The U.S. economy has changed from one in which workers enjoyed relatively stable work-relationships with their employers including forty-hour workweeks, career advancement, generous benefit packages, and steady jobs. Now, these sorts of working relationships, which were hallmarks of the industrial economy, have been widely replaced by relationships in which many burdens have been shifted onto individual workers: from the burden of providing their own pension and health benefits to the burden of adapting themselves to flexible scheduling demands made by their employers. This Article examines one solution to the predicament in which workers now find themselves under the more flexible conditions of the contemporary economy—a law requiring employers to consider requests for flexible work arrangements from their employees. It analyzes the prospects for such a law in the United States by detailing a similar initiative that has been enacted in the United Kingdom and by describing the regulations and some case law that have developed under the UK law. The Article concludes that the UK law does not go nearly far enough in bringing balance to the employer-employee relationship, but that it can be a component of an agenda that makes gains toward producing such balance.
I. INTRODUCTION

In the past three decades, the world of work has changed. Gone are the stable working relationships promoted by industrialization. In their place is a more flexible service-based economy in which many workers struggle to find steady full-time work, to pay for health care, to save for retirement, and—importantly for this Article—to balance work and family demands. Workers are finding it increasingly difficult to take time off or reschedule work in order to spend time with families or to care for children, and this problem disproportionately affects low-wage workers and working women.1

Recent popular social scientific literature adequately reflects some of the ways in which the contemporary flexible economy impacts workers. For example, in The Great Risk Shift, political scientist Jacob Hacker traces the changes in the labor market that have led to a shifting of burdens from government and employers to individual employees.2 Hacker’s book provides both social scientific analysis and concrete examples of how the burden of providing jobs, health care, and pensions has shifted to individual employees and the detrimental effects that this shift has had on middle and

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1. In one study, only 28% of low-wage workers surveyed were able to take “a few days off” to care for a child “without losing pay, without using vacation days, and without having to make up some other reason for one’s absence.” Families and Work Institute, When Work Works: A Project on Workplace Effectiveness and Workplace Flexibility, http://familiesandwork.org/3w/highlights.pdf (last visited Apr. 13, 2008). In the same study, only 13% of women without children and younger than 45 reported that they would return to work as soon as possible after having children. Id. This problem, too, can be traced to the lack of flexibility options in most workplaces. Id. See also Heather Boushey, Values Begin at Home, but Who’s Home?, THE AM. PROSPECT, Mar. 2007 (describing the effect of work-life balance issues on women in the United States), available at http://www.prospect.org/cs/articles/article=values_begin_at_home_but_whos_home.
low-income Americans. Hacker also makes a number of suggestions regarding ways in which government can help to recalibrate the risk-sharing balance between employers, the government, and workers.

In *The Disposable American*, former New York Times business reporter Louis Uchitelle methodically explores the effects of layoffs on employees ranging from working-class factory workers to high-powered CEOs. Uchitelle focuses not only on the economic effects of layoffs on employees, but also on their psychological effects. Employers, he contends, respond to economic shifts and the demand for workplace flexibility by utilizing layoffs more frequently. Uchitelle argues that government can and should intervene with new policies to help alleviate the problems that arise from these new economic conditions.

Both popular books share a common theme: the economy has changed, these changes detrimentally affect workers, and there have been few policy changes to alleviate those effects. Indeed, most labor and employment laws in the United States were written and designed in a time when industrial labor markets were the dominant economic model. The notion that work is stable and predictable underlies the basic assumptions of these laws. In some ways, these laws and policies remain effective, but they fail to address new problems workers face in the contemporary economy. These problems include a loss of health and welfare benefits and pension benefits; the destruction of a traditional community interest among workers who no longer interact on steady shop floors; and a loss of control for the worker over terms of employment such as scheduling.

From a regulatory perspective, the problem of workplace inflexibility requires new policy solutions. While advocating that current U.S. labor laws are inadequate to address workplace inflexibility, this paper argues that any new policy solutions must incorporate the progressive ideals intrinsic to the movement that led to the passage of existing United States labor laws. Indeed, as Professor Karl Klare points out, "Labor law evolved

3. Id. at 35-39, 60-63, 87-90.
4. Id. at 165-93 (suggesting, inter alia, programs that promote an improved social safety net for unemployed workers, enhanced pension security, and expansion of health benefits to more Americans).
6. See, e.g., id. at 178 ("In the cataloging of damage that results from layoffs, incapacitating emotional illness almost never appears on the lists that economists, politicians, sociologists, union leaders, business school professors, management consultants, and journalists compile.").
7. Id. at 4-5.
8. Id. at 205-26.
10. Id.
in response to (although it also channeled and contained) worker resistance
to injuries and injustices visited upon them by industrial capitalism."
In a
similar spirit, new legislation must respond to the current injustices and
injuries—physical, mental, and emotional—that the new flexible system of
work places on workers, particularly working women and working people
with families.

This Article explores potential policy responses to the problems of
workplace inflexibility, problems that are collectively termed
"flexibilization" in this Article. Specifically, it examines a British law, the
Employment Act of 2002, which granted workers in the United Kingdom a
right to request "flexible work arrangements from their employers," and
assesses the desirability of similar legislation in the United States. Flexible
work arrangements are arrangements whereby a worker deviates from a
standard workweek. The deviation might include a decrease in hours, a
shift in hours, or a shift in the location of work. Under the UK
Employment Act an employer must follow certain procedures in responding
to employee requests for flexible work arrangements, but is permitted to
refuse requests for enumerated business reasons.

