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Lecture

***2221 CANARIES IN THE MINE: WORK/FAMILY CONFLICT AND THE LAW**

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The issue for women lawyers has changed little since this cartoon was published in 1993. [FN2] The problem is not that women don't enter *2222 law school. In fact, soon they will be a majority of law students. [FN3] The problem is that women don't proceed up through the ranks (particularly in law firms, which will be the focus of this article). Though women have comprised close to half of law school classes for quite a while, eighty-six percent of law firm partners are still men. [FN4] There's a gushing hole leaking legal talent in the pipeline between law school and partnership. [FN5]

We are used to analyzing this problem within the framework of the “glass ceiling.” Indeed, glass ceiling problems still exist, but there are other obstacles on the way to the glass ceiling. While it is now unusual for firms to hold events in clubs where women are excluded, more subtle forms of stereotyping persist. This presents obvious hurdles in the partnership context. More generally, the literature on ambivalent sexism pinpoints how men may be welcoming to women who perform gender in a conventional manner, but may react negatively to women who perform gender unconventionally--like Ann Hopkins, the assertive, “abrasive” plaintiff in the landmark case of *Price Waterhouse v. Hopkins*. [FN6]

As the *Price Waterhouse* Court noted, talented women may find themselves held to a double-standard where exemplary work is not enough: “[female partnership] candidates were viewed favorably if *2223 partners believed they maintained their femin[in]ity while becoming effective professional managers,” but “[t]o be identified as a ‘women's lib[b]er’ was regarded as [a] negative comment.” [FN7] In Ann Hopkins's case, her clients viewed her as “extremely competent, intelligent,” “strong and forthright, very productive, energetic and creative,” but some of the male partners of her firm felt that she was “macho,” that she “overcompensated for being a woman,” and that she could use “a course at charm school.” [FN8] Yet another male partner advised Hopkins that “in order to improve her chances for partnership, . . . [she] should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’” [FN9]

Though glass ceiling problems persist, most women never even get near the glass ceiling. Most are stopped dead, long beforehand, by the maternal wall. That wall stems from the way we define our ideals at work: in the law, the ideal worker is defined as someone who starts to work in early adulthood, and works fifty or sixty hours a week, without a break, for the next forty years. [FN10] This requirement for forty years of unbroken “face time” eliminates most women from the pool for law firm partnership due to the time taken for motherhood.

I. The Maternal Wall

To understand the law's maternal wall, you need to know only two facts: Eighty-five percent of women become mothers during their working lives. [FN11] Ninety-three percent of mothers aged 25 to 44 work fewer than fifty hours a week year round. [FN12] The maternal wall results when lawyers are offered, as their only option, a schedule very, very few mothers are willing to work. [FN13]

On paper, of course, most firms do not offer only one option. In fact, 96% of law firms offer part-time work. [FN14] The problem is that women rarely opt to work part-time--only 3.9% of lawyers work part-time, according to one study. [FN15] And, according to the Women's Bar Association of Massachusetts's study of part-time lawyers in Boston, *2224 attrition among part-time lawyers may be even higher than the sky-high attrition among full-timers. [FN16] Thus, the maternal wall in the law does not stem from the nonexistence of part-time programs but from stigma and schedule creep. [FN17]

A. Schedule Creep

Schedule creep occurs when part-time lawyers find their schedules creeping back up towards full time--a common problem. [FN18] In many firms, schedule creep results in a lower per-hour wage, given that many firms do not have a "look-back" provision, which allows lawyers who have worked more than their part-time hours to be paid retroactively for the number of hours they actually worked. [FN19] A look-back provision is definitely better than not being paid at all. Yet the fact is that, if the part-time lawyer had wanted the money rather than the time, she/he would not have opted for part-time in the first place. [FN20] Schedule creep is rampant even in some law firms where managing partners have a personal commitment to make their part-time programs work.

B. Stigma

Schedule creep is particularly demoralizing when it is combined, as is common, with stigma. Part-time lawyers report they are often treated as part-committed as the following comments indicate: [FN21]

Eventually, the head of the litigation department decided that the best way to use someone in my anomalous (part-time) position was to assign me sole responsibility for the smaller, less sophisticated matters (or, to put it more bluntly, the "dog cases") that the litigation department took on more or less as a favor for clients of the firm's business department. [FN22]

Supervisors couldn't keep track of my schedule, I definitely was not considered 'serious,' I definitely was given secondary work. My *2225 supervisor wanted to deprive me of benefits required by law until [the] personnel office stopped her. [FN23]

One part-time lawyer found to her surprise that they had forgotten to invite her to the practice group retreat. They had invited male attorneys far junior to her, but they forgot to invite her. [FN24]

I was only part-time for two weeks after a maternity leave, but long after I had returned to full-time, partners still kept asking me when I was coming back full-time if I happened to be out of the office one morning. [FN25]

In addition, the Project for Attorney Retention ("PAR") and other groups have heard reports of part-time lawyers (most of whom were women) who were removed from the partnership track; who had to change practice groups because their original practice would not accept a part-time lawyer; or who did not get bonuses because

bonuses were based solely on the number of hours worked. [FN26] In other words, the stigma surrounding part-time is not only often profoundly demoralizing for women lawyers, it can also result in part-timers who are treated very differently from full-time lawyers who may be doing identical work, a situation that may have legal implications.

When part-time programs are marred by stigma and schedule creep, part-timers can easily find themselves working far more hours than the firm has promised them, without being paid for the extra hours, as well as being denied many concrete employment benefits. The classic justifications for stigma are that “law can't be practiced part-time” and that “part-timers cost the firm money.” Both contentions are untrue.

