I. Introduction

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

The vast legal literature, which discusses the work-family tradeoff, concentrates on the issue of how to smooth the conflicts and obstacles that arise within the workplace, when women enter motherhood or are otherwise essentialized as mothers and not professionals. The objective of most scholars is to outline policies that will enable women (and men) with care responsibilities to compete more effectively in the labor market. The underlining assumption of this scholarship is that most women can choose to get married and/or have children, but what they risk after they make this choice is jeopardizing their career prospects. The causality of the work family tradeoff is framed in either discrimination theory, which targets workplace practices, such as inflexible long working

* Assistant Professor, Radzyner School of Law, Interdisciplinary Center (IDC), Israel. Comments can be emailed to srabin@idc.ac.il

1 For discussion of the empirical data see Part II. B-C.

hours and absence of mandatory paid parental leave as negatively impacting women with
care responsibility, or within a theory that the unequal sharing of childrearing work
among spouses results in less time for women to invest in paid work. These, of course,
are complementary explanations; both focus on the time constraints faced by women who
perform care work.

The perspective of this paper is different. It looks into the disadvantage that obtaining an
education and a career pose in the marriage market for women. This is by no means a
new observation. It is a popular perception that “the more successful the women, the less
likely it is that she will find a husband or bear a child”\(^3\). The paper investigates whether
this statement can be substantiated by scientific research – finding unfortunately that it
can. In the marriage market women pay a “success penalty”. The source of the penalty
can be explained both in social and economic terms. There is a social norm defined by
anthologists as “female hypergamy”, that is that women tend to marry up in various
dimensions including education, professional and material.\(^4\) Hypergamy will result in low
sex ratio in the marriage market of successful women\(^5\). Another explanation, drawn from
the economic literature is that the returns from specialization and exchange are greater
when partners differ in market relative to home productivity\(^6\). If education and careers
increase market productivity more than home productivity, then marital surplus will be
greater in hypergamous marriages. The fact that women pay a success penalty is
extremely relevant for the career- family discourse:

\(^3\) Maureen Dowd, Dominant Women don't get Husbands..., http://society.krishna.org/Articles/2002/04/008.html

\(^4\) Elaina Rose, Does Education Really Disadvantage Women in the Marriage Market 2, University of Washington

\(^5\) Sex ratio is the number of men for each woman in a reference population. Sex ratios are powerful in affecting
marriage rates. An increase in the sex ratio may increase female power in the marriage market and vise versa. See
Joshua Angrist, How Do Sex Ratios Affect Marriage and Labor Markets? Evidence from America's Second
Generation, IZA Discussion Paper No. 368, (September 2001), available at

\(^6\) Gary S. Becker, A Theory of Marriage: Part II, 82 J. POL. ECON. S11 (1974); see also GARY S. BECKER, A
TREATISE ON THE FAMILY 14-24, 30-53 (1991). (Becker concludes that the household division of labor is
efficient in light of presumed differences between men and women: either women specialize in the household because
they have a comparative biological advantage in household work or because men have a comparative advantage in
market work attributable to discrimination against women in the workforce).
It may shift the focus from analyzing the impact of work practices in the labor market on the lives of women to the impact of women’s educational and career decisions on their status in the marriage market. The current understanding is that the difficulties women face are the result of inflexible workplace structures or unequal spousal sharing of care work. This is only relevant for women who carry these types of responsibilities. It ignores the constraints of the marriage market - that many women are not able to balance careers with family responsibilities because they do not have a family at all, and not out of choice. The assumption that most women can get married and have children is somewhat stereotyping. Concentrating only on how to ease the dual burden is oversimplifying the forces that are at play, and does injustice to this complicated issue.

This paper attempts to address the issue from this direction. Asking how can women who aspire to educational and professional success increase the probability they will not need to make sacrifices on the family front. The basic argument is that it is more a matter of timing and less of time constraints.

The models that were developed so far are based on temporal sequencing. They imply that women must sequence tasks in order to avoid a tradeoff between career and family. Shedding off the rhetoric, formal feminists are still clinging to the initial position of the feminist movement of “career then family”, an approach that will enable women to best compete in the labor market. This paradigm has proven disastrous on the family front. Striping care feminist theory to its core reveals that underneath the slogan of “balancing tasks” the sequencing of tasks recommended is the traditional fifties model of “family then career”. It is a modified weakened version. Women are not called upon to be “stay at home moms” and then enter the labor market (the fifties model), because the labor market is unforgiving to long absenteeism from labor market participation. But parenting accommodation theory is a tool which enables women with family responsibilities to partially put on hold their careers, while attending to their family needs. Accordingly, rearing children is the primary responsibility and jobs must accommodate it.
The paper analyzes the feasibility of a true simultaneous approach: Whether women can enter motherhood while advancing their careers at the same time. This is without waiting for the coming of the Messiah in the form of parental accommodation rights in the workplace or benevolent spouses who readily share the burdens of care work. The conclusion is that today the most effective path for women who ex ante declare they wish to “have it all”, is not postpone their plans to have a family in order to safeguard their career opportunities. While this sounds as the rebirth of Wonder Woman (whom we all know has passes away), the claim is that strategy wise, when looking at empirical data, women who married young and had their first child by age 30, were the most likely to have both families and careers\(^7\). Women who delayed motherhood did better on the career front, percentage wise, but their prospects of success on the family front were very dim. Thus altogether they faired much worse than those who did not defer motherhood. In a similar manner women who delayed their commitment to the labor market were more likely to be married and have children, but were confronted with insurmountable barrier to kicking up their careers once they were relieved from their care responsibilities\(^8\).

The simultaneous paradigm accepts social norms within families, and labor market practices as a given. It is foremost a pragmatic model which offers a rule of thumb of how to prioritize in an imperfect world. A world in which regulatory powers are not an effective tool in reforming the design of jobs, and social change is a tenuous and on going process. The model also takes into account other social norms that are ignored by the two sequential models. Both focus on concrete social obstacles, i.e. the design of jobs and spousal behavior in sharing family responsibilities. It is a process of rationalizing what possible factors are interfering with the ability of women to master both tasks. But other factors are disregarded:

\(^7\) See empirical data in Part IVA.
\(^8\) This model does not contain moral judgment on the preferences of women – family or career. There are women who do not want to jeopardize their careers by including in the matrix care responsibilities. If this is a conscious choice it is very rational to postpone any family commitments. Other women are unalarmed by the prospects that performing care work might impede their careers. This model is relevant for women that insist they want both. In this case the simultaneous approach should be taken seriously.
For example, the fact that the attainment of higher education impedes the chances of women to marry and have children, even if these women do not enter the labor market in a career path. This has nothing to do with the tension between career and family. This is an expression of the way women are stereotyped in our society. In the marriage market education increases the value of men, but decreases the value of women. Another example pertains the argument presented by care feminists that one of the reasons career women remain single is that they are overworked, and in the relevant years do not find time to go out and meet eligible men. This may be true, but at the same time it should hold true for career-oriented men. The latter group seems to fair much better in the marriage market than their colleague females, and also fellow men who work less hours and earn less. Therefore the time bind argument in this context is not convincing. A plausible explanation is that high power women are less appealing in the marriage market.

The paper proceeds as following: Part two discusses empirical studies, which can inform us of the career-family tradeoff that women are confronted with in the United States. In this part I also rebut the claim that the segmentation in women’s lives is the product of choice. That is that many women prefer concentrating only on their professional or family life. My perception is that these choices are a second best for a group who is convinced they can’t have it both ways. Part three criticizes reforms to restructure the labor market in order to enable women to balance their careers with family responsibilities. Most policy schemes can at best secure a woman’s economic situation (paid leave or job security), but they cannot guarantee professional growth or career tracks. In this part the possibility of shifting housework and care work to men is also discussed. This avenue has the advantage of confining itself to the nuclear family cell, and does not attempt to interfere with prevalent labor market practices. However the prospects of changing these allocations are meager, as they are entrenched deeply in current social norms. Part five presents the simultaneous approach and its advantages. Part six concludes.

---

II. The Facts: The Career-Family Tradeoff Which Women (But Not Men) Confront

A. Preliminaries

Detecting trends and patterns of women’s labor market behavior is an exhilarating task. The data is at the same time encouraging and discouraging, and much confusion is present. The following account is an impartial attempt to put some order in the sea of existing data.

The entrance of women in significant numbers into the labor force, since the mid sixties, is one, if not the most, important changes in labor market composition. It may be referred to as the feminization of work.\textsuperscript{10} The general growth in employment to population ratios\textsuperscript{11}, which has risen in the past three decades\textsuperscript{12}, is attributed to the growing number of women engaging in paid work. By the year 2002 59.4% of all women in the United States were working\textsuperscript{13}. This occurred while employment rates for men decreased slightly\textsuperscript{14}. Another interesting fact is that employment to population ratios of women is significantly higher in the United States than the average in European OECD countries\textsuperscript{15}. Less known is the fact that the largest increase in women involvement in market work

\begin{thebibliography}{99}
\item Employment to population ratios is the percentage of people who work in the population, usually calculated for persons ages 16 to 64.
\item In 1970 the employment to population ration stood on 57.4%, by 2002 it crept up to 62.7%, 2003 Statistical Abstract of the United States (US Census Bureau), Table 589, p. 386, http://www.census.gov/prod/2004pubs/03statab/labor.pdf
\item Id. at Table 591, p. 387. This is in contrast to a mere 40.8% female employment to population ratio in 1970. Id at Table 589, p. 386.
\item From 79.7% in 1970, to 74.1% in 2002. Id at Table 589, p. 386.
\item According to the OECD Employment Outlook, in 2001 the employment to population ratios for American women stood on 67.1% compared to 50.9% in OECD Europe, see OECD Employment Outlook 2002: Statistical annex, Table B, p. 306 available at www.oecd.org/dataoecd/29/42/1939233.pdf9233.pdfId. This is important for later discussion pertaining the desirability to model policy after the experience of western European countries with maternal and parenting rights such as paid leave and job protection. See also Dora L. Costa, From Mill Town to Board Room: The Rise of Women's Paid Labor, 14 J. ECON. PERSP. 101, 114 (2000) ("Although comparisons of women's success in business are harder to make across countries, the available data suggest that women in the United States fare relatively well.")
\end{thebibliography}
occurred among married women with young children. Between 1970 and 2002 the number of mothers with children younger than six who participated in the labor market doubled, from 30.3% to 60.8%\(^{16}\).

The price theory model of the supply and demand for labor predicts that a huge influx of any group of workers into the labor market would reduce their earnings and occupational positions, other things being equal\(^ {17}\). This did not occur in the case of women entering the labor market. The earnings of women relatively to men are higher than ever, and the wage gap is decreasing\(^ {18}\). One plausible explanation to this phenomenon is an increase in the educational achievements of women. Women on average are now more educated than men. Whereas in 1960 the ratio of female to male bachelor’s degree recipients was 0.54, in 2001 the ratio stood on 1.33\(^ {19}\). This means that women are now 33% more likely to earn a bachelor’s degree than men. It is an incredible achievement for women. Good education opportunities for women translated into better representation of women in top occupations. In 2002 45.9% of all executive, administrative and managerial employees were women, as were 30.6% of all physicians and 29.3% of all lawyers and judges\(^ {20}\). Even in occupations that were considered as male territories such as engineering and math there is growth in female employment participation\(^ {21}\).

But not all news is merry in womenland. Apparently the unprecedented success of women in attaining higher education and professional growth came at a price. Education

\(^{16}\) See 2003 Statistical Abstract of the United States (US Census Bureau), Table 597, p. 391 available at http://www.census.gov/prod/2004pubs/03statab/labor.pdf. For single mothers with children under 6, the rates since 1999 are even higher. For example in 2002 participation rates for this group was 71%.


\(^{19}\) These ratios were computed by me from the 2003 Statistical Abstract of the United States (US Census Bureau), Table 298, p.191 available at http://www.census.gov/prod/2004pubs/03statab/educ.pdf.


\(^{21}\) Today 10.8% of all engineers and 30.8% of all mathematical and computer scientists are women. Id. Compare to 5.8% representation of women in the engineering profession in 1983. This translates to an increase of almost 100% in two decades.
and success in the labor market decrease the chances of women to be married and have children. The following summary details and discusses recent studies on this matter.

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

Harvard economist Claudia Goldin looked into the effect of college education on the career-family choices, which four generations of American women made. Goldin considered four cohorts of female college graduates, each about 20 years in duration.

For cohort I – a group drawn of the upper echelons of American wealth, graduating around 1910, and born around 1890, college education distanced them from the opportunity of marriage and children. More than 50% of college graduate women in this cohort either did not get married or, if they did so, did not have children. Although college men in this generation married and had families at the same rate as men without higher education, college women were set apart from their non-college counterparts. The general conclusion of the turn of the century studies on nuptiality and college was that the college experience both caused and enabled women to have lower marriage rates. Employment opportunities were open for women of this cohort almost exclusively in the teaching positions. Of the college graduate women who were 45-54 years old in 1940, and never married 88.4% were in the labor force that year. This cohort was characterized by Goldin as the family or career generation.

Cohort II, born around 1910 and graduating around 1933 were more successful at the marriage and childbearing matrix. They usually remained at work for several years after graduation, frequently with aspirations, rarely fulfilled, of a full career. Eventually family intervened and these women were forced out of the labor market. Only 19.1% of women college graduates did not marry by age 45-54, still a considerably higher rate than the...
6.1% for those who were not college educated\textsuperscript{26}. This cohort can be defined as a career then family generation.

Cohort III graduating around 1955 was the first generation of women to enjoy greater accessibility to college education. But college served mainly as a meeting forum for the marriage market of eligible college graduate men\textsuperscript{27}. Women graduates got married early and started a family. Among female graduates who eventually married, 57.2% did so before or within a year of college graduation. Only 10% of college graduate women born between 1926-1935 did not have a baby by age 35-44. Once children were grown, women did enter the labor market, once again in the teaching profession in which teaching credentials generally remained valid during job interruptions. This is indisputably the manifestation of the family then career era, in which the returns on college education were ripped primarily in the marriage market and not the labor market\textsuperscript{28}.

Cohort IV graduating around 1972 were the first for whom a considerable fraction have considered the career path. At the time the survey was conducted (1991) 29% of those attaining a B.A degree had not yet had their first birth\textsuperscript{29}. Among those with more than four years of education 33.3% did not have their first birth\textsuperscript{30}. This cohort expressed a preference for having a career and family, but sequenced their actions by concentrating first on the career front and then on family. As a consequence, this cohort experienced a high rate of childlessness.

\textsuperscript{26} Id. At 37.
\textsuperscript{27} In 1960 the probability that a 30-39 year old woman was married to a college graduate, vastly increased by herself graduating from college. Almost two thirds of all college graduate women were married to a college graduate. Only 10% of high school graduate women were married to a college graduate. Not only did college-educated women enjoy higher probabilities of marrying a college man, but they also married men with higher incomes within each educational level. Id., at 40-41.
\textsuperscript{28} The ratio of college enrolment was two men for each woman. The supply of husbands greatly outstripped the demand. The college marriage market sex ratio was 2, which predicts high marriage rates for women. College graduate women who married college graduate men (two thirds) ripped indirect returns to their education by the higher income of their spouses. Id., at 39.
\textsuperscript{29} These women were between the ages of 37-47 in 1991 Id., at 22.
\textsuperscript{30} Id. at 43.
In another study Elaina Rose\textsuperscript{31} finds that women with more than a college degree were likelier to experience childlessness: 81.5\% of women with 16 years of education were mothers at 44-45, while only 63.4\% of women with a professional degree or doctorate had children\textsuperscript{32}. This study also looked into the relationship of education and marriage among men. Increased education was found to be associated with greater likelihood of marriage at all ages. The relationship became stronger with time. In 1980 an additional year of education resulted in 0.4 percentage point increase in the likelihood of marriage. The comparable numbers in 1990 and 2000 were 1.1 and 1.8 percentage points respectively\textsuperscript{33}.

These studies concentrated on the effect of education on the prospect of marriage and motherhood, less on the effect of careers. Education in itself could explain lower marriage and motherhood rates among college-educated women, regardless of their actual labor market position\textsuperscript{34}. This somewhat defeats the argument that the time bind that goes along with the need to balance careers and family hinders women’s prospect to succeed in “having it all”. It directly strengthens my argument that educated women are less desirable in the marriage market, while men are more desirable\textsuperscript{35}.

C. The Effect of Careers on Family Status

\textsuperscript{32} Id., at 15.
\textsuperscript{33} Id., at 12.
\textsuperscript{34} Except for cohort III in the Goldin study. This cohort presents a special case in which college facilitated marriage. But even for this cohort marriage rates among college graduate women were lower than for high school graduates. See Goldin, supra note 22, at fn. 34.
\textsuperscript{35} This can support a signaling thesis. Education can signal ambition. The longer women stay on the education track the signal is stronger. The reason women are devalued in the marriage market in proportion to their ambition is quite obvious. These women signal to prospective partners that they do not intend to specialize within the household in care work. The implication is that there is a threat that some care work will be shifted to the spouse. If the preferences of men are to specialize in labor market work, they prefer partners that intend to specialize in care work. This hypothesis is strengthened by research showing that men tend to worry more than women do about the effect of women’s career commitments on the quality of mothering, see ” Lee Badgett, Pamela Davidson, Nancy Folbre, and Jeannette Lim, Breadwinner Dad, Homemaker Mom: An Interdisciplinary Analysis of Changing Gender Norms in the United States, 1977-1998 (2000)
A study published recently in the Harvard Business Review documented the sad fact that successful women in the labor market are less likely to be married and have children than other women in the population. This is in stark contrast to men. For men the likelihood of being married and having children increases with labor market success. According to the study, only 60% of high achieving women, ages 41-55 were married as opposed to 76% of men in this age group. When moving to the ultra achievers category the figure for women drops to 57% and rises to 83% for men. The prospect of having children for high achieving women is even dimmer. In the 41-55 age group, 33% of high achievers and 49% of ultra achieving women were childless, as opposed to 25% of high achieving men and 19% of the ultra achieving men.

A handful of other studies conducted throughout the nineties, surveying different segments of the population, documented that women committed to careers experienced high childlessness rates, ranging form 34 to 61 percent. For example, a 1993 study of Harvard’s female graduates in professional schools reported 34% were childless. A 1994 study found that 61% of female American managers were childless. A 1996 study of women in corporate leadership documented a 36% childlessness rate. A 1998 study of women in the academia found that 50% were childless. A 2001 study of women on

---


37 High achievers are women who are earning more than $55,000 in the younger group, and $65,000 in the older group. Id at5-6.

38 Ultra high achievers are women who are earning more than $100,000. Id at 5-6.

39 Id., at 7.

40 Summaries of these studies are in Sylvia Ann Hewlett, Creating a Life: Professional Women and the Quest for Children, fn.8 313-314. (2002).

41 Watkins, Herrin, & McDonald, The Juxtaposition of Career and Family: A Dilemma for Professional Women (1998) available at http://www.advancingwomen.com/awl/winter98/awl98_watkins5.html. This study relies on an earlier survey by Nancy Hensel, Realizing Gender Equality in Higher Education: The Need to Integrate Work/Family Issues (1991) available at http://www.ericfacility.net/databases/ERIC_Digests/ed340273.html. The authors of these studies suggest that the high childlessness rates among women of the academia is the result of the time constraints the tenure track creates, which coincides with the prime fertility years of women. Academia is perhaps the archetypal professional institution in which there is flexibility, ability to work at home, and inability of employers to monitor precise time commitments. The fact that high childlessness rates are reported for this sector leads me to suspect that other factors are influencing this outcome, perhaps the specialization of academia women in knowledge and their persistence in attaining formal education.
Wall Street reports that only half of the women had children compared to 74% of the men.\(^{42}\)

Another study, concentrating on the returns to career decisions in the marriage market for men found that marital status was strongly correlated with career choices.\(^{43}\) Conditional on wages, blue-collar workers were significantly less likely to be married than white-collar workers. Higher wages for men increased the chances of being married.\(^{44}\) The author concludes that: “the literature ignores the evolutionary instinct in men to achieve material success in order to attract female partners. This instinct is alive even in today’s modern economy. If there were no returns to career outcomes in the marriage market, the result suggest that men would work less, study less, and if they did work, they would work more in the blue collar sector than the white collar sector”\(^{45}\)

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

This sort of contention typically comes in two forms. Either it is argued that career women do not want children, regardless of their professional commitments.\(^{46}\) A subtler claim is that childless career women understand that care responsibilities will hinder their career prospects and therefore they consciously choose to give up on this facet of life. It is a choice under constraint, but still a choice.\(^{47}\)

---

\(^{42}\) Women in Financial Services: The Word on the Street, an independent study undertaken by Catalyst Organization, available at [http://www.catalystwomen.org/press_room/factsheets/fact_women_in_financial_services.htm](http://www.catalystwomen.org/press_room/factsheets/fact_women_in_financial_services.htm). Other relevant facts from this survey are that 67% of the women were married or living with a partner as opposed to 86% of the men; 79% of the partners of women were working full time, while only 28% of the partners of men worked full time.


\(^{44}\) Id., at 8.

\(^{45}\) Id., at 31.

\(^{46}\) Perhaps representing the fact that the opportunity cost of childbearing is rising as women establish high-end careers, making parental time increasingly expensive.

\(^{47}\) See an example of this type of reasoning in To have or not to have: Reasoning of Childfree Wives and Husbands, available at [http://wl.middlebury.edu/zgan/stories/storyReader$23](http://wl.middlebury.edu/zgan/stories/storyReader$23) (“Women are more likely than men to consider career opportunities as a cost of having children. Since the responsibility of looking after children and doing related housework mostly falls on women, they would miss a lot of opportunities of promotion, further education or other kind of personal development, which already favor male employees much more. In addition, it is women who actually give
This portrayal is not substantiated empirically. Most childless women do not make at any stage of their adult life a deliberate choice to remain permanently childless. The lack of children in the lives of successful women is not for lack of want. For example, the Goldin study found that of the women that remained childless in 1991 62.9% desired children when asked about this issue in 1978. This translates to 19% of the entire cohort that were disappointed with the “family outcome.” Goldin rebuts the hypothesis that there is a self-selection process in which women who choose to go to college are less interested in matrimony and maternity than their non-college peers, concluding that college actually provided a treatment effect.

In the Hewlett survey women reported that being childless was not a conscious choice for them, but rather a “creeping non choice”, meaning that circumstances, usually career oriented, dictated the childless path of their personal life. Many deeply regretted this outcome. Some defined their lives as a failure because of being childless. 31 percent of the ultra high achieving women in the 41-55 age group said they still wanted to have children. Only 14 percent of high achieving women agreed with the statement “looking back at their twenties when they graduated from college they definitely did not want children”. These numbers are somewhat higher than the average for the female population at large. In westernized countries, approximately 9-12 percent of young birth to the child. Managerial or administrative women usually cannot afford the time off to give birth. And many companies are unwilling to allow paid maternity leaves, or even fire any female employee who gets pregnant. Thus, having children can not only hurt women's chances of development in career, but can also cost them their jobs.

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

49 Claudia Goldin, Career and Family: College Women Look to the Past.” In Francine Blau and Ronald Ehrenberg, eds., Gender and Family Issues in the Workplace 49 (1997). The 19% disappointment rate is computed by 63%X 30% (where 30 percent represents the percentage of women with no births at the end of the fertility period).

50 Id. at 34-35.


52 There is a body of anecdotal evidence on this issue in in Sylvia Ann Hewlett, Creating a Life: Professional Women and the Quest for Children, (2002).

53 Id., at 87.

54 Id., at 86.
women state that they expect to remain childless. But 14 percent is still significantly lower than the percent of women who end up remaining childless. Leading to the conclusion that the majority of women in the childless category are disappointed with this outcome.

E. Summary

The data sketches the following picture: The American women work revolution was successful on many frontiers. In the past three decades there was a tremendous growth in women’s education attainment and participation rates in the labor market. The increase in women’s labor supply was not followed by depressed wages. Women are able to enter high-end jobs and their representation rates in lucrative professions and jobs are catching up with those of men. But success for women is not costless. Marriage and motherhood rates among women decreases with educational and professional success, while increasing for men. This veracity leads the vast majority (84%) of high achieving women to conclude that it not likely that women can have it all in terms of career and family.

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

III. An Issue of Time

55 Hewlett presents studies pertaining this issue in fn. 4, 312.
56 According to the Hewlett and Goldin roughly 20 to 30 percent of the entire relevant cohort (defined either by education or career success) remain childless unintentionally.
57 Hewlett, supra at 19.
A. Laying Down the Theoretical Background

The promise of sex equality carries with it a social obligation that women will enjoy the same opportunities as men to fulfill themselves in relation to career and family choices. This day is yet to come. Currently there are two schools of thought offering remedial policy agendas to tackle this problem. Obviously, one concentrates on reforming workplace practices; the other targets the structure of sharing family responsibilities within the household\textsuperscript{58}. There is agreement within the relevant literature that the dual burden of work life and family life, placed disproportionately on the shoulders of women in our society, is the source of the problem\textsuperscript{59}.

Women who enter motherhood and then carry the bulk of family responsibility are expected to compete in the labor market on jobs and promotions with men who carry little or no such responsibilities. In working environments, in which time commitment on behalf of workers is highly valued, and in many cases a perquisite of employment or advancement, women with family responsibilities cannot fair well. A woman can certainly choose to handle her career by mirroring the behavior of her male colleague. She does away with her family responsibilities.

Advocates for restructuring work practices to eliminate the gender time gap are associated with the feminist care movement\textsuperscript{60}. Their claim is that desirable employment opportunities are structured around an “ideal male worker”\textsuperscript{61}. This worker has no time constrains. He is willing to relocate and travel on short notice. His primary commitment, with relation to his time, is to the workplace. Put bluntly; he never says ”no” when asked if he can put more hours on the job.

\textsuperscript{58} Vicki Schultz, Life’s Work, 100 COLUM. L. REV. 1881 1904-1905 (2000) (noting that one's view of the primary cause of women's economic disadvantage as either "women's position within families" or women's position within "the workworld" dictates one's view on the "primary locus" for policy change).

\textsuperscript{59} See references cited in supra note 2.

\textsuperscript{60} On the development of the feminist care movement see Mary Becker, Care and Feminists, 17 WISC. WOMEN’S L.J. 57 (2002).

\textsuperscript{61} Joan Williams, Unbending Gender: Why Family and Work Conflict and What To Do About It, 1 (2000) (defining the “ideal worker” as one who “works full time and overtime and takes little or no time off for childbearing or child rearing, in other words, the traditional male employee”).
Care feminists perceive current workplace practices, which emphasize time commitment, as discriminatory because they disparately impact women. Workplace practices which de facto bar women with family responsibility from succeeding are called upon to be amended. The format is to install a duty to accommodate the needs of working parents, similar in substance to the accommodation requirements of the ADA. One way to accommodate the needs of women with family responsibilities is to institute career paths with reduced hours. These career tracks will not penalize workers like today’s “mommy track”, but will offer promotions and career growth. Other recommendations are buffering up the Family and Medical Leave Act with paid maternity and fraternity leave, and lobbying for unpaid career breaks with job security for up to 3 years for employees who want to take care of their children. Another idea is to cap via regulation the length of the workday and workweek for all workers. This will eradicate altogether the concept of an ideal worker able to work endless hours. No one will be allowed to work extremely long hours, blurring the most pronounced differentiator between the typical male and female employee. This type of reform will presumably benefit not only women with family responsibilities, but also men (and women without family responsibilities) who will have more free time to pursue other interests in their lives.

While care feminists do not dispute the fact that women carry the bulk of household and child rearing responsibilities, they do not concentrate on how to download some of these burdens to third parties. Some commentators are simply less optimistic about the

---

62 Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job, 26 Harv. Women's L.J. 77 (2003), (discussing the possibility of utilizing Title VII of the Civil Rights Act to address the difficulties working mothers face in succeeding in a labor market crafted around the reduced family responsibilities of an ideal male worker).


64 Sylvia Ann Hewlett, Executive Women and the Myth of Having It All, Harvard Business Rev, 9-10 (April, 2002) (advising the installation of reduced hour careers “high jobs should be created to permit reduced hours and workloads on an ongoing basis but still offer the possibility of promotion”).


prospects of instigating in the near future a revolution within the structure of the family. Others view it as an autonomy issue: The right of women to take the primary responsibility for childrearing, without being devalued by society, or penalized for this choice in the labor market. The competing theory is that the problem of the time gap should be attacked at home where it is instigated, not within the labor market where it merely impacts women. Formal feminism is associated with this school of thought: Workplace practices are perceived neutral and non discriminatory, as long as women are given the exact same opportunities as their fellow men. The present legal legacy of Title VII of the Civil Rights Act which follows the construct of formal equality in relation to sex discrimination is adequate in dealing with sex discrimination in the workplace, because it primarily guards and protect women from being stereotyped and treated differently then men.

Accommodating within the workplace the special needs of women with family responsibilities will undermine the achievements of women in the labor market, as it will taint all women. It will discourage employers from hiring and promoting women in fear of future accommodation requests. Formal feminists argue that the remedy lies outside the workplace. Women should demand and press for a more equitable allocation of housework responsibilities within the family. This will free up time for women to spend

---

67 For a summary of the different viewpoints see Joan Williams, It's Snowing Down South: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate, 102 COLUM. L. REV. 812, 813-818 (2002). (There is a broad spectrum of vocations relating these issues among care feminists, which can be situated on a continuum. On one end there are care feminists who embrace traditional gender performances. Their battle is against the devaluation of these tasks in society. They endeavor is to empower women performing traditional roles within the family and in the workplace, by instating prestige and economic power with traditional female gender tasks. They clash with formal feminists who call women to battle for equal opportunity to compete with men on the traditional male roles and jobs in society. This school of thought of care feminists argues that formal feminists ideas contributes to the further devaluation of traditional female roles. On the other end of the spectrum, care feminist adopt a more practical view of why care roles of women should be taken into account. They advocate for special rights for women who carry care responsibility because reality has proven that women who attempted to compete on male roles and jobs ended up carrying a double burden of work and care. For practical care feminists the day-to-day difficulties that women carrying the double burden encounter, justifies a mandate to accommodate care roles. It is not the glory of care work, but rather the fact that women end up performing those tasks).

68 Mary Ann Case, How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children should be Shifted, 76 CHI.-KENT L. REV. 1753,1759 (2001) (“All women may be at increased risk for employment discrimination in a world in which women do all the childbearing and most of the childrearing, if benefits required by law for childbearing and child rearing come from the employer”).

on promoting their careers. It will reduce the time available for men to dedicate to work. Equal sharing of housework and child rearing responsibilities will narrow the time gap between men and women. When women invest the same amount of time in the labor market they have a better chance at competing with men for the desirable jobs and promotions. Once women are freed of some child rearing responsibilities they will be able to enjoy both worlds, on equal terms with men.

It is unsurprising that there are tensions between the two camps campaigning for the elimination of the time gap. Reforms that will please the accommodatinal camp sabotage the endeavor of formal feminist to ensure that women will not be stereotyped in the labor market as caregivers. Accommodation reforms also have the effect of preserving the traditional allocation of family responsibilities between spouses. On the other hand the insistence of the formal camp that labor market practices are sex neutral because women are free to mimic the work behavior of “ideal” male workers, is professed by care feminists as insensitive to the every day reality of working mothers. The proposition that women should focus on equitable sharing of care work is considered both naïve (unworkable in today’s social framework) and a devaluation of the importance of care work.

My concern is that both avenues to eliminate the time gap are doomed to fail.

B. Attempts to Restructure the Workplace

There are two questions to be answered. One is whether the call to regulate the workplace in order to accommodate the needs of working mothers is equitable, the other is whether it is workable and effective.

---

70 But see Michelle A. Travis, Equality in the virtual workplace, 24 BERKELEY J. EMP. & LAB. L. 283, 287-8(2003) attempting to mitigate these differences (“The gendered nature of work/family conflicts has many causes, which originate both inside and outside of the workplace. Where commentators differ is in their assessment which of those causal origins is the most significant. Accordingly, the debate should be conceptualized not as a dichotomy, but as a discussion of where one situates oneself along a causal continuum, with one end of the continuum representing causes solely external to the workplace and the other end representing causes solely internal to the workplace. The closer one situates oneself to either end of the continuum helps to prioritize one's choice of approaches for addressing work/family conflicts”)
1. Moral Challenge

Formal feminism dominated the initial legal treatment of sex equality in the United States. It was not particularly engaged with the issue of children, and the need for women to balance family and work responsibilities, in order to achieve both. As long as women were formally able to take advantage of work opportunities as men, formal feminists were not concerned about the tradeoffs women made between work and family. Formal feminists focus on the sameness between the sexes, and their call for equality is based on this sameness. The lack of children is viewed as a personal choice, even if it is circumstances driven. Of course, we can define the breach of equality in a formal manner, by stating that precisely because most men can achieve a workable balance between career and family, but women must choose, there is no formal equality. But formal feminists, concentrating on workplace discrimination, view this issue as lying outside the reach of workplace regulation. Any attempt to remedy it will result in undermining other formal equalities attained in the workplace such as equality among women with family responsibilities and those without.

For example, Mary Anne Case rejects the concept of easing the burdens which working mothers face by granting them special workplace rights (accommodations). The special treatment of working mothers comes at the expense of co-workers not eligible for these accommodations. Childless women, like herself, are expected to carry on the access burden of work, and finance through their wages the benefits provided to women who opted for motherhood. Underlying this theory is the notion that formal equality is

\[71\text{ Mary Becker, Care and Feminists, 17 WISC. WOMEN’S L.J. 57,58 (2002).}
\[72\text{ Joan Williams, Unbending Gender: Why Family and Work Conflict and What To Do About It 217-232 (2000).}
\[74\text{ MaryAnn Case, supra at 1758; Elinor Burkett supra at 25-62. In the Hewlett study, supra note 9 at 91: “54% of high achieving women without children say that in their workplaces people without children are unfairly expected to pick up the slack for those who have children and that this rift between working parents and the “childfree” has the potential of becoming ugly”.}
disrupted when accommodating the special needs of women attempting to have it all. Workplace equality is about the work being shared equally and the combined wage – benefit package being equalizing for all workers, and not favoring one group at the expense of another. The idea that the right to accommodation of one employee ends where the burden of providing it is expected to affect the rights of fellow employees is present in the recent Supreme Court decision of *U.S Airways v. Barnett*. In the context of an ADA disability accommodation request, the court held in favor of the employer who refused to retain a disabled employee in a position that was subject to seniority privileges, because granting accommodation would impact unfavorably other workers.

Accommodation rights for working mothers may also stigmatize women of childbearing age, whether they plan to become mothers or not. Employers, grouping all women of childbearing age as potential mothers, may refrain from hiring or promoting women of childbearing age in fear of later encountering the costs and difficulties of adhering to the mandated parental accommodation requirements, if his female workers will decide eventually to become mothers. Of course that such an employer is deemed to engage in unlawful discriminatory practice under Title VII. But the experience with accommodation mandates for disabled employees under the ADA revealed that employers do attempt to avoid the hiring of disabled employees entitled to accommodation, in order to avoid the extra costs associated with the accommodation.

---

75 See Michelle A. Travis, Equality in the virtual workplace, 24 BERKELEY J. EMP. & LAB. L. 283, 326-7 (2003) (arguing in relation to the ADA accommodation duty that because many people remain unconvinced that accommodation is a form of equal opportunity, the ADA has been less effective than many had hoped, in part because it is viewed as a social welfare statute, rather than an antidiscrimination law. The press, the public, and many legal scholars explicitly label accommodation as a form of preference or affirmative action, which engenders less public support than equal opportunity).


77 U.S. Airways v. Barnett, 122 S Ct. 1516, 1522 (2002), (“Yet a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees -- say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent”).

78 Mary Ann Case, How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children should be Shifted, 76 CHI.-KENT L. REV. 1753,1758 (2001) (“permanently childless women like me will be in a lose/lose situation – so long as we are potentially mothers, we are at risk for discrimination: so long as we are not actually mothers”); Katherine M. Franke, Theorizing Yes: An Essay on Feminism, Law, and Desire, 101 Colum. L. Rev. 181,183 (2001) (calling to fight the maternalization of women’s identity).

79 Employment levels of disabled individuals have fallen since the enactment of the ADA, while wage levels for these individuals were not depressed. Daron Acemoglu & Joshua Angrist, Consequences of Employment Protection? The Case of the Americans with Disabilities Act, 109 J. of Poli. Econ. 915 (2001); Thomas DeLeire, The Wage and Employment Effects of the Americans with Disabilities Act, 35 J. Hum. Resources 693 (2000).
This is economically rational, especially due to the fact that most workplace
discrimination litigating in the past two decades involved firing decisions, and not hiring
decisions.80

The point made here is that advocates of a strict formal equality paradigm view
accommodation rights for working mothers as penalizing all women of childbearing age,
as they become more susceptible to workplace statistical discrimination on the account
that they are “potential mothers”.

Under a formal equality regime, childless women can compete successfully with men for
jobs and promotions. Employers are not fearful of hiring and prompting these women. If
ex-post to the hiring/promotion decision a woman enters motherhood and cannot keep up
with the work demands terminating her employment or altering her responsibilities is not
considered discriminatory. Therefore women who do not bear family responsibilities, or
the ones who successfully manage to pursue their careers without interruptions, although
they carry family responsibilities, are better off without parental rights. Such rights can
only sabotage their success in the workplace.

2. Is Restructuring the Workplace Workable?

Today, the most vocal agenda to solve the family-work conflict is the restructuring of
work, in order to accommodate the dual burden of women with family related care
responsibilities. The popularity of such reforms has to do with the fact that the workplace
is a tangible and solid target to attack, more than gender roles within the family. In view
of the relative success of battling race and sex workplace discrimination through
adjudication, this seems a reasonable assumption.

The main assault is on the long and inflexible hours of work. The redress is to shorten the workweek of all workers, men and women alike, in order to blur the distinction between the disparate amount of time that men and women can afford to spend at work. Another proposal, accommodational in substance, is to enable workers with family responsibility to work flextime and/or shorter work hours without being penalized career wise for taking advantage of these options. This proposal is connoted and influenced by the reasonable accommodation requirements of the ADA.

**Regulation of the Workweek:**

In the past forty years Americans are overworked. Decreasing the amount of time people spend at work is essential to the well being of everyone, men and women alike. This would not only eliminate the gender time gap but will free up time for social activities. Theoretically this proposal is solid. With work hours lengthening both for men and women, limiting through regulation the time people will spend at work will eradicate the differences between workers who are constrained by family responsibilities (disproportionally women) and those who are not constrained (disproportionally men). Workers who cannot commit to a 50 hours workload will not be penalized, because no one will work so many hours. This proposal has the virtue of meshing well with both care

---

81 ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME & HOME BECOMES WORK (1997) See also Sylvia Ann Hewlett, Executive Women and the Myth of Having It All, Harvard Business Rev, 6 (April, 2002). The more successful the women, the longer her work week. 29% of high achievers and 34% of ultra achievers work more than 50 hours a week. A third of these women work longer hours than they did five years ago. The time issue affects not only the presence of children in women’s lives, but also careers of high achieving women who enter motherhood. A large majority of high potential women, who left their careers when their child was born, felt that this decision was forced on them by long workweeks, unsympathetic employers and inflexible workplace.)

82 Juliet B. Schor, The Overworked American: The Unexpected Decline in Leisure 29-30 (1991). Since the 1960s annual hours have actually been increasing Analysis of American working time from 1969 to 1987 shows that “the average employed person is now on the job an additional 163 hours, or the equivalent of an extra month a year”.

83 Vicki Schultz, Life’s Work, 100 COLUM. L. REV. 1881 1956-7 (2000) (“We must also restructure working time so as to eliminate the gender disparity associated with full-time and nonstandard work. This means abandoning proposals to create part-time or other nonstandard jobs for women, and redefining what is “standard” in a way that will encourage men and women from all walks of life to work at a livable pace.”

84 Id., (“In the face of these trends, we should consider amending the Fair Labor Standards Act to reduce the standard workweek to thirty-five or even thirty hours per week for everyone - including the upper-level workers who are currently exempted - as a way to create a new cultural ideal that would allow both women and men more time for home, community, and nation. A reduced workweek should alleviate work-family conflict for everyone and help promote greater sharing of employment and housework among men and women.”).
and formal feminists ideas. It does not undermine formal equality principles, yet favorably impacts women with family responsibility. Restricting work hours will enable men, who wish to become active participants at home, to do so. Today these men suffer professional and social penalties for choosing to perform care work at home.\(^{85}\)

The idea is to cap work week hours at somewhere between 30 up 35 hours, similar to the initiative of some European countries.\(^{86}\) This proposal does away with the overtime pay structure of the FLSA. One of the explanations for the ever-lengthening workweek is the motivation of workers to earn over time pay.\(^{87}\) The option to pay overtime pay must be curtailed if we are to achieve a unified workweek load. Exemptions, such as for professional and managerial employees, currently available under FLSA should also be omitted, if the scheme is to work.\(^{88}\)

This is a utopian concept with little political support. Restricting work hours in Europe was brought about to deal with high rates of structural unemployment. It is a method to achieve work sharing in a stagnated and highly regulated labor market. It is a controversial method to spread the social and economical costs of unemployment among employed workers. It is unimaginable to think of regulating American labor markets in such manner. Can we seriously demand that corporate America, including employees in the highest positions would restrict their work load to 30 hours a week? This scheme will only work if we do not exempt any employees. Once high level jobs are exempt the issue of whether women can put in the same amount of hours in paid work as men will surface, affecting the promotional ladder from its first step. This proposal is detached from any realistic expectation of the extent to which we can regulate labor market practices. The enforcement of such measure on motivated ambitious career oriented individuals is close to impossible.

---

\(^{85}\) I elaborate on this point in fn. 129-132 and accompanying text.


\(^{87}\) see Jacobs and Gerson, supra note 86 at 470.

\(^{88}\) Id., at 467.
Another proposal is to amend the FLSA in a three-fold manner. Shortening the workweek from 40 hours to thirty or thirty five hours. Increasing over time pay to double, instead of the time and a half prevalent today. Furthermore, the mandate to pay over time pay would be extended to the now exempt employees- in particular professional and managerial employees. These amendments are expected to deter employers from working their employees overtime due to the added costs of paying overtime pay. It is argued that professional and managerial employees are over worked because of the managerial overtime exemption.

Tampering with overtime regulation will probably not carry with it the expected result of shortening the workweek. Moreover it will probably have dire impact on the wages of women.

Over time pay is relevant mainly to minimum wage earners. Standard wages of workers earning more than the minimum wage can be adjusted downward in order to keep the overall wage intact. This implies that the firm and its workers are indifferent between combinations of straight time and overtime wage rates that result in the same level of weekly compensation. Empirical evidence supports the claim that overtime pay regulation has no discernible impact on overtime hours, as straight time hourly wages adjust to changes in overtime premium.

This means that extending the mandate to pay overtime to managerial and professional employees will only depress the regular hourly wages of these employees, without having

---

89 John Addison and Barry Hirsh, The economic Effects of employment Regulation: What Are the Limits? in Government Regulation of the Employment Relationship 125, 141-142 (Bruce E. Kaufman ed., IRRA, 1997) (“The argument that overtime premium will increase employment is weakened further by the possibility that as a result of the premium the straight-time wage will decrease so that the wages hours combination is of equivalent value to workers, That is the availability of jobs offering overtime hours may reset an equilibrium straight-time wage that is slightly lower than it would be in the absence of the premium.”).
90 See, Stephen J. Trejo, The Effects of Overtime Pay Regulation on Worker Compensation, 81 American Economic Review 719 (1991); Stephen J. Trejo, Does the Statutory Overtime Premium Discourage Long Workweeks (IZA Discussion Paper No. 373, September 2001). Stephan Tjero’s empirical work on the effect of expanded coverage of overtime pay mandates on work schedules supports the compensating deferential model in which work schedules are largely unaffected and straight hour wages are adjusted to mitigate the increased costs of overtime hours. It rejects the alternative model according to which the demand for overtime hours is decreased with the introduction of overtime mandates. The model of the FLSA which assumes that overtime pay will promote work-sharing and boost up employment rates is not substantiated by empirical work.
any affect on the length of the work week. This harms employees who will not engage in overtime work, as their standard wages will be depressed downward. Since women tend on average to work less hours then men, implementing this proposal will only increase the wage gap between men and women.

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

A separate avenue to deal with the time bind problem is to target and accommodate specifically the special needs of workers with family responsibilities. The vision is that such accommodation will disparately favor women who will then have a good chance of “having it all”. This model is inspired by the accommodation paradigm of the ADA, which requires employers to reasonably accommodate the needs of an otherwise qualified individual.

Under this model employers may be required to provide paid parental leave, subsidize or built childcare centers, enable long career breaks with job security for parents who wish to spend time with their children. Most importantly employers will be required to design jobs with reduced hours - jobs that will not carry any penalty for the decision to work a reduced hour load[^1]. These new “mommy tracks” on all levels of skills and responsibility, will not suffer from the stigma of non commitment, and will provide promotional and career growth[^2]. In other words, there will be two employment tracks in the workplace. A regular one designed to meet the employer organizational needs, most probably requiring for the top jobs many hours of work. The other track, with reduced hours to meet family needs, would still have a meaningful opportunity to receive promotions, and theoretically will enable participants to advance to the highest levels in the organization, still working reduced hours.

[^1]: Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 Colum. J. Gender & L. 271, (2002) (“If a range of alternative work time options was available and legitimized— in terms of rewards, recognition, responsibility, and interest— as standard full-time employment alone is now legitimized, this would go a long way toward enabling people to balance their employment and family commitments. Existing working time norms act to exclude full participation in both employment and family.”)

[^2]: Sylvia Ann Hewlett, *Executive Women and the Myth of Having It All*, Harvard Business Rev., 10 (April, 2002). (“High level jobs should be created that permit reduced hours and workloads on an ongoing basis, but still offer the possibility of promotion.”)
Legally there are numerous obstacles to implement this proposal. I will review them only briefly, since they are discussed in length in the literature, receiving too much attention, in light of the fact that it is questionable whether this proposal is at all workable, even if it can stand legal challenge. I therefore deliberate whether this proposal is applicable, when taking into account how labor markets operate.

**Legal issues:**

Because parents are not a protected group under Title VII, one has to construct a theory why work practices that exclude women with childcare responsibilities are equivalent to sex discrimination. Turning to disparate treatment law is not helpful, since this model applicable when women claim they can work like men. Disparate treatment is relevant to combat stereotyping of women because they are mothers, not in restructuring work practices. A more plausible route is disparate impact law. Disparate impact litigation can examine the legality of mandatory overtime, availability of leave or part time work, requirements of traveling, all of which are based on the expectation of a carefree male worker, and unfavorably impacting women. Current disparate impact law is focused on safeguarding equality within the workplace and not outside it. Employment practices are deemed discriminatory when they disproportionally impact (with out a business

---


94 For the range of theories see Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77 (2003).


96 Under disparate impact theory, practices or policies that appear to be neutral on their face may be found to violate Title VII, if they have a significantly negative impact on applicants or workers of one sex, and the employer cannot provide a business necessity justification for this practice.

97 Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1226-7 (1989) (detailing the ways to challenge prevailing work norms, including stringent absenteeism limits and demanding travel and time commitment requirements under disparate impact theory); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 484-89 (2001) (detailing how might disparate impact law encourage employers to reexamine prevalent work practices which systemically exclude women); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77,133-137 (2003)(detailing cases that were successful in bringing a disparate impact claims).
necessity justification) the chances of protected group members to be hired promoted or fired. The legal hurdle in these cases is that the impact is felt outside the workplace, in the personal life sphere. Employment practices are impacting the chances of women (but not men) to balance successfully their time at home and work, and therefore they are faced with a choice of career or family. It seems unlikely that courts will view this as employment discrimination.\textsuperscript{98}

Granting parents accommodation rights is the principle model. Although there is no statute or case law, which integrates this model in relation to parents’ rights, the legal literature has turned to disability accommodation law under the ADA\textsuperscript{99} and religious accommodation rights under Title VII\textsuperscript{100}, as possible paradigms to assist parents at work. Accommodation is a limited strategy in redressing women’s workplace disadvantage attributed to care giving\textsuperscript{101}. The ADA has not effectuated wide-scale changes in the structure of employment for the disabled\textsuperscript{102}. While the ADA makes disability a “protected characteristic” it perceives performance-related disability as a legitimate “non-discriminatory” business concern\textsuperscript{103}. Thus the courts rejected requests of accommodation pertaining hours of work, mandatory over time, or pace of work, defining all of them as non-reasonable accommodation\textsuperscript{104}. These precedents will surely affect future interpretation of any legislated parental accommodation mandate.


\textsuperscript{102} See studies in supra note 79.

\textsuperscript{103} Id., at 363.

\textsuperscript{104} Rachel Arnow-Richman, Id., at 364-366 discusses the following cases to support this argument: Davis v. Microsoft Corp., 37 P.3d 333, 335-36 (Wash. Ct. App. 2002) (upholding employer’s decision not to accommodate a Hepatitis C infected employee who requested to work 40 hours a week with no overtime where all other employees were expected to work overtime. According to the court Microsoft demonstrated that the structure of the position does not lend itself to a regular 40-hour workweek. The court in no way questioned the wisdom of the employer’s work expectation or
Labor Market Forces

Labor market forces determine that care accommodation mandates will turn out to be ineffective. Promotions in high-end jobs usually take the form of tournaments in which co-workers are competing among themselves for the better jobs and promotions. In order to motivate employees and extract effort there is an implicit understanding that only a small fraction of the workers will end up in the most prestigious jobs in the organization. The high payoffs are supposed to elicit great effort from all workers. Ever increasing work hours are most probably the product of the continuous process of job tournaments, in which workers performance are evaluated relatively to their peers. Ambitious women who want to participate in this “game” must let go of their family friendly work rights, if they are to succeed in getting to the finish line.

Tournaments have three central features: which worker will win any given promotion or career opportunity is uncertain in advance. The “winner” is selected based on relative performance- compared to other co-workers. Finally the rewards are concentrated in the hands of the “winner”, so there is a big difference between winning and losing. One might call it a winner takes it all game. At the end of the tournament there is usually a significant monetary prize for the winner. She alone will enjoy it, notwithstanding how well the other employees preformed.

considered the norms that underlie an eighty hour availability requirement, a requirement that would systematically exclude employees with any number of disabilities); Davis v. Florida Power & Light Co., 205 F.3d 1301, 1305-06 (11th Cir. 2000) (Finding mandatory overtime work to be an essential function of the job in denying employee’s ADA claim where employer had a policy of processing all customer orders within 24 hours and employee’s coworkers worked an average of 216 overtime hours each in the year preceding employee’s termination); Milton v. Scrivner, Inc., 53 F.3d 1118, 1121(10th Cir. 1995) (Finding that the plaintiff-employees who were grocery selectors, could not keep up with the pace standards and therefore terminated, are not entitled to relief under the ADA, because the new productions standards imposed by the company was an essential function of the job).


106 Id., at 403.

107 They may be labeled as the other contestants.

108 Envisioning a tennis tournament might be helpful.
Tournaments can explain why salaried employees often put in unbelievably long hours at work, are willing to travel and relocate their families at the wishes of their employers. Tournaments create a race to the top in work related investments\textsuperscript{109}. There is a collective action problem. If one worker is working more hours, all his contestants must catch up in order to maintain their relative position in the race. It is then quite possible that another worker will heighten the benchmark, implicitly requiring all others to match, to the benefit and convenience of their employer\textsuperscript{110}.

While promotional tournaments do not fit the promotional structure of all jobs, it is believed that many of the senior leadership positions are achieved through tournaments. This is relevant for the issue discussed in this paper, because the paper concentrates on these jobs. Many of the women who believe they cannot combine care work with demanding careers are influenced by the tournament structure of promotions. They understand that the additional responsibilities, which come with having a family, might undermine their performance on the job, and decrease their chances of winning the tournament.

Within view of the nature of job tournaments, it is clear why the accommodation for workers with care responsibilities is not a workable solution. The essence of a tournament is creating a competitive atmosphere. Individuals on the accommodation track will not have a chance at winning the tournament. On the performance level, it is less likely they will out perform workers who are working twice as many hours. But even in the rare case that an accommodated employee does outperform a traditional track employee, the employer has every reason to dispute this conclusion. An employer is less interested in the specific skills of the winner and more interested in the general incentive mechanism

\textsuperscript{109} Or a race to the bottom if one defines these investments as harming the well being of these employees and their families.

\textsuperscript{110} One of the reasons American employers prefer long hours is that management assumes a linear relationship between time and productivity: longer hours are assumed to deliver proportionally more output per employee, see Belinda M. Smith, Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change, 11 COLUM. J. GENDER & L. 271, 283 (2002). The implementation of tournaments has been mentioned also in the context of signaling and information market failure: distinguishing between work committed applicants and leisure-committed applicant. By insisting and making good on the promise that workers will need to work very hard, the employer weeds out leisure oriented applicants. RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY, 402-404 (6th ed., 1996).
created by the tournament. Employers want their workers to work as hard as they can, and be fully committed to their jobs. Admitting that the best performer was working significantly less hours, defeats the purpose of inducing workers to work long hours. This is not in the employer’s best interest. The employer is better off selecting a traditional track employee as the “winner”. Because the criterions are usually somewhat subjective and unverifiable, it is fairly easy for employers to make their decisions with little threat of a challenge. Of course employees must believe the tournaments are fair and decisions are not made arbitrarily, but in most cases there is more than one worker that can be accepted as being deserving of the “prize”. At the end of the day the accommodatinal track will shadow the traditional mommy track, with no real chance to win the tournament, and therefore no incentive (albeit intrinsic) to perform exceptionally well. In fact, the current mommy tracks are jobs, which explicitly do not participate in the tournament.

Another option is to require employers to institute two parallel tournaments. One tournament for regular employees, and another for employees carrying family responsibilities. Each will have its own winners, a-la separate but equal mode. This proposal is also unworkable. Employers will never agree to institute two parallel tracks of equally desirable promotions. The existence of an accommodation track will disrupt the smooth operation of the regular track. Employees in the regular track will constantly be aware of the disparate expectations from their colleagues on the accommodation track. This will surely affect their motivation and make them question the necessity to work as hard. As recent studies pertaining compensation in the labor market reveal, employees are very concerned with equitable distributions of pay and promotions. Employers

---


112 TRUMAN F. BEWLEY, WHY WAGES DON’T FALL DURING A RECESSION (1999). C. 6, 8 (Although non-unionized establishments can offer better compensation packages to some workers and not others, employers avoid this strategy for fear that perceptions of inter-employee inequality will damage morale and productivity).

113 Id.
aware of this, cater their policies to meet the quest for formal equality\textsuperscript{114}. Parallel and separate tracks of promotions will not work in the workplace setting.

Parallel tracks are present today in many organizations in which temporary help workers are employed for extended periods of time and perform similar tasks to permanent employees, but are compensated less for their work\textsuperscript{115}. These practices have dire consequences on the motivation of those secondary employees and have been criticized for that\textsuperscript{116}. It is hard to believe that regulation of the workplace will take the form of dividing workers into groups, even if the goal is to address the needs of the disadvantaged group\textsuperscript{117}.

C. Attempts to Restructure Who Performs Care Work

If men spent more time on care work two things are expected to happen. It will release women of some of their responsibilities, freeing them to invest more time on their careers. It will also restrict the amount of time men will be able to spend on the job, thus leveling the playing field\textsuperscript{118}. Hochschild in the Second Shift looks to men doing their share of care work as a possible solution to the family – career dilemma\textsuperscript{119}. At fault are not only the structure of work, which arguably is neutral, but also the responsibilities at home. Women are performing a disproportional amount of household and care work, regardless of their employment status\textsuperscript{120}. What is required is the restructuring of family

\textsuperscript{114} Id.
\textsuperscript{116} Id.
\textsuperscript{117} This takes the discussion back to the moral issue of justifying accommodations whose provision is externalized to other employees, see Part III.B.1.
\textsuperscript{118} See for example Michael Selmi, Family Leave and the Gender Wage Gap, 78 N.C. L. REV. 707, 712 (2000) (In order to progress further toward workplace equality, it will be necessary for men to change their behavior in the labor market. Proposing that men would be forced to take family leave upon birth or adoption of a child to correct this problem and change prevailing gender norms).
\textsuperscript{120} Margaret F. Brinig, "Unmarried Partners and the Legacy of Marvin v. Marvin: The Influence of Marvin v. Marvin on Housework During Marriage," 76 Notre Dame L. Rev.1311, 1327-1328 (2001) (presenting time studies that the ideal that house work is shared among spouses has not materialized. Labor is sharply divided, even when both adults
responsibilities—empowering women to shift some of the household workload to their spouses or third parties.\textsuperscript{121}

Women do perform the bulk of care work. Information about the relative time the two sexes spend at work and on household chores confirms that women carry most of the burden of household work.\textsuperscript{122} Women who work decease slightly the amount of time they spend on childcare, but this deficit is not mitigated by significant involvement of men in childrearing.\textsuperscript{123}

Why are women performing the bulk of care work and why are men resilient to the shift of care work?

An economic explanation would suggest that time availability determines which spouse performs housework, inferring that women who work less hours are time wise more available to perform these tasks. But empirical studies have not borne out this explanation. Women perform care work irrespective of their commitment to the labor market.\textsuperscript{124} A subtler version of this explanation is that families allocate care work to the work full time. Most routine household tasks are done by women, who also perform most of the childcare and associated functions.

\begin{footnotesize}
\begin{enumerate}
\item Katherine Silbaugh, Turning Labor into Love: Housework and the Law, 91 Nw. U. L. Rev. 1, 14-15 (1996). (Taking the position that it is as important to focus on improving the consequences that flow from the uneven distribution of home labor as it is to focus on altering that distribution or accommodating it in the wage labor market); Martin H. Malin, Fathers and Parental Leave Revisited, 19 N. Ill. U. L. Rev. 25, 26-27 (1998).
\item Beth A. Shelton, Women, Men and Time: Gender Differences in Paid Work, Housework and Leisure 65-66 (1992); For a survey of such studies and data see Katharine Silbaugh, Turning Labor into Love: Housework and the Law, 91 Nw. U. L. Rev. 1, 12-13 (1996).
\item Families and the Labor Market – Analyzing the Time Crunch” A report by the Council of Economic Advisors - (1999) available at http://clinton4.nara.gov/media/pdf/famfinal.pdf concludes that the hours American parents work in paid jobs have increased enormously since 1969 due to a dramatic shift of mothers time from the household to the labor market. Virtually all of the increase in total hours families spend on paid work has come from an increase in women’s hours spent on paid work. Women’s entrance into paid labor decreased slightly the amount they spent on childcare by ten percent (from ten to nine hours per week) . Fathers did not make up the difference. Their childcare time remained about 2.6 hours per week (1965-1985). This suggests that the increase in market work among women has reduced parents’ total childcare time
\item Margaret F. Brinig, "Unmarried Partners and the Legacy of Marvin v. Marvin: The Influence of Marvin v. Marvin on Housework During Marriage," 76 Notre Dame Law Review 1311, 1327-1328 (2001); Dora L. Costa, From Mill Town to Board Room: The Rise of Women's Paid Labor, 14 J. ECON. PERSP. 101, 119 (2000) ("Even women who work still disproportionately bear the burden of domestic chores"); Catherine E. Ross, The Division of Labor at Home, 65 Soc. Forces 816, 816 (1987). Marion Crain, "Where Have All the Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society, 60 Ohio St. L.J. 1877, 1914 (1999) (explaining that despite the increase of women in the waged labor market in the last 25 years, "women continue to perform the lion's share of the homemaking and caretaking duties, and citing research that when women begin work outside the home, their husbands often "retaliate by refusing to assume the burdens of keeping the house and caring for children").
\end{enumerate}
\end{footnotesize}
lower earning spouse—usually the women.¹²⁵ This theory is also not substantiated by the
data. Reallocation of resources does not occur in households with children in which
women’s earnings are relatively higher than their spouses.¹²⁶ This is somewhat
discouraging, because if this explanation were to hold true, women would be able to shift
care work to their spouses by entering the labor market or increasing their earnings
relatively to men.

Social norms shape our expectations that women will take the primary responsibility for
household work and child rearing¹²⁷. Social norms are probably more significant than
economic forces in preserving traditional gender roles.¹²⁸ Women are expected to
perform care work regardless of labor market position. Social preferences for maternal
care, rather than paternal care keep rearing their heads. Communities and families
including many women wish to preserve the status quo¹²⁹. Employers are antagonistic to
men who request parental leave, subjecting them to harassment if they reveal their
preference to perform care work at home¹³⁰. Fathers who wish to take active care giving

¹²⁵ Gary S. Becker, A Treatise on the Family 14-24 (1981). According to this theory gender powers outside the
workplace are bound to change with women gaining more economical and educational power within the household. As
this evolves women will transfer childrearing and household responsibilities to their spouses; Richard B. Freeman, The
Feminization of Work in the US: A new Era for (Man)kind in Gender and the Labor Market: Econometric Evidence
and Obstacles in Achieving Gender Equality (1999) (Given a household production function where male and female
times are substitutes; higher wages for women should lead to a shift in the burden of household chores toward men).
¹²⁶ Sylvia Ann Hewlett, Creating a Life: Professional Women and the Quest for Children, 88 (2002). See also Michelle
A. Travis, Equality in the virtual workplace, 24 BERKELEY J. EMP. & LAB. L. 283, 314 (2003) (In telecommuting,
where people work from home women become more family-oriented after they start telecommuting. Men who
telecommute become even more work-oriented, as they use the time previously spent on commuting and workplace
distractions to do additional paid work, rather than to do unpaid work in the home). Concluding that for all of these
reasons, men who perform paid work from home, regardless of their occupation, typically spend no more time on
housework or childcare than men who work outside the home); Marion Crain, "Where Have All the Cowboys Gone?"
Marriage and Breadwinning in Postindustrial Society, 60 Ohio St. L.J. 1877, 1914 (1999) (women who out-earn their
husbands actually do more housework than those whose husbands out-earn them, or who earn an amount roughly equal
to that of their husbands).
(explaining and describing various sociological research showing that housework is a significant aspect of women's
lives).
¹²⁸ Michael Selmi and Naomi Cahn selmi, New Perspectives on Work/Family Conflict: Caretaking and the
Contradictions of Contemporary Policy 55 Me. L. REV. 289, 305 (2003) (arguing based on polls that one reason
extensive state support has not substantially improved women's equality is that gender ideologies, particularly
surrounding childrearing, have remained stubbornly resistant to change, even in the face of extensive public policies
designed to facilitate childrearing).
¹²⁹ Selmi and Cahn present data to this point, Id. See also Dora L. Costa, From Mill Town to Board Room: The Rise of
Women's Paid Labor, 14 J. ECON. PERSP. 101, 116 (2000) (presenting Gallup polls which confirms that still a
significant minority of married women of childrearing age agreed with the statement that preschool children suffered if
the mother works.)
immediately following the births of their children. They do so by using accrued vacation and personal days. Fathers
take this approach… because they believe it is all they can get away with -- that is, taking a real family leave will
tasks are stereotyped to a greater extent than women as unworthy workers, for women are at least viewed as living the ideal of motherhood\textsuperscript{131}. Being perceived as a good father is still linked with work success\textsuperscript{132}, debilitating men from performing care work without being ostracized.

Because social norms in the community, home and work are the driving forces for the gendered division of care work it is unlikely that they will succumb regulatory powers\textsuperscript{133}. Since the causes of inequality are perpetuating themselves outside the realm of regulative life - in the context of the family it is unrealistic to expect that women will be able to achieve equality in sharing care work. While many women may strive towards a more equitable distribution of the household burden, men, as a class, are still resilient to a shift in household responsibilities\textsuperscript{134}.

jeopardize their careers because of employer hostility\textsuperscript{135}). Even among large employers providing paternal leave, forty-one percent considered it unreasonable for a man to actually use it, and another twenty-three percent considered a reasonable leave for a man to be two weeks or less. It appears that many employers extend parental leave to fathers so that they can give the appearance of gender-neutral policies, but never intend for fathers to use it. Id at fn. 188. See also Martin H. Malin, Fathers and Parental Leave Revisited, 19 N. ILL. U. L. REV. 25, 39 (1998). (Reporting of a 1997 Business Week survey which found that men expressed greater frustration balancing work and family than women and another study by the Wisconsin Maternity Leave and Mental Health Project found that 63 percent of men believed their supervisors would react negatively if they took parental leave of one month or more.)

\textsuperscript{131} Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job, 26 Harv. Women's L.J. 77, 101-102 (2003) (“Stereotyping affects fathers as well as mothers. Fathers who assume, or seek to assume, active caregiving roles may experience an even chillier climate than do mothers. Although mothers who take time off from work for caregiving may be considered less valuable workers, they may well be deemed to be living up to widely held ideals of motherhood); Martin H. Malin, Fathers and Parental Leave, 72 TEX. L. REV. 1047, (1994) (“Many employers' willingness to make such accommodations is limited to women workers. Men's accommodation requests are often met by, "Your wife should handle it").

\textsuperscript{132} Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job, 26 Harv. Women's L.J. 77, 102 (arguing that a good father is linked with being a good provider. Thus, a father who takes time off for caregiving--if he is measured by traditionalist standards of fatherhood--may actually be considered a failure as a father").

\textsuperscript{133} Even proponents of mandatory paternal leave policies such as Selmi, are spectacle on the success prospects of such plans, see Michael Selmi, Family Leave and the Gender Wage Gap, 78 N.C. L. REV. 707, 712, 775 (2000) (“Despite its possible success, the objections to a mandatory paternity leave policy would almost certainly block its implementation. As a legal matter, questions would arise regarding the law's constitutionality on both due process and equal protection grounds… Although I believe that a well-developed program could survive constitutional scrutiny, exhorting men to become more involved in their family lives or touting the importance of families seems unlikely to ease the burden on women to any significant extent").

IV. The Simultaneous Approach: A Genuine Family and Career Model

A. Confronting the Numbers From a Different Angle

The model of “career then family” was presented to American women in the mid sixties-early seventies. It was built on the presumption that delaying family plans will enable women to compete on equal terms with men in the workplace, without having to worry over the effect that care responsibilities will have on their careers. After stabilizing their professional lives, it was assumed that women could focus on raising their family. Sequencing tasks was the remedy to discriminatory workplace practices and the uneven sharing of care work among men and women. In chapter II I discussed empirical evidence, which demonstrates that this order of sequencing hampered significantly the chances of women to eventually get married and have children. I now turn to assess whether the recommendation to concentrate on careers proved fruitful professionally.

Gauging whether a women has achieved a “career” is considerably less objective than determining whether she has been married or had a first birth. Any measure will be somewhat arbitrary. Because careers are generally assessed against a male standard, it can be useful to use this standard for comparison. Goldin in her study used the earnings of women in their late thirties and early forties, when both family and schooling investments were generally complete. The standard was set relatively low – the 25\(^{th}\) percentile of the distribution of income of men with four years of college education. 43\% of all women with at least four years of college, achieved career status according to

---

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

136 Claudia Goldin, Career and Family: College Women Look to the Past.” In Francine Blau and Ronald Ehrenberg, eds., Gender and Family Issues in the Workplace 44-49 (1997). But see criticism of Goldin’s choice of earnings measurement as the relevant criteria of a career in Marianne A. Ferber and Carole Green, Career or Family: What Choices Do college Women Have?, 24 Journal of Labor Economics, 143, 147 (2003) (arguing that it is entirely likely that many women think of work in a traditionally female profession, for instance kindergarten teaching or the arts as a career although their pay might be too low to satisfy Goldin’s criterion.)
this definition. The comparable figures are 35% for women who had at least one child and 56% for those who remained childless.

These numbers sketch the following veracity: The fact that a woman does not have children increases her chances of having a career within her group (no children), but still 44% of this group, a substantial percentage, did not attain a career. Almost half of the women who gave up on having children ended up with no career and no family. Motherhood was not the only impediment to women’s career success, although there can be no question that having children does pose additional challenges. On the other hand 35% of women with children were successful at having it all. The Goldin study, nor the Ferber and Green study, provide data on how old were women when they had their first child. Taking into account the declining chances of women of getting married in their late thirties and getting pregnant at this age, it is likely that many women in this group did not delay motherhood, and were nonetheless successful at achieving both simultaneously.

If we look at the numbers from the Goldin study from a different angle we can discern that the probability of having a career and family was exactly equal to the probability of having a career with no family. This time we are defining the group as all women with at least four years of college. In this group 57.7% had children and no career, 16.2% had neither a career nor children, and 13.1% had either a career but no children or both. If we envision a population of a thousand college graduate women, approximately 580 have

---

137 Ferber and Green, recalculating Goldin’s data argue that the figure of women without a career in the childless group stands on 56%, and using HRS data the career-less rate creeps up to 58% among childless women. Id., at 148.
139 Hewlett reports that when high achieving women marry, they tend to get married young. In the older group only 8 percent married for the first time after age 30, and only 3 percent after age 35. Most of the women in each group had their first child in their mid 20s. Among the older group the most popular age to have a child was 22, and for the younger group it was 29. Sylvia Ann Hewlett, Creating a Life: Professional Women and the Quest for Children, 87,114 (2002).
140 Claudia Goldin, Career and Family: College Women Look to the Past.” In Francine Blau and Ronald Ehrenberg, eds., Gender and Family Issues in the Workplace, Table 2.6, 47 (1997). Goldin herself mentions briefly this point when stating that; “For every women who attained family and career there was another woman who attained career but has no family, using any of the definitions”. Id., at 45.
children without a career, 160 are left empty handed, and the remaining 260 women are split in a way in which 130 have both a career and a family and 130 have only a career\textsuperscript{141}.

When you look at the numbers this way it becomes clear that a-priori a woman’s chances of combining a career with family are equal to her chances of having only a career – both 13.1\%\textsuperscript{142}. Women who postpone childrearing risk falling in the no children- no career group, without increasing their prospects of having a career. Strategically it is wiser then not to postpone motherhood\textsuperscript{143}.

The traditional feminist’s advise of career then family does not pass empirical challenge. It is derivative of assumption that women with no children fair better in the labor market. This is true only if we focus on the distribution of attaining a career within the specific groups (with children or without). When we initially divide the population to women with children and without children, and only then compute the percentages of those who achieved a career within these groups, we get the result that among the group of women with no children a higher percentage achieved a career than among the group of women with children. But for women who want to make a career-family path decision this is not the correct way to look at the numbers. These women usually want to know what are their prospects of having both, as opposed to having only a career. For these women the relevant information is that they have the same chances of having a career with or without children. Information about the breakdown of having a career among non-mothers as opposed to mothers is less of an interest for women who want both. The later breakdown is irrelevant in the context of a strategy of how best to act in order to have it all. In order to “enjoy” the higher probability of having a career, a woman must commit herself to not having children at all, not just delaying motherhood. But for women who

\textsuperscript{141} In the Ferber and Green study there is a rosier picture pertaining the group that achieved both career and family. Because in this study the definition of career is lenient (definition A: women who worked 20 years or more in an executive or professional capacity; Definition B: women who are working full time in an executive, managerial or professional capacity). According to definition A 29.4\% of all women entered the career and family group, and 44.3\% were in this group according to definition B. see Marianne A. Ferber and Carole Green, Career or Family: What Choices Do college Women Have?, 24 Journal of Labor Economics, 143, Table 2, 148 (2003)

\textsuperscript{142} Goldin uses other criteria as well (all earning based). In each measurement the number of women with a career and a family was similar (or higher) than the number of women with only a career, table 2.6

\textsuperscript{143} This conclusion is strengthened when looking at the Ferber and Green numbers, because they use the lenient definition of a career.
initially want to pursue the dual path, delaying motherhood does not increase their chances of having a career. On the other hand it increases the chances that they will fall eventually in the no children category – with 44% probability of not attaining a career at all.

B. The Model

Women are delaying marriage and motherhood in the belief that sequencing their commitments in this order, career then family, will assist them in attaining both. The high rate of childlessness is a by-product of implementing this strategy. When women turn later in life to the second stage of their sequencing plan – they find insurmountable social barriers in finding a spouse, and physiological barriers in conceiving\textsuperscript{144}. The feminist scholarship has overlooked this problem, assuming incorrectly and somewhat stereotypically that the source of the family-work conflict lies solely in the inability to balance work with family responsibility. I argue that some impediments are entrenched in low sex ratios within the marriage market of educated/professional women, which make it difficult for these women to succeed in attaining both a career and a family.

The argument that women who wish to have both a career and a family must understand that they may encounter difficulties on the family front, as well as on the career front is not a strand of conservatism\textsuperscript{145}. It is setting the facts straight, which will enable women to make informed decisions about both their personal and professional lives. No value judgment is involved in the claim that women who report they wish to have both a family and a career should not follow the career then family model nor the family then career model. Certainly the advice that women should follow the career then family path in

\textsuperscript{144} Sylvia Ann Hewlett, Executive Women and the Myth of Having It All, Harvard Business Rev, 8 (April, 2002) (reporting that although 89% of young high achieving women believe that they will be able to get pregnant deep into their 40’s, new reproductive technologies have not solved the fertility problems for older women. Research shows that only 3%-5% of women who attempt in vitro fertilization in their 40s actually succeed in bearing a child.)

\textsuperscript{145} See for example Michelle Goldberg, A Woman’s Place, available at http://www.salon.com/mwt/feature/2002/04/23/childless_women/index2.html (criticizing Hewlett’s book for presenting this argument – “such thinking makes the book weirdly bifurcated between serious, feminist-minded policy recommendations and reactionary personal advice.”)
order to attain balance in their life is detached from marriage market sex ratio studies. Such advice can only exasperate the phenomenon that only a minority of women attains their goal of having both a career and a family.\footnote{Returning to the Goldin study, if 30\% of the women did not have children, potentially only 70\% of the women could have both a career and family.}

The career then family slogan is tainted by prejudicial beliefs that women are marriageable, regardless of age or status. Stereotyping is embedded in the fact that most women still get married and bear children. The simultaneous model, of family and career, takes into account the empirical evidence that there is a substantial minority of women who are successful in having it all, and that these women marry young, during the crucial years of professional growth.

I turn to offer an explanation why women who marry young are more likely to succeed in having a family and a career. Sex ratios\footnote{To recap sex ratios are conventionally defined as the number of men for each woman in a reference population. An increase in the sex ratio may increase female power in the marriage market and vise versa.} in the marriage market is a vital component of the explanation:

Hypergamy, one of the pillars of the patriarchal social systems, can explain why educated or successful women are less likely to get married. Hypergamy, or the “marriage gradient” means that women tend to marry up in various dimensions including education, professional and material. A male doctor might well marry a female nurse, but a female doctor would hardly consider marrying a male nurse. The female nurse may be underpaid, but in the marriage market her prospects are better than those of the female doctor because there are more desirable males she can hope to "marry up"\footnote{See M.V. Lee Badgett and Nanacy Fohrle, Job gendering: Occupational Choice and the Marriage market, 42 Industrial Relations 270 (2003) (This study suggests that occupational segregation is perpetuated because women (and men) may be penalized in the marriage market for making non traditional occupational choices).}. The existing literature on marriage and dating points to the direction that gender non-conforming occupational choices reduce women’s (and men’s) attractiveness in the
marriage market\textsuperscript{149}. Women in male dominated jobs are viewed as less desirable marriage partners\textsuperscript{150}.

Hypergamy practices decreases the sex ratio in the marriage market for educated and professional single women. There is strong empirical evidence that links sex ratios to marriage rates\textsuperscript{151}. As women proceed with their education and career, while remaining single, there are less and less eligible men in the relevant pool\textsuperscript{152}. Thus the sex ratio declines to the detriment of those women; decreasing the chances they will eventually get married. Hypergamy coupled with sex ratios theory can also explain why as men become more successful the probability they are married increases\textsuperscript{153}. Sex ratios decrease with a man’s rising status, because the pool of available women increases as more women view marrying him as marrying up.

Some social norms regulating the behavior surrounding marriage have changed\textsuperscript{154}. In order for hypergamy to follow this path, values and preferences of both men and women must transform. Even if women would shun hypergamy, by overcoming their emotional attraction to men of higher status, men may still wish to marry younger women with lower status\textsuperscript{155}. Because marriage is based on a mutual decision, women alone cannot dissolve female hypergamy\textsuperscript{156}.

A connoted explanation, which also has to do with sex ratios in the marriage market, puts the emphasis on the age difference at marriage between men and women. According to the US Census the difference in the median age between men and women at first

\textsuperscript{149} Id., at 274.
\textsuperscript{150} Id., at 275.
\textsuperscript{152} In this explanation age is a proxy of success.
\textsuperscript{153} See data presented in Section II C.
\textsuperscript{155} Id., at 644-647.
\textsuperscript{156} Wax discusses in length why the proposition that women will turn to hypogamy mating (marrying down) in order to solve their marriage market bargaining power problem is not foreseeable. Her arguments are based on collective action problems and the ingrained preferences and attraction to high status men, which cannot be rationalized. Id., at 645-6.
marriage was 2.5 years in 1960. Thirty years later, in spite of tremendous social changes the difference in the median age at first marriage between men and women was still 2.3 years\textsuperscript{157}. A recent explanation to the existing age gap in marriages, beside hypergamy\textsuperscript{158}, is biological\textsuperscript{159}. It is a biological fact that women are fertile for less of their lives than are men. The consequences of this asymmetry in the fecundity horizons is that at any given point of time there will always be more fertile men than women. Thinking of this imbalance as relative scarcity implies more bargaining power for the sex in short supply, in this case women, so long as they are fertile. Sex ratios are high during the peak years of women’s fertility, but drop dramatically thereafter.\textsuperscript{160} If women have more bargaining power when young and men as they get older a pattern of age differences within marriages will evolve.

V. Conclusion

The discourse pertaining the family-career conflict concentrates on lack of time. The disagreement lies whether the source of the time gap between men and women is at work or at home. One theory congenial to care feminism argues that the labor market is still structured around an ideal male worker, with no family care responsibilities. These labor market practices make it difficult for individuals with care responsibilities (disproportionately women) to fare well in the workplace. The other theory, related to formal feminism, stresses the unequal sharing of care work within household. The reforms offered to ease the time bind women encounter range from transforming


\textsuperscript{158} hypergamy in itself can explain the age gap, because age is a good proxy of status. Thus women looking for higher status men will end up sorting with older men, and vise versa – men looking for women with less status would sort with younger women.

\textsuperscript{159} Aloysius Siow, Differential Fecundity, Markets and Gender Roles, 107 J. POL. ECON. 334 (1998).

\textsuperscript{160} This is substantiated empirically by Eugenio P. Giolito , A Search Model of Marriage with Differential Fecundity Table 5.1.1, (2004), available athttp://papers.ssrn.com/sol3/papers.cfm?abstract_id=497294. See also Sylvia Ann Hewlett, Executive Women and the Myth of Having It All, Harvard Business Rev, 6(April, 2002) (finding that at age 28 there are four single college graduate men for every three single college graduate women, while a decade later at age 38 there is one man for every three women.)
workplace practices to family friendly organizations, to getting men more involved in care work. In this paper I have criticized these proposals as unworkable.

The current discourse takes for granted motherhood. It assumes that the inability to achieve career-family balance is rooted in the derailed career paths of mothers disabled by time constraints. This paper emphasizes the other side: Many women are unable to achieve balance because they do not have a family, and not due to lack of time, but rather miscalculated timing. By getting married younger, women improve their chances of having both a family and a career, because as they get older and are more successful the sex ratio in the marriage market is diminishing to their disadvantage.

This paper does not carry any political viewpoint of the importance of marriage and children to society or to the individual well being of women (and men). It attempts to factually answer the question: “Why are women less likely than men to have both a family and a career?” The conclusion is that marriage market conventions, and not only labor market practices or childrearing sharing norms are responsible for this outcome.

Identifying, as part of the problem, the way in which the marriage market operates is important. This issue was overlooked in the family-work debate. Information pertaining the prospect of marriage and maternity is relevant for women about to make personal and professional decisions. It can also encourage research on the question whether and how hypergamy conventions can be dissolved. The main limitation of this paper is that it does not offer any remedial policy for those mothers who do carry family responsibilities and find it hard to continue and develop their careers.