The Article begins with a discussion of the history of political
economy in the United States and Britain in the Twentieth Century that
brought about the problem of flexibilization. It locates the UK
Employment Act of 2002 within that history, describing the law, the
accompanying regulations, and two cases in which workers brought claims
under the law. It next offers a comparative assessment of the state of
employment law in the United States. Finally, the Article analyzes the UK
Employment Act, assessing its merits as a tool to increase workers’ ability
to advocate for themselves within the workplace with regard to scheduling
work and balancing family and work. The Article concludes that although
flexible work laws have their shortcomings, they may be successful where
they form one part of a comprehensive agenda to address flexibilization in

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11. Karl Klare, The Horizons of Transformative Labour and Employment Law, in Labour Law in
An Era of Globalization: Transformative Practices & Possibilities 3, 3 (Joanne Conaghan et
al. eds., 2002).
12. I borrow this term from Professor Katherine Stone. See Stone, supra note 9, at 568.
available at http://www.law.georgetown.edu/workplaceflexibility2010/definition/general/
14. The Employment Act of 2002 states that flexible working refers to
(i) the hours [an employee] is required to work,
(ii) the times when [an employee] is required to work,
(iii) where, as between [an employee’s] home and a place of business of [an employee’s]
employer, [an employee] is required to work, or
(iv) such other aspect of [an employee’s] terms and conditions of employment as the
Secretary of State may specify by regulations . . .
15. See Workplace Flexibility 2010, supra note 13, at 1.
the United States. In particular, the Article cautions against viewing a flexible work law as a cure-all to United States' workers' rights problems and it encourages policymakers to package the policy with other efforts toward greater worker security in the realms of health care, pensions, union organizing, and work-life balance.

II. BACKGROUND—THE PROBLEM OF FLEXIBILIZATION

Professor Katherine Stone uses the term "flexibilization" to refer to the late-Twentieth Century shift away from a model of workplace regulation that emphasized "internal labor markets."

Describing internal labor markets, she writes:

In internal labor markets, jobs were arranged into hierarchical ladders and each job provided the training for the job on the next rung up. Employers who utilized internal labor markets hired only at the entry level, then utilized internal promotion to fill all of the higher rungs. Employers wanted employees to stay a long time, so they gave them an implicit promise of long-term employment and of orderly and predictable patterns of promotion. Consistent with the internal labor market job structures, employers structured pay and benefit systems so that wages and benefits rose as length of service increased.

Thus, internal labor markets were built on a model of security and predictability. The forty-hour work week, career advancement, stable benefit packages, and steady jobs were the basis of this model.

Today's labor markets are decidedly different. In contemporary developed economies, workers face new demands from the labor market such as being willing to change schedules from day-to-day, accepting part-time work, continuously learning new skills, and even changing jobs multiple times throughout their lives. In short, workers must be more flexible in every aspect of their work lives; hence, Professor Stone uses the term flexibilization. Stone attributes flexibilization to "increasingly competitive product markets" focused on forms of capital such as "intellectual capital," or capital that is directly related to the particularized knowledge and skills that employees possess in addition to their ability to meet productivity quotas.

Geographer David Harvey posits that the corporate model used by Henry Ford, the early-Twentieth Century automobile magnate, exemplifies

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16. Stone, supra note 9, at 568.
17. Id.
18. Id.
19. Id.
20. Id. at 568-70.
21. Id. at 568.
the paradigmatic internal labor market. Ford's corporate model ensured that workers would have the financial stability and security to buy the products they produced. Financial stability and security were provided by the sorts of generous benefit packages and promotional paths that are the hallmarks of Stone's internal labor markets. Ford and other industrialists of the time recognized that they needed consumers for the products they were supplying in order to expand their businesses. Thus, the Fordist economy and its internal labor markets were in part a result of an economy centered on the production of tangible goods, rather than an economy based on services.

Harvey explains that the Fordist economy gave way in the mid-1970s in response to a host of macroeconomic events that began in the latter half of the 1960s. In particular, Harvey points out that "corporations found themselves with a lot of unusable and excess capacity (chiefly idle plants and equipment) under conditions of intensifying competition." Corporations began looking for ways to manipulate their labor forces in order to increase profit margins. Then, in 1973, "the sharp recession . . . exacerbated by the oil shock" cleared the way for corporations to begin reorganizing their workforces with an eye toward flexibility. The result of

23. Id. at 126.
24. See Stone, supra note 9, at 568.
25. HARVEY, supra note 22, at 126. Harvey writes:
    Ford believed that the new kind of society could be built simply through the proper application of corporate power. The purpose of the five-dollar, eight-hour day was only in part to secure worker compliance with the discipline required to work the highly productive assembly-line system. It was coincidently meant to provide workers with sufficient income and leisure time to consume the mass-produced products the corporations were about to turn out in ever vaster quantities.
    Id.
26. See id. (describing the need for workers who could simultaneously be consumers).
Importantly, Harvey traces this trend of Fordism across a handful of advanced industrial economies including both the United States and Britain. See, e.g., id. at 130 (describing the annual rates of economic growth in the United State, Japan, West Germany, France, and Britain from 1960-75). Thus, for macro-political economic purposes, the Fordist model and its internal labor markets can be said to apply to both mid-Twentieth Century Britain and mid-Twentieth Century United States. Id.
27. Id. at 145.
28. Id.
29. See id. ("This forced [corporations] into a period of rationalization, restructuring, and intensification of labour control (if they could overcome or bypass union power)").
these experiments is what Harvey refers to as a “flexible accumulation” economic regime and what Stone (and this Article) refers to as flexibilization.31

Under the new economic regime, workers have lost a tremendous amount of security. And importantly, as Harvey explains, service workers, non-skilled workers, low-income workers, and working women bear the brunt of the new flexible economy because these workers, whom Harvey dubs “periphery” workers, experience less job stability, fewer benefits, lower unionization rates, and more rigorous scheduling demands than their forbearers from the Fordist era.32 Job stability decreases as employers, responding to market demand, “move away from regular employment towards increasing reliance upon part-time, temporary or sub-contracted work arrangements.”33 Benefits decrease as employers seek to shift the costs and risks of social insurance—including pensions, health care, and other employment benefits—to workers.34 Workers often find that their employers have abandoned the “implicit promise of long-term . . . orderly and predictable . . . promotion” of the Fordist era.35

III.
EMPLOYMENT LAW AND POLICY IN COMPARATIVE PERSPECTIVE

A. The United Kingdom

The United Kingdom passed the Employment Act of 2002 in part to address some of the problems of flexibilization.36 This Article focuses on Section 47 of the Act, which amends the Employment Rights Act of 1996.37 The Employment Rights Act is an important place mark in contemporary employment policy in the United Kingdom because it is referred to by subsequent acts that expand on its formalization of certain employee rights in the UK, such as rights to information from employers and rights to take leave.38

31. See id. at 141; Stone, supra note 9, at 568.
32. See HARVEY, supra note 22 at 150 (stating that core workers are relatively insulated from the effects of flexible work while workers on the periphery are more susceptible to the new instabilities created by flexibility demands).
33. Id.
34. See HACKER, supra note 2, at 6-9 (describing the ways in which the burdens of social insurance have to be borne by workers as both employers and government roll back welfare entitlements).
35. Stone, supra note 9, at 568.
The New Labour government enacted two notable legislative initiatives that amend the Employment Rights Act: the Employment Relations Act of 1999 and the Employment Act of 2002. The Employment Relations Act of 1999 was perhaps most important for its codification of the right to union recognition in the UK. The 1999 Act also codified individual employee rights, such as the right to take maternity leave and leave to care for one’s children.

The Employment Act of 2002 further expanded these rights by granting parents paternity and adoption leave and specifying periods through which employees must be paid when taking paternity, adoption, and maternity leave. It also grants employees the right to request a flexible work arrangement if the employee’s “purpose in applying for the change is to enable [the employee] to care for” their child, or a child with whom the employee has a qualified legal relationship under the Act. The 2002 Act allows workers to request flexible scheduling in the hours they are required to work, the time they are required to work, or the place—home or office—they are required to work. The employer may refuse an employee’s request for a variety of reasons related to the employer’s business needs. The Act further stipulates that it applies only to the parents of children under the age of six and the parents of disabled children under the age of eighteen. The regulations stipulate that after an employee petitions for a change in her schedule, an employer shall meet to discuss the request with the employee within twenty-eight days. The employer must

41. Employment Relations Act, 1999, c. 26, §§ 1-6 (U.K.). Political scientist Chris Howell observes that “[t]he central pillar of the New Labour industrial relations project was the 1999 Employment Relations Act (ERA).” CHRIS HOWELL, TRADE UNIONS AND THE STATE: THE CONSTRUCTION OF INDUSTRIAL RELATIONS INSTITUTIONS IN BRITAIN, 1890-2000 182 (2005) (noting also that “[t]he ERA contained a number of new or enhanced individual and collective rights at work, including the third key pre-election pledge of a statutory right to union recognition”).
44. Employment Act, 2002, c. 22, § 47 (U.K.) (explaining that an employee’s “purpose in applying for the change is to enable [the employee] to care for someone who, at the time of application, is a child in respect of whom he satisfies such conditions as to relationship as the Secretary of State may specify by regulations”).
45. Id.
46. Id. (stating that the employer “shall only refuse the application because he considers that one or more of the following grounds applies—(i) the burden of additional costs, (ii) detrimental effect on ability to meet customer demand, (iii) inability to re-organise work among existing staff, (iv) inability to recruit additional staff, (v) detrimental impact on quality, (vi) detrimental impact on performance, (vii) insufficiency of work during the periods the employee proposes to work, (viii) planned structural changes, and (ix) such other grounds as the Secretary of State may specify by regulations”).
47. Id.
issue a written notice of its decision within fourteen days of the meeting.\textsuperscript{49} The employee then may make a timely appeal of the decision to the employer within fourteen days.\textsuperscript{50}

The 2002 Act allows an employee to then appeal the employer’s decision to the government Employment Tribunals within fourteen days of receiving the employer’s decision.\textsuperscript{51} Decisions of the Employment Tribunals are further appealable to the Employment Appeals Tribunal.\textsuperscript{52}

Two such appeals regarding the Flexible Work provisions of the Employment Act of 2002 have been certified by the Employment Appeals Tribunal with published decisions. In the first case, \textit{Grimmer v. KLM Cityhopper}, Grimmer applied for a flexible work arrangement with her employer in order to care for her children.\textsuperscript{53} The question before the Employment Appeals Tribunal was whether her appeal to the tribunal of her employer’s refusal of her request for flexible working sufficiently stated the details of her claim.\textsuperscript{54} Grimmer stated the basis of her appeal as her employer’s mistaken assumption that “‘if they concede to my request, others would be requesting similar/same working arrangements.’”\textsuperscript{55} The Employment Appeals Tribunal overturned the Employment Tribunal’s holding that Grimmer had not sufficiently detailed her claim to the tribunal and remanded the case for proceedings on the merits of her claim.\textsuperscript{56} The Appeals Tribunal found “that in the field of industrial relations where application forms are frequently completed by individual employees without professional assistance a technical approach is particularly inappropriate.”\textsuperscript{57} While the merits of Grimmer’s flexible work request were not before the Employment Appeals Tribunal, the Appeals Tribunal opinion provided insight into the power-balancing achieved through the procedural mechanisms of the Employment Act of 2002. The Appeals Tribunal recognized the lower tribunals’ role in ensuring some amount of power balancing between employers and employees, even going so far as to

\textsuperscript{49} \textit{Id.} \S 4-5.
\textsuperscript{50} \textit{Id.} \S 8.
\textsuperscript{52} Employment Appeals Tribunal Homepage, http://www.employmentappeals.gov.uk/ (last visited Dec. 18, 2009).
\textsuperscript{54} \textit{Id.} \S 5.
\textsuperscript{55} \textit{Id.} \S 2.
\textsuperscript{56} \textit{Id.} \S 16.
\textsuperscript{57} \textit{Id.} \S 12.
suggest that an exceedingly technical approach to procedural requirements could violate human rights.\footnote{Indeed, the Appeals Tribunal asked the following set of questions: Furthermore, how does such a policy meet the overriding objective in Regulation 3 of dealing with a case justly and ensuring that the parties are on an equal footing? How does it have proper regard to the fact that Employment Tribunals are frequently approached by claimants who are not legally represented? How does refusing to accept a claim on the basis of not providing 'required information' affect a claimant in respect of the running out of time limits for bringing claims? How can principles of considering prejudice to the Claimant and the Respondent be taken properly into account? Could it be that a rigid application of these rules might result in a breach of the safeguards enshrined in Article 6 of the European Convention on Human Rights? \cite{Id. \S11}}

In the second case, \textit{Commotion Limited v. Rutty}, Rutty claimed that her employer had unreasonably rejected her request for a flexible work situation in order to care for her granddaughter.\footnote{Commotion Ltd. v. Rutty, [2006] I.R.L.R. 171, \S 2 (Employment App. Trib.) (U.K.).} The lower tribunal found that Commotion violated the Act because its response to Rutty’s request was legally deficient.\footnote{Id. \S 4 (finding that Commotion “failed properly to respond to [Mrs. Rutty]’s request for flexible working”).} Commotion denied Rutty’s request on the grounds that it would be detrimental to production and run contrary to Commotion’s goal to “create a team spirit by having a uniform working day.”\footnote{Id. \S 7.} When her request was denied, Rutty left the job,\footnote{Id. \S 8.} claiming that she had been constructively discharged because she could not continue to work the hours Commotion demanded and care for her granddaughter.\footnote{Id. \S 2. See also Id. at \S 5 (describing Mrs. Rutty as primary caretaker for her granddaughter).} The Employment Appeals Tribunal upheld the Employment Tribunal’s ruling that Commotion improperly considered Rutty’s flexible work request.\footnote{Id. \S 37.}

In \textit{Rutty}, the Employment Appeals Tribunal found that an Employment Tribunal should not “look and see whether it regards the employer as acting fairly or reasonably” when the employer rejects an employee’s flexibility request.\footnote{Id. \S 38.} Rather, the tribunal should examine the factual basis for the employer’s reason for rejecting the request.\footnote{Id. \S 38.} The Employment Appeals Tribunal set forth a rule for the Employment Tribunals to follow and explained the rule by posing questions for the Tribunals to answer:

\textit{[T]}o establish whether or not the decision by the employer to reject the application was based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. . . . Could it have been coped with without
disruption? What did other staff feel about it? Could they make up the
time? And matters of that type.\textsuperscript{67}
The Employment Appeals Tribunal found that the lower tribunals were
entitled to rule against Commotion in this case because Commotion had not
offered sufficient evidence to answer those questions.\textsuperscript{58} While the Grimmer
case elaborated on the procedural standards of the 2002 Act, Rutty
addressed substantive requirements an employer must meet in order to deny
an employee request for flexible work.

\textbf{B. The United States}

In the United States little has been done to address the problem of
flexibilization, with two notable exceptions: the Family and Medical Leave
Act (FMLA) and the Federal Employees Flexible and Compressed Work
Schedules Act (FEFCWA).\textsuperscript{69} FMLA gives many workers in the United
States the right to take leave in the case of their own sickness or the
sickness of a close family member.\textsuperscript{70} FEFCWA creates a framework under
which federal agencies are authorized to allow their employees to work
flexible or compressed work schedules.\textsuperscript{71}

The Family and Medical Leave Act entitles employees to a total of 12
workweeks of leave during any 12-month period in a variety of situations
under which employees become ill or must care for a family member.\textsuperscript{72}
Congress passed the FMLA, in part, to address the problem of "inadequate
job security for employees who have serious health conditions that prevent
them from working for temporary periods."\textsuperscript{73} Employees who are found to

\begin{itemize}
  \item \textsuperscript{67} Id. \S 38.
  \item \textsuperscript{68} Id. \S 39.
  \item \textsuperscript{69} One might also include in this list the Consolidated Omnibus Budget Reconciliation Act of
1985, which gives workers temporary health coverage continuation when they lose employer-sponsored
workplaceflexibility2010/law/index.cfm (last visited Feb. 11, 2008) (listing a variety of other laws
"impacting workplace flexibility").
  \item \textsuperscript{70} Family and Medical Leave Act of 1993, 29 U.S.C. \S\S\ 2601-2654 (2006 & Supp. II 2008).
  \item \textsuperscript{71} Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. \S\S\ 6120-
  \item \textsuperscript{72} 29 U.S.C. \S\ 2612 (2006 & Supp. II 2008). FMLA specifically provides for leave under the
following four circumstances:
  \begin{enumerate}
    \item Because of the birth of a son or daughter of the employee and in order to care for such
son or daughter.
    \item Because of the placement of a son or daughter with the employee for adoption or foster
care.
    \item In order to care for the spouse, or a son, daughter, or parent, of the employee, if such
spouse, son, daughter, or parent has a serious health condition.
    \item Because of a serious health condition that makes the employee unable to perform the
functions of the position of such employee.
  \end{enumerate}
  \textit{Id.}
  \item \textsuperscript{73} \textit{Id.} \S 2601.
have been wrongfully denied such leave by their employers are entitled to sue for "wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." Notably, the FMLA does not guarantee paid leave for employees, rendering it unusable to those employees who simply cannot afford to take time off without pay.

The Federal Employees Flexible and Compressed Work Schedules Act allows federal agencies to adopt employment policies permitting employees to work flexible and compressed schedules. The Office of Personnel Management views flexible scheduling as giving employees an opportunity to choose the schedule under which they will work the hours required of them. For example, employees could choose to alter their start and end times on given days during the week, completing their required hours of work, but doing so from 11:00 am to 7:00 pm rather than the traditional 9:00 am to 5:00 pm schedule. In contrast, compressed scheduling "require[s] full-time employees to work 80 hours in less than 10 days in a pay period. Under a compressed schedule, the times of arrival at and departure from the office are regular and fixed." It is difficult to assess the effectiveness of FEFCWA because agencies are free to implement flexible and compressed scheduling programs as they desire and no good statistical analyses exist regarding agency use of FEFCWA.

74. Id. § 2617(a)(1)(A)(i)(I).
75. Id. Proposals to partially fill this hole in United States employment policy have been proposed by Representative Rosa DeLauro and Senator Edward Kennedy in the House and Senate respectively. Healthy Families Act, H.R. 1902, 109th Cong. (2005); S. 902, 109th Cong. (2005).
77. U.S. OFFICE OF PERSONNEL MGMT., NEGOTIATING FLEXIBLE AND COMPRESSED WORK SCHEDULES n. 1 (1995), available at http://www.opm.gov/lmr/html/flexible.asp (follow “flexible” hyperlink). The OPM describes flexible working as ... refer[ing] to a variety of scheduling arrangements in which fixed times of arrival and departure are replaced by a workday or workweek composed of two different types of time—core time and flexible time. Core time is the designated periods during which all employees must be present. Flexible time is designated as part of the schedule of working hours within which employees may choose their time of arrival and departure from the office, within limits consistent with the duties and requirements of their position.
78. Id.
79. Id. at n. 2.
80. See 5 U.S.C. §§ 6120-6133. While FEFCWA goes to show that flexible work scheduling is not unheard of in the United States (even at the level of the federal government) and is interesting to note, the lack of statistics regarding its usage make it hard to use as an example in an academic paper on the subject of flexible work. As a result, discussion of FEFCWA in the remainder of this Article is limited.
IV.
ANALYSIS

A. Problems Facing U.S. Policymakers

Worker-employer power imbalances exist because employers typically have more economic leverage than workers; as demonstrated below, flexibilization exacerbates these power imbalances. Employers have shifted many burdens, such as health care and other welfare benefits, onto employees in order to keep their firms flexible.\(^{81}\) Employees, particularly low-wage employees, must sometimes choose between a paycheck and their own health or the health of their families.\(^{82}\) Low-wage and part-time workers are often unable to take advantage of flexible work benefits where doing so means forgoing important hourly pay.\(^{83}\)

As illustrated in Rutty and Grimmer, the effects of workplace imbalances on women with families are particularly acute.\(^{84}\) Yet, the prevailing policy frameworks construct “[f]amily and the market . . . as private, pre-legal, and autonomous from the state. The role of background legal rules in entrenching power imbalances within those societal spheres is ignored.”\(^{85}\) Workplace policies fail to take into account the fact that work happens not only at one’s place of employment but also at the home.\(^{86}\) Creating statutory frameworks that address these work-life balance problems that affect women and families should be a priority for policymakers seeking to address flexibilization.

In the United States, non-unionized employees have little leverage when it comes to advocating for their own needs within the workplace, including on decisions related to pay, benefits, scheduling, and other terms and conditions of employment. Specifically, non-unionized employees who

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81. See supra Part II.
83. Id. (“Even fewer lower-wage workers have flexible hours, and people who seek part-time work in order to fulfill family responsibilities often miss out entirely on paid leave and other benefits”).
85. Lucy A. Williams, Labour Law’s Parochialism, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 113 (Joanne Conaghan et al. eds., 2002).
86. Id. at 114.
seek to assert themselves by demanding a say in these matters face summary discipline or discharge under the at-will employment regime. With the exception of the Family and Medical Leave Act, and in limited circumstances the National Labor Relations Act, there are very few statutory protections provided to non-unionized employees in the United States who make demands—or even requests—of their employers regarding terms and conditions of employment. Strengthening the ability of employees to negotiate with their employers on the conditions of their employment, specifically their schedules and locations of work should also be a priority for policies regarding flexibilization.

B. Policy Goals Applied to Employment Act of 2002

How does the Employment Act of 2002 stack up when compared with the policy goals of strengthening workers’ ability to advocate for themselves and allowing them to better balance work and family obligations? Since the passage of the law, unions, employers, nonprofits, and the government have examined its efficacy. The UK Department of Trade and Industry reported in 2006 that fifty-six percent of British employees polled were aware of their right to request a flexible work schedule. Out of all those polled seventeen percent reported that they had applied for a change of schedule. Women made up a much higher percentage of those requesting flexible work: twenty-two percent of women said they had requested a change, while only fourteen percent of men made such a request. The report notes that the overall number of requests did not rise since the previous reporting period ending in 2003.

87. See Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 520 (1884) (“All may dismiss their employes [sic] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.”) overruled by Hutton v. Watters, 132 Tenn. 527, 540 (1915); see also Matthew W. Finkin, “In Defense of Contract at Will”—Some Discussion Comments and Questions, 50 J. AIR L. & COMM. 727 (1985) (criticizing the employment at-will doctrine in the context of Payne).
89. Section 7 of the National Labor Relations Act protects even non-unionized employees who join together to protest the terms or conditions of their employment. See NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962) (holding that an employer is not “at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects”); Rachael Simon, Workers on the March: Work Stoppages, Public Rallies, and the National Labor Relations Act, 56 CATH. U. L. REV. 1273, 1276 (2007) (discussing the rights of non-unionized immigrant workers to attend rallies during work time).
91. Id.
92. Id.
93. Id at 7. Compare STEPHEN WOODLAND, ET AL., DEP’T OF TRADE AND INDUSTRY, EMPLOYMENT RELATIONS RESEARCH SERIES NO. 22, THE SECOND WORK-LIFE BALANCE STUDY:
In a 2005 report the Trades Union Congress (TUC), a federation representing the majority of labor unions in the U.K., “[t]he introduction of the right to request has been successful for employers and is popular with those employees who have been able to benefit from new working arrangements that meet their needs.” The TUC called for an expansion of the right to request flexible schedules to all workers, starting with an intermediate extension of the Act to “all parents and carers.” Individual unions in the UK have made similar calls. Many employers also support an extension of the right to more employees. The Chartered Institute of Personnel and Development (CIPD), an employer group, reported that it found that two-thirds of UK employers supported an extension of the right to request to more employees. The same report found that forty-six percent of the employers supported the extension of the right to all employees. In response to these calls for expansion, Prime Minister Gordon Brown committed to introducing “proposals to help people achieve a better balance between work and family life.” The government signaled that such proposals will include extending flexible work schedules to more parents.

Despite broad support for the 2002 Act, problems remain. Primarily, the right to request is limited to a narrow segment of the population: only those employees with a child under the age of six or a disabled child under the age of eighteen are entitled to request flexible work. Many workers do not fall into this category, yet need flexible work arrangements, particularly workers without children or with children over the age of six.

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95. Id. at 23.


98. Id.


The narrow applicability of the Act prevents it from addressing broad power imbalances in the workplace. Simply put, the Act does not go nearly far enough in shifting the burden of flexibilization off of workers. The right to request does not reach enough people to have any balancing effect.

Second, as one union points out, the “right [to request flexible work] remains essentially a procedural one.” That is, the right to request flexible work is just that: a right to request. There is no statutory obligation for employers to accept such requests. As illustrated by the Rutty case, the right to request only affords a worker a remedy if the employer presents patently incorrect facts. The Rutty decision and the statute itself prevent the tribunal from determining whether “the employer [has] act[ed] fairly or reasonably” in rejecting an employee’s flexibility request. Accordingly, an employer can escape liability by simply stating a factually sound yet unreasonable basis for rejecting a flexible work request. In this sense, a right to request only goes half way toward the goal of giving workers power to advocate for fairer terms and conditions of employment. In order to be a fully endowed right to better working conditions, it must be accompanied by a statutory obligation for the employer to only reject such requests on objectively reasonable grounds.

Women make up a higher percentage of flexible work requesters than men. Yet, because the right to request flexible work situations is so limited and because it is only a procedural right, it does not adequately shift the burden of flexibilization off of working women. The Trades Union Congress noted that true equality in the workplace cannot be achieved in a two-tiered system under which women are treated differently from men:

We endorse the view of the EOC: “the hugely unequal take-up of flexible working is a gender issue that needs to be addressed at all levels. It creates a two-tier system—the ‘mummy track’, which reinforces the gender pay gap. Yet we know where companies introduce flexible working for all staff, equal take-up by men and women can be achieved.”

This statement strikes at a troubling and entrenched gender paradigm deeper than any right to request alone can solve, the societal devaluation of work done by women outside of their place of employment. The devaluation of women’s work outside the workplace is too complex for policy alone to fix; certainly a policy change as narrow and procedural as a right to request—even if expanded to all workers—does not fully address it. Such a fundamental and deeply rooted problem requires social, cultural, and policy solutions, and is beyond the scope of this Article.

102. GEN., MUN. & BOILERMakers’ UNION, supra note 96, at 19.
104. HOOKER ET AL., supra note 90, at 8.
105. TUC, supra note 90, at 8.
106. Williams, supra note 85, at 113-14.
While the right to request gives workers a voice in the workplace, their ability to advocate for themselves remains limited. The Act prevents employers from retaliating against employees who petition their employers for changes in scheduling. However, since employers have no duty to accommodate reasonable requests for flexible scheduling, workers’ ability to advocate for themselves effectively ends at submission of a request. A flexible work law that grants only a procedural right does not grant workers enough power to effectively advocate for better working conditions.

To be sure, a flexible work law—even one that only confers procedural rights—might be an important victory for workers, especially working women, who care for young children. Yet, laws that confer rights on individual workers are problematic insofar as individual workers must expend resources to exercise such rights. In order to exercise statutorily granted rights, a worker must have the time, knowledge, and support to initiate procedures when a right has been denied. In Grimmer, the Employment Appeals Tribunal recognized this problem when it ruled that a tribunal complaint brought by a worker should not be subjected to overly technical requirements because it would unduly hamper a worker’s ability to bring a complaint under the flexible work law. The tribunal rightly decided that it was imperative to ensure that the law was not construed too technically. In doing so, it also raised important issues as to the ability of individual workers to bring successful complaints against their employers.

When unionized workers bring a claim, they benefit from the guidance and support of their union representatives, who are knowledgeable of the procedural requirements involved and have established relationships with management representatives. Unionized workers often receive further support in retaining legal counsel if a complaint must be raised to outside adjudicators such as a court, an employment tribunal, or an arbitrator. Non-unionized workers receive neither type of support—indeed, they typically do not even have the option of arbitrating a claim. As a result, it is less likely that they can effectively assert and vindicate their statutorily granted rights. Non-unionized workers often lack experienced guidance on how to navigate complex grievance procedures that must be followed before they may pursue outside adjudicatory relief. If a non-unionized worker successfully navigates the grievance stage of their complaint, they are faced with a complex adjudicatory process. They may choose to try and navigate

107. See Grimmer v. KLM Cityhopper UK, [2005] I.R.L.R. 596, ¶ 12 (Employment App. Trib.) (U.K.) (“It seems to us that in the field of industrial relations where application forms are frequently completed by individual employees without professional assistance a technical approach is particularly inappropriate.”).

this process alone or hire an attorney, which also takes a degree of technical sophistication and, usually, money. Sometimes—especially in the American context—a government agency will provide guidance and/or legal representation. However, in the context of the UK flexible work law, the government does not provide any support. Workers are left to navigate the process alone. And, because they lack resources in relation to the employer's resources, it is very difficult for individual workers to effectively participate in such processes.

C. Is the Right to Request a Viable Policy Alternative for the United States?

In the British context, the right to request flexible work situations is a mixed blessing for individual workers. On the one hand, it has been popular and has allowed a large number of people to make requests to their employers. On the other hand, the law does not fully realize the goals of making workplaces more equitable and of facilitating work-life balance. The law is a starting point for more advanced flexible work laws that would grant rights to all workers and would entail more than procedural promises. The question the remainder of this Article addresses is whether a law that confers the right to request flexible work is desirable in the United States.

As a preliminary matter, it is important to set forth a key difference in workplace law in the United States and in the United Kingdom. In the United Kingdom there is a separate judicial body for the enforcement of workplace law: the Employment Tribunals. These tribunals handle only employment law matters and are the adjudicatory body best-suited to hear disputes arising under the flexible work law. The United States does not have a similar body that deals with all workplace law issues. Instead various government agencies and state and federal courts adjudicate cases arising in the workplace.

The National Labor Relations Board (NLRB) prosecutes and adjudicates cases arising under the United States labor laws, which largely pertain to employer-union conflicts.109 The United States Equal Employment Opportunity Commission (EEOC) is responsible for enforcing laws that govern employment discrimination in the United States, but does not adjudicate violations of those laws.110 The United States Department of Labor has similar prosecutorial authority with regard to wage and hour violations, safety violations, and other workplace matters, but does not

adjudicate such cases. Though one could argue that the EEOC should enforce a flexible work law because the law would particularly impact working women, neither the EEOC, the Department of Labor, nor the NLRB would be clearly responsible for hearing cases regarding a flexible working law. As a result, it is possible that any complaints regarding flexible work violations would likely fall under the jurisdiction of the federal courts.

The UK law has been interpreted liberally with regard to procedural matters in order to make it easier for individual employees to bring complaints to the Employment Tribunals *pro se.* If United States workers’ only option for enforcing their rights is through the federal courts, it would put up a steep procedural barrier to effective enforcement of the right to flexible work. The Brennan Center for Justice reports that “[f]ewer than 20 percent of low-income families with civil legal needs are ever able to obtain the services of counsel to help them gain access to the courts.” Because many workers face steep boundaries to accessing the courts, policymakers must consider mechanisms that will lessen the burden on workers seeking to enforce their rights. Such mechanisms might include assigning enforcement power to a federal agency such as the Department of Labor, which already is responsible for enforcing the country’s wage and hour laws.

Workers may also face an information barrier. In the UK, only fifty-six percent of people surveyed by the government were aware of the right to request flexible work. This statistic is striking when one considers that the UK law had been in effect for four years when that survey was taken. Without educational campaigns by the assigned government agencies, a similar law in the United States could suffer from an even greater awareness deficit as a result of the broader geographic size of the United States and the larger population. A United States flexible work law would have to be accompanied by a rigorous educational campaign, although it may be more costly and difficult to implement than a similar initiative in the UK, if for no other reason than the fact that the United States is substantially larger both in terms of population and geographical area. Such a campaign would require the dedication of resources and the political will of the executive branch to create a strong framework for implementing a right to flexible work.

114. Hooker et al., supra note 90, at 8.
115. The consequences of executive hostility to programs effecting workers rights have been evident throughout the years 2000-08. See, e.g., Nathan Newman, *Bush’s Assault on Workers Rights,*
Any law encouraging flexible work must also avoid incentivizing part-time working arrangements. While part-time work may be desirable for some employees, for many employees part-time working arrangements can mean losing pay and crucial benefits that are attached to full-time status. In order to be a viable policy solution to the problem of flexibilization, which itself encourages part-time work and shifts pension, health and welfare burdens away from the employer, a flexible work law must be developed that discourages employers from pushing employees into flexible but part-time positions.

The UK law places the right and ability to request flexible work firmly in the employee's hands. As a result, the incentives embedded in the UK law work almost exclusively in favor of the employee and do little to encourage employers to push employees into unwanted part-time work situations. Still, policymakers should remain wary of any flexible work law that gives employers incentives to push workers into part-time working arrangements. The market demands for flexibilization are incentive enough for employers.

Despite its flaws, the UK law has the potential to increase workplace equity by conferring a right on workers that legitimizes and draws public attention to the need for policy initiatives that address flexibilization. Critics, such as labor advocate Lucy Anderson, argue that the UK law is merely ""sound bite' employment legislation." They argue that "the extra attention and publicity given to [the law's] introduction may . . . encourage progressive employers to pay more attention to the benefits of flexible working, but the new legislation will not provide harassed parents with any real additional rights to challenge unsympathetic managers." This criticism of the 2002 Act should not be taken lightly. However, there is a real need to highlight the problem of flexibilization in the United States, and legislation that provides such attention is desirable in its own right. There is a dearth of federal law that deals with flexibilization, at least in part because the problem has simply not made it onto policymakers' agendas. The lack of a United States policy or discourse on flexibilization is particularly harmful to women and low-wage workers,

117. Id. at 41-42.
119. See supra Part II (discussing the existing U.S. laws geared toward the problems of flexibilization).
who are most vulnerable to the injurious demands of flexibilization. Accordingly, United States policymakers should pursue a flexible work law, even if the law only confers a procedural right similar to the one established in the United Kingdom.

Yet, policymakers should do so as part of a comprehensive long-term agenda to address flexibilization. Such an agenda should include expanding on the UK law by requiring employers to demonstrate that their rejection of an employee request for flexible work was objectively reasonable. Policymakers should also ensure that individual employees have access to an effective enforcement mechanism by providing subsidized counsel or the ability to bring complaints with the assistance of federal agencies. A law that only allows workers to enforce their rights in federal court will be ineffective for many workers because of the costs and logistics of retaining counsel and prosecuting a case.

Additionally, a policy agenda that addresses flexibilization should include other expansions of worker rights, such as rights to paid sick leave, better provision of healthcare, government encouragement of secure pension plans, and expansion of the right to choose to join a union. Flexibilization is a multi-level problem that requires multiple policy responses. A policy response that includes only a right to request flexible work does not reach all of the problems posed by flexibilization; indeed, neither does a substantive right to flexible work arrangements reach these problems. The multiple injuries suffered by workers require that policy makers keep their “eye on the ball” and stick to an agenda that has the long-term goal of responding to these multiple injuries.

Pursuing an agenda of policy change also almost always raises the potential for cooptation, described as “a process by which the focus on legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and transformative alternatives.” In the case of flexible work laws, this could come in the form of “sound bite” legislation. Policymakers may trumpet legislation that provides a limited right to request flexible work as an important advancement for workers’ rights while refusing to advance legislation that would bring about a substantive right to flexible work. Moreover, there is a risk that the passing of a flexible work law could distract from “more transformative alternatives”—i.e., laws that transform employer-employee relations in ways which better promote balance of

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120. For more discussion on the right to counsel in civil cases, see Brennan, supra note 113.

121. Orly Lobel, The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics, 120 HARV. L. REV. 937, 939 (2007) (emphasis added). Importantly, Lobel argues that although legal reform has its limits, those seeking political change should not eschew all forms of legal change out of an overwhelming fear of cooptation. Id. at 941 (“This Article demonstrates how extralegal activism proponents misrepresent alternative avenues of activism as solutions to cooptation concerns by overlooking the risks of cooptation present in extralegal activism.”).
power in the workplace—such as laws that enhance rights to join labor unions, force employers to provide paid sick leave, or provide better healthcare and pensions to low income workers.

Activists and progressive policymakers must act to ensure that any flexible work law is part of a broader and more well-defined agenda to address the problem of flexibilization on all of its many levels and must work to ensure that the agenda is carried out beyond the implementation of a flexible work law. In the British context, unions have taken the lead in demanding that the government expand the right to request to all employees. In November 2007, the UK government responded by promising an expansion of the right to more workers in the UK. While this expansion likely will not include a substantive right to flexible work, it provides an example of the type of sustained campaign necessary to win new rights incrementally. Incrementalism, though not a radical reform program, can produce real results for people who, like the plaintiffs in Rutty and Grimmer, have an immediate need for relief from some of the pressures caused by flexibilization.

The other risk of cooptation is that resources will go to fighting for limited legislative change while worker organizing and other “extra-legal” activities falter. To this concern, Professor Lobel responds eloquently,

Understanding the limits of legal change reveals the dangers of absolute reliance on one system and the need, in any effort for social reform, to contextu-ralize the discourse, to avoid evasive, open-ended slogans, and to develop greater sensitivity to indirect effects and multiple courses of action. Despite its weaknesses, however, law is an optimistic discipline. It operates both in the present and in the future. Order without law is often the privilege of the strong. Marginalized groups have used legal reform precisely because they lacked power. Despite limitations, these groups have often successfully secured their interests through legislative and judicial victories. Rather than experiencing a disabling disenchantment with the legal system, we can learn from both the successes and failures of past models, with the aim of constantly redefining the boundaries of legal reform and making visible law’s broad reach.122

Groups must balance their pursuit of legislative change with other types of activism, especially organizing. With this balancing in mind, a flexible work law should be just one part of a comprehensive legislative agenda to address flexibilization.

122. Id. at 988.
V. CONCLUSION

The flexible work law, as enacted in the UK, is not a perfect legislative initiative. Its problems are many. First, its reach is limited since it only extends to workers with children under six years old or disabled children under eighteen. Second, it is only a procedural right that does not force employers to respond in an objectively reasonable manner to employee requests for flexible work. Third, even if these problems are resolved, it is not clear that all employees will be able to effectively enforce their rights under the law because there are many obstacles to lower-income workers’ ability to access adjudicatory bodies.

Despite these criticisms, policymakers and worker advocacy groups should push the right to request flexible work as a first step in a comprehensive legislative agenda to address the problem of flexibilization that should ultimately include a substantive right to flexible work for all workers. Moreover, they should locate the right within a policy agenda that includes expanded access to paid sick leave, stable pension funding, healthcare, the right to choose to join a union, and other initiatives that equalize power in the workplace and enable more sustainable work-life balancing. Finally, both progressive policymakers and worker advocates must guard against cooptation by continuing efforts to pursue complete policy agendas and continuing non-policy activism such as organizing. In this manner, policy and advocacy groups can and should make flexible work a successful part of their agendas.