C. Law Can't Be Practiced Part-time

Most lawyers work on a variety of matters at once, giving part-time attention to each. The only question is how many matters they will work on at once. To quote Andrew Marks, partner at the Washington, D.C. law firm Crowell & Moring LLP and former president of the District of Columbia Bar Association, “Virtually every associate who works with me works on other cases for other partners, and is therefore a part-time lawyer as far as my cases are concerned.” [FN27]

Clearly then, one workable approach to part-time is to reduce total hours worked by reducing the number of matters worked on. In practice, though, this approach is rarely taken. Through its website *2226 (www.pardc.org) and interviews, PAR heard numerous reports of lawyers who changed to a part-time schedule without having their workloads changed at all. Not surprisingly, schedule creep and frustration was the result. [FN28]

Another important point stressed by PAR is that a part-time schedule does not necessarily mean leaving at a set time each day, or even working a set number of days each week. [FN29] This type of limited schedule is possible far more frequently than is commonly assumed. PAR Co-Director Cynthia Thomas Calvert (formerly a law firm partner in Washington, D.C.) and I found that every time someone asserted that a given area--mergers and acquisitions, for example, or litigation--was not suitable for part-time work, we soon found someone successfully working a part-time schedule in precisely that practice area. [FN30] Said one M & A lawyer:

One transaction I worked on was a \$45,000,000 leveraged lease (in 1990). I drafted all the documents, attended all the negotiating sessions, and never worked a Friday during the course of the deal. We traveled and the hours were intense, yet I managed to spend Fridays with my children. I also managed to leave most days by 5:00 p.m. Now this often meant working after my children went to bed, but I was willing to do this because the work was interesting, and I could still find the balance I needed. After the deal was done, I let things move more slowly for a period of time. In 1997, I represented a client in the closing of a \$300,000,000 acquisition of multiple plants located in the southeastern United States. Again the work was intense, there was some travel involved, but in 1997 with the advent of e-mail and voice mail I had even an easier time. When my children were preschool age I took Fridays off, though I checked my voicemail a couple of times a day. During the period I took Fridays off (five years) I can count on one hand the number of Fridays I worked. Now that I come in every day, I take the time in fits and starts as I need it. My colleagues know that I am committed to a project I take on and my clients can always reach me when needed, yet my billable hours will not exceed 1350 this fiscal year. [FN31]

Yet, even in the situations where limiting hours per week is not practical, limiting hours per year is. Some lawyers worked round-the-clock when necessary, and then took off blocks of time once the crunch was over, be-

fore taking on another major work responsibility. [FN32] While all mothers may not be willing to do this, certainly more mothers are willing to do this than to work fifty or sixty-hour weeks throughout the child-rearing years.

***2227 D. Part-timers Cost the Firm Money**

PAR heard again and again that “we can’t afford part-time” because they do not bill enough to cover fixed overhead costs. [FN33] This “common knowledge” is untrue for two distinct reasons. First, it is based on unsound accounting practices. It allocates overhead expenses pro rata to each attorney despite the facts that revenue is not allocated pro rata and that individual attorneys incur varying amounts of expenses. [FN34] Additionally, looking at the macro level, the overhead figure typically includes high expenses related to attrition although a usable part-time program would cut these expenses dramatically. [FN35]

Second, the business case for providing usable part-time programs demonstrates that the savings attributable to reduced attrition far outweigh any arguable higher overhead. [FN36] The business case for a usable balanced hours program reflects four basic elements: the high costs of attrition, the shrinking pool of talent, the generation gap between baby boomers and younger attorneys, and the relationship between client satisfaction and high turnover.

The high costs of attrition. The costs of associate attrition, both quantitative and qualitative, are enormous. Quantitatively, the loss of an associate includes the expenses for recruiting, training, and administration. [FN37] Qualitatively, the firm loses knowledge, experience, and productivity. [FN38] Altogether, a firm loses at least \$200,000 every time an associate walks out the door permanently. [FN39] As one partner noted: “We are spending substantial amounts to recruit [associates], keeping them here and training them for the first two or three years in which they are not profitable, and then we see them begin to leave at about the time they become profitable.” [FN40]

Men, as well as women, are affected. As noted above, women will soon comprise the majority of law students. [FN41] Thus, “[w]omen are an important part of that, because there just aren’t enough men to do the work. That is the simple reality of it.” [FN42] In addition, the women “are voicing the concerns of a growing number of men.” [FN43] A recent study of the graduates of six elite law schools found that seventy-one percent of the graduates with children reported work/family *2228 conflicts. [FN44] Said one Gen-X father, “I want to be a parent who’s involved. I want to be a dad who, 30 years down the road, my kids say, ‘Yeah, he was a big part of our life.’ And right now, I’m not that.” [FN45] Experts note that when men leave due to work/family conflict, they virtually never admit that’s why they are leaving. [FN46] A communication gap exists not only between firm management and women; often it also exists between firm management and male attorneys, too.

Thus, the business case demands change: in order to have adequate staffing to meet client needs, firms are going to have to offer non-stigmatized part-time programs that will attract and keep talented lawyers.

Generational conflict. Generational conflict exists between baby boomers and younger attorneys. Successful baby boom women tended to fall into one of two groups. One group resolved work/family conflict by remaining childless, or childfree: women lawyers are much less likely than men to have children. [FN47] A second group did have children, but followed the list patterns of male attorneys--like the woman who in 1982 was pointed out to me as “having a baby the responsible way”--taking two weeks off and returning full time. Younger women, who have a heftier sense of entitlement both to a non-marginalized work life and hands-

on motherhood, feel alienated from both these solutions, which is why firms with high levels of work/family conflict may also find a lack of solidarity among women on these issues. The generational conflict among men reflects younger men's reluctance to "give up their all" to firms in a social context where many of them saw their fathers do so, only to be fired in middle age. [FN48]

Clients hate high turnover. Clients hate high attorney turnover for one simple reason: it hurts their bottom line. A client must invest substantial amounts of time and effort to educate a new attorney about its business and legal issues and to develop a working relationship. [FN49] Every time an attorney leaves, she takes the client's investment of money and goodwill with her. [FN50] A senior in-house counsel underscored this point: "Stability is extremely important. *2229 Outside lawyers who have an institutional memory are incredibly valuable to us." [FN51]

To resolve client dissatisfaction, law firms must learn what many businesses already have accepted: flexible work arrangements make good business sense. Clients are not interested in perpetuating the law firm culture of crushing workloads, but only in maximizing their profitability, as a senior partner related to PAR: "I have found that clients, being very bottom-line oriented, quickly grasped that they would rather have 80% of an attorney that they knew and trusted, than 100% of an attorney that knows neither them nor their deals." [FN52]

In the face of this evidence, why do so many firms remain convinced that "part-time costs us money" ? The flawed accounting procedures noted above are partially to blame. Moreover, unlike most other businesses, law firms traditionally do not measure expenses: instead, they measure only income generated. [FN53] Thus, partnership income commonly rewards "rainmakers." [FN54] But if a rainmaker drives people away from the firm when she/he departs, she/he is not only bringing money in; she/he is also hemorrhaging money out. Once a firm stops overlooking the high costs of attrition, the economics shift: rather than showing that each part-timer costs the firm money, an analysis that takes account of costs as well as cash flow and focuses not only on revenue generated but also on the bottom line will reveal that a usable part-time policy is in the firm's best interest economically. [FN55]

It is not big news that businesses should be attentive to costs as well as revenue, that a well-run business attends closely to the bottom line. Why is this not standard practice? Why have the flawed accounting procedures been allowed to continue? To answer this, we need to look back at the cognitive bias literature, to the findings of social psychologists studying ambivalent sexism. Work by Susan Fiske, Peter Glick, and Thomas Eckes offers some important insights. Using the ambivalent sexism scale, these researchers plot different stereotypes on a graph, one axis of which is "competence" and the other is "warmth." In a controlled setting, subjects rate "business woman" as similar in competence to "business man," "millionaire," and "Mr. Joe Cool." [FN56] In sharp contrast, "housewives" are rated as high in warmth and low in competence, close to (in the terminology of the researchers) "blind," "disabled," "retarded," and "elderly." [FN57]

These findings suggest the failure to implement usable part-time programs may well reflect more than an accounting failure. It may *2230 also reflect stereotyping, in which women, once they go part-time, fall out of the high-competence/low-warmth "business woman" category, into the low-competence/high-warmth "housewife" category. To quote the Boston lawyer who was given the work of a paralegal when she returned from maternity leave, women who enter motherhood at work (by getting pregnant, taking maternity leave, or going part-time) may well feel the need to protest, "I had a baby, not a lobotomy." [FN58]

Why does this stereotyping occur? I suspect the stereotyping often does not fit the classic model of women-

don't-belong-here discrimination. Instead, it may well reflect a category mistake that is common--indeed pervasive--today: a failure to distinguish between the quality of someone's work and the schedule someone keeps. [FN59] Law firms and other employers need to be alert to avoid situations where unconscious bias leads them to offer different employment conditions--differences in pay, bonuses, advancement, etc.--based on stereotypes about competence that cannot be backed up in terms of objective measures. The scenario of two lawyers, one part- and one full-time, working on identical matters in adjacent offices, but treated differently in terms of pay, bonuses, advancement, and other conditions of employment is, we know, common. [FN60] It does not take a rocket scientist to spot the potential for legal liability in this context. [FN61]

II. Beyond the Maternal Wall

The first step to finding a path beyond the maternal wall is to recognize that the “part-time” terminology is disserving us. What many mothers are seeking is not “part-time” in any traditional sense of the term. Indeed, in Washington, D.C. and elsewhere, a typical “part-time” schedule at a law firm is forty hours a week. [FN62] What many lawyers seek is not part-time hours, but balanced hours.

Men as well as women seek balanced hours that will allow them to pursue a serious career, while at the same time allowing them to live up to a widely held and uncontroversial sense that children need and deserve time with their parents--what I have called the norm of family care. [FN63] The problem mothers face is the same problem faced by many fathers: they feel caught in a clash between the way we define ***2231** our ideals at work, and the norm of family care. [FN64] For, in the U.S., we not only rely heavily on family members for child care--indeed, one out of every four mothers aged twenty-five to forty-four is still out of the labor force--but we also rely on family networks for eighty-five percent of all elderly care, as well as care for ill spouses and other life partners. [FN65]

Men as well as women face a clash of social ideals that reflects, at bottom, a work system that does not fit with our family system. Many fathers today, particularly Gen-X and Gen-Y men, want the same thing most mothers want: a schedule that allows them to balance their goals at work and their goals in family life. [FN66] The so-called “time divide” studies show that large numbers of high-hour men wish they could work fewer hours. [FN67] But most men do not feel free to use balanced hours policies because they have to put up with stigma and marginalization as the price of balance. [FN68]

The challenge, then, is this: how to design a usable policy that offers nonmarginalized, balanced hours. Although there is not a “one-size-fits-all” solution, firms can look for guidance in two ground-breaking works: *Balanced Lives: Changing the Culture of Legal Practice* [FN69] by Deborah Rhode for the ABA Commission on Women, and *Balanced Hours: Effective Part-Time Policies for Washington Law Firms* by myself and Cynthia Calvert for PAR. [FN70]

***2232** A. Bridging the Communication Gap

One of PAR's key findings was the communication gap between management and lawyers that is best illustrated by an incident that occurred outside of Washington. I was talking with the managing partner of one firm who told me that he was very proud of their part-time policy, which he considered one of the best in the state. He said that they worked hard with part-time attorneys to ensure that their schedules actually worked. He spoke with sincerity. But earlier that day, I had spoken with some of the attorneys who worked part-time at his

firm, and was told that they were so demoralized that when they met each other in the office, they put an “L” (for loser) on their foreheads as a joke. Unbeknownst to management, these part-time attorneys felt like they were treated as losers simply because they were part-time. [FN71]

To help firms bridge the communication gap, PAR developed a simple, objective test to give firms a quick “read” on whether their part-time program is “usable.” The concept of “usability” is drawn from the important work of Susan Eaton, whose dissertation suggested that we should stop asking merely whether firms have “family friendly” programs, and start to assess whether existing programs are “usable.” [FN72] Here is the PAR usability test:

PAR Usability Test

1. Usage rate, broken down by sex;
2. Median number of hours worked and duration of the balanced hours schedule;
3. Schedule creep;
4. Comparison of the assignments of balanced hours attorneys before, and after, they reduced their hours;
5. Comparative promotion rates of attorneys on standard and balanced hours schedules; and
6. Comparative attrition rates of attorneys on standard and balanced hours schedules. [FN73]

If a firm finds that the usage rate of its part-time policy is low; that virtually no men go part-time; that most “part-time” schedules are more than a forty-hour week; that schedule creep is widespread; that lawyers get lower quality assignments after they go part-time than they did before; that part-timers are, de facto or de jure, barred from *2233 promotion; that part-timers experience higher attrition than do full-timers--if some or all of these statements are true at the firm in question, its part-time policy is not truly usable--it is a mere shelf product. How does a firm get from shelf product to usable balanced hours program? The Model Policies attached as Appendices are an important tool.

B. The Principle of Proportionality

The first basic tenet of PAR's model policy is the “principle of proportionality”: a statement and practice of proportional pay, benefits, and bonuses. [FN74] Proportional advancement means that balanced-hour attorneys should be kept on partnership track--which, de facto or de jure, they are not now at many law firms. [FN75] Partnership typically reflects a certain level of professional maturity and confidence; a sense that a lawyer has “paid her dues”; and a sense that an attorney has “become equally adept not only at ‘doing the work, but also at getting the work.’” [FN76] A reduced-hours attorney who is given assignments similar to those given to full-time attorneys will achieve all these goals--just on a somewhat different schedule. [FN77] Some firms today enforce proportional advancement through a formula--e.g., an eighty percent attorney drops back one class every two years. [FN78] Others keep reduced-hours on the same schedule, or make the decision on a case-by-case basis. [FN79] The main point is that reducing one's hours should not be a permanent bar to partnership, and that attorneys should not have to return to full-time in order to be considered for partnership. Both of those rules--now very common--are recipes for high attrition and a failure to reach a proportional representation of women.

C. Make the Nonbillable Hours Requirement Explicit

The second basic tenet is that any balanced hours arrangement should set out the number of nonbillable hours an attorney will work, as well as the billable hours. [FN80] This is vital because, to get ahead, attorneys need to do more than bill hours: they need to participate in bar activities, serve on firm committees, perform pro bono work, develop business, take continuing legal education courses, and the *2234 like. [FN81] The time of a full-time attorney typically is divided into billable and nonbillable hours; the same should be true of a reduced-hours attorney. This is in sharp contrast to the current practice, where reduced-hours attorneys are paid only for billable hours and so end up doing everything from professional reading to business development on their own time. [FN82]

D. Implementation

PAR also focuses on implementation. The current system of individualized and often secret side-deals needs to be replaced with a well-publicized policy open to all--men as well as women. [FN83] An important model is the approach of the accounting firm of Ernst & Young. Up until 1996, Ernst & Young had a typical shelf-product policy, with low usage rates. Then Deborah Holmes took over the Center for the New Workforce, and set out to end the secrecy and remove any stigma from alternative work schedules. "We had a lot of people working part-time, but not partners. Each had crafted a deal with her supervisor, and no one was supposed to know about it." [FN84] Under Holmes' guidance, an icon was placed on the initial screen of the computer of each Ernst & Young employee, with a message from the CEO expressing his strong support for flexible work arrangements. An extensive database was added that lists (with their permission) the name and contact information of about 500 people on flexible work arrangements, along with information on what had worked, as well as the challenges each respondent had to face. [FN85] The result: usage rates climbed sharply, and last year, Ernst & Young estimates it saved \$25.5 million due to decreased attrition. [FN86]

This experience highlights several important features of a successful implementation plan:

Support from the top. This entails both explicit and reinforced verbal support from top management, combined with both the signal and the reality that partners as well as associates will be using the balanced hours policy. [FN87] Modeling is important; at one major Washington firm, the current managing partner took six months off after the birth of his son: "I know what it is like to have to juggle *2235 work and other commitments. When my first child was born, I took a six-month sabbatical and stayed home to take care of him from the day he was three months until the day he was nine months old." [FN88]

Sunshine. A usable policy is one that is embraced openly and publicized consistently. [FN89] One important finding of PAR is that the "series of side-deals" approach not only sends the wrong signal, it also means that the chief way people find out about flexible options is through the female social network. Some men expressed to PAR that they found it hard to find out what options were available. [FN90] In one case, PAR found that men and women had been given different information regarding the availability of reduced hours--a situation every firm would certainly want to avoid. [FN91] In firms with a usable program, attorneys no longer feel the need to hide the fact that they are working a balanced schedule--either from their colleagues or their clients.

Universal application. Obviously, a firm cannot offer reduced hours only to mothers. This is a recipe for backlash from a human resources management viewpoint, and may in some situations have legal implications as well. [FN92] At the very least, a policy should be available to anyone with caregiving responsibilities--to elders

and ill partners as well as children. [FN93] It should also be available to new hires as well as attorneys already at the firm: headhunters and law firm placement personnel are increasingly hearing from laterals who seek a balanced schedule, and the credentials of such candidates are often sky-high. [FN94] The best approach, according to one panel of human resources professionals, is “to ask not, ‘why do you need it?’ but ‘will it work?’” [FN95]

The experience of Deloitte & Touche, which also has a forward-looking program of flexible work arrangements, demonstrates another important element of a successful program: training. Deloitte devoted many thousands of hours of firm time to training over a several-year period. [FN96] The result? Deloitte estimated that it saved \$20 million in 2001 thanks to flexible work arrangements. [FN97] Two types of basic training include:

***2236** How-to training. This includes the pros and cons of different types of balanced schedules; how to ensure that business needs are met; how to ensure communication among lawyers and responsiveness to clients when attorneys are not in the office (due to travel and other matters as well as balanced schedules); time management and realistic deadline-setting; and criteria for evaluating individual success. [FN98]

Cognitive bias. Training also needs to explain the cognitive processes through which (to quote Professor Lotte Bailyn of the Massachusetts Institute of Technology), “employers confuse . . . who has talent with . . . who puts in . . . face time.” [FN99] PAR is now working with Harvard psychology professor Mahzarin Banaji to develop useful tools to achieve this goal.

Resentment and the business case. Both the commitment of individual supervisors, and the acceptance of balanced hours by full-time colleagues, depend on their understanding of the business case. Colleagues as well as supervisors need to understand why successful implementation is in the firm's best business interest, and that balanced-hours attorneys have traded off money in return for flexibility and time; and that they can do so too, if they present a viable business proposal. If “negative comments and jokes” remain a part of firm culture, a balanced-hour program will be unsuccessful. [FN100]

Several additional features of a successful plan are highlighted by the experience of Pillsbury, Winthrop, LLP, including the issue of individual partners who refuse to work with balanced-hours attorneys (a practice that will often be inconsistent with maintaining the same quality of assignments). Said Mary Cranston, Chair and CEO of the firm, “We make sure all the young women know that [nonsupport for attorneys on balanced schedules] is not acceptable-- that if there is a problem they should let me or [the head of HR] know. We just have no patience for that here.” [FN101] Such nonsupport is inconsistent with an understanding of the business case. In fact, an informed understanding of the business case has caused Pillsbury, Winthrop to go further: the firm holds practice group managers accountable for attrition. “A well-run group will watch the make-up of their group, and if there is a problem they will look into it and report to the managing board,” said Cranston. [FN102] The firm has a very active system of reviewing associates, so “we have a very complete picture of who is a top performer and who is not.” [FN103] If attrition is higher than expected, managers can go in and see “whether a practice group head ***2237** is weeding people out,” [FN104] or is losing top performers. “We are not passive about these things. If there is a lack of mentoring or a problem with a partner, we expect group heads to come to us with solutions.” [FN105] Cranston concluded, “Very bad attrition because of a failure to manage or a failure to make the workplace friendly for everyone is a particular factor in compensation.” [FN106] This practice reflects bottom-line concerns. Said Cranston:

You've got to look at the big picture here. If women or men with family obligations can't find what they need here, they will vote with their feet. You've got to load all of the costs of attrition into the equa-

tion. In light of the demographics of who is graduating from law school, firms that get diversity right will have much lower attrition. This more than swamps out the slightly higher overhead costs. [FN107] The firm's experience has borne this out. "During the recent period when the market was aggressive and it was very hard to hang on to lawyers, we lost many fewer associates. We really didn't lose that many women. It gave us a tremendous edge." [FN108]

A final major element of PAR's usable Model Policy is the appointment of a Balanced Hours Coordinator or Office of Attorney Retention (which would handle a variety of other retention matters in addition to administering the balanced hours policy). [FN109] The coordinator's functions are as follows:

Functions of a Balanced Hours Coordinator

1. Collect and provide information about balanced hours at the firm;
2. Help attorney and firm plan balanced hour proposal;
3. Monitor schedule creep and assignments;
4. Address excessive hours with supervising attorneys; and
5. Advocate and support balanced hours attorneys. [FN110]

Additional best practices discussed by PAR include ending "up or out," where "associates who did not make partner were expected to leave," (already being eliminated in Washington, D.C.), providing technology support for all lawyers, providing support for planning both by the individual seeking balanced hours and the firm, ending *2238 caps on the duration of a balanced schedule, and providing periodic evaluations to all balanced-hour attorneys. [FN111]

Conclusion

Women lawyers are the canary in the mine on work/family issues in several ways. First, their experience dramatizes the role of work/family conflict in stalling women's progress towards economic equality. Due to law's rigid career path and a standard workweek stretching fifty to sixty hours, women lawyers are caught in a clash between the way we define our ideals at work and the way we define our ideals for family life. In family life, we believe that children need and deserve time with their parents, and that, when elders or parents are ill, the answer is not always to pass the buck and return to work. These ideals of family care are fundamentally inconsistent with work ideals that enshrine the employee who works long hours of overtime for forty years straight, taking no time off for childbearing, childrearing, or anything else. Many women lawyers feel this clash of social ideals has played a central role in shaping the course of their lives. Their own experience shows them the maternal wall that results from the clash between a work system that assumes an ideal worker without family responsibilities, and a family system still heavily reliant on family care.

Women lawyers are the canary in the mine not only because work/family conflicts hit them so hard, but because they may be more likely to interpret workplace demands that bar women disproportionately from advancement as discrimination. In one recent case, a woman lawyer, Joann Trezza, sued when her employer, The Hartford, Inc., repeatedly passed her over for promotion-- after she had children--despite consistently excellent job evaluations. [FN112] The first time this occurred, her supervisor told her he assumed that she was not interested in the higher-level job because she was a mother. [FN113] After being passed over a second time, Trezza told

her supervisor “that she felt Hartford was discriminating against her because she was a woman with children.” [FN114] In response, The Hartford promoted Trezza two months after her complaint, only to later pass her over for Managing Partner in favor of a less-experienced woman without children. [FN115] Trezza sued, and the company defended its action by claiming the promotion of a woman as a defense to the charge of sex discrimination. [FN116] But the court, following *Phillips v. *2239 Martin Marietta, Corp.*, [FN117] ruled that the relevant comparison was between the experience of mothers to that of fathers, not women to men; noted that only seven of the defendant's forty-six managing attorneys nationwide were women and not one was a mother in the relevant region; and held that the plaintiff had stated a cause of action. [FN118] Since then, two more cases have been filed against The Hartford, Inc., both containing counts that a systematic failure to promote people on flexible work arrangements has a disparate impact on women not justified by business necessity. [FN119] As firms decide whether to take the step from shelf policies to usable balanced-hours programs, they need to keep in mind that the potential for legal liability in this arena may be growing. The potential for legal liability is an integral part of the business case, given the high costs of defending a lawsuit.

Here's the bottom line: it makes no sense, in a market where half or more of graduating lawyers are women, to settle for part-time policies that are little used because of stigma and schedule creep. Legal employers need to take a closer look at existing policies, and to pay close attention to the felt need for personal balance. PAR and other groups can provide important resources for employers who seek to implement work/life policies that really work--not only for mothers, but for all lawyers seeking balanced lives.

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[FN2]. The excellent sociological studies of women lawyers include: Cynthia Fuchs Epstein et al., *The Part-Time Paradox: Time Norms, Professional Lives, Family and Gender* (1999); Cynthia Fuchs Epstein, *Women in Law* (Univ. of Illinois Press 1993) (1981); Marjorie B. Schaafsma, *Women Lawyers in Large Law Firms: Conformity, Resistance and Disorganized Coaction*, *Am. J. Soc.* (forthcoming 2002); Marjorie B. Schaafsma, *Women Lawyers' Resistance to Work Overload: Making Time for Families*, 45 *Berkeley J. Soc.* 136 (2001); Marjorie B. Schaafsma, *Disruptive Ambitions: Women Lawyers in Large Law Firms* (1998) (unpublished Ph.D. dissertation, Northwestern University) (on file with author). For studies of the issues related to work/family balance, see Boston Bar Ass'n Task Force on Prof'l Challenges and Family Needs, *Facing the Grail: Confronting the Cost of Work-Family Imbalance* (1999) [hereinafter Boston Bar Ass'n, *Facing the Grail*]; Catalyst, *Flexible Work Arrangements III: A Ten-Year Retrospective of Part-Time Arrangements for Managers and Professionals* (2000); Deborah L. Rhode, *ABA Comm'n on Women in the Profession, Balanced Lives: Changing the Culture of Legal Practice* (2001), available at [http:// www.abanet.org/women/balancedlives.pdf](http://www.abanet.org/women/balancedlives.pdf) [hereinafter Rhode, *Balanced Lives*]; The Women's Bar Ass'n of Mass., *More than Part-Time: The Effect of Reduced Hours Arrange-*

ments on the Retention, Recruitment, and Success of Women Attorneys in Law Firms (2000) [hereinafter Women's Bar Ass'n of Mass., *More than Part-Time*]; Joan Williams & Cynthia Thomas Calvert, *The Project for Attorney Retention Final Report--Balanced Hours: Effective Part-Time Policies for Washington Law Firms* (2001), available at <http://www.pardc.org> [hereinafter Williams & Calvert, *Par Report*].

[FN3]. Jonathan D. Glater, *Women are Close to Being Majority of Law Students*, N.Y. Times, Mar. 26, 2001, at A1; see also Joan Williams, *Letter to the Editor, As More Women Become Lawyers*, N.Y. Times, Mar. 28, 2001, at A20.

[FN4]. NALP Found. for Research & Educ., *Perceptions of Partnership: The Allure & Accessibility of the Brass Ring* 131 (1999).

[FN5]. See Gillian Flynn, *Deloitte & Touche Changes Women's Minds: Career Development for Women*, Personnel J., Apr. 1, 1996, at 56 (noting that by the mid-1980s, fifty percent of Deloitte & Touche's new hires were women, yet its number of female partners continued to drop into the early 1990s).

[FN6]. 490 U.S. 228 (1989); see also Thomas Eckes, *Ambivalent Stereotypes: Testing Predictions From the Stereotype Content Model* (paper presented at the 8th Social Psychology Meeting, Wurzburg, Germany (Sept. 2001)) (on file with author).

[FN7]. 490 U.S. at 236 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985) (second, third, fourth, and fifth alteration in original)).

[FN8]. *Id.* at 234-35.

[FN9]. *Id.* at 235.

[FN10]. See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 25-30 (2000) [hereinafter Williams, *Unbending Gender*] (documenting evolution of the ideal worker norm in the United States).

[FN11]. Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 Colum. L. Rev. 812 (2002).

[FN12]. See *id.* ("A rarely recognized but extraordinarily important fact is that jobs requiring extensive overtime exclude virtually all mothers (93 percent).").

[FN13]. For a more detailed discussion of the maternal wall, see *id.*

[FN14]. NALP Found. for Research & Educ., *Beyond the Bidding Wars: A Survey of Associate Attrition, Departure Destinations & Workplace Incentives* 65 (2000).

[FN15]. *Id.*

[FN16]. See *id.* at 53 (finding that thirty-eight percent of new associates leave within three years; seventy percent by seven years); Women's Bar Ass'n of Mass., *More than Part-Time*, *supra* note 2, at 17 ("In fact, the data show that women attorneys with a reduced hours arrangement left firms at an even higher rate than did full-time women and at a rate more than double the rate of full-time men.").

[FN17]. Williams & Calvert, Par Report, supra note 2.

[FN18]. Id. at 34.

[FN19]. Id. at 35.

[FN20]. Id.

[FN21]. See Women's Bar Ass'n of Mass., More than Part-Time, supra note 2, at 21 (“Although the part-time partner Respondents have been with their respective firm on average of fourteen years and are devoting more time to work than their arrangement requires, 70% of the partner Respondents reported that their full-time colleagues view them as ‘lacking commitment.’”).

[FN22]. Williams & Calvert, Par Report, supra note 2, at 18.

[FN23]. Id. at 24.

[FN24]. Id. at 15.

[FN25]. Women's Bar Ass'n of Mass., More than Part-Time, supra note 2, at 23.

[FN26]. Id. at 31-32; Williams & Calvert, Par Report, supra note 2, at 22.

[FN27]. Williams & Calvert, Par Report, supra note 2, at 44.

[FN28]. Id. at 15.

[FN29]. Id. at 28.

[FN30]. Id. at 43-44.

[FN31]. Id. at 44 (quoting Terri Krivosha, partner in the corporate department of Maslon, Edelman, Borman & Brand in Minneapolis, Minnesota).

[FN32]. Id. at 45.

[FN33]. Id. at 42.

[FN34]. Id.

[FN35]. Id.

[FN36]. Id. at 42-43.

[FN37]. Id. at 7.

[FN38]. Id.

[FN39]. Id.

[FN40]. Id. (alteration in original).

[FN41]. Glater, *supra* note 3.

[FN42]. Williams & Calvert, Par Report, *supra* note 2, at 8 (quoting Catalyst, *Advancing Women in Business—The Catalyst Guide* 26 (1998)).

[FN43]. *Id.* at 9 (quoting Catalyst, *Women in Law: Making the Case* 1 (2001)).

[FN44]. *Id.* at 9 (citing Catalyst, *Women in Law: Making the Case* 18 (2001)).

[FN45]. *Id.*

[FN46]. *Id.*

[FN47]. See Laura W. Perna, *The Relationship Between Family Responsibilities and Employment Status Among College and University Faculty*, 72 *J. Higher Educ.* 584, 585 (2001) (“1980 census data showed that White women lawyers... were substantially less likely than White women of the same age in the general population to be married and have children.”).

[FN48]. Williams & Calvert, Par Report, *supra* note 2, at 9-10.

[FN49]. *Id.* at 11.

[FN50]. *Id.*

[FN51]. *Id.*

[FN52]. *Id.*

[FN53]. Boston Bar Ass'n, *Facing the Grail*, *supra* note 2, at 17.

[FN54]. *Id.* at 18.

[FN55]. Williams & Calvert, Par Report, *supra* note 2, at 42-43.

[FN56]. Eckes, *supra* note 6.

[FN57]. *Id.*

[FN58]. Williams, *Unbending Gender*, *supra* note 10, at 69.

[FN59]. Lotte Bailyn, *Breaking the Mold* 79-83 (1993).

[FN60]. Williams & Calvert, Par Report, *supra* note 2, at 14-15.

[FN61]. Williams, *Unbending Gender*, *supra* note 10, at 101-13; Joan Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job* (forthcoming 2002).

[FN62]. Williams & Calvert, Par Report, *supra* note 2, at 17.

[FN63]. See generally Ellen Galinsky, *Ask the Children: What America's Children Really Think About Working*

Parents 58 (1999) (“We asked parents in our Ask the Children survey, ‘If you were granted one wish to change the way that your work affects your child’s life, what would that wish be?’ The largest proportion of parents--22 percent--wished to ‘have more time with their child.’”).

[FN64]. Ann Crittenden, *The Price of Motherhood: Why the Most Important Job in the World is Still the Least Valued* 22-23 (2001).

[FN65]. Williams, *Unbending Gender*, supra note 10, at 2; Judy Mann, *Blessed, and Undervalued, Are the Caregivers*, *Wash. Post*, May 11, 2001, at C9.

[FN66]. Catherine Loughlin & Julian Barling, *Young Workers' Work Values, Attitudes, and Behaviours*, 74 *J. Occupational and Org. Psychol.* 543, 545 (2001).

[FN67]. Williams, *Unbending Gender*, supra note 10, at 59.

[FN68]. *Id.* at 59-60.

[FN69]. Williams & Calvert, *Par Report*, supra note 2.

[FN70]. Rhode, *Balanced Lives*, supra note 2. For further information on the ABA Commission on Women in the Profession, see <http://www.abanet.org/women>.

Professor Rhode has been in the forefront of confronting the work/life balance dilemma for many years. See Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000); Deborah L. Rhode, *Justice and Gender* (1989); Deborah L. Rhode, *Speaking of Sex* (1997); Deborah L. Rhode, *Gender and Professional Roles*, 63 *Fordham L. Rev.* 39 (1994); Deborah L. Rhode, *Myths of Meritocracy*, 65 *Fordham L. Rev.* 585 (1996); Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 *Yale L.J.* 1731 (1991).

The Program for Attorney Retention is an initiative of the Program on Gender, Work and Family at the American University, Washington College of Law, and is funded by the Alfred P. Sloan Foundation. The PAR Report is available at <http://www.pardc.org>.

Other important publications that address usable part-time policies include: Boston Bar Ass'n, *Facing the Grail*, supra note 2; Women's Bar Ass'n of Mass., *More than Part-Time*, supra note 2; and Catalyst, *Flexible Work Arrangements III*, supra note 2.

[FN71]. Williams, *Unbending Gender*, supra note 10, at 72-75.

[FN72]. Susan Catharine Eaton, *Work/Family Integration in Biotechnology: Implications for Firms and Employees* (2000) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with author).

[FN73]. Williams & Calvert, *Par Report*, supra note 2, at 16.

[FN74]. Rhode, *Balanced Lives*, supra note 2, at 24; Williams & Calvert, *Par Report*, supra note 2, at 21-23.

[FN75]. Rhode, *Balanced Lives*, supra note 2, at 36-37; Williams & Calvert, *Par Report*, supra note 2, at 25-26.

[FN76]. Williams & Calvert, *Par Report*, supra note 2, at 26.

[FN77]. *Id.*

[FN78]. *Id.*

[FN79]. *Id.*

[FN80]. Rhode, *Balanced Lives*, *supra* note 2, at 34; Williams & Calvert, *Par Report*, *supra* note 2, at 25.

[FN81]. Rhode, *Balanced Lives*, *supra* note 2, at 39; Williams & Calvert, *Par Report*, *supra* note 2, at 25.

[FN82]. Williams & Calvert, *Par Report*, *supra* note 2, at 25.

[FN83]. *Id.* at 30.

[FN84]. *Id.* at 31.

[FN85]. *Id.*

[FN86]. Alison Hooker, Partner, Center for the New Workforce, Ernst & Young, Washington, D.C., *Speech at the Work/Family Summit (Feb. 12, 2002) (sponsored by Senator Edward M. Kennedy and organized by the Program on Gender, Work, and Family, Washington, D.C.)*.

[FN87]. Rhode, *Balanced Lives*, *supra* note 2, at 40; Williams & Calvert, *Par Report*, *supra* note 2, at 29-30.

[FN88]. Williams & Calvert, *Par Report*, *supra* note 2, at 29.

[FN89]. Rhode, *Balanced Lives*, *supra* note 2, at 40.

[FN90]. Williams & Calvert, *Par Report*, *supra* note 2, at 30.

[FN91]. *Id.*

[FN92]. *Id.* at 27.

[FN93]. Rhode, *Balanced Lives*, *supra* note 2, at 34.

[FN94]. *See id.*

[FN95]. Williams & Calvert, *Par Report*, *supra* note 2, at 27.

[FN96]. *Id.* at 38.

[FN97]. E-mail from Kathryn Davie Wood, Senior Manager, Initiative for the Advancement of Women, Deloitte & Touche, to Joan Williams (Feb. 27, 2002, 16:08:23 EST) (on file with author).

[FN98]. Rhode, *Balanced Lives*, *supra* note 2, at 38; Williams & Calvert, *Par Report*, *supra* note 2, at 32.

[FN99]. Williams & Calvert, *Par Report*, *supra* note 2, at 38.

[FN100]. *Id.* at 32.

[FN101]. *Id.* at 37 (alteration in original).

[FN102]. Id.

[FN103]. Id.

[FN104]. Id.

[FN105]. Id.

[FN106]. Id.

[FN107]. Id.

[FN108]. Id. at 38.

[FN109]. Id. at 36; see Rhode, *Balanced Lives*, supra note 2, at 23.

[FN110]. Williams & Calvert, *Par Report*, supra note 2, at 36.

[FN111]. Id. at 28, 33-34, 39-41.

[FN112]. *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *6 (S.D.N.Y. Dec. 30, 1998).

[FN113]. Id. at *3.

[FN114]. Id. at *4.

[FN115]. Id. at *4, *6-7.

[FN116]. Id. at *14-15.

[FN117]. 400 U.S. 542 (1971).

[FN118]. *Trezza*, 1998 U.S. Dist. LEXIS 20206, at *7, *17-21.

[FN119]. *Capruso v. The Hartford, Inc.*, No. 01-4250 (S.D.N.Y. removed from N.Y. Sup. Ct. May 18, 2001); *Goldstick v. The Hartford, Inc.*, No. 120969/00 (N.Y. Sup. Ct. filed Sept. 27, 2000). For a comprehensive survey of case law concerning discrimination against caregivers, see Joan Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job* (draft on file with author).
70 Fordham L. Rev. 2221

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