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Equality in the Virtual Workplace

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Equality in the Virtual Workplace

Michelle A. Travis†

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† Associate Professor of Law, University of San Francisco School of Law. B.A., 1991, Cornell
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I recently attended a conference at Stanford Law School that was titled, “Women and Leadership.” At this conference, an impressive group of legal scholars, sociologists, judges, and lawyers assembled to tackle the question of why women remain dramatically under-represented in leadership positions in the legal profession. While watching one panel discussion on “The Struggle for Balanced Lives,” I was captivated by the comments of Mark Chandler, the Vice President of Legal Services and General Counsel at Cisco Systems, Inc., a worldwide internet networking company. I found myself nodding along as Mr. Chandler argued that the struggle for work/life balance required “questioning assumptions” about the way that work is organized. However, when Mr. Chandler went on to argue that technology in general—and telecommuting in particular—was the means for achieving that end, I found myself taking pause.

Mr. Chandler’s comments mirror those by legal scholars, activists, the popular press, and others, who have been touting telecommuting as the new means for achieving women’s workplace equality. These advocates predict that telecommuting will dismantle the existing gender segregation and hierarchy in the paid labor market by allowing women to balance waged work and domestic responsibilities and remain employed continuously during early child-rearing years. Similarly, these advocates predict that telecommuting will redistribute the gendered division of labor in the home, as male telecommuters begin to substitute caregiving time for their prior commute time. In this light, telecommuting indeed sounds like the perfect answer to the work/family conflicts facing so many workers today. These predictions, however, all assume one very significant

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2. See id. (providing a streaming video of Mr. Chandler’s speech as part of the “Plenary Session II: Would You Rather Sleep or Win? The Struggle for Balanced Lives”). Cisco Systems, Inc. is described on the company’s website, at http://www.cisco.com/public/corp_about.shtml (last visited July 12, 2002).
4. See id.
5. See infra notes 60-72 and accompanying text.
6. See infra notes 85-87 and accompanying text.
7. See infra notes 88-92 and accompanying text.
premise, which is that technological innovation has the power to modify existing employment structures and gender roles, rather than being adapted to and governed by the status quo.

Unfortunately, telecommuting proponents have been ignoring a growing body of sociological research that points toward the opposite conclusion: that telecommuting actually is increasing gender inequality both in the workplace and in the home. More specifically, telecommuting appears to be magnifying the existing gender segregation and hierarchy in the paid labor market because employers have developed two distinct types of telecommuting arrangements that affect men and women differently. For the predominantly male population of high-level professionals, employers use telecommuting as a benefit that gives workers increased choice, flexibility, and autonomy. In contrast, for the predominantly female population of low-level clerical workers, employers use telecommuting to increase managerial control and reduce costs, resulting in decreased pay, benefits, autonomy, job security, and advancement opportunities. At the same time, current telecommuting arrangements also appear to be magnifying the gendered division of labor in the home, as female telecommuters tend to use prior commute time for additional caregiving, while male telecommuters tend to use prior commute time to perform additional hours of paid work. In other words, the data suggests that new telecommuting technology is not working as an independent or causal variable to transform existing gender norms either in the workplace or in the home. Instead, telecommuting is acting as a dependent variable that

8. See infra Part II.C.
9. See infra notes 106-107 and accompanying text.
10. See infra notes 108-109 and accompanying text.
11. See infra notes 166-177 and accompanying text.
12. Telecommuting is also likely to have a negative impact along racial and ethnic lines, if the history of industrial homeworking is any indication of how employers will implement modern forms of home-based work. See generally ANNIE PHIZACKLEA & CAROL WOLKOWITZ, HOMEWORKING WOMEN: GENDER, RACISM AND CLASS AT WORK 45-68 (1995) (documenting the racial and ethnic effects of homeworking); Julia Kirk Blackwelder, Texas Homeworkers in the 1930s, in HOMEWORK: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON PAID LABOR AT HOME 75 (Eileen Boris & Cynthia R. Daniels eds., 1989) [hereinafter HOMEWORK]; Eileen Boris, Black Women and Paid Labor in the Home: Industrial Homework in Chicago in the 1920s, in HOMEWORK, supra, at 33; M. Patricia Fernandez-Kelly & Anna M. Garcia, Hispanic Women and Homework: Women in the Informal Economy of Miami and Los Angeles, in HOMEWORK, supra, at 165. This is also likely because telecommuting's negative effect on women is related to women's low economic status and over-representation in jobs at the lower end of the workplace hierarchy, which are characteristics shared disproportionately by members of minority groups. This Article, however, focuses on gender issues, while recognizing that proposed solutions must be scrutinized for the risk of essentializing the experience of women who are white. Cf. Nancy E. Dowd, Resisting Essentialism and Hierarchy: A Critique of Work/Family Strategies for Women Lawyers, 16 HARV. BLACKLETTER L.J. 185, 186 (2000) [hereinafter Dowd, Resisting Essentialism] (noting the risk of essentializing women when discussing workplace equality solely from the perspective of white women). See generally Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House, 10 BERKELEY WOMEN'S L.J. 16 (1995); Joan Williams,
employers are manipulating in ways that magnify existing gender inequality.

This disappointing result is not inevitable. Work/family conflict scholars and other telecommuting advocates are correct that new technology has the potential to advance women’s workplace equality. That potential, however, is not inherent in the technology itself. Technology will not move the workplace automatically toward greater equality without some type of external control on how the technology is implemented. The next step, of course, is to determine what form that external control should take.

In undertaking that next step, this Article seeks to advance the larger feminist project of denaturalizing current workplace structures. In addition, it attempts to denaturalize the gendered nature of work/family conflict itself. One current debate among feminist scholars seeking solutions to work/family conflicts is whether women inevitably will experience such conflicts differently from men. Some characterize this debate as a reformulated version of the traditional “sameness/difference” or “equal treatment/special treatment” debate that periodically has divided feminist thought. On one side of the debate are feminist scholars who argue that women’s economic disadvantage arises in significant part from their commitment to caregiving—either because women are inherently more nurturing, or because they are socialized to become caregivers. Those scholars argue that the appropriate approach to work/family conflicts should not devalue women’s caregiving, nor should it assume that the correct objective is complete gender integration in paid and unpaid work. On the


Much of this Article also focuses implicitly on the so-called “traditional” family: a married, heterosexual couple with children. While I celebrate the wide variety of other family structures, a limited focus is required in large part because the sociological data that exists on telecommuting focuses primarily on the traditional family model. Cf. Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 8 (2000) (hereinafter Williams, Unbending Gender) (explaining why such a limited focus is used in work/family conflict scholarship); Dowd, Resisting Essentialism, supra, at 189 (noting the problem of ignoring “single-parent families, blended families and other relational configurations” when analyzing work/family conflicts).


14. See, e.g., id. at 819, 824-26 (arguing “that a significant proportion of women’s economic disadvantage is attributable to their family roles,” and pointing to work/family literature, family law literature, and gender theory to emphasize the persistence of women’s “commitments to caregiving and other traditionally feminine gender performances”); see also Vicki Schultz, Life’s Work, 100 COLUM. L. REV. 1881, 1893, 1900 (2000) [hereinafter Schultz, Life’s Work] (noting that “some feminist scholars argue that women’s economic disadvantage arises from their primary commitment to their families—rather than from sexist dynamics in labor markets and firms,” and describing this conventional view as one in which “women’s domestic orientation is fixed by the time we enter the labor force”).

15. See, e.g., Williams, “It’s Snowing Down South,” supra note 13, at 824-26; see also Martha M. Ertman, Love and Work: A Response to Vicki Schultz’s Life’s Work, 102 COLUM. L. REV. 848, 851-52
other side of the debate are feminist scholars who highlight the role that employers’ practices and organizational norms play in creating and retrenching the connection between women and carework. They argue that sexist labor market dynamics and social controls within the workplace are significantly responsible for the gendered nature of carework and women’s resulting economic position. They contend that feminists who naturalize women’s domestic orientation end up reifying gender-based labor patterns, perpetuating class bias, and too easily giving up on achieving truly integrated work in the paid labor market and at home.

I believe, as I suspect most feminists do, that the gendered nature of work/family conflicts has many causes, which originate both inside and outside of the workplace. Where commentators differ is in their assessment of which of those causal origins are the most significant. Accordingly, the debate should be conceptualized not as a dichotomy, but as a discussion of where one situates oneself along a causal continuum, with one end of the continuum representing causes solely external to the workplace and the other end representing causes solely internal to the workplace. The closer one situates oneself to either end of the continuum helps to prioritize one’s choice of approaches for addressing work/family conflicts. The telecommuting research surveyed in this Article provides some empirical support for the view that employers are a significant cause of the gendered nature of carework: i.e., the data pushes one toward the internal end of the causal continuum. The evidence suggests

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(2002) (arguing that feminists should propose solutions that do not force women to "choose between work for wages and work for love," but that treat paid work and carework as "equally important"); Schultz, *Life’s Work*, supra note 14, at 1884 (characterizing this feminist position as embracing the view "that it is women’s position within families, rather than the workworld, that is the primary cause of women’s economic disadvantage, and hence should be the primary locus for redistributive efforts").


17. See, e.g., Schultz, *Life’s Work*, supra note 14, at 1883-84, 1892-1907 (concluding that workplace disadvantage causes the gendered nature of carework, not the other way around).

18. See, e.g., id.

19. Indeed, many of the scholars who are categorized by others as falling into one of the camps described above would describe themselves as recognizing multiple causes for women’s work/family conflicts. See, e.g., Williams, "It’s Snowing Down South," supra note 13, at 824-26 (criticizing others’ characterization of her position, which she self-describes as a "a multicausal model" of women’s economic disadvantage).

20. Cf. Schultz, *Life’s Work*, supra note 14, at 1884, 1904-05 (noting that one’s view of the primary cause of women’s economic disadvantage as either “women’s position within families” or women’s position within “the workworld” dictates one’s view on the “primary locus” for policy change).
that the workplace is not just a "passive reflector of inequalities already formed elsewhere," but that employers are structuring telecommuting to create and retrench gender inequalities in both paid and unpaid work. By identifying a causal locus within the workplace itself, this evidence helps to prioritize the use of employment discrimination law as one approach to the work/family conflicts that are disadvantaging women workers.

Employment discrimination law should play more than just the prohibitive role of banning employment decision-making based on invidious prejudice and gender stereotypes. Antidiscrimination law also has a transformative role to play, by requiring employers to redesign workplaces that have been built around unstated norms of workers (typically men) who lack significant caregiving responsibilities. While courts sometimes have fallen short of applying antidiscrimination law to serve even its prohibitive role, courts consistently have failed to interpret antidiscrimination statutes to meaningfully transform the workplace. Advancing the transformative role of antidiscrimination law is essential for making progress with the seemingly intractable work/family conflicts currently felt disproportionately by women.

This Article explores antidiscrimination law’s untapped transformative potential, particularly within the disparate impact model, which bars facially neutral practices that impact women more negatively than men. This Article attempts to conceptualize the law in a way that would require employers to use telecommuting and other flexible work arrangements to advance women’s workplace equality. By identifying the specific ways that employers are using telecommuting to create and retrench the gendered nature of work/family conflicts, it becomes possible to overcome prior "causation" limitations in disparate impact doctrine and mine additional space within that antidiscrimination model.

This conclusion should not further divide feminists on the issue of work/family conflict. While the evidence of internal workplace causes of the gendered nature of work/family conflicts provides a stronger basis for using antidiscrimination law, the ultimate result of using disparate impact

21. Id. at 1899 (using this phrase to characterize conventional work/family conflict causation theories).

22. Cf. id. at 1899-1907, 1928 (arguing that if workplace structures are the fundamental cause of women’s economic disadvantage, then the appropriate solution is to challenge the sex bias in labor markets and workplaces, but if the fundamental cause is sociobiology that makes women more committed to childcare and housework, then the appropriate solution is to increase the value of that unpaid work).

23. See ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 4-10 (1996) (describing the transformative thrust of antidiscrimination law); ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 20-21 (2001) (arguing that "[a]ntidiscrimination law understands itself as transformative, as fundamentally altering existing social arrangements," and advocating the use of antidiscrimination law "as a tool of transformative social policy").
doctrine is to require employers to eliminate practices that disproportionately affect women who perform significant carework. By thereby helping to restructure the entire workplace around a caregiving worker norm, the final result of this approach should be positive even for those who situate themselves closer to the external end of the causal continuum.

To achieve these objectives, Part II begins by intersecting the parallel conversations taking place among work/family scholars who advocate telecommuting, and among sociologists who study the performance of paid work from home. This Part debunks the popular misconception that telecommuting naturally will result in greater workplace equality for women. Instead, it shows how employers are co-opting telecommuting technology to magnify existing gender inequality.

Part III explains why there remains value in seeking answers to this multifaceted problem within existing antidiscrimination law. It begins by exploring the advantages and disadvantages of two leading alternatives: special legislation treating telecommuting as an individual accommodation for caregiving, or amending current antidiscrimination law to include a general duty to accommodate carework. While acknowledging the limitations of existing law, this Part reveals the benefits and unrealized potential of using antidiscrimination doctrine to restructure the organization of work. Part IV then uses telecommuting as an example to help articulate how existing antidiscrimination law could require employers to actively redesign the workplace around a gender-neutral caregiving worker norm.

II. HOW TELECOMMUTING AFFECTS WOMEN'S WORKPLACE EQUALITY

A. The Rise of Telecommuting

There is no single definition of “telecommuting” or “telework,” two words that often are used interchangeably. Typically, telecommuting is described as “the use of computer and communications technology to transport work to the worker as a substitute for physical transportation of the worker to the location of the work.” Despite some variations, all

24. See Kurt Reymers, Telecommuting: Attempts at the Re-Integration of Work and Family, at http://www.acsu.buffalo.edu/~reymers/telecomm.html (1996) (last visited April 18, 2003) (on file with author) (noting that “the definitions for telecommuting are quite diverse,” and that it is also called “telework, electronic homework, the electronic cottage, networking, distance work, location-independent work and flexiplace”). Jack Nilles coined the term, “telecommuting,” during the 1970s when policy-makers were looking for ways to conserve fossil fuel energy. See id.

