my favorite large-scale changes that I think ties into the tax code proposals in a larger way. Some of you may be familiar with a wonderful book by Marilyn Waring, a woman from New Zealand, called *Counting for Nothing*.⁶¹ This book is an attack on the United Nations' system of national accounts, the way we compute gross domestic product.⁶² I cannot think of a more technical subject, but the book is fascinating. It demonstrates the ways in which the calculation of our well-being is skewed because we do not take into account the unpaid labor that men and women do, particularly women in most economies, and we do not take into account environmental degradation, though we do count as a positive benefit to our well-being costs for military

61. MARILYN WARING, *COUNTING FOR NOTHING: WHAT MEN VALUE AND WHAT WOMEN ARE WORTH* (2d ed. 1999).

62. *See id.* at 75-134 (discussing the inadequacies in the United Nations' system of national accounts).

expenditures.⁶³

That is a change that will have to take place in the higher reaches, kind of at the opposite end from the kinds of changes that I have talked about in the context of unemployment. But I raise that partly to remind us all that there's work to be done wherever we are in changing the structures that define our work lives.

Thank you.

PROFESSOR SELMI: And thank you, and let me thank all the panelists for getting us going with very thought-provoking discussions.

What I think I am going to do now is just pose a general question for all the panelists, rather than do specific questions for each of the panelists, and at the same time try and pull together a theme that binds the speakers.

We've heard a number of different issues discussed regarding ways we might be able to make the workplace more compatible for work and family issues for men and women, particularly focusing on women. It is clear to me, not just from the audience, but from all the reading I've done in this area that family leave issues and these care issues we've been discussing, largely remain women's issues. Whether we can expand that focus so as to obtain a broader coalition is one of the things I want to discuss.

The general question I have is why we haven't yet made more progress. A lot of Joan's book,⁶⁴ I found quite depressing. All of the statistics are depressing in terms of the current state of the work force, particularly regarding how little progress women have made in the last twenty years. I think we should have expected more by now in terms of the increase in the pay gap, more in terms of the glass ceiling, and also in terms of more equal parenting. We really haven't changed very much the nature of the care for children. What has really happened is that women have gone into the workplace more, and they're just working more overall.

The question, then, is why we haven't made more progress, and whether we'll really be able to make progress in any realistic sense. One thing I want to throw out is, from our first panel we've heard a lot about the evil forces that will react to the various proposals, but I want to suggest that it's really not just the evil forces. They are there, and they were mentioned, and there are many more of them, as well.

63. *See id.* at 135 ("While women, children and the environment are counted as nothing, the entire international economic system calls war productive and valuable.").

64. *See* UNBENDING GENDER, *supra* note 1.

2000]

PANEL ONE

879

But a much broader group of people resist these changes as well.

The proposal that has been suggested to allow the current unemployment insurance surplus to be used for family leave issues has been opposed vigorously,⁶⁵ and it will be interesting to see if any proposal is actually implemented. The Clinton Administration has done very little to try and push any issues in terms of making a more flexible workplace or in trying to make it easier for corporations to adjust and get some benefits from the government. It simply hasn't been an agenda item.

We have a very low unemployment rate, about four percent, which has now reached near historic lows.⁶⁶ Workers are struggling to keep up, because currently the goal of the Federal Reserve is to keep wages from rising. Any time there is a threat that wages will rise, interest rates rise to stop it. The great fear is that workers will be paid more—and we must acknowledge that the proposals discussed so far will all cost money. There is no question about that.

Although the proposals may be productivity enhancing in some respects, the bottom line is that they would cost more money. There is also a question in terms of part-time work: whether it is feasible to increase its availability in that people are currently working so much. There is actually work to be done by people, and it is not clear that it would be feasible to cut hours, or where we would get more workers. You would also hear employers, and not just the reactionary groups, reacting that it simply is not feasible, given the tight labor market.

Part of the tight labor market is that there are a lot of people who are not looking for work, so you could expand that pool more. But it is not clear that right now, we would be able to cut back on jobs quite so much.

So the question is why we haven't made more progress yet, and whether it's realistic, given the primacy of the market at the moment—I remember a quote a while back from Frederic Jameson in an article in the *New Left Review* where he started by saying, "The market has won." Everyone has sort of given over to the market right now, so there isn't a great coalition for changing right now. As long

65. See, e.g., Unemployment Compensation, 2000: Hearing Before the Human Resources Subcommittee the House Ways and Means Committee, 3/9/00 Cong. Testimony, 2000 WL 1106947 (statement of Kimberley Hostetler, Director, Human Resources Services, for the Connecticut Hospital Association) (maintaining that unemployment insurance trustfunds are endangered by people on family leave because it jeopardizes the financial resources for out of work people).

66. See Bureau of Labor Statistics, *Civilian Unemployment Rate* (visited Apr. 19, 2000) <<http://stats.bls.gov/>> (reporting a civilian unemployment rate between 4.0% and 4.9% from January 1999 to March 2000).

as the stock market keeps going up, I do not think we're going to see great pressure for change.

So with that background and the question framed—whether progress is feasible and why we haven't seen more of it, and also, as Heidi Hartmann mentioned, why the market has not produced a more flexible workplace already—why we don't have an ability to find employers who will let us choose our hours? That should have happened if we had any kind of free market. It should be much more flexible than it currently is; instead, it is very rigid and extremely difficult to change.

So let me throw that up to the panelists in whatever order.

PROFESSOR FELLOWS: There are a couple of things that I think your question raises. One is that what I think we need to do is not only make part-time work feasible, but change our idea of full-time. I mean, everybody is talking about these twelve-hour and sixteen-hour days.

To go to your last question, I don't think large corporations that are creating the economic growth, that everybody else sort of follows along, are efficient, market-sensitive, or market players. They do things quite conservatively, and they do what they did before, and they do what they do, and that's as far as they get.

I don't believe in the statement "if it was cost-saving, they'd do it." Corporations do a lot of non-cost-saving things. They discriminate against women. They discriminate against people of color. They do a lot of things that are against their own interests. But they do it. So I don't know that we should give up and say it's not productive.

The other point: The notion exists that somebody who is working that twelfth hour is doing a good job, doing a safe job, doing any job. I don't think there are many people out there who can do good work for twelve hours a day. I think we need to change our thinking on that. I sort of disagree with Robert. May I call you that?

PROFESSOR DRAGO: Call me Bob.

PROFESSOR FELLOWS: I disagree with what you have said about productivity. I think that we have to be careful about specific kinds of employment and economic sectors in which part-time flexible employment does work very well. My suspicion is that there are more of those than not. I think that one of the European countries has just this week gone to a thirty-six-hour week and found that it's much more efficient than having a forty-hour week, because they can have two six-hour shifts and use the factory for twelve hours when they

2000]

PANEL ONE

881

used to use it for only eight or nine.⁶⁷

There are all kinds of ways to think about this, and we should not just give up on it. One of those is not only to change part-time, but to change full-time. Once we change part-time, we probably will rethink full-time in that regard.

The other point that I want to make is, if we think this is good social and economic policy, then tax law is an area that we can use to do something about it. One thing we can do is provide lower tax rates, for example, for employers who do good things for their workers.

At one point there was a proposal that floated around, and everybody just sort of pooh-poohed it as not feasible, but I think it's still percolating. It related to health care. If you provide health care to your workers, your income tax rate for your business will be lowered. So there are different ways that we can go about this that may be feasible. So let me just throw those couple of things out.

SPEAKER: One question that I would ask—and I don't have the data, so I'd be curious if anybody has anything factual on this—but we know that a high percentage of women do not work full-time, full-year. I suspect that there are a number of women who are not in the labor market who would be if there were good part-time jobs available. So when we talk about the lack of workers and the productivity issues, I think that's an issue we need to consider.

PROFESSOR DRAGO: I want to respond before we move on. This idea has been coming together for a long time. If you want to know why, why now, why hasn't it happened earlier—that was one of your questions—it took a long time for the media and for the research around these issues to build up.

I, for one, was sitting around for the last five years studying these issues, and reading everything I could get a hold of, and looking for a practical proposal that made sense.

And one of the things Joan tried to do in her book was say, "Look, we've been divided over these issues. It's time to come together." And probably the most surprising thing for me this morning was Heidi Hartmann's statement in support of part-time work. I was shocked.

PROFESSOR HARTMANN: It was a conversion, a true conversion.

PROFESSOR DRAGO: But let me explain how positive. When I talk about a part-time tenure track with a part-time job, the tenure

67. See Charles Fleming, *French Disagree with Shorter Workweek: Some Believe Plan May Prove Good for Business*, WALL ST. J., Feb. 12, 1998, at A17 (discussing France's plans to cut the workweek from 39 to 35 hours by 2002).

clock goes to half-speed. That is a proposal that probably does not appeal as strongly to women as it does to men, because the men go home and write articles so they don't have to worry about losing their jobs.

I don't care. They're still doing it. If you're forcing people to cut back on their hours, if you're changing the culture for men and women, then you're doing the right thing.

SPEAKER: This isn't a question. This is an attempt to give you a concrete example that I think will resonate with at least half of the people in this room.

I got a frantic e-mail yesterday from a dear friend because there is a new web site, <infirmation.com>⁶⁸ about law firm salaries. My friend found out that his law firm, which will remain nameless because he's spectacularly concerned about confidentiality, was at the low end of salaries for Washington, D.C. It will destroy his ability—and they're fielding inquiries from the press—to recruit decent people.

I said, "Well, how do your hours compare to other firms?"

He said, "I'm reasonably sure our hours are lower than other firms."

And I said—this is an argument he and I have been having for approximately ten years: "And are you marketing your firm on that basis?"

"No, because then you get a bunch of losers. We don't want to be known as the loser law firm."

I said, "Have you considered the gender implications of that last sentence?"

"Yes, I have."

The end.

Now, this is a web site that allows the user to funnel anonymous information and have anonymous discussions about law firm salaries. I looked at it while we were having this first e-mail and then phone conversation. I didn't look at it very closely. It didn't seem to be very focused on hours and these issues.

I'm speaking very carefully as a former antitrust lawyer here, because I know that law students couldn't, for example, collectively decide that they don't want salaries higher, they want hours lower. But why aren't you screaming bloody murder? I mean, why aren't you on these web sites, saying stop raising the salaries to \$92,000, \$98,000? Start lowering the hours. It's crazy.

68. See <<http://www.infirmation.com/shared/insider/payscale.tcl#DC>> (visited Apr. 8, 2000) (providing associate salaries at specific law firms located in major U.S. cities).

2000]

PANEL ONE

883

SPEAKER: What's the site name?

SPEAKER: The site is <infirmation.com>. It's categorized by city, by salary, by size, by subject area, by everything. I didn't look at it very closely. I wasn't focused on this conference. It didn't seem to be—it wasn't conspicuously about hours.

SPEAKER: I have been perplexed for years as to why that hasn't happened, in terms of pressure from the workers to reduce hours in exchange for lower salaries.

SPEAKER: I think students would answer, up until perhaps this booming economy, because they were fearful that they couldn't get a job, that there were twenty other people standing in line for that job and that was the best they could do.

SPEAKER: I should probably not be perplexed in light of the conversations last night about how unwilling many of us faculty are to push for implementation of leave policies.

SPEAKER: Perhaps one of the reasons why things have not changed is because there's no accountability. I remember when Clinton was elected, I was very excited about the change and the possibility of working in a Democratic administration. I was at that time in a very reasonable law firm, but I really wanted to go back to the government, and I thought it would be just more family-friendly.

It is not. Actually, there's a lot of lip service. I do employment law for a government agency. They really hold nobody accountable. The Clinton Administration officials do not really care about workers. They have policies in effect and all these policies against discrimination, but it means nothing.

I think that is the real issue. There is a lot of lip service, and no one is really held accountable. I am wondering if anyone agrees with that and how we can start making employers accountable, starting with the federal government that is supposedly more family-friendly.

PROFESSOR HARTMANN: Well, I have a comment on that. The federal government has a law that allows them to count for example, a half-time worker as half of a full-time equivalent employee. Before that time, if you had a half-time worker, a quarter-time worker, or a two-thirds worker, they all counted as full-time workers, because the agencies have employee ceilings that they're not allowed to exceed.⁶⁹

I think it was in the 1970s, if not earlier, that this law was passed. The theory behind it was that it would encourage the agencies to create more part-time career opportunities. Mostly, they haven't taken advantage of it. They have not done it.

69. See 5 U.S.C. §§ 3401, 3404 (1994).

I think the issue of accountability that you raise is an interesting one. In the Gingrich era, one of the things that the Republican Congress did when they gained control of Congress in 1994 was to reduce a lot of the reporting requirements. So now the Office of Personnel Management (“OPM”), is no longer obligated to report on how much part-time work the different agencies are creating through this law.

I probably would also agree with you about the structure of the bureaucracy with the political people entering. It’s almost like they nominally sit on top of this large structure that does not change very much, no matter who is in power. You’re right, many of them are not really interested in the workers. They’re only interested in having some particular policy angle that will make them look like they did something during their time in office.

It is a shame. However, because it is the public sector, we have another avenue to try to do something about it through our votes, and the workers through their unions, as well. I would like to start a project of really working with the federal government to try to get it to be the model employer in terms of part-time work, because I think it would set a good example for the rest of the country.

SPEAKER: I’m curious—if you think it’s relevant—could you address the nature of the work itself, because part of the comments that you’re making apply across the board to all work. You mentioned mine workers. Sometimes we talk about professionals and managers, and sometimes we’re talking about lawyers.

One of the things that I wonder about as a former trial lawyer is that, certainly in that field, there are some objective deadlines. For instance, if you have a temporary restraining order (“TRO”), it’s the next morning. Yet I also think that some of it is cultural. Because people have talked about personal experiences, I had an experience recently—you talked about school teachers—where my child’s teacher returned a phone call and didn’t leave her phone number. It’s sort of like, in your profession, you don’t contact us at home. I’m thinking, in my profession, this is outrageous.

So when you talk about changing part-time work, it’s linked, of course, to the economics of it. How do you craft the benefit package, *et cetera, et cetera*? But how do you craft the job and ensure that lawyers are serving their clients?

JOAN WILLIAMS: If I could jump in here, because I’ve talked to an awful lot of lawyers about this.

My experience is that most people say, “oh, this would work for other work places, but in my particular work place for these

2000]

PANEL ONE

885

particular reasons, this is totally impossible.”

One thing I would say about the trial lawyer situation is that Andy Marks, who was the head of the D.C. Bar last year, was very interested in these issues, and had two lawyers working—both women, of course—with him part-time on litigation.

There are a couple of things you have to do. You have to set up a part-time policy that is not a certain number of hours a week, but a certain number of hours a year. Also, you have to have a full-time nanny. I mean, we’re talking about elite jobs. Although I would be really interested in hearing us talk about a full range of jobs, because it’s not only elite jobs where part-time work is marginalized; it’s not only elite workers who have part-time work/family conflicts.

But that’s one concrete example. You need flexibility to be able to work long hours when you have a trial or a closing, but then take “comp time.” That’s one important element in designing a non-marginalized part-time policy.

The other thing is that, as Andy Marks said, almost every lawyer works part-time on a number of different cases simultaneously. But that isn’t considered to be an outrage. That this lawyer is not available because he’s working for another partner is not a sign of a lack of professionalism.

So in fact, partners are very used to working in teams, sharing work, and limiting their demands, just not for child-rearing or any kind of family work.

SPEAKER: I just wanted to take a step back and comment on the statement that you made and that Professor Hartmann made.

I work for the Department of Justice, and Janet Reno since day one—and that’s been close to eight years now—has espoused a work life with a family-friendly environment. She has sent down memo after memo espousing this view. I truly believe that she does want to create that kind of a work environment, that it is something she holds dear to her heart. But in terms of that trickle-down effect, it really hasn’t trickled down.

In my opinion, it’s more like she is paid lip service by the people, the section chiefs of different sections of the Department of Justice. Myself and two other women, for example—I work in the Criminal Division—for the last year, approximately, I have been trying to get part-time status. It’s been one memo after another memo after trying to alleviate the anxieties of our section chief: “What about the perception of other workers? What about limiting factors? I’m afraid everyone is going to ask for this. Pretty soon we’ll have a whole section of part-time workers, God forbid.”

It's just one concern after another concern. I think it just boils down to control. They are afraid of losing control over their workers. They don't perceive us as professionals: "You have to get that brief in. It's going to be done. You put in these extra hours." We've put that all in memos and everything else, and it just does not do anything. It has not accomplished anything.

I think it's just disheartening to do that. Here we are, professionals. I'm not going to let a brief deadline go by. I'm going to put those extra hours in and have that work done, but those times when I'm not needed, why should I be there? Why shouldn't I be at home with my son? So it's a little disheartening. You're right, there is no accountability, because once he says "No, you can't get this part-time policy," who do we appeal it to? I'm not going to go to Janet Reno and yell and scream and make waves. I would have to think two or three times about doing something like that, but there's no accountability if you're a section chief. Of course, this is just in particular to the government. Once the bucks stops there, where do you go from there?

SPEAKER: As to the discussion about adapting part-time work to certain kinds of legal work, I think there's often a conflation of the idea of part-time work and fixed hours. I think Joan has done a very good job of disassociating those two things.

On the other hand, in talking to a lot of lawyers about this issue, it seems to me that part-time work for lawyers is most successful in those settings where full-time lawyers do work on a more fixed schedule.

The question I have is—I think one of the commentators said something about it—does part-time work change the concept of full-time work? I think that's really a fascinating question, and I was wondering if there was any empirical research about what goes on in a work place where part-time work is encouraged, and whether it changes the culture of the work place in decreasing hours that full-time workers work, or whether it only segregates further those people who work part-time from those workers who are willing to work longer and longer hours?

PROFESSOR HARTMANN: I think that more part-time work would have a positive effect on full-time hours. I was giving a talk somewhere, and a man who was a federal worker stood up and said, "Why can't every agency figure out all the work it has to get done, and assign it to packages—you know, the 20-hour package, the 30-hour package, the 25-hour package, the 35-hour package, the 40-hour package—and the employee would get to pick one of the packages."

2000]

PANEL ONE

887

I think that if those kinds of choices were around, it would create a positive effect. It depends on how widespread they are, but if these choices were the norm—that you pick your work package—then you would eliminate the full-time norm as the norm. The norm would become one of the packages. Forty hours would simply be one of the packages, and it wouldn't be the norm anymore. I think it would have a positive effect.

There isn't any reason for us not to also be talking about how to reduce that 40-hour norm. That was part of our history, reducing work hours. We stopped in 1937-38, when we passed the Fair Labor Standards Act.⁷⁰ We could easily reduce the 40-hour norm to 35 or 37½ or some other number, as other countries have done. When you do that you say as a country, we will take productivity growth in the form of greater leisure, rather than in the form of more money. Usually the earnings of lower-waged people are adjusted, so they make just as much in 37½ or 35 hours as they would have made in 40 hours.

PROFESSOR FELLOWS: I would like to address another point about what part-time jobs could do to full-time work. The other aspect we're leaving fixed here is that the nature of the work absolutely stays the same, and then we're going to just sort of fill it in. I'm sort of struck—and you can tell this is an academic, non-practicing attorney speaking—when somebody says “The TRO is due tomorrow.”

It's conceivable in our world that a judge would not require a TRO and all of the documents to be in tomorrow if she/he didn't assume you would be up all night to produce it. Everybody is under the assumption that everyone is there for however long the work takes to complete, and everything needed, is needed tomorrow.

We do get caught up in this idea about the nature of work that needs to get done immediately. The immediacy is built into the idea that there is somebody there to do it at ten o'clock at night or whenever. What we now think is feasible should really be infeasible.

That is a law office aspect. I think it probably is similar to stocking grocery shelves or whatever work is happening in the work place in which we find ourselves.

PROFESSOR DRAGO: This isn't difficult in every work place. Here is an anecdote.

There is a group of radiologists working in Wisconsin. There are five doctors in the group, all are women. They reached an

70. 29 U.S.C. § 201 (1994).

agreement when they started that nobody would work more than twenty hours a week. What did the other doctors think about that? The other doctors were jealous. The radiology group had a man ask to join the group, saying "I'll do it." Of course, as soon as he joined the group, he was up to thirty hours a week, and they had to let him go.

So it's hard to change the culture. But the disappointment that these men felt at seeing the success of part-timers should, over the long haul, cause them to say, "Hey, wait a minute. Why am I knocking myself out? I don't need that much money."

SPEAKER: I'd like to make some practical comments about part-time work and its feasibility, particularly in elite jobs. First of all, when Ruth Bader Ginsburg first came to the Supreme Court, one of her law clerks worked part-time, and I believe he was a man. I don't know if this is a custom she's continued.

Secondly, Jeff Lehman, the current Dean of the University of Michigan Law School, and his wife both worked part-time for many years—I don't know all the details—when their kids were young.

Also, with regard to the federal government, I think that how the feasibility of part-time turns out has a lot to do with the culture of the agency. There are certain agencies, like the EEOC, that are pretty good about it, and there are others that are terrible.

The Labor Department, at least in 1997, was allowing workers to work flexible days in fifteen-minute increments. The agency started it as an experiment with a small group of workers, and everybody was very hostile to the idea, and thought it would be inefficient.

SPEAKER: It seems that that produces two questions. One is—particularly if we're thinking about equality as well—the question of income subsidization, so that more people have available this kind of flexibility. It's an old, boring question, but I think the more seriously we take these possibilities in the context of increasing global inequality, we have to keep asking that question.

The other question is what these kinds of visions do to the effort to try to make care work—the work of caring for the kids while people choose the packages and do the increasingly flexible hours—more viable. The efforts to try to make the direct work of caring for kids in order for people to work more flexibly in many ways is pushing toward more formalization of care work. These efforts entail the child care workers being able to work from nine o'clock to five o'clock, with all the union wages, rather than work themselves around the flexible hours of the elite people that are pushing for more flexibility.

2000]

PANEL ONE

889

PROFESSOR FELLOWS: One of the proposals mentioned by Professor Williams, is the idea of child-care facilities on site of one's employment.

This proposal has, to me, a double benefit. Most importantly, it does allow for the interchange, not the isolation and abuse that can occur in individual homes with regard to child care workers. It does make them employees with health care benefits, control, vacation, and things. Regularized employment improves the working conditions of child care workers in very important ways.

It has the second obvious benefit of proximity to one's child and a sense of interchange. There are several anecdotes and actual studies about what it means to have your child care happening near and around your workplace. So I think that's one direction people need to take.

The other point to be made about child care workers is this: what does it mean that we are their employers? What are our responsibilities? You raised some really important questions about this issue that I don't think we have carefully addressed as we talk about child care and child-rearing.

SPEAKER: I would like to propose one possible tool in the process of finding the right solution for the elite professional problem, particularly for lawyers. I am with the Women's Bar Association of D.C., and we're working on our web site, as I know you are working on your web site for the Gender, Work & Family Project at American University.

I am struck by the fact that nobody has mentioned information technology and the home office, and the accessibility of the Web, and the fact that you can create a collaborative work environment and a virtual law firm, if you will. That's the project we're working on at the Women's Bar Association ("WBA").

Perhaps we could just pool forces here and get this kind of information technology structure and Web structure. These sorts of technology issues I struggle with all the time as a lawyer at a large law firm where we have policies about part-time partners. We are hemorrhaging our women. Our women are going out the door all the time, because they cannot realistically use these policies. If they do, they're being paid part-time and working full-time.

So again, I would suggest that we work together, as part of the solution, on the home office Web access issues. Anyone who would like to talk to me about that in conjunction with the Women's Bar, please see me afterwards.

BARBARA BERGMANN: Well, I'd like to draw attention to the fact

that the audience is, as far as I can see, 99 percent women. That means that men are not interested in this. They're not interested in changing. If we do pay attention to equality issues, which are at least as important as flexibility issues, then we have to worry about that. We have to worry what our strategy is going to be if we are interested in equality issues. I would assume all women lawyers are.

We have to ask the basic question. When we address the problem that Joan Williams has very ably put on the table, how do we mesh these worlds? Do we try to get the men to act more like the women would like to act? Do we all take flexible hours? Would that be too much of a compromise or, if it can't happen, a bar to equality? If we just say, "Well, we ought to try to get this flexibility," I think we are letting women in for a drop in the potential for equality.

I don't know how many of you have seen Cynthia Epstein's new book on part-time work in the legal profession,⁷¹ but it's very pessimistic. It shows, again, that the attempt by women to do part-time work has by and large been stigmatizing and not advancing.⁷²

So I would say, at least consider alternatives in this increase in flexibility and part-time work of which virtually only women are going to take advantage. Again, consider new institutions, public provision of child care with better hours, lower prices, and so on.

Also, don't forget that the law industry is a very special industry. Think of all the single mothers who are cleaning toilets in hotels after being pushed off of welfare. Part-time work isn't going to do it for them. Yet they need help in managing the connection between work and child.

I would further argue that we need to pay attention to the social provisions of, what have been up to now, family services. That direction is equally as important, if not more important. I would say it's more important than these family-friendly, mommy-track policies which men are not going to join.

SPEAKER: Care to comment?

PROFESSOR HARTMANN: Well, Barbara Bergmann, a distinguished economist, and I frequently disagree on the margins. We agree on the overall aspects of things, but we tend to often disagree on the margins.

71. CYNTHIA FUCHS EPSTEIN ET AL., *THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER* (1999).

72. *See id.* at 133-34 (finding that part-time work often has negative career consequences and that it is "stigmatized for its violation of [the legal] profession's norms").

2000]

PANEL ONE

891

I agree, Barbara, with you that child care—the institution of good, high-quality child care throughout the society—is essential. It should be highly subsidized so that low wage workers have access to it, and the workers doing the child care should have good working conditions.

In fact, regular child care hours do tend to control working hours. We did research on how many hours professionals actually work. There are only two professions out of all the professions—or very few, maybe it's four or five professions—where the average number of hours reported by workers is over forty. One is medicine and the other is law. I forget what the other two or three are; however, there are very, very few. A lot of times early on in your career, you have to work a lot of hours. But after awhile, the work becomes more routine, and you actually reduce your hours, probably without even realizing it.

So actually, most professionals are not working more than forty hours. I know when I used to work at a larger place than IWPR, the carpool and the day care hours were one of the things that regulated my hours, especially in this area with the second-worst congestion after Los Angeles. You can be working on a very important thing at work, but at a quarter of five, the carpool's leaving: out the door you go.

So there are structures you can build into your life that require you to leave, which most people will find acceptable. Carpooling is one of them. Child care hours is often another one. You say, "Oh, day care center's closing." Out the door you go.

So this does structure and control the number of overall hours one works. The more people realize that and start to do that, the more the judges will say, "Well, next week's fine for that TRO." We should be changing the ethic of what it means to work full-time. I think Barbara's quite right; we should also be making full-time work more manageable for parents.

SPEAKER: I know that there are a lot of questions; however, I want to come back in a way, link that back to Lucie's question that we really didn't address, which is the question of income subsidization. I think because of who we are in this room, it's very easy for us to get sucked into focusing on the problems of elite professional women. That's where we live, and those problems are important to us.

We should focus on the problem of ordinary women who are in and out of the bad jobs in our world, and how to deal with subsidizing those jobs through—I assume what you were referring to, Lucie, is what used to be our welfare system? No?

SPEAKER: ——. (Inaudible).

SPEAKER: Right, right, yeah. The benefit structure that we provide, either through the low income tax credit or whatever we want to call what the welfare system has become, or some other method, is critical to a lot more women than ourselves.

JOAN WILLIAMS: I wanted to pick up on a number of themes.

First of all, in response to Barbara Bergmann—and we're so honored to have her here, she's really one of the founding mothers of this whole enterprise—my fear is that what we're doing is not producing equality either. I think that we're all in agreement that something needs to change. The only issue is how you more effectively get closer to equality. My fear is—and we'll talk about this in the second panel—that in holding out as the ideal the goal of shifting women into full-time work in an industrialized economy that has the highest level of overtime other than Japan, we are setting up a goal that women are not interested in, and at some level, that I don't think men are interested in, either. I think we will talk more about that after lunch, as it's an extraordinarily important issue.

In response to Lucie's question, there are a couple of parts to the income subsidization issue. One is the question of how you organize and structure income subsidization programs.

Bracketing that, though, for a moment—though it's incredibly important, the political will to do that seems pretty weak right now—is it feasible—and I'd love to hear from the economists. If you have a structure, a family structure, where the average father still earns seventy percent of the income, you basically have an economy where fathers work overtime and mothers work undertime. What I'm proposing is to have a family where instead of the father earning seventy percent and the mother earning thirty percent of the income, both of them should work a more equal number of hours and earn closer to fifty percent of the income. That's certainly the hope that I have, partly because of my despair over the political will about income subsidization.

Then finally, very, very quickly, in terms of the accountability issue that was brought up, I think there are two things you can do on a very concrete level.

Number one: it's been found that in order for these policies to be effective, part of the annual review of managers has to be whether they have successfully implemented these policies.

The second thing—what Dickstein Shapiro has found in the law firm context, although I think it's probably true in the government as well—you can't have a face-off between the managing partner and a

2000]

PANEL ONE

893

second-year pregnant attorney. That's a joke. What you need is to have somebody at the managing partner level, or the equivalent in the government, who is charged with implementing the work/family policy and gets read-outs of people's contracted hours and their actual hours, such that if there's a real disparity, that managing partner type goes to the other managing partner types, or to the supervising partner, and says, "Are you having trouble implementing our work/family policy? Can I help you?"

That's absolutely the minimum kind of things you need for a work/family policy that is not guaranteed to be a marginalized mommy-track policy.

PROFESSOR DAVIS: — (Inaudible).

SPEAKER: Thank you, Professor Davis, I was going to speak on behalf of students. I'm speaking from the perspective of the law student, so I don't know about other students. The culture is started in law school, and it's not necessarily once you jump into the workplace that suddenly you're worried about how to balance your personal life with your work life.

I think about my personal schedule right now, and I don't feel like I could have a husband, let alone a child. I feel like I'm awfully selfish right now. My time is limited, even for myself.

Getting to that same point, if I'm relaxing, people look down on that. It's almost like the busier you are, the better the student you are, the more impressive as a person you are, the more attractive you'll be to firms and other employers.

As I was going through fall recruitment this year, I decided not to work for a firm, and firms also decided not to hire me. [Laughter] But while I was going through that, it was crazy. I was there for four hours just for an interview. Some of the things that I saw in fall recruitment were very depressing and scary, and I wasn't impressed. It was a turnoff, if anything.

One of the firms I went to did have child care in the workplace. That was nice; however, I just really wondered, did that mean that it was expected that those women stay at work longer because they had child care there? Did it mean that the women could run down between twelve and one o'clock and see their children, when they probably should have been eating lunch or taking care of themselves?

I think that that's a concern of mine, that this culture starts in law school. I'm not saying that law school should be made easier. But at the same time, I'm just wondering how that work ethic can remain high without necessarily trying to make your life constantly work-oriented.

PROFESSOR DRAGO: If I could just mention—is it Jim Rebitzer’s research? He has a particular theory on why lawyers work long hours, which has to do with the loyalty factor.⁷³ A lot of what is valuable about a law firm to the business clients is that information remains confidential and that people stay at that firm for a long time. When a senior partner retires or dies, his cases and his clients are going to be passed on to junior partners. The clients need to know that those people are very, very reliable and loyal. That is one of the most significant factors.

The way you prove it is by working these ridiculously long hours, because one of the things that happens when you make partner is you are given a huge windfall gain. You are given a gift. Your salary doubles or goes up quite incredibly, and you’re now sharing in the profits of the firm.

That’s very illogical. I mean, why on earth is it happening that some group of men gives gobs of money to a younger group of men only when they make partner?

His theory is that it was an economic thing that developed in that industry to reward and foster the loyalty that will keep those clients coming to that law firm.⁷⁴ Then he looked at accounting. It has a different structure with a lot more partners, and loyalty is not as important in accounting. So it’s interesting to think about what some of the economic reasons for the way it developed are.

He basically argues that once these things become institutionalized, it’s very difficult to change them. It might be that everybody would say, “they’ve got this ridiculous equilibrium up here, and everybody would really prefer an equilibrium down here, and if we could get from here to there, it could make this equilibrium work.” But it’s very difficult to get from one to the other. So, I sympathize with your problem.

SPEAKER: Good morning. I just wanted to make a couple of comments. One is that I am pro-technology; however, I also find that technology is going to lengthen the work day for men and women, because even if you have to pick up that child from child care or get in that carpool, you can e-mail anything to home and work on that brief or work on that motion there. Your day is extended long after those children are in bed.

The second thing is, I’m a former Department of Justice employee too, and the part-time—which was never offered or never considered,

73. See Renee Landers et al., *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, 86 AM. ECON. REV. 329, 329-48 (1996).

74. See *id.*

2000]

PANEL ONE

895

because it wasn't available in my section—was thirty-two hours a week.

For me, I have two children a year apart, and they're still babies. That was never an option; thirty-two hours was never an option that I considered. But that's standard policy at the Department of Justice.

Third, I've just recently been through the process of looking for part-time work. I just don't think there are a lot of jobs out there. I mean, the fact of the matter is that the Department of Justice doesn't offer it. If they do, it's a non-lawyer job. You're in a policy job rather than in a litigating position.

I was finally able to get part-time work two days a week, but I have no benefits. I actually didn't care. I was at the point that I just wanted some balance in my life, and I was willing—I'm working at a great job—but I was actually willing to do just about anything for work.

PROFESSOR DRAGO: Just a couple of brief things. First, in our study of teachers, when we asked the typical teacher "How much are you working, how much should you work," they said, "I should work less" on average, except those who are doing a lot of child care. They feel under-worked. They feel horrible. They're denying their employer those hours that they should be giving.

The ideology is just perverted around how much we should all be working. There is some economic basis for long hours. But a lot of it's just ideology and shared beliefs.

The second thing is, in response to Lucie's question, what about poor women? Suppose we have a group of poor women and you ask, "how can we help them?" Barbara Bergmann suggested long ago that we make fathers pay more child support and that we mandate it, and the states have done that. Joan suggested a dramatic ramping up of father responsibility to financially take care of their children in the event of divorce. That takes care of another group. The high-quality, part-time jobs take care of another group, because the penalty, the per-hour penalty for going part-time, as in your case, is huge. It's probably forty to fifty percent, or something like that. So if you can get rid of that penalty, you'll also help poor women. There is, however, a group that's left out. If you're worried that this group would be even more marginalized because they get smaller in this event, you're probably justified in that concern.

SPEAKER: I'd like to go back to the strategy issue for just a minute, the political strategy issue, and the question of how to pitch a movement in terms of the encumbered worker versus family values versus caring for children, and the demographics you've already commented on.

But I'd like to raise another issue, and this goes to something Mary Lou Fellows talked a little bit about. The issue is—going back to the 19th century—the maternalism, the linking of certain work-related benefits to maternal care and so forth, and the breadwinner kind of impulse behind many progressive reforms.

Do you see similar dangers with regard to the focusing in on care issues currently? Or is the climate now different so that we don't have the same kinds of dangers? Those are the kinds of issues that I'd really be interested in hearing some thoughts about in terms of political strategy—the upsides and downsides of some of those issues.

SPEAKER: Well, I feel you should be able to respond to that.

PROFESSOR DRAGO: Yes, there are dangers. Elder care is becoming a bigger issue, and it will become much bigger. The amount of elder care the American people will provide will probably double in the next ten years. The problem is, eventually people do get sick. The numbers are already out there. Our parents, for many of us, aren't ill yet, but they will be. We're going to have to care for them. So that's kind of a danger in terms of promoting a child care strategy.

The new right has framed a lot of the war against women in terms of how women should be at home taking care of kids. They tapped into the deep-seated value of children.

This is the only reason we still have a public education system in this country. All the political ideology says we shouldn't even have public education because we shouldn't have anything in the public except the military. The ruling ideology is anti-government. Yet because kids are in those schools, people say, "Okay. We're willing to pay taxes and take care of this."

PROFESSOR HARTMANN: I would just comment that we shouldn't put all of our eggs in the children basket. If you look at all the households in the United States at any one time, far fewer than half have children under eighteen in them. There are a lot of older people, a lot of single people, a lot of married couples whose kids are grown. If you look at those with children under six, it's an even smaller amount.

I think that children are not universally appealing as the argument for paid family leave. This is actually one of the debates that's going on now in the unemployment insurance community. There's a lot of anger at the President for singling out, as the only group for which unemployment insurance should be expanded, parents of infants or newly adopted children. He said, "You know, parents, new parents, should be able to get time off for the family care period after the

2000]

PANEL ONE

897

birth of a child or the adoption of a child.” Well, that’s singling out one reason in all the Family and Medical Leave Act⁷⁵ reasons to expand unemployment insurance. It made a lot of people pretty mad. Also, it’s pretty illogical. How can we pick that reason out of established law among all other reasons? That’s a tiny proportion of people.

One thing I would like to comment on—I think it was Joan who said it earlier—is that work and family have been so totally separated in our concepts. One of the things we tried to figure out was how many working women have babies in any given year. You cannot figure this out from any data set that we have. You ask workers questions about workers, and you ask women questions about their fertility, but when you ask women questions about their fertility, you don’t ask them whether they happen to have a work life.

There are two different questions that we looked at in the Current Population Survey. Are you working now, and do you have a young child—that’s one possible answer to the question. The other was, were you working when you had a baby and did you leave work? The answers to those two questions turn out to differ by about a million women.

So if you look at the answer to one question, you say, “Oh, there are 1.5 million working women a year who have babies.” If you look at the answers to the other questions, you say, “Oh, it’s 2.5 million working women a year who have babies.”

Well, that’s pretty big—a million here or there. If you’re up in the hundreds of millions, it’s not so bad. However, when the base is 1.5 million versus 2.5 million, you’d think we would have a better answer to that. Maybe it was 2.5 million and 3.5 million. That’s a small number of all the workers. I think we have a workforce now of something like 120 million people.

So it begins to look like a privilege for a few. That creates jealousy and animosity. So I am for a very much more broad-based approach to the issue of what workers’ rights are in terms of getting reduced working time or any other family leave benefits.

SPEAKER: I’m not at all convinced that our society—that the pull of children is as strong as Joan suggests. I think we give it a lot of lip service, but much less in the way of support and money.

SPEAKER: Thank you. Obviously, this is a large question that I don’t think can be addressed here. I’m wondering, in terms of practical policy proposals, what the panel is thinking in terms of the

75. 29 U.S.C. § 2601 (1994).

Supreme Court's recent federalism decisions which greatly limit the ability of the federal government, of Congress, to legislate new policies, and the chilling effect these decisions have on Congress, even if certain laws could be upheld were they challenged. I'm also wondering whether the reforms we're thinking of are going to be happening mostly at the state level, and in terms of the climate with regard to the federal/state power, how these ideas would be implemented.

SPEAKER: Well, I guess I will exercise my prerogative to respond on this, because it's something I have been working on. It seems there are a couple of things the federal government can do. One thing it can do, and we've discussed this a little bit, is use its money more.

One thing I have discussed is creating a set-aside or adding to the existing set-aside programs for businesses that are family-friendly—successfully family-friendly, not just lip-service family-friendly. The details of how to work this out are complicated.

The federal government could use this money and so could state governments. Also, you're starting to see local governments do more of this, requiring certain benefits too. I think there is as much activity on the local level as on the federal level, which isn't a lot, but I think there is some.

One problem I've seen with the Family and Medical Leave Act⁷⁶ is it seems to have truncated state efforts. The Family Medical Leave Act for the most part has become this ceiling of benefits, and without the paid aspect, it really isn't something that people are using to the extent that would be ideal. A lot of people just can't afford it.

Unions are starting to pick up some of the slack, I think, smartly. There currently doesn't seem to be much activity in terms of family leave or paid leave at the state level. I think paid leave under the Family and Medical Leave Act would be a tremendous addition to it. My guess is it's a ways off, but maybe not as far as I think.

JOAN WILLIAMS: I wonder if I could go ahead and say one quick thing about the issue of children? The management literature shows very strongly that the only practical way to implement these flexible policies is, as one person said, not to ask "why do you need it," but "will it work?" Although I think it is important to talk in the language of children and in the language of caring generally, I think that the only practical way to implement a society of flexible workplaces would in effect have benefits for everyone, because that's the only practical

76. 29 U.S.C. § 2601 (1994).

2000]

PANEL ONE

899

way to institute that kind of policy.

PROFESSOR SELMI: Well, please join me in thanking all the panelists for a terrific panel.

(Whereupon, the PROCEEDINGS were adjourned.)

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