25. Margrethe H. Olson, Organizational Barriers to Professional Telework, in HOMEWORK, supra note 12, at 215-16 (emphasis omitted); see also JACK M. NILLES, MANAGING TELEWORK: STRATEGIES
definitions of telecommuting share the two essential components of this description. First, telecommuting involves work that is done by an individual for an organization, outside of the "normal organizational confines of space and time," for at least some portion of the workweek. Second, this spatial and temporal separation is made possible by computers, e-mail, facsimile, the internet, telephones, and related telecommunications technology. Thus, telecommuters are a subset of the broader population of "homeworkers," which also includes the self-employed and those whose market work in the home does not depend on information technology. The telecommuting portion of the homeworking labor force is made up primarily of "office workers," including both professionals and clerical staff.


27. See Barbara J. Risman & Donald Tomaskovic-Devey, The Social Construction of Technology: Microcomputers and the Organization of Work, BUS. HORIZONS, May/June 1989, at 71, 71 ("Telecommuting is a variant of other forms of working from home, with a computer-technology twist.").

28. See Jamie Faricellia Dangler, Electronics Subassemblers in Central New York: Nontraditional Homeworkers in a Nontraditional Homework Industry, in HOMEWORK, supra note 12, at 147, 149 [hereinafter Dangler, Electronics Subassemblers] (defining telecommuting as "the movement of professional and clerical computer-based work into the home"); Olson, supra note 25, at 215 (explaining that "[b]ecause of the role of information technology, telework is generally confined to work that would otherwise be performed in an office").
The telecommuting population has grown dramatically in the last decade and a half. In 1985, the home-based clerical workforce in the United States was under 250,000. By the first half of the 1990s, the number of telecommuters had already grown to between 2 and 8.5 million at an annual growth rate of 15 to 20 per cent. This growth in the number of telecommuters also represented a growth both in the percentage of the labor force that was telecommuting and in the number of employers that allowed telecommuting arrangements. In 1992, for example, 1.6 per cent of the labor force telecommuted an average of 1 to 2 days per week, a figure that had risen to 6.1 per cent of the labor force by 1993. In 1991, only

29. See Kathleen Christensen, Home-Based Clerical Work: No Simple Truth, No Single Reality, in HOMEWORK, supra note 12, at 183, 184 (citing an approximate figure of 246,000). After the mid-1980s, most records do not differentiate between telecommuters in specific jobs, and recent figures tend to vary for each year due to different definitions and research methodologies. See Krishna Kundu, Telecommuting: Work is Virtually Something You Do, Not Somewhere You Go, at http://www.epf.org/etrend/tr991123.htm (Nov. 23, 1999) (last visited August 31, 2003) (on file with author) (noting how definitional and measurement problems hinder obtaining reliable telecommuting data); Constance Perin, The Moral Fabric of the Office: Panopticon Discourse and Schedule Flexibilities, in 8 RES. IN THE SOC. OF ORGANIZATIONS 241, 247-48 (Pamela Tolbert & Stephen Barley eds., 1991) ("Demographic analyses of the telecommuting population are handicapped by definitional problems, and detailed occupational breakdowns are unavailable."); Reymers, supra note 24 (noting that "definitions of telecommuting vary to a great degree, throwing comparative estimates off"). Nevertheless, the trend in all reports has been a rapid rise in telecommuting since the mid-1980s. See Patricia Braus, Homework for Grown-Ups, 15 AM. DEMOGRAPHICS 38, 38 (1993) (stating that although trend-watchers "disagree over who home-based workers are [and] how many of them there are," they all agree "that there has been a steady growth in this group").

30. See Lynne S. Dumas, Home Work: The Telecommuting Option, WORKING MOTHER, July 1994, at 24, 24 (citing data from LINK Resources finding that 3.5 million men and 4.1 million women were working at home at least part of the time in 1993); Kembra J. Dunham, Telecommuters’ Lament, WALL ST. J., Oct. 31, 2000, at B1 (citing reports by Find/SVP, Cyber Dialogue, and the International Telework Association and Council/AT&T finding less than 5 million telecommuters in 1990 and 8.5 million in 1995); Reymers, supra note 24 (noting a 1993 figure of 2.9 million full-time employees who performed all work at home and 7.5 million part-time, and contract workers who telecommuted at least part of the time, and a 1995 figure of approximately 7.6 million part-time and full-time telecommuters); Judith Richter & Illan Meshulam, Telework at Home: The Home and the Organization Perspective, 12 HuM. SYS. MGMT. 193, 194 (1993) (citing a 1991 study by LINK Resources finding about 4.4 million U.S. telecommuters); Roseman, supra note 25 (citing a 1992 figure of 2 million telecommuters); Telecommute America, New National Survey Reports Sharp Rise in Telecommuting, at http://www.att.com/news/0797/970702.bsa.html (July 2, 1997) (last visited May 14, 2003) (on file with author) [hereinafter New National Survey] (citing a figure of 4 million telecommuters in 1990 and 8.1 million in 1995). During the 1990s, telecommuters were part of a larger group of 20 to 43 million people who worked at home in some capacity. See Pitman, supra note 25 (citing a report of 43.2 million Americans working out of their home in 1995); Reymers, supra note 24 (citing a 1991 figure of 26.6 million homeworkers and noting that some researchers put the number as high as 20 to 39 million in 1993).

31. See Braus, supra note 29, at 40 (citing a telecommuting growth rate of 20% between 1992 and 1993); Reymers, supra note 24 (citing an average increase in telecommuting in the early 1990s of 15% per year); Richter & Meshulam, supra note 30, at 194 (citing a 20% annual growth rate in the telecommuting population during the late 1980s and early 1990s).

32. See Roseman, supra note 25.

33. See Dumas, supra note 30, at 24 (citing data from LINK Resources).
about 500 United States organizations offered telecommuting, but 6 to 30 per cent of organizations offered telecommuting by 1992. By 1994, over 70 per cent of large employers offered some employees a telecommuting option, including one-third to one-half of all Fortune 500 firms.

This trend continued, and even accelerated, during the late 1990s. During the second half of that decade, approximately 9 to 21 million Americans were telecommuting, with formal telecommuters making up nearly 10 per cent of the American workforce. By 1996, the number of American companies that supported some type of telecommuting program had risen to an estimated 2 million, or approximately 19.5 per cent of all organizations. That number had risen to 28 per cent by 1999. These figures are even higher for large companies. In 1998, 33 per cent of large companies allowed regular telecommuting and 14 per cent were considering such a policy, while another 55 per cent allowed telecommuting at least on an occasional basis. As early as 1996, all Fortune 100 companies either

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34. See Reymer, supra note 24.


36. See Dumas, supra note 30, at 24 (citing data from LINK Resources).


38. See Ingle, supra note 37, at 4 (citing a survey finding that 10% of U.S. adults telecommuted in 1999); Langhoff, supra note 37 (stating that nearly 10% of the U.S. workforce was telecommuting as early as 1996); see also Kundu, supra note 29 (citing a May 1997 Bureau of Labor Statistics report finding that nearly 18% of the workforce did some work at home for their primary job, and citing a 1997 National Study of the Changing Workforce placing that figure at 19%).

39. See Langhoff, supra note 37.

40. See Kundu, supra note 29.

41. See id. (citing a survey by the Society of Human Resource Management finding that 28% of firms offered telecommuting in 1999, and citing a 1998 Hewitt Associates survey finding that 35% of employers that had other forms of flexible work arrangements would be offering telecommuting by 1999).

42. See id. (citing a 1998 Business Work-Life Study of large companies).
had a telecommuting program or had plans to develop one in the immediate future.\textsuperscript{43}

The growth in telecommuting appears to be continuing into the new millennium. By the year 2000, an estimated 24 million Americans were telecommuting to work either regularly or occasionally.\textsuperscript{44} Despite a few recent reports that some employers may be scaling back on their telecommuting workforce,\textsuperscript{45} most experts predict future growth, both in the number of telecommuters and as a percentage of the total workforce.\textsuperscript{46} The Stanford Institute for the Quantitative Study of Society, for example, estimates that at least 25 per cent of the workforce, or 32.3 million people, will be telecommuting by 2005.\textsuperscript{47} Longer-range studies predict that by 2030 there will be 51 million workers in the American telecommuting population.\textsuperscript{48}

The rise in telecommuting has been part of a more fundamental shift from centripetal to centrifugal forces in the structure of work. The original trend toward centralized work locations began in the early 19th century

\begin{itemize}
\item \textsuperscript{43} See Handbook, supra note 25.
\item \textsuperscript{44} See Dunham, supra note 30, at B1 (citing findings from the International Telework Association and Council in Washington); see also Ferdinand Hogroian, Telecommuting Employees May Yield Unexpected Tax Consequences, 69 U.S.L.W. (BNA) 2643 (Apr. 24, 2001) (citing data from the International Telework Association and Council stating that over 16.5 million U.S. workers regularly telecommuted at least one day a month in 2001).
\item \textsuperscript{45} See, e.g., Dunham, supra note 30, at B1 (suggesting that employers are having a "change of heart" about telecommuting); Ingle, supra note 37, at 6 (citing a study of 150 companies finding that 60% cut back on telecommuting in the late 1990s, largely due to concerns over loss of managerial control); Simon J. Nadel, Deconstructing Telework: Legal Questions, Concerns About Workers Among Drawbacks, 19 HUM. RES. REP. (BNA) 425 (Apr. 23, 2001) (reporting a November 2000 survey of 648 employers finding that although 50% allowed telecommuting, 62% wanted to eliminate their telecommuting programs because of perceived harm to teamwork and loyalty, coworker resentment, and supervision difficulties).
\item \textsuperscript{46} See, e.g., Nilles, Managing Telework, supra note 25, at 295 (predicting increased use of telecommuting); Andrew Calabrese, Home-Based Telework and the Politics of Private Woman and Public Man: A Critical Appraisal, in WOMEN AND TECHNOLOGY 161, 166, 171 (Urs E. Gattiker ed., 1994) [hereinafter WOMEN AND TECHNOLOGY] (predicting that telecommuters will continue to grow in relative size); C. Andrew Head, Telecommuting: Panacea or Pandora’s Box?, at http://www.hklaw.com/OtherPublication.asp?Article=89 (Sept. 1, 1999) (last visited May 14, 2003) (on file with author) (predicting a future rise in telecommuting); Hogroian, supra note 44, at 2643 (citing a prediction by the International Telework Association and Council that U.S. workers who telecommute at least 1 day a month will rise to 30 million by 2004); Pitman, supra note 25 (predicting future growth in telecommuting). The predictions of future telecommuting growth are based in part on a growing disparity between a rising demand for skilled employees and an inadequate local supply of skilled workers. See Nilles, Managing Telework, supra note 25, at 295. In addition, expected technological innovations are likely to continue increasing the percentage of jobs that are compatible with telework. Id. at 31. Proposed tax initiatives also could create further incentives for telecommuting. See Hogroian, supra note 44, at 2643; see also Nadel, supra note 45, at 425 (describing a bill by Representative Frank Wolf that would offer tax credits for expenses incurred in setting up telecommuting).
\item \textsuperscript{47} See Kundu, supra note 29.
\item \textsuperscript{48} See id. (citing figures by JALA, an international group of information technology consultants).
\end{itemize}
with the Industrial Revolution, which was responsible for moving the workplace out of the home.\textsuperscript{49} The pre-industrial domestic system was replaced by a production system of industries, factories, and assembly plants, which had to be located near materials, supplies, and workers.\textsuperscript{50} As industries grew, so did the cities where they were located, which helped create larger and larger workplaces and a more and more concentrated workforce.\textsuperscript{51} Under this industrial model, people were pressed to come to where the work was, not the other way around.

As the industrial economy has given way to a more information and service dominated economy, many of the reasons for centralization no longer exist.\textsuperscript{52} The tasks of the growing information workforce revolve around creating, manipulating, and disseminating data.\textsuperscript{53} With new forms of technology, the work process no longer dictates the "when and where" of work.\textsuperscript{54} Yet, even in the post-industrial period after the need for centralization had diminished, the identification of "work" with a particular, physical location and the expectation of separation between work and home continued to be embedded structurally in the employment relationship.\textsuperscript{55}

Slowly, however, the assumption of a centralized workplace has been called into question, and the rise in telecommuting represents one aspect of the new shift toward decentralization.\textsuperscript{56} In part, these centrifugal forces were initiated by the rising costs of maintaining a centralized work-site. Employers recognized that telecommuting reduces the need for office space, which reduces the fixed costs for real estate, rent, utilities, and


\textsuperscript{50} DANGLER, HIDDEN IN THE HOME, supra note 49, at 75; NILLES, MANAGING TELEWORK, supra note 25, at 5, 9.

\textsuperscript{51} NILLES, MANAGING TELEWORK, supra note 25, at 5, 9.

\textsuperscript{52} See Penny Gurstein, The Gendered Experiences of North American Home-Based Information Workers, AIT-ASAT Asia Conference, at http://gendevtech.ait.ac.th/gasat/papers/pennyp.html (Aug. 4-7, 1998) (last visited May 15, 2003) (on file with author); see also NILLES, MANAGING TELEWORK, supra note 25, at 6 (describing the impetus for decentralization); Risman & Tomaskovic-Devey, supra note 27, at 71 (explaining that "jobs that once had to be done in a central office because of the large space needs associated with traditional information-processing technology (for paper, files, mainframe computers), and because of the necessity of proximity for communication, can now be decentralized").

\textsuperscript{53} See NILLES, MANAGING TELEWORK, supra note 25, at 6.

\textsuperscript{54} Greenbaum, supra note 49, at 296; see also Gurstein, supra note 52 (explaining that the "transformation of the economy from an industrial to a service economy has created many jobs that can be done independently of a centralized facility"); Risman & Tomaskovic-Devey, supra note 27, at 72 (explaining that as many as half of all information-sector jobs could be performed through telecommuting).

\textsuperscript{55} See Greenbaum, supra note 49, at 296.

\textsuperscript{56} See Dangler, Electronics Subassemblers, supra note 28, at 152 (arguing that the expansion of telework "can be best understood as part of the broader process of decentralization of capitalist production").
overhead. In addition, employers realized that telecommuting increases the skilled labor pool by expanding the geographic boundaries for recruiting. These economic benefits of telecommuting outweighed the costs, as increasingly affordable telecommunications technology facilitated this decentralization trend. Accordingly, many employers actively are seeking ways to move work out to employees, instead of pressing employees to come into work.

B. The Telecommuting Promise

"Work/family" rhetoric has played a critical role in developing the telecommuting phenomenon. The Labor Department formally has encouraged telecommuting as a way to help workers balance work and family demands, and one of the telecommuting benefits that the press mentions most often is the potential for working parents to trade commute time for family time. Employees themselves frequently cite "family reasons" as a primary motivation for telecommuting. According to the Bureau of Labor Statistics, parents are more likely to perform paid work from home than workers without children, and married women with

57. See NILLES, MANAGING TELEWORK, supra note 25, at 8, 15, 157 (citing space savings and lower real estate and rental costs as telecommuting benefits); Dombrow, supra note 25, at 689-91 (listing reduced real estate and overhead costs as telecommuting benefits); Dumas, supra note 30, at 24 (noting that telecommuting reduces the need for office space); Handbook, supra note 25 (listing real estate savings as a telecommuting benefit and citing case studies finding that telecommuting reduced overhead); Roseman, supra note 25 (listing a decrease in fixed costs for office space, rent, and utilities as a benefit of telecommuting).

Some of the increase in telecommuting also may be due to environmental protection laws. See Reymers, supra note 24. The Clean Air Act of 1990 requires companies with more than 100 employees to submit proposals for reducing employee commute time, and many companies adopted telecommuting policies to comply with that legal mandate. See id.; see also Dumas, supra note 30, at 24 (explaining how employers have used telecommuting to help comply with federal environmental requirements).

58. See NILLES, MANAGING TELEWORK, supra note 25, at 8, 12 (noting that a perceived telecommuting benefit is expanding the supply of workers); Langhoff, supra note 37 (stating that telecommuting expands the radius of the labor pool); Reymers, supra note 24 (explaining that telecommuting helps employers find scarce skills); Roseman, supra note 25 (noting that telecommuting extends the geographic boundaries for recruiting).

59. See Olson, supra note 25, at 227 (explaining that the "trend to physical decentralization" was "facilitated . . . by lowered costs of telecommunications").

60. See Nadel, supra note 45, at 426 (citing a 2001 Labor Department report).

61. See Hogroian, supra note 44, at 2643; see also URSULA HUWS, WERNER B. KORTE & SIMON ROBINSON, TELEWORK: TOWARDS THE ELUSIVE OFFICE 58 (1990) (stating that "[o]ne of the most frequently cited advantages of telework is that it allows the parents of young children to combine work with parenting," and citing examples of commentators who tout this potential advantage).

62. See Head, supra note 46 (listing increased family contact as one reason for telecommuting); Pitman, supra note 25, at 6, 8 (citing a 1995 survey of thousands of U.S. managers involved in company telecommuting policies reporting that 60% of the employees who telecommuted did so for family reasons); Reymers, supra note 24 (explaining that many workers see telecommuting as a childcare solution); see also New National Survey, supra note 30 (listing increased time for family as a perceived benefit of telecommuting).
children under age six are the most likely to telecommute.\textsuperscript{63} Employers are encouraging this link between telecommuting and caregiving by marketing their telecommuting programs to highlight the purported benefits of coordinating work and family demands. Companies at the forefront of telecommuting innovation, including AT&T and Bell Atlantic, cite the desire to help employees balance their work and home lives as one of their primary objectives.\textsuperscript{64} The technology industry has engaged in a similar effort to promote telecommunications innovation as the way to maintain market work while resurrecting family life.\textsuperscript{65}

Although much of this rhetoric is framed in gender-neutral terms, the implicit and quite often explicit message is that telecommuting particularly will benefit women.\textsuperscript{66} Jack Nilles, the person who coined the term “telecommuting” in the 1970s, immediately linked the concept to bettering the welfare of women with primary childcare responsibility.\textsuperscript{67} The Reagan Administration did much to perpetuate this message by advocating telecommuting as ideally suited for mothers,\textsuperscript{68} and this view has continued through today. Working Mother magazine now publishes annually a ranking of the “100 Best Companies for Working Mothers,” which ranks companies in part on the availability of telecommuting arrangements, and which high-ranking companies use as a marketing and recruiting tool.\textsuperscript{69} Although feminist voices were conspicuously absent from the early

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\textsuperscript{63} See Kundu, supra note 29 (noting that there were 25 million telecommuting parents in 1997 and that married women with children under age 6 telecommuted at a rate of 23.9%).

\textsuperscript{64} See Dumas, supra note 30, at 24 (citing data from Bell Atlantic); Nadel, supra note 45, at 427 (citing data from AT&T).

\textsuperscript{65} See Ursula Huws, Telework: Projections, FUTURES, Jan./Feb. 1991, at 19, 25 [hereinafter Huws, Telework] (providing examples of technology industry propaganda framing telecommuting as a way to save "the family").

\textsuperscript{66} See id. (noting that although pro-telecommuting messages from the technology industry “carefully avoid[] mentioning the word, ‘woman’” and are “presented as abstract concepts, affecting everyone,” they are “of course” implicitly commenting on the proper role of women); see also Mark Brewer, A Remote Possibility, LEGAL MGMT., March/Apr. 1991, at 92, 94 (describing how the law firm Hale and Dorr implemented its telecommuting program in response to its “women’s issues” committee); Risman & Tomaskovic-Devey, supra note 27, at 73 (noting that the popular literature focuses almost exclusively on how telecommuting will affect nonprofessional women with children).

\textsuperscript{67} See Risman & Tomaskovic-Devey, supra note 27, at 72.

\textsuperscript{68} See Calabrese, supra note 46, at 170-71. During the mid-1980s, Utah’s Republican Senator Orrin Hatch introduced to Congress the “Freedom of the Workplace Act,” and Republican Newt Gingrich, who was then a Georgia Representative, reintroduced the “Family Opportunity Act,” both of which would have limited federal regulation of paid work from home. PHIZACKLEA & WOLKOWITZ, supra note 12, at 26-27. Hatch argued that the legislation would increase the “opportunity for women, particularly those with small children, to work at home,” while Gingrich argued that the legislation would “restore the family setting by allowing families to learn and earn together at home.” See id.

\textsuperscript{69} See Belinda M. Smith, Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change, 11 COLUM. J. GENDER & L. 271, 302 & n.142 (2002). Working Mother magazine also has printed a pro-telecommuting article describing telecommuting as "a wonderful arrangement for working moms." Dumas, supra note 30, at 25.
telecommuting rhetoric of the 1980s, feminist commentators and sociologists have now joined the popular press in describing telecommuting as a potentially liberating development for women engaged in paid work. Leading legal scholars in the work/family conflict arena have listed telecommuting as one type of “family-friendly” policy that has the potential to restructure the workplace to eliminate masculine norms and advance women’s workplace equality.

More specifically, these advocates predict that telecommuting will help address women’s inequality by dismantling the gendered division of labor both in paid work and in the home. Women’s occupational segregation in paid work is still a highly visible sign of inequality, as women remain greatly over-represented in low-paid, low-status, and often dead-end jobs. Nearly 60 per cent of women engaged in market work are clustered in traditionally female jobs in service, clerical, and sales positions, and women make up approximately 98 per cent of all secretaries, typists, and billing

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70. See Huws, Telework, supra note 65, at 24 (discussing telecommuting in Great Britain); see also PHIZACKLEA & WOLKOWITZ, supra note 12, at 26-27 (describing pro-homeworking legislative proposals introduced in the 1980s by prominent Republicans who relied on pro-child and pro-family rhetoric); Eileen Boris, Homework and Women’s Rights: The Case of the Vermont Knitters, 1980-85, in HOMEWORK, supra note 12, at 234, 235 (describing why “conservatives” may favor telecommuting as a way of “maintaining women’s place within a male-dominated society: at home, earning wages, while caring for children”).

71. See PHIZACKLEA & WOLKOWITZ, supra note 12, at 1; see also Ursula Huws, The New Homeworkers: New Technology and the Changing Location of White-Collar Work 10-11 (1984) [hereinafter Huws, THE NEW HOMEWORKERS] (describing the idyllic vision of telecommuting that many commentators believed would open up new career options for women who want to combine market work with domestic responsibilities); Huws, Telework, supra note 65, at 26 (noting the voices in the telecommuting debate arguing “that telework was a means of liberating women”).

72. See, e.g., WILLIAMS, UNBENDING GENDER, supra note 12, at 85; Deborah L. Rhode, Balanced Lives, 102 COLUM. L. REV. 834, 846 (2002); Deborah J. Vagins, Note, Occupational Segregation and the Male-Worker Norm: Challenging Objective Work Requirements Under Title VII, 18 WOMEN’S RTS. L. REP. 79, 90, 92-93 (1996); see also Cynthia L. Estlund, The Changing Workplace as a Locus of Integration in a Diverse Society, 2000 COLUM. BUS. L. REV. 331, 351 (noting that telecommuting is “a potential solution to the conflict between work and family that burdens many parents, especially mothers, and impedes their career progress,” but also articulating potential downsides).

73. See Vagins, supra note 72, at 79-81; see also DANGER, HIDDEN IN THE HOME, supra note 49, at 103 (“That women have been largely confined to the lowest-paying, lowest-status jobs in the economy has been amply documented by labor historians, economists, and sociologists alike.”); ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 26, 51 (1999) (documenting the “high levels of sex segregation by job in the American economy”); Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1204 (1989) [hereinafter Abrams, Gender Discrimination] (explaining that “women tend to occupy the lower rungs of most professional hierarchies”); Eileen Green, Gender Perspectives, Office Systems and Organizational Change, in WOMEN, WORK AND COMPUTERIZATION, supra note 25, at 365, 367 (noting “the historical development of gendered occupational groupings and jobs”); Vicki Schultz & Stephen Petterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. CHI. L. REV. 1073, 1074 (1992) (noting that even 25 years after Title VII was enacted, the American workforce is “remarkably” sex segregated, with women concentrated in low-wage, low-status jobs with few advancement opportunities).
clerks. Segregation occurs not only horizontally but also vertically, with hierarchical divisions along gender lines within organizations. Empirical data consistently documents the "glass ceiling" that keeps women underrepresented in executive and management positions. Although women make up approximately 46 per cent of the American workforce, and the education and skills gap between men and women has virtually disappeared, women hold only 5 per cent of top-level jobs.

While women's entry into the paid workforce has not been on equal footing with men, neither has it led to an equitable redistribution of unpaid work in the home. The predominant pattern continues to be one in which women add market labor to their existing domestic responsibilities, rather than shifting unpaid work to men. Despite the dramatic increase in the

74. WILLIAMS, UNBENDING GENDER, supra note 12, at 81; Ann Bookman, Flexibility at What Price? The Costs of Part-Time Work for Women Workers, 52 WASH. & LEE L. REV. 799, 804 (1995). In 1996, nearly half of all women in the workforce were in jobs that were 80 per cent female. Vagins, supra note 72, at 79-81; see also NELSON & BRIDGES, supra note 73, at 26, 51 (explaining that as recently as 1991, 53% of either working women or working men would have to change jobs to integrate the American workforce).

75. See NELSON & BRIDGES, supra note 73, at 51 (documenting the “intractability of gender-based hierarchies in many organizations”); Helena Karasti, What's Different in Gender Oriented ISD?: Identifying Gender Oriented Information Systems Development Approach, in WOMEN, WORK AND COMPUTERIZATION, supra note 25, at 53 (noting that most women “work in the lower levels of occupational and organizational hierarchies”).


77. WILLIAMS, UNBENDING GENDER, supra note 12, at 67 (citing data finding that women hold only about 13% of tenured academic positions, 6% of partnerships in large law firms, 3% of executive positions at publicly traded corporations, 1% of the top-ranking partnerships in Wall Street, 5.6% of partnerships at national accounting firms, and 3-5% of senior management positions at Fortune 1500 companies).

78. See Stuart C. Aitken & Matt Carroll, Man's Place in the Home: Telecommuting, Identity and Urban Space, at http://www.ncgia.ucsb.edu/conf/BALTIMORE/authors/aitken/paper.html (last visited July 12, 2002) (on file with author) (“[D]espite the movement of women into paid work outside the home, men have shown little increase in their contributions to household work.”); Nancy E. Dowd, Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace, 24 HARV. C.R.-C.L. L. REV. 79, 85 (1989) [hereinafter Dowd, Work and Family] (explaining that “[w]omen’s entry into the paid workforce has not led to equitable redistribution of work,” and that “the predominant pattern has been the addition of wage work to women’s existing unpaid household and childcare work”); Pitman, supra note 25 (explaining that although more women are in the paid workforce, they remain the primary caregivers and continue to do most household chores); Joan Williams, Market Work and Family Work in the 21st Century, 44 VILL. L. REV. 305, 315 (1999) [hereinafter Williams, Market Work] (stating that “women still shoulder virtually all the family work traditionally performed by housewives”); Joan Williams, Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work, 19 N. ILL. U. L. REV. 89, 144 (1998) [hereinafter Williams, Reconstructive Feminism] (noting that “mothers’ entrance into the labor force has not been accompanied by fathers' equal participation in family work”); see also Marion Crain, “Where Have All the Cowboys Gone?” Marriage and Breadwinning in Postindustrial Society, 60 OHIO ST. L.J. 1877, 1914 (1999) (citing research finding that when women begin work outside the home, their husbands often “retaliate by refusing to assume the burdens . . . of keeping a house and caring for children”).
proportion of women in the paid labor force and the rise in dual-earner and female-headed families, women still have disproportionate responsibility for child rearing and domestic tasks.79 American women perform two-thirds of core housework and 80 per cent of childcare.80 Simply put, domestic responsibilities are still viewed as women’s work.81

This may be unsurprising, as decades of sociological research has documented that power structures within the family track the power structures outside the home.82 Some argue that it is sexist labor market dynamics and employers’ social controls within the workplace that create the power structures within the family.83 Others argue that the causal connection works largely in the opposite direction, with the domestic gender system justifying, reinforcing, and sustaining the inequalities in employment.84 But, regardless of whether causation flows from the workplace to the home or vice versa, telecommuting advocates claim that telecommuting will help equalize the gendered division of labor in both locations.

First, advocates predict that telecommuting will challenge the existing workplace hierarchy that results in women being concentrated in sex-segregated, low-paying, dead-end jobs. The theory is that telecommuting will allow women to climb the corporate ladder by providing a more effective means for combining waged and unwaged work,85 particularly if

79. See Crain, supra note 78, at 1877-78 (explaining that despite the increase of women in the waged labor market in the last 25 years, “women continue to perform the lion’s share of the homemaking and caretaking duties”); Nancy E. Dowd, Maternity Leave: Taking Sex Differences Into Account, 54 FORDHAM L. REV. 699, 701, 705-06 (1986) [hereinafter Dowd, Maternity Leave] (noting that despite the dramatic increase in the proportion of women in the workplace, women still have disproportionate responsibility for child-rearing and housework).

80. See WILLIAMS, UNBENDING GENDER, supra note 12, at 2; Williams, Market Work, supra note 78, at 308-09.

81. See Williams, Market Work, supra note 78, at 311-14 (citing a 1998 survey finding that two-thirds of Americans believe it would be best for women to stay home and care for their family and children).

82. See Williams, Reconstructive Feminism, supra note 78, at 162.

83. See, e.g., Schultz, Life’s Work, supra note 14, at 1884, 1894-1900; Schultz, Telling Stories, supra note 16, at 1824, 1841 (arguing that “[k]eeping women in their place economically requires a lifelong system of social control that must be exercised powerfully within the workplace itself”).

84. See, e.g., Williams, Market Work, supra note 78, at 311-14.

85. See Fothergill, supra note 25, at 334-35 (explaining that telecommuting is “appealing to, in particular, women because they often want flexible ways of working to be able to combine paid work and family responsibilities”); Rhode, supra note 72, at 844 (suggesting that not enough women have access to telecommuting and other flexible arrangements that would allow them to balance work and home responsibilities, “without jeopardizing their prospects for advancement”); see also Dowd, Resisting Essentialism, supra note 12, at 205 (noting the assumption that “technology can free women and help in meeting multiple roles”); cf. Felicity Henwood & Sally Wyatt, Women’s Work, Technological Change and Shifts in the Employment Structure, in THE GEOGRAPHY OF DE-INDUSTRIALISATION 106, 134 (Ron Martin & Bob Rowthorn eds., 1986) (studying Great Britain and explaining how telecommuting could be “advantageous to women” by providing a way to “combine waged work and domestic responsibilities”).
telecommuting allows women to remain in the waged workforce without interruption during child-bearing and early child-rearing years. The dominant hypothesis has been that the increased flexibility of telecommuting ultimately will allow women to gain greater access to higher-level management and executive jobs.

Second, advocates predict that telecommuting will facilitate an equitable redistribution of domestic responsibilities inside the home. Idealized media accounts portray telecommuting as the mechanism forequalizing men’s and women’s roles as their children’s caregivers. The theory is that male telecommuters will be able to spend more time at home and therefore will take on greater childcare responsibilities, allowing women to spend more time on paid work. In addition, telecommuting also holds the promise of indirectly restructuring the workplace itself. As male workers begin to share the domestic responsibilities, employers no longer will have an available workforce of “ideal workers” who have no commitments outside of their market work, and employers will be unable to sustain organizational structures that currently exclude most “non-ideal” women workers from the most desirable jobs. Advocates therefore predict that telecommuting could facilitate an even more fundamental restructuring of the workplace to eliminate masculine norms that perpetuate employment

86. See Huws, The New Homeworkers, supra note 71, at 13 (explaining that one impetus for the growth in telecommuting is women’s need to be employed continuously to maintain up-to-date skills); cf. Yap & Tng, supra note 25, at 228 (noting that in Singapore telecommuting is “seen to be one way for women with family commitments to remain in the labour force while fulfilling their domestic responsibilities”).

87. See Pitman, supra note 25.


89. See Pitman, supra note 25 (describing the media portrayal).

90. See Judy Wajcman, Feminism Confronts Technology 40-41 (1991) (noting the prediction that telecommuting will “lead to much more sharing of paid and unpaid domestic labour, as men and women spend more time at home”); Wajcman & Probert, supra note 88, at 53-54, 57 (describing telecommuting advocates’ “idealized picture of the future,” in which the “domestic dilemma is resolved when men bring their work back into the home, and become available for greater child care responsibilities”).

91. Williams, Market Work, supra note 78, at 311-14, 330 (describing the “ideal worker” who is based on masculine norms, such as being able to relocate and work unlimited overtime, and not needing leave time to bear, raise, and care for children); see also Williams, Reconstructive Feminism, supra note 78, at 160 (arguing that shifting women into the workforce without changing organizational assumptions or equalizing the division of labor in the home allowed employers to retain a sense of entitlement to workers who have the traditional resources of a male worker with full-time unpaid female labor at home); Vagins, supra note 72, at 80 (arguing that “the workplace is still structured around a male-worker norm, in which the ideal worker is one that has no family responsibilities, or that has the privilege of hiring someone else to take care of home and child care duties . . . [which] implicitly reflects the lifestyles and privileges of male workers”).
This gender-equalizing vision of telecommuting originated in part from Alvin Toffler's influential 1980 book, *The Third Wave.* In his book, Toffler describes three "revolutions." First was the Agrarian Revolution, ending between 1650 and 1750, during which time "work" and "home" were integrated closely in space and time. Second was the Industrial Revolution, lasting until the mid-1950s, during which time "work" was moved to "the workplace" and became separated physically and temporally from "home." Third was the Information Revolution of the modern era. Toffler advocates telecommuting as a central component of this "third wave." In doing so, Toffler paints an idyllic vision of what he calls "the electronic cottage," in which modern technology allows families to re-integrate their work lives back into their domestic lives in new, flexible, self-designed routines. By returning to a time in which the distinction between work and home was blurred, and by increasing both men's and women's available time for domestic responsibilities, Toffler's "electronic cottage" holds out the promise of transforming gender-based power structures and traditional gender roles.

For Toffler and others who predict that telecommuting will increase gender equality, technology is viewed as an independent or causal variable in social and organizational change. The most common view in the

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92. See WILLIAMS, UNBENDING GENDER, supra note 12, at 85.
94. TOFFLER, supra note 93, at 26, 29-30, 44-45, 53-61; see also Gunter, supra note 93, at 440 (describing Toffler's work); Williams, Market Work, supra note 78, at 311 (explaining that before about 1780, "market work and family work were not sharply separated in space or time").
95. TOFFLER, supra note 93, at 26, 38-40, 44-45, 53-61; see also Gunter, supra note 93, at 440 (describing Toffler's work).
96. TOFFLER, supra note 93, at 26-27, 155-56, 172-74; see also Gunter, supra note 93, at 440 (describing Toffler's work).
97. See TOFFLER, supra note 93, at 210-23; see also Gunter, supra note 93, at 440 (describing Toffler's work).
98. See TOFFLER, supra note 93, at 26, 210-42, 261-81; see also Gunter, supra note 93, at 440 (describing Toffler's work); Risman & Tomaskovic-Devey, supra note 27, at 72-73 (same); Wajcman & Probert, supra note 88, at 54 (same); cf. Crain, supra note 78, at 1952 (explaining how telecommuting and related changes may "alter the way work is done as well as when and where it is done, and offer significant potential for breaking down the artificial barriers between work and family life").
99. See TOFFLER, supra note 93, at 210-42, 261-81; see also Gunter, supra note 93, at 445 (explaining Toffler's prediction "that an increase in home working would decrease the gender division of labour, because it would blur the boundaries of waged and unwaged work"); Aitken & Carroll, supra note 78 (describing Toffler's work); Wajcman & Probert, supra note 88, at 53-54 (same).
100. See Risman & Tomaskovic-Devey, supra note 27, at 72 (providing examples of telecommuting advocates with idyllic views, including Toffler, who envisioned utopian "electronic cottages," and Nilles, who thought "that the flexibility in location made possible by computer technology [would] allow... women with primary responsibility for child care greater income
popular press, in organizational literature, and in academic discussion is
that new technology can be a determinant of change in how employment is
organized.101 These advocates often fail to consider the possibility that the
quality of telecommuting arrangements may vary for members of different
groups according to existing power structures, resources, and the relative
status of job categories within firms.102 Instead, telecommuting advocates
assume that technological innovation has the power to modify existing
employment structures and gender roles.103

C. The Telecommuting Reality

Unfortunately, the evidence is mounting that the idyllic image of
women telecommuters who can finally “have it all” does not match with
reality.104 Rather than increasing workplace equality for women by
reducing the gendered division of labor in paid work and at home,
telecommuting appears to be widening both divides.

1. Widening the Gap Between Men and Women in the Paid Labor Market

The first flaw in the “gender-equalizing” vision of telecommuting is
the assumption that telecommuting will allow women to advance in the
waged workplace by minimizing work/family conflicts. Numerous studies
indicate that employers often use telecommuting in two different ways,
creating two distinct telecommuting populations with different impacts on
men and women.105 In one form of telecommuting, employers use the
technology as a benefit for high-level, upper-middle class professionals in
information and service-related jobs—a group made up predominantly of
men.106 For that population, telecommuting does provide increased choice,
flexibility, and worklife autonomy, with no impact on job status.107 In the

opportunities”).
101. See id.
102. See id. at 72, 74.
103. See id. at 72.
104. See PHIZACKLEA & WOLKOWITZ, supra note 12, at 1 (arguing that the “rather glamorous,
post-industrial image of home-based working...does not tally with the evidence”); Gunter, supra note
93, at 440 (concluding that “the ideal of Toffler’s ‘electronic cottage’ does not compare favourably with
the current reality for most homeworkers (usually women) of low pay and social isolation”).
105. See, e.g., WAJCMAN, supra note 90, at 42-43; Gurstein, supra note 52; Tomaskovic-Devey &
Risman, supra note 25, at 368-83.
106. See, e.g., Gurstein, supra note 52; Tomaskovic-Devey & Risman, supra note 25, at 368-83;
see also WAJCMAN, supra note 90, at 42 (summarizing research finding that telecommuting tends to
benefit male professionals).
107. See, e.g., Gurstein, supra note 52; Tomaskovic-Devey & Risman, supra note 25, at 368-83;
see also DANGLER, HIDDEN IN THE HOME, supra note 49, at 13 (explaining that those “who choose to
work at home from a position of strength on the labor market (salaried professionals)...may indeed
other form of telecommuting, however, employers use the technology to reduce costs and increase control over low-level workers in clerical positions or other data-processing jobs—a group made up predominantly of women.\textsuperscript{108} For that population, telecommuting decreases pay, benefits, autonomy, job security, and advancement opportunities.\textsuperscript{109} In short, telecommuting tends to improve the lot of male workers who begin in high-level positions, while making female workers in low-level positions worse off than before.\textsuperscript{110}

These two distinct telecommuting populations are linked to managerial beliefs about the benefits of telecommuting. In one study, researchers in North Carolina sent 248 surveys to the chief personnel decision-makers of large firms and firms specializing in computers and word-processing.\textsuperscript{111} The results from the 114 returned surveys showed that managers who viewed telecommuting as likely to increase productivity and job satisfaction were the ones most likely to favor the use of telecommuting for professional employees, while managers who viewed telecommuting as likely to lower labor costs were the ones most likely to favor the use of telecommuting for clerical workers.\textsuperscript{112}

These managerial beliefs helped shape the firms’ telecommuting programs, which were designed to reinforce the managers’ preexisting assumptions. Firms with managers who viewed telecommuting as a productivity-enhancing device established telecommuting arrangements for professionals—primarily male researchers and computer programmers—that allowed the employees to restructure their own jobs to work occasionally at home for greater flexibility.\textsuperscript{113} Consistent with that vision of telecommuting, those programs were designed to increase worklife quality and employee satisfaction, and they did not come with any loss in pay.\textsuperscript{114}

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\item[108.] See, e.g., Gurstein, \textit{supra} note 52; Tomaskovic-Devey & Risman, \textit{supra} note 25, at 368-83; see also \textit{WAJCMAN}, \textit{supra} note 90, at 42-43 (summarizing research finding that telecommuting tends to make the position of female clerical workers in the labor market more vulnerable).
\item[109.] See, e.g., Gurstein, \textit{supra} note 52; Tomaskovic-Devey & Risman, \textit{supra} note 25, at 368-83.
\item[110.] See Risman & Tomaskovic-Devey, \textit{supra} note 27, at 74 (concluding from an empirical study that “the organization of telecommuting programs tends to exacerbate current inequalities in the workplace”).
\item[111.] Risman & Tomaskovic-Devey, \textit{supra} note 27, at 73; Tomaskovic-Devey & Risman, \textit{supra} note 25, at 371. The researchers sent surveys to the 100 largest firms headquartered in North Carolina, to 36 research and development firms in the Raleigh-Durham Research Triangle, to all state headquarters of commercial banks and insurance companies, and to all computer and word-processing firms in Raleigh and Durham. Risman & Tomaskovic-Devey, \textit{supra} note 27, at 73; Tomaskovic-Devey & Risman, \textit{supra} note 25, at 371.
\item[112.] Risman & Tomaskovic-Devey, \textit{supra} note 27, at 73-74; Tomaskovic-Devey & Risman, \textit{supra} note 25, at 371, 377, 380-82.
\item[113.] Risman & Tomaskovic-Devey, \textit{supra} note 27, at 74; Tomaskovic-Devey & Risman, \textit{supra} note 25, at 377, 380, 382-83; see also Reymers, \textit{supra} note 24 (analyzing prior research).
\item[114.] Risman & Tomaskovic-Devey, \textit{supra} note 27, at 74; Tomaskovic-Devey & Risman, \textit{supra}
In contrast, firms with managers who viewed telecommuting as a cost-cutting device established telecommuting programs for their largely female clerical workforce in the context of work-force reductions or other cost savings measures. Those telecommuting programs typically involved reduced wages and a transition from full-time, in-office jobs with fringe benefits, to part-time, piece-rate positions working solely from home. The managers specifically organized their telecommuting programs for clerical workers "to take advantage of the labor market restrictions associated with the female family role." While male professionals can bargain for telecommuting arrangements from a position of job market strength, many women end up accepting telecommuting arrangements in an attempt to solve existing conflicts between work and family demands. The researchers in the North Carolina study concluded that the employment decision-makers felt justified in organizing telecommuting in ways that exacerbated the current gender inequalities in the workplace because of the decision-makers' "ideological stance that mothers with young children do and should prefer to be at home." The employers that provided telecommuting for their female clerical workers essentially were exploiting mothers' domestic responsibilities to lower overhead and other labor costs.

A recent case study in California's Silicon Valley also supports this conclusion. That study found that telecommuting and other flexible employment relationships had benefited the predominately male class of mobile, high-skilled professionals in the information and communications technology industry. In contrast, telecommuting had caused reduced

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115. Risman & Tomaskovic-Devey, supra note 27, at 74; Tomaskovic-Devey & Risman, supra note 25, at 380, 382; see also Reymers, supra note 24 (analyzing prior research).

116. Risman & Tomaskovic-Devey, supra note 27, at 74; Tomaskovic-Devey & Risman, supra note 25, at 382; see also Reymers, supra note 24 (analyzing prior research).

117. Tomaskovic-Devey & Risman, supra note 25, at 382-83 (reaching this conclusion based on their research results).

118. See Eileen Boris & Cynthia R. Daniels, Introduction, in HOMEWORK, supra note 12, at 5; see also Calabrese, supra note 46, at 183 (explaining that while male workers who possess "highly leveragable skills" can benefit from the flexibility of telecommuting, female workers in lower occupational strata are at risk for exploitative telecommuting arrangements, in part because "they are more likely than men to be forced into the 'choice' of homework due to child-rearing demands"); Tomaskovic-Devey & Risman, supra note 25, at 370, 382-83 (explaining that many men can use their labor market strength to bargain for beneficial telecommuting arrangements).

119. Risman & Tomaskovic-Devey, supra note 27, at 74.

120. See id. (concluding that "[e]mployers providing telecommuting options to clericals take advantage of the domestic responsibilities of mothers to lower labor and space costs"); Tomaskovic-Devey & Risman, supra note 25, at 382-83 (concluding that employers organized telecommuting for female clerical workers "specifically to take advantage of the female family role" and to achieve the "managerial goals of labor control and labor cost savings").

121. See Gurstein, supra note 52.
wages, poorer working conditions, and job losses for the industry's predominantly female class of lower-skilled, non-professional workers.\footnote{122}{See id.}

For many employers, using telecommuting as a cost reduction measure has become linked to the broader trend toward increasing the use of part-time, temporary, contract, and other types of contingent workers.\footnote{123}{See DANGLER, HIDDEN IN THE HOME, supra note 49, at 56-57 (describing the trend toward a more contingent workforce); PHIZACKLEA & WOLKOWITZ, supra note 12, at 2-4, 123 (same); Gurstein, supra note 52 (same).} Employers often use telecommuting to switch employees from regular, secure, full-time positions, to a more contingent status,\footnote{124}{See DANGLER, HIDDEN IN THE HOME, supra note 49, at 56-57; Christensen, supra note 29, at 188-89; Gurstein, supra note 52.} and women are over-represented in jobs most often targeted for this strategy.\footnote{125}{See Calabrese, supra note 46, at 183 (citing researchers who predict that female clerical telecommuters "are likely to constitute a growing portion of the 'disposable workforce'"); Christensen, supra note 29, at 184, 187-89 (describing the most vulnerable telecommuters as female clerical workers who are "questionably hired as independent contractors"); see also PHIZACKLEA & WOLKOWITZ, supra note 12, at 2-4 (explaining that women represent the largest increase in the expanding contingent workforce); Bookman, supra note 74, at 804 (noting that nearly 60% of women are clustered in jobs frequently targeted for contingent status: low-wage, traditionally female jobs in clerical, sales, and service occupations); Eileen Silverstein & Peter Goselin, Intentionally Impermanent Employment and the Paradox of Productivity, 26 STETSON L. REV. 1, 11 (1996) (noting that "the sectors of the economy in which contingent employment has been used most commonly are also sectors in which women are concentrated").} Using telecommuting to "casualize"\footnote{126}{See DANGLER, HIDDEN IN THE HOME, supra note 49, at 56-57 (describing the trend to replace regular, full-time employees with contingent workers as "casualization"); Fothergill, supra note 25, at 345 (defining "casualisation" as "the process by which employers achieve flexibility by transforming secure jobs into temporary insecure ones").} a large portion of the female workforce reinforces the existing sexual division in the labor market. Women who are part of the contingent workforce typically receive significantly lower average wages than members of the core workforce, their health care benefits and pensions are reduced or eliminated, and they no longer have job security, training, or career development opportunities.\footnote{127}{See Silverstein & Goselin, supra note 125, at 2.} Moreover, contingent workers who lose their status as "employees" are no longer protected by many employment laws.\footnote{128}{See id. at 4.}

Several case studies have documented this phenomenon. One northeastern insurance company, for example, offered its female workers the option of telecommuting in lieu of continuing to provide extended maternity leaves.\footnote{129}{See Christensen, supra note 29, at 188-89; see also Pitman, supra note 25 (noting the risk that female telecommuters will "be exploited as a way for companies to dodge day-care and maternity issues").} As part of this "offer," the women had to switch from "employees" to "independent contractors," which meant that they were no
longer full-time, salaried workers, and they lost all employee benefits, including health care, pension plans, paid sick leave, and vacations. In the end, they made “less than they did when they worked in the office,” while “doing the same work.” In addition, the company no longer considered the women for training and advancement, which meant that they rapidly were marginalized within the firm. In another California-based insurance company, the firm similarly offered some of its insurance claims processors—most of whom were women with family responsibilities—the opportunity to telecommute. Many of the women believed the promises that telecommuting would allow them to save time and money from daily commuting, would provide them greater flexibility, and would allow them to better coordinate their work and family lives. They soon realized that the telecommuting “opportunity” was a way for the company to avoid providing benefits, and they found themselves working up to fifteen hours a day as the company repeatedly increased its processing quotas.

These types of gender differences in telecommuting experiences are prevalent, with many women experiencing exploitative arrangements involving lower wages, lost benefits, irregular work loads, poor working conditions, marginalization, and decreased job security. The editors of Family Circle magazine found evidence of this phenomenon in data from a group of 7000 women who responded to a published questionnaire. Many of the women reported that when they started telecommuting, they lost their status as employees and the rights and benefits that such status affords. Moreover, once workers are decentralized, it becomes even

130. See Christensen, supra note 29, at 188-89.
131. Id. at 189.
132. See id.
133. See id. at 190.
134. See id.
135. See id.
136. See PHIZACKLEA & WOLKOWITZ, supra note 12, at 123; Gurstein, supra note 52; see also Calabrese, supra note 46, at 169 (noting that women homeworkers often have less pay, job security, and benefits than those doing the same work in a central office, and arguing that women are in “particular jeopardy” of being exploited by telecommuting); Christensen, supra note 29, at 188-89 (identifying examples of “place discrimination,” by which firms switch female workers from full-time salaried employees with benefits to independent contractors without benefits when implementing telecommuting); Pitman, supra note 25 (describing research suggesting that “those most disenfranchised and exploited by telecommuting arrangements will be women”); Reymers, supra note 24 (citing evidence that many women telecommuters end up with fewer paid benefits and staff support); Tomaskovic-Devey & Risman, supra note 25, at 368 (explaining that telecommuting for female clerical workers “tends to be subcontract or piece rate work done totally at home and with the loss of benefits packages”).
137. See PHIZACKLEA & WOLKOWITZ, supra note 12, at 37.
138. See id. at 38; see also Tomaskovic-Devey & Risman, supra note 25, at 374 (stating that female clerical workers often are offered telecommuting programs that reduce their “organizational citizenship rights”).

more difficult to engage in collective activity to protect against further exploitation.\textsuperscript{139}

The gendered effects of telecommuting are not just an American phenomenon. Researchers have found similar results studying telecommuting in Great Britain, where employers also frequently use telecommuting to reduce costs for their largely female clerical workforce.\textsuperscript{140} Women in Great Britain report that telecommuting has exacerbated their inferior status in the workplace, as they find themselves doing the same tasks in low-status, low-paying, sex-segregated jobs.\textsuperscript{141} These female telecommuters are paid less than workers performing similar jobs at a central office, and many are shifted into contingent work relationships with a loss of benefits.\textsuperscript{142} As in the United States, the locational restructuring of work in Great Britain has failed to dismantle the existing social organization of the workplace.\textsuperscript{143} As one British researcher has concluded,

\textsuperscript{139} See Reymers, supra note 24 (citing evidence that many women telecommuters end up with fewer paid benefits in part because their geographic dispersal makes it more difficult to organize collectively); see also Dangler, Hidden in the Home, supra note 49, at 92 (explaining that managers view homework “as a way to decentralize the labor force before union inroads are made,” and that unions view homework “as a union-busting tactic”).

\textsuperscript{140} See Juliet Webster, Gender and Technology at Work: 15 Years On, in Women, Work and Computerization, supra note 25, at 311, 314-15.

\textsuperscript{141} See id.

\textsuperscript{142} See Ursula Huws, Terminal Isolation: The Atomisation of Work and Leisure in the Wired Society, in Making Waves: The Politics of Communications 9, 15, 18, 20-21 (1985) [hereinafter Huws, Terminal Isolation] (concluding that the trend in Great Britain “is overwhelmingly in the direction of casualisation,” leaving women telecommuters with low wages and lost employment benefits); Webster, supra note 140, at 314-15 (noting the pay differential between female telecommuters and their office counterparts).

\textsuperscript{143} See Webster, supra note 140, at 314-15. In one illustrative study, researchers in Great Britain interviewed 84 telecommuters (46 women and 38 men) in various occupations. See Fothergill, supra note 25, at 333-37. The telecommuters’ mean age was 41 for the women and 45 for the men, and the majority had children living at home. See id. at 336-37. Nearly 62% of the telecommuters worked full-time (22 of the women and 29 of the men), but nearly all of the part-time workers were women (22 of the women and only 5 of the men). See id. at 339. In this sample, the female telecommuters had less pay and benefits, fewer advancement opportunities, and more temporary and insecure positions than on-site workers who were doing the same or similar work. See id. at 343-45; see also Huws, et al., supra note 61, at 123-24 (citing data from Great Britain indicating that female telecommuters often earn less than their on-site counterparts, while the pattern is often the reverse for men); Phizacklea & Wolkowitz, supra note 12, at 66 (describing a study of telecommuters in Britain in the early 1990s that found that female clerical workers who telecommute are “clearly disadvantaged as compared to their office counterparts”). Researchers replicated these finding in another Great Britain survey of 78 telecommuters. See Huws, The New Homeworkers, supra note 71, at 8, 28-29, 34-37, 39-40, 43; see also Fothergill, supra note 25, at 341-42, 345 (analyzing the Huws research). The majority of these telecommuters were women in their thirties who viewed telecommuting as their only option, given their disproportionate childcare responsibilities. See Huws, The New Homeworkers, supra note 71, at 8, 28; see also Fothergill, supra note 25, at 341-42, 345 (analyzing the Huws research). Although the female telecommuters typically had several years of experience working on-site as computer professionals, many found themselves with lower pay, less job security, fewer benefits, and poorer promotion prospects than were enjoyed by similarly qualified on-site workers doing similar work. See Huws, The
"women, far from being liberated by technology . . . [are] thereby being placed into positions of greater dependence on men."144 Researchers in Australia145 and in the Netherlands146 have found similar results and reached similarly disappointing conclusions. While telecommuting is often seen as a "step toward entrepreneurship" for many men, it ends up being a "step
away from unemployment" for many women.\textsuperscript{147}

These consistent reports of telecommuting’s negative effects on many women workers are probably unsurprising to social scientists who have studied either the history of homeworking or the history of workplace technology. It is easy to draw parallels between modern-day telecommuting and the exploitative industrial homeworking in the United States in the early and mid-1900s.\textsuperscript{148} During that time, industrial firms took advantage of women’s position in the labor market and the home to impose onerous conditions on women homeworkers, including extreme quota and piece-rate systems, long hours for little pay, and no benefits or job security—many of the same conditions experienced by women telecommuters today.\textsuperscript{149}

The history of workplace technology provides even more reason to be wary of the telecommuting promise.\textsuperscript{150} Sociologists have documented numerous examples of how potentially liberating new technologies end up being adapted to, and governed by, preexisting gender hierarchies in the workplace.\textsuperscript{151} When computers were introduced into traditional workplaces

\begin{footnotesize}
\begin{enumerate}
\item[147.] Weijers, et al., \textit{supra} note 146, at 1048-49 (commenting on the Netherlands experience).
\item[148.] See \textit{Wajcman}, \textit{supra} note 90, at 42-43 (“Electronic homework for clerical women . . . is an extension of traditional homework with all its disadvantages.”); Boris & Daniels, \textit{supra} note 118, at 4 (concluding that “clerical homework has taken on some of the same characteristics as industrial homework,” including working for piece-rates without “employee” status); Danzler, \textit{Electronics Subassemblers, supra} note 28, at 147 (asking whether telecommuting will be any different for women than the past exploitation of women industrial homeworkers); Virginia duRivage & David Jacobs, \textit{Home-Based Work: Labor’s Choices, in WORK, supra} note 12, at 259 (arguing that “[d]espite the facile assumption that clerical work is relatively dignified and conforms to high standards as a form of employment, the potential for exploitation is the same” as it was for women industrial homeworkers); Gurstein, \textit{supra} note 52 (“While clearly teleworkers have significant advantages over industrial homeworkers in terms of flexibility and control over their time and resources, there is a very real danger that conditions similar to those found for industrial homeworkers could be perpetrated on this group as well . . . .”); Henwood & Wyatt, \textit{supra} note 85, at 134 (researching trends in Great Britain and urging people to be “wary” about telecommuting’s liberating potential for women, given the use of exploitative industrial homework); see also Michelle A. Travis, \textit{Telecommuting: The Escher Stairway of Work/Family Conflict}, 53 \textit{ME. L. REV.} 261, 277-78 (2003) [hereinafter Travis, \textit{Telecommuting}] (describing how telecommuting may be returning women back to many of the same conditions that existed in the days of industrial homeworking).
\item[149.] See \textit{Dangler, HIDDEN IN THE HOME, supra} note 49, at 7 (describing homeworking as “a distinctive vehicle for the exploitation of women”); Boris & Daniels, \textit{supra} note 118, at 2-4 (describing the poor conditions faced by women industrial homeworkers); Calabrese, \textit{supra} note 46, at 169 (describing the “long hours, poor working conditions, low pay, [and] piece work” endured by women industrial homeworkers in the pre-New Deal era); Cynthia R. Daniels, \textit{Between Home and Factory: Homeworkers and the State, in WORK, supra} note 12, at 13, 14-19 (documenting how industries exploited women homeworkers in New York garment industries in the early 1900s); see also Travis, \textit{Telecommuting, supra} note 148, at 277-78 (drawing parallels between telecommuting and industrial homeworking).
\item[150.] See Gunter, \textit{supra} note 93, at 451 (warning that to assume that telecommunications technology will advance women’s workplace equality “is to be guilty of ignoring the lessons of history”).
\item[151.] See Felicity Henwood, \textit{Establishing Gender Perspectives on Information Technology: Problems, Issues and Opportunities, in GENDERED BY DESIGN? INFORMATION TECHNOLOGY AND
in the 1970s, for example, the technology did not allow women clerical workers to take on more responsibilities and climb the corporate ladder as many predicted. Instead, sociologists documented the ways in which computers benefited many male workers who began in power positions, while computers were used to gain greater control over and further devalue the work of many women who lacked initial organizational status. As with the introduction of telecommuting technology, researchers found that "[f]ar from eliminating the differences between 'men's' and 'women's' work," computers were used to "widen the gap." Sociologists have found similar results with many other types of technology, and they therefore have concluded that workplace

Office Systems 31, at 31 (1993) [hereinafter GENDERED BY DESIGN] (explaining that a substantial body of literature exists examining the relationship between gender and technology; see also Travis, Telecommuting, supra note 148, at 278-82 (describing sociological literature on the gendered effects of new workplace technologies).

152. See Wajcman, supra note 90, at 28 (describing how managers used computers to magnify sexual hierarchies in the workplace, and concluding that "[t]echnical change has not substantially undermined sexual divisions in the labour market and occupational segregation between women and men"); Barbara A. Gutek, Clerical Work and Information Technology: Implications of Managerial Assumptions, in Women and Technology, supra note 46, at 221 (explaining how the sex-stratification of the workplace resulted in "widely diverging patterns of implementation" of computers); Ursula Holmgren, Everyday Experts? Professionals' Women Assistants and Information Technology, in Women, Work and Computerization, supra note 25, at 121, 122 (concluding that computer technology was "built into a stable gendered division of labour"); Karasti, supra note 75, at 45 (explaining that male workers with labor market power had "more autonomy and discretion in their work and thus more power to influence how their work [was] computerized"); Savvas Katsikides & Margit Pohl, Dichotomous Thinking, Women, and Technology, in Women, Work and Computerization, supra note 25, at 35 (concluding that "working conditions for women get worse because of the introduction of information technology"); Janine Morgall, Typing Our Way to Freedom: Is It True that New Office Technology Can Liberate Women?, in Feminist Rev., No. 9 (1981) (explaining how managers used word processors to increase control over women clerical workers); Webster, supra note 140, at 312, 317 (describing a large-scale study finding that firms often used computer technology to increase control over women in clerical fields); cf. Hazel Downing, Word Processors and the Oppression of Women, in The Microelectronics Revolution 275 (Tom Forester ed., 1980) (finding similar results in studies of the introduction of computers into workplaces in Great Britain); Jane Barker & Hazel Downing, Word Processing and the Transformation of Patriarchal Relations of Control in the Office, Capital & Class, Spring 1980, at 10, 64 (finding similar results in Great Britain); Gunilla Bradley, Women, Work and Computers, 13 Women & Health 117, 127 (1988) (finding similar results in a University of Stockholm research project); Sonia Lifl, Information Technology and Occupational Restructuring in the Office, in GENDERED BY DESIGN, supra note 151, at 95, 97-98, 104 (1993) (finding similar results in Great Britain); Elena Soffley, Word Processing: New Opportunities for Women Office Workers?, in Smothered by Invention: Technology in Women's Lives 222 (W. Faulkner & E. Arnold eds., 1985) (finding similar results in Great Britain); see also Travis, Telecommuting, supra note 148, at 279-80 (describing the sociological research documenting the gendered effects of the introduction of computer technology in the workplace in the 1970s).

153. Morgall, supra note 152.

technologies "are no more gender-neutral than they are neutral in any other sense."\textsuperscript{155} The research on telecommuting supports that conclusion: overall, telecommuting does not work as an independent or causal variable that restructures the workplace to achieve greater equality for women. Instead, the quality of telecommuting arrangements varies within firms according to the existing resources, level of power, and relative status of the specific job in question.\textsuperscript{156} Rather than changing the social organization of the workplace, telecommuting technology is a dependent variable that is being adapted to and governed by preexisting market power, workplace interaction patterns, organizational status assumptions, and managerial goals.\textsuperscript{157}

The evidence therefore pushes one toward the internal end of the causal continuum: i.e., toward the conclusion that employers’ conduct within the workplace is a significant cause of the gendered nature of work/family conflicts. Because employers are designing telecommuting arrangements in ways that magnify the gender hierarchies in the workplace, many women who lack initial organizational status and labor market power are unable to reap the anticipated benefits. Instead, many women are finding themselves in even more vulnerable positions in the paid labor market than before the telecommuting revolution began.

changes have been used to exacerbate or create differences between men and women"); Leslie Regan Shade, Gender Issues in Computer Networking, in WOMEN, WORK AND COMPUTERIZATION, supra note 25, at 91, 96 (describing the gendered effects of the introduction of electronic list serves in academia); Lucy Suchman, Supporting Articulation Work: Aspects of a Feminist Practice of Technology Production, in WOMEN, WORK AND COMPUTERIZATION, supra note 25, at 7, 13, 15 (describing the gendered effects of the introduction of document coding technology in law firms); Webster, supra note 140, at 315, 320 (concluding that "the introduction of new technologies does not substantially undermine sexual divisions in the labour market, the gendering of occupations allocated to men and women, or the social construction of skill"); see also Travis, Telecommuting, supra note 148, at 278-82 (placing telecommuting technology into the broader context of sociological research on the gendered effects of new workplace technology).

155. Webster, supra note 140, at 321; see also Turid Birkenes & Annita Fjuk, A Feminist Approach to Design of Computer Systems Supporting Co-operative Work: The Troublesome Issue of Co-operation Seen From a Women’s Perspective, in WOMEN, WORK AND COMPUTERIZATION, supra note 25, at 75, 77 ("Technology is never neutral. The consequences are ... dependent on the social context in which the technology is integrated."); Karasti, supra note 75, at 51 (explaining that technologies are "gendered" because they “have social patterns embedded in them”).

156. Risman & Tomaskovic-Devey, supra note 27, at 72, 74; Tomaskovic-Devey & Risman, supra note 25, at 370, 382-83; see also Reymers, supra note 24 (concluding that “the elements of status and power come to affect the stratification of occupations within the telecommuting trend”).

157. Risman & Tomaskovic-Devey, supra note 27, at 72, 74; Tomaskovic-Devey & Risman, supra note 25, at 370, 382-83; see also PHIZACKLEA & WOLKOWITZ, supra note 12, at 18 (arguing that telecommuting must be analyzed in the context of “an already sexually segregated labour market”); Reymers, supra note 24 (analyzing the Risman & Tomaskovic-Devey research); Gurstein, supra note 52 (arguing “against a technological determinist stance," and attributing the decreased status of women telecommuters in part to their low level of bargaining power and socio-economic status).
2. Widening the Gap Between Men and Women in Unwaged Domestic Work

The second flaw in the "gender-equalizing" vision of telecommuting is the assumption that telecommuting will equalize the division of labor in the home. This assumption is based on the premise that telecommuting will allow men to substitute child-rearing and domestic tasks for time previously spent commuting, thereby freeing up more of women's time to spend on waged work. As men and women begin to play more similar roles at home, it is assumed that employers will be forced to restructure their operational norms around a gender-neutral concept of working "parents," rather than being able to demand "ideal workers" who can provide uninterrupted labor force participation and limitless hours of work. In theory, the new operational norms regarding when, where, and how work is performed will allow women to finally compete in the workplace on level ground. Unfortunately, the telecommuting research suggests that these premises are incorrect. Telecommuting arrangements have not equalized the gender division of labor in the home, nor have they changed many women's status as primary caregivers. If anything, telecommuting may have made the disparity even greater.

Those in the popular press who tout the liberating potential of new information technologies fail to account for the social and political barriers to renegotiating domestic and professional identities, roles, and responsibilities. The gender-equalizing telecommuting vision lacks an explanation for why men "should suddenly develop a taste for house and childcare" just because they are doing their waged work at home. The idyllic telecommuting predictions ignore that the traditional gender-role differentiation regarding domestic tasks is likely to imply a very different definition of "the home" for male and female telecommuters.

158. See supra note 90 and accompanying text.
159. See supra notes 91-92 and accompanying text.
160. See id.
161. See Gurstein, supra note 52 (concluding that telecommuting does not change attitudes regarding gender roles, nor does it change the division of labor in the home); Pitman, supra note 25 (concluding that most women have been unable to use telecommuting to change their status as primary caregivers).
162. See Dangler, Hidden in the Home, supra note 49, at 2 (arguing that telecommuting has "helped to create and sustain a gender division of labor that not only guarantees the permanence of women's 'double burden,' [of waged and unwaged work] but also prevents the development of a healthier integration of family and work life for both sexes").
163. See Calabrese, supra note 46, at 167.
164. Gunter, supra note 93, at 445; see also Fothergill, supra note 25, at 344 (concluding that "the pattern of gender roles is not automatically changed just because a man works at home").
165. Pitman, supra note 25 (explaining that "to be at home will imply certain responsibilities of child care and housework that men will not consider if this is not part of their responsibilities at home");
More specifically, when women begin telecommuting, they continue to view themselves as having dual responsibility for their paid work and for the family's domestic needs. Women typically cite the desire to coordinate worklife and homelife as their primary reason for starting to telecommute. Because of this perceived dual role, female telecommuters are more likely than male telecommuters to intersperse childcare with paid work, and women more often are dissatisfied with telecommuting and more often experience an increased level of work-related stress. In fact, many women telecommuters report an increase in the time they spend on domestic tasks and childcare after beginning to telecommute.

In contrast, when men begin telecommuting they continue to view themselves as engaged solely in paid work. Male telecommuters typically cite non-family-related reasons for telecommuting, such as increasing productivity. Accordingly, while female telecommuters end
up interspersing their paid work with family responsibilities, male telecommuters tend to separate their paid work from family life, and they do not take on a greater proportion of the childcare and household tasks. This is possible because male telecommuters more often have the social and environmental support to keep family responsibilities separate from their paid work. For example, male telecommuters tend to have defined workspaces at home that are separated physically from the rest of the house by a door, while female telecommuters tend to do their paid work in central areas of the home, such as the kitchen. One study has found that while women become more family-oriented after they start telecommuting, men who telecommute become even more work-oriented, as they use the time previously spent on commuting and workplace distractions to do additional paid work, rather than to do unpaid work in the home. For all of these reasons, men who perform paid work from home, regardless of their occupation, typically spend no more time on housework or childcare than men who work outside the home.

This supports the conclusion that gender role patterns do not change automatically just because men are working at home; in fact, they may

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172. See Gurstein, supra note 52 (explaining that male telecommuters “see themselves as primarily working at home,” while female telecommuters “are torn between their work and family responsibilities”); see also Pitman, supra note 25 (finding that women telecommuters “are the only ones who deal with the difficulty of integrating work and child care”).

173. See Aitken & Carroll, supra note 78.

174. See Gurstein, supra note 52.

175. See id.; see also Aitken & Carroll, supra note 78 (citing a study finding that male telecommuters who have children “attempt to isolate themselves spatially from childcare roles while working at home”).

176. See Aitken & Carroll, supra note 78; cf. Crain, supra note 78, at 1929 (finding a similar result with the use of part-time work); Ertman, supra note 15, at 858 (predicting that “[i]f women engage in more wage labor and men in less, it seems likely that . . . many men would use the freed up time to play more rather than to vacuum or write Christmas cards”).

177. See DANGLER, HIDDEN IN THE HOME, supra note 49, at 121; Gurstein, supra note 52. While some evidence indicates that some male telecommuters do increase their childcare and housework after starting to telecommute, any such increase does not appear to represent a shift of those responsibilities from women to men, but merely an increase in the overall amount of time spent on domestic tasks. See Fothergill, supra note 25, at 344, 346.

178. See PHIZACKLEA & WOLKOWITZ, supra note 12, at 65 (concluding that telecommuting continues to “reflect gendered ideologies which assign women the main responsibility for bringing up children”); Aitken & Carroll, supra note 78 (reviewing research and concluding that there is a “failure of telecommuting to change gender roles”); Calabrese, supra note 46, at 172 (concluding that telecommuting does not challenge “the place of men in the home or in the economy,” nor does it challenge “the place of the home in the economy or of women in the home”); Fothergill, supra note 25, at 344, 346 (concluding that telecommuting has not changed the fact that women perform the majority of childcare and domestic work).
become even more extreme. Not only does the evidence suggest that men who telecommute do not increase their share of domestic responsibilities, but men who work in traditional offices and whose wives begin telecommuting often end up reducing their already low level of involvement in household tasks.179

Researchers have also duplicated these findings in other countries. In the largest study in Great Britain, researchers found that most telecommuters are women with children, and the need to combine paid work and childcare was the primary motivation to telecommute for far more of the women than the men.180 While seventy-four per cent of the female telecommuters rated the ability to look after dependants as a "very important" advantage of telecommuting, only seven per cent of the men gave such a response.181 In another survey involving forty-six female and thirty-eight male telecommuters in Great Britain, twenty-one of the participants listed "children" as the main or only reason for working at home.182 Of those twenty-one participants, twenty were women.183 A smaller case study of nineteen telecommuting households in Great Britain provided similar data.184 It was nearly always women telecommuters who cited domestic responsibilities and childcare as their main reason for telecommuting,185 and while female telecommuters interspersed their paid work with an increase in domestic work, male telecommuters used the home exclusively for paid work during working hours.186 Researchers have arrived at similar conclusions from empirical work in Australia.187 Simply

179. See Aitken & Carroll, supra note 78.
180. See PHIZACKLEA & WOLKOWITZ, supra note 12, at 35-36 (describing a study by Ursula Huws in the late 1980s); see also Huws, THE NEW HOMEWORKERS, supra note 71, at 8, 28-29, 34-37, 39-40, 42-43, 45 (concluding from a study of 78 telecommuters in Great Britain that the most typical telecommuter is a women in her thirties whose primary reason for starting telecommuting is childcare responsibilities).
181. See PHIZACKLEA & WOLKOWITZ, supra note 12, at 110.
182. See Fothergill, supra note 25, at 333, 341, 346.
183. See id. at 346 (finding that "motivations for working at or from home are largely gender based").
184. See PHIZACKLEA & WOLKOWITZ, supra note 12, at 36-37 (describing a 1993 study involving in-depth interviews of 19 households in Great Britain where 2 partners were living together with children and 1 of the partners telecommuted to work).
185. See id. at 37, 110-11.
186. See id. at 111; see also Fothergill, supra note 25, at 343-44 (finding in a survey of telecommuters in Great Britain that women have more difficulty than men in separating their paid work from housework, that women cite the lack of "clear boundaries" between the two as a disadvantage of telecommuting, and that about half of the women increased their domestic work after starting to telecommute); Henwood & Wyatt, supra note 85, at 134 (studying Great Britain and finding that women telecommuters "may find it difficult to resist unrealistic demands on their time, not only from their employers, but also from their family").
187. In a study of 19 male and 20 female telecommuters in Australia, 13 participants said that they chose telecommuting to be close to their children. See Wajcman & Probert, supra note 88, at 54-57. Of those 13 telecommuters, 12 were women, and the only male who began telecommuting for childcare
put, male professional telecommuters use telecommuting to work "from home," while women use telecommuting to work "at home."\textsuperscript{188} Again, these findings are likely to be unsurprising to sociologists who study workplace technology, and who found very similar results when computers were introduced into the centralized workplace in the 1970s. As with telecommuting technology, there was initial optimism that computers could achieve greater equality for women by helping to redistribute childrearing and other domestic responsibilities.\textsuperscript{189} It was possible to envision the productivity gains from computers as a means for reducing work hours for both men and women, which would allow more time for parenting and domestic work by both parents.\textsuperscript{190} But that vision never became a reality,\textsuperscript{191} and that vision appears to be going unrealized in the telecommuting context as well.

It is not entirely clear how this portion of the telecommuting data affects how one should situate oneself on the internal/external causal continuum. This data may mean that the way that employers are structuring telecommuting ends up creating, retrenching, or magnifying the gendered nature of carework (i.e., pushing one toward the internal end of the continuum), or that the gendered nature of carework arises outside of the workplace and ends up making telecommuting less effective for women than for men (i.e., pushing one toward the external end of the continuum). However, viewing this portion of the data in connection with the data above may provide at least some support for an internal causal theory.

As explained above, employers are structuring telecommuting to magnify the gender hierarchies within paid work by linking women's telecommuting arrangements much more frequently with reduced pay, benefits, autonomy, job security, training, and advancement opportunities. By disadvantaging women in the paid labor market and expanding the disparity between women's and men's labor market power, employers

\textsuperscript{188} Wajcman, supra note 90, at 41 (emphasis in original).
\textsuperscript{189} See Morgall, supra note 152.
\textsuperscript{190} See id.
\textsuperscript{191} See id.
likely are contributing to women's inability to restructure the division of labor in the home. As Vicki Schultz has hypothesized, "[w]omen may take on more housework and childcare because we are segregated into lower-paying, lower-status jobs—a position which deprives us of the ability to obtain more egalitarian arrangements for household labor." This is exacerbated when employers impose telecommuting programs on women as a substitute for providing maternity leave, sick pay to care for family members, and childcare alternatives, which would provide other means of meeting caregiving responsibilities without harming women's status in their paid jobs.

This theory is consistent with broader sociological evidence indicating that the more traditional role that women adopt—which may occur via involuntary telecommuting arrangements that physically relocate women back into the home—the more likely women are to end up with full responsibility for the family's domestic work. Research has documented that power structures within the family will track power structures outside the home. Thus, this portion of the data may also be consistent with the view that women's workplace disadvantage may be playing a significant causal role in retrenching the gendered nature of carework, rather than the gendered nature of carework being the primary cause of women's workplace disadvantage.

Overall, all of this research undermines the dominant hypothesis that telecommuting will be an independent variable that reorganizes the workplace and the home to provide a more level playing field for women. Instead, telecommuting appears to reinforce the gender division of both paid and unpaid labor. While some women certainly view telecommuting

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192. See Webster, supra note 140, at 315 (concluding that telecommuting "seems merely to capture and relocate workplace divisions of labour into the home").

193. Schultz, Life's Work, supra note 14, at 1896, 1899-1907; see also Cockburn, supra note 154, at 230-31 (arguing that workplace structures perpetuate the gender division of waged labor, which helps eliminate women as workplace competitors and ensures women's continued provision of unpaid domestic work).

194. See Christensen, supra note 29, at 188-89 (describing an insurance company that substituted telecommuting for extended maternity leaves); see also Pitman, supra note 25 (noting the risk that female telecommuters may be "exploited as a way for companies to dodge day-care and maternity issues").

195. See Gunter, supra note 93, at 445; see also Cynthia Negrey, Gender, Time, and Reduced Work 1-2 (1993) (arguing that increasing flexible, reduced-work options risks "reinforc[ing] unequal gender relations rather than challeng[ing] them," by further entrenching the gendered division of domestic work).

196. See Wajcman, Reconstructive Feminism, supra note 78, at 162.

197. See Wajcman, supra note 90, at 42 (concluding that "new forms of computer-based homework would appear to reinforce sexual divisions in relation to paid work and unpaid domestic work," and describing telecommuting as "a stark example of the reproduction of women's traditional position in the new electronic age"); see also Phizacklea & Wolkowitz, supra note 12, at 68, 124 (concluding that telecommuting "replicated and reproduced" existing gender inequalities); Boris &
as the best option for balancing caregiving with waged work (particularly those who begin from a position of labor market power and/or economic privilege), the data undermines any global assumption that telecommuting will benefit women as a whole. While advocates might view telecommuting as the easy answer to work/family conflicts, that simply is not the case, at least not in the way that employers currently are designing telecommuting arrangements.

This result is not inevitable. Telecommuting advocates are correct that new technology has the potential to advance gender equality in the workplace. But women should be more skeptical in thinking that such potential is inherent in the technology itself, or that such an outcome will occur without controls on how employers design and implement the new technology. That is where antidiscrimination law has a role to play.

III.
THE VALUE IN SEEKING SOLUTIONS IN EXISTING ANTIDISCRIMINATION LAW

Because the telecommuting research pushes one toward the internal end of the causal continuum by providing evidence of employers’ role in shaping the gendered nature of work/family conflicts, the research helps to prioritize solutions that focus on the workplace. Antidiscrimination law is therefore an obvious approach to explore. Title VII of the Civil Rights Act of 1964 ("Title VII") is the federal statute that prohibits sex-based employment discrimination. Title VII does not protect an employee’s

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Daniels, supra note 118, at 5 ("[H]omework both reflects and reinforces the traditional gender division of labor in and out of the home." (emphasis in original)).

198. See, e.g., Handbook, supra note 25 (citing a Bureau of Labor Statistics National Longitudinal Study of professional telecommuters with labor market power, including women who could put their children in day care while they telecommuted, which found that both men and women telecommuters earned higher salaries and had similar or better benefits and promotion rates than their on-site counterparts).

199. See Dangler, Hidden in the Home, supra note 49, at 2, 17-18, 44 (explaining that "while the ability to work at home may be relatively beneficial for some, for the most part homework helps to maintain the subordinate position women, as a group, hold at home and on the labor market"); see also Calabrese, supra note 46, at 184 ("Some home-based telework arrangements have been found to be quite beneficial for women in higher occupational and socio-economic strata of society, but the prospects are not uniformly appealing for women in lower strata.").

200. See Urs E. Gattiker, A Brief Summary of Volume 4, in WOMEN AND TECHNOLOGY, supra note 46, at 234; see also Gurstein, supra note 52 (arguing that for many women telecommuting is a "survival strategy," rather than a "panacea for unresolved tensions in the work and domestic spheres"); Risman & Tomaskovic-Devey, supra note 27, at 73 (arguing that telecommuting is "nothing more than an illusory solution to the perceived conflict between childcare and employment" for women); cf. Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C. L. REV. 709, 711 (1986) [hereinafter Chamallas, Part-Time Work] (arriving at a similar conclusion regarding the use of second-class part-time arrangements as a flawed answer to women’s work/family conflicts).

status as a parent, so many have argued that Title VII has very limited ability to address sources of women's workplace inequality that have their roots in women's caregiving role. However, while antidiscrimination law is not the entire answer to the multi-faceted problem of work/family conflict, antidiscrimination law still retains some untapped potential.

The first step is to cast off Title VII's moorings in formal equality, which has restricted Title VII's reach by only requiring that like workers be treated alike. Casting off those moorings would allow Title VII to play more than just a prohibitive role in the workplace. It also would allow Title VII to play a transformative role by requiring employers to restructure workplaces that have been built around male worker norms. While courts sometimes have fallen short of applying Title VII to serve even the former role, skeptics are correct that courts thus far have failed to interpret Title VII to meaningfully advance the latter. Yet, courts periodically have been willing to make significant paradigm shifts, even within seemingly non-malleable antidiscrimination doctrine, particularly when facing new

§ 2000e(b), nor does it cover independent contractors, see 42 U.S.C. § 2000e(f), which many women are forced to become when they are subjected to a cost-cutting telecommuting program. See supra Part II.

C; see also DANGER, HIDDEN IN THE HOME, supra note 49, at 109-10 (noting that firms avoid employment laws by treating homeworkers as independent contractors); Christensen, supra note 29, at 189 (arguing that employers have exploited telecommuting clerical workers by labeling them as independent contractors). However, the initial decision of which workers to switch from "employee" to "independent contractor" should be governed by Title VII—i.e., employers should be barred from making that selection in a way that either intentionally targets or disproportionately impacts women. In addition, many state antidiscrimination statutes that mirror Title VII apply to much smaller employers. State antidiscrimination law tends to follow federal case law, so Title VII doctrinal developments should have a wider effect than may be obvious from the face of the statute. Moreover, once most large employers are required to provide workplace flexibility, including nondiscriminatory telecommuting options, the market may push non-covered employers to follow suit.

202. See, e.g., Dowd, Work and Family, supra note 78, at 80, 171 (identifying the limits of framing work/family conflicts in terms of sex discrimination); Mary Joe Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U. L. REV. 55, 61, 94 (1979) (arguing that addressing work/family conflicts requires "supplementing" Title VII); see also Williams, Market Work, supra note 78, at 305 (noting the "accepted wisdom that discrimination law offers few weapons to challenge the problem of work/family conflict").

203. Some feminists have urged a move away from the use of antidiscrimination law. See, e.g., Dowd, Work and Family, supra note 78, at 154 (arguing that feminists' "primary focus" should be "to acknowledge the limited reach of discrimination analysis, articulate that limit, and move on in search of a broader framework"). While I believe there is an important continued value in using antidiscrimination law in this area, I agree that there will never be a single solution. Cf. Schultz, Life's Work, supra note 14, at 1885 (noting that "employment discrimination law alone will not get us where we need to go"); Abrams, Gender Discrimination, supra note 73, at 1196-97, 1215-16 (arguing that discrimination litigation should be only one approach for transforming male workplace norms); Peggie R. Smith, Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations, 2001 WIS. L. REV. 1443, 1447 (2001) (noting that "no singular approach can effectively address the variety of ways in which employees experience the competing pulls of work and parenting"); Julie Novkov, A Deconstructing of (M)otherhood and a Reconstruction of Parenthood, 19 N.Y.U. REV. L. & SOC. CHANGE 155, 185 (1991/1992) (arguing that "Title VII is not a universal solution" to issues of work/family conflict).
evidence of another subtle form that employment discrimination may take.

There have been at least three such examples since Congress enacted Title VII in 1964. In 1971, the Supreme Court held that neutral practices that disproportionately burden minority groups may constitute discrimination, even without discriminatory intent.\textsuperscript{204} In 1986, the Supreme Court held that discrimination includes the creation of a hostile work environment.\textsuperscript{205} And in 1989, the Supreme Court held that employment decision-making based on gender stereotypes may constitute discrimination.\textsuperscript{206} In each of these moments, the Court expanded the concept of "discrimination"—and the correlate concept of "antidiscrimination"—within existing Title VII provisions. As judges become aware that sex discrimination is multi-dimensional and that many of its dimensions work in initially unrecognizable ways, judges periodically are willing to reinterpret antidiscrimination law.\textsuperscript{207}

This process is slow, and it is certainly an incomplete answer. Moreover, as Professor Joan Williams has stated, "suing your employer is not the ideal mechanism for social change."\textsuperscript{208} Lawsuits are costly. The costs are borne unequally. And the process works in fits and starts. Perhaps more significantly, characterizing caregiving as a women’s issue, which is required in order to fit work/family conflicts into a sex discrimination box, risks reinforcing the very norms and assumptions that antidiscrimination theory is intended to disturb.\textsuperscript{209} Nevertheless, there still are benefits to pursuing the use of antidiscrimination law to address work/family conflict issues. One benefit is the power with which equal opportunity rhetoric resonates with the American public.\textsuperscript{210}


\textsuperscript{207} See Vagins, supra note 72, at 93 (arguing that “[c]ourts have the remedial power to breathe life into Title VII”). But see Kathryn Abrams, Cross-Dressing in the Master’s Clothes, 109 YALE L.J. 745, 753 (2000) [hereinafter Abrams, Cross-Dressing] (criticizing solutions that “rely on a judicial embrace of the claims or rules proposed”).

\textsuperscript{208} Williams, Market Work, supra note 78, at 335; see also Abrams, Gender Discrimination, supra note 73, at 1196, 1215-16 (noting that discrimination litigation “imposes enormous costs, in hostility and in ostracization, on the women involved,” and that the “[l]ingering resentments fostered by litigation can penalize women external to the suit itself”).

\textsuperscript{209} See Dowd, Work and Family, supra note 78, at 112-15 (identifying the paradox created by the fact that “[w]ork-family conflict is a women’s issue because of women’s position in the existing social context of work and family,” while “focus[ing] solely on women threatens to perpetuate the gendered division of work-family responsibilities”); Ertman, supra note 15, at 857-58 (noting that antidiscrimination law inevitably invokes the identity of caregivers as women and therefore “may inadvertently perpetuate the inequality inherent in the division of labor”).

\textsuperscript{210} See Joan Williams, Do Women Need Special Treatment? Do Feminists Need Equality?, 9 J.
current political climate, characterizing demands for workplace flexibility as a form of equal opportunity has the greatest potential to legitimize those demands.\textsuperscript{211}

Many who question the use of antidiscrimination law to address work/family conflicts argue that Title VII lacks the means for challenging the basic organization of work.\textsuperscript{212} Title VII has two primary discrimination models: disparate treatment and disparate impact. The disparate treatment form of sex discrimination occurs when an employee's status as a woman is a "motivating factor" in an employment decision.\textsuperscript{213} The disparate impact form of sex discrimination occurs when a facially neutral employment practice has a disproportionately negative effect on women, regardless of the employer's intent, unless the employer can show that the practice is "job related" and "consistent with business necessity."\textsuperscript{214} Even if the employer can make that showing, the employer still must abandon the facially neutral practice if a less discriminatory "alternative employment practice" is available.\textsuperscript{215} Part IV applies these two models in the telecommuting context to demonstrate that Title VII does have some untapped potential to force employers to restructure the workplace around gender-neutral norms. That transformative potential is most evident in the disparate impact model, including the obligation for employers to adopt less discriminatory alternative employment practices.

History suggests that using these two general antidiscrimination

\textsuperscript{211} Cf. WILLIAMS, UNBENDING GENDER, supra note 12, at 98 (arguing that "the threat of litigation could actually help employers handle work/family conflict by ameliorating the rancor that sometimes accompanies grants of flexibility today").

\textsuperscript{212} See, e.g., Abrams, Cross-Dressing, supra note 207, at 758 (questioning whether antidiscrimination law "will actually alter the dominant norms of most workplaces or the kinds of roles that men and women play within them"); Dowd, Work and Family, supra note 78, at 80-82 (arguing that "discrimination analysis is a very partial, limited means" for addressing work/family conflicts because it "fails to reach structural discrimination or mandate structural reform"); Frug, supra note 202, at 61, 94 (arguing that Title VII cannot address work/family conflicts because it "favor[s] the status quo" and is therefore "unlikely to achieve the dramatic labor market restructuring that is necessary"); Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279, 1326 (1987) (stating that the disparate impact theory "does not allow for challenges to male bias in the structure of business, occupations, or jobs"); Schultz, Life's Work, supra note 14, at 1885 (stating that antidiscrimination law is "not capable of generating the structural transformations necessary"); Smith, supra note 203, at 1456 (arguing that antidiscrimination law is a "poor tool" for addressing work/family conflicts because "it lacks a principled framework for altering structures that devalue employees with parenting responsibilities").


\textsuperscript{214} See id. § 2000e-2(k)(1)(A)(i).

models has advantages over proposing new legislation that specifically targets telecommuting.\textsuperscript{216} State and federal legislators used that approach to address the historic exploitation of women industrial homeworkers in the early and mid-1900s.\textsuperscript{217} The laws attempting to regulate or ban industrial homeworking were a failure, in part due to enforcement problems, but in part because the legislative process effectively reinforced the preexisting gender segregation and inequality in both paid and unpaid work.\textsuperscript{218} Both the supporters and the opponents of special homeworking laws defended their positions using the image of “sacred motherhood,” thereby essentializing women and women’s caregiving role.\textsuperscript{219} Those who sought to ban industrial homeworking argued that it demanded too much of mothers’ time, while proponents of industrial homeworking argued that it was necessary to allow women with financial needs to preserve their essential responsibilities of home and family care.\textsuperscript{220} Absent from the debate was

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\item \textsuperscript{216} See Travis, Telecommuting, supra note 148, at 282-86 (drawing lessons from the historic use of targeted legislation regulating industrial homeworking and concluding that it would be more effective to regulate telecommuting through a broader legal framework governing the workplace in general).
\item \textsuperscript{217} See id. at 282-84 (explaining the development of state and federal laws regulating industrial homeworking). Homeworking legislation began with state “anti-sweating laws” in the pre-New Deal era. See Dangler, Hidden in the Home, supra note 49, at 128, 132-39 (explaining that 16 states had homework legislation by 1936, with some states banning it entirely); Susan Porter Benson, Women, Work, and the Family Economy: Industrial Homework in Rhode Island in 1934, in Homework, supra note 12, at 53-54 (explaining that 13 states had homework legislation by 1919, with some states banning it entirely). The first federal law was the New Deal era’s National Industrial Recovery Act of 1933 (“NIRA”), which eliminated homework in 22 industries and regulated it in many others. See Dangler, Hidden in the Home, supra note 49, at 88-89, 128, 139-41; see also Benson, supra, at 54 (describing NIRA); Hilary Silver, The Demand for Homework: Evidence from the U.S. Census, in Homework, supra note 12, at 103, 105. When the Supreme Court struck down NIRA as unconstitutional in 1935, Congress passed the Fair Labor Standards Act in 1938 (“FLSA”). See Dangler, Hidden in the Home, supra note 49, at 128, 139-40; Boris & Daniels, supra note 118, at 7; see also Benson, supra, at 54 (describing the limited reach and lifespan of NIRA); Silver, supra, at 105 (describing NIRA’s temporary effect). Although FLSA did not initially refer to homeworking, Congress amended FLSA by 1949 to prohibit homework in 7 apparel and garment industries that had the worst reputation for exploiting women. See Dangler, Hidden in the Home, supra note 49, at 128, 140; see also Boris, supra note 70, at 238 (describing the history of FLSA’s homework regulations); Boris & Daniels, supra note 118, at 7 (same); Daniels, supra note 149, at 19-21 (describing organized labor’s role in obtaining federal homework limits); duRivage & Jacobs, supra note 148, at 264 (describing the history of FLSA’s homeworking restrictions).
\item \textsuperscript{218} See Dangler, Hidden in the Home, supra note 49, at 128, 130, 141-47; see also duRivage & Jacobs, supra note 148, at 264 (noting the enforcement difficulties of FLSA’s industrial homeworker provisions).
\item \textsuperscript{219} See Travis, Telecommuting, supra note 148, at 282-84 (analyzing the sex-stereotyping inherent in the industrial homework debates); see also Dangler, Hidden in the Home, supra note 49, at 128, 130 (describing the “sacred motherhood” image used by both sides of the industrial homework debates).
\item \textsuperscript{220} See Travis, Telecommuting, supra note 148, at 282-84; see also Dangler, Hidden in the Home, supra note 49, at 128, 130-31 (arguing that “homework regulation was couched in a New Deal policy that accepted the separation of economic life into men’s and women’s spheres,” and that “[s]uperimposed on the debate was an ideological commitment on the part of many lawmakers to the gender division of labor in the home,” and explaining how social reformers and labor unions used the motherhood ideal to seek homeworking bans, while industrial employers used the same ideal to support
any discussion of employers’ role in rendering work/family conflicts gendered in the first place.

The Reagan Administration used the same sex-stereotyping and essentializing rhetoric in the 1980s when it challenged homeworking regulation. Just as the supporters of industrial homeworking regulation in the 1940s had sought to limit homeworking to preserve women’s maternal role, so the supporters of deregulation in the 1980s sought to permit homeworking to preserve women’s “preference” for caregiving inside the home. In both waves of regulation and deregulation, all participants in the debate accepted as a given both the gender division of labor in the home and women’s limited opportunities in the paid labor market. Looking for answers through special legislation makes it too easy for the legal and political debate to accept the underlying assumptions about men’s and women’s responsibilities both inside and outside of the home.

In contrast to targeted legislation that tends to frame the debate in terms of “protecting” women and “preserving” their caregiving role, antidiscrimination law frames the debate in terms of “equal opportunity.” While sex discrimination law also risks reinforcing existing gender norms because claims explicitly are framed in terms of “women” rather than “parents” or “caregivers,” the advantage of sex discrimination law is that its focus is on women’s “rights” rather than on women’s “needs.”

homeworking); Boris, supra note 70, at 238 (arguing that all participants in the debate over industrial homeworking legislation “shared a common conception of womanhood that equated women with mothers and mothers with the home”).

221. See Travis, Telecommuting, supra note 148, at 284 (analyzing the Reagan Administration’s sex-stereotyping rhetoric and efforts to deregulate homeworking); see also Dangler, Hidden in the Home, supra note 49, at 1, 101, 129, 146, 156-57, 163-64 (describing how the Reagan Administration lifted six of FLSA’s homeworking bans).

222. See Travis, Telecommuting, supra note 148, at 282-84 (describing parallels between the rhetoric used in regulating and deregulating homeworking); see also Dangler, Hidden in the Home, supra note 49, at 164; Phizacklea & Wolkowitz, supra note 12, at 14 (explaining how the Reagan campaign to deregulate industrial homework used the image of the “home-working family” that reintegrated paid work with family life); Boris & Daniels, supra note 118, at 1, 6-7 (describing the Reagan Administration’s defense of the patriarchal family in its attempt to lift bans on industrial homework).

223. See Dangler, Hidden in the Home, supra note 49, at 164; see also Daniels, supra note 149, at 13 (arguing that industrial homework policies “reproduce[d] gender inequality by reinforcing dominant assumptions about women and work and by circumscribing the real choices available to women for paid labor”).

224. See Travis, Telecommuting, supra note 148, at 282-86.

225. See Williams, Special Treatment, supra note 210, at 317 (arguing that “‘rights talk’ is a key resource for articulating moral claims in legal language,” because “Americans are more receptive to arguments based on claims of entitlement than to claims based on need”); cf. Martha Minow, Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 65 (1987) (explaining that “[i]f we want to make a difference in existing arenas of power, it appears that we must take these established criteria as the governing rules, even if they confine what we have to say or implicate us in the patterns we claim to resist”).
For similar reasons, pushing the envelope of disparate impact theory to restructure the workplace seems currently more politically attractive than asking Congress to amend Title VII to require employers to “accommodate” caregiving. The accommodation concept gained prominence in work/family conflict scholarship with its adoption in the Americans with Disabilities Act of 1990 (“ADA”).

The ADA bars employers from discriminating against any “qualified individual with a disability.” An individual with a disability is “qualified” if he or she can perform the essential job functions, “with or without reasonable accommodation.”

A reasonable accommodation includes any modification to the way that work is structured that enables the employee to perform. Examples of accommodations include, among other things, “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies,” and “permitting the use of accrued paid leave or providing additional unpaid leave.”

The accommodation concept is appealing because it explicitly recognizes that the workplace is mutable. In the context of disability discrimination, the accommodation duty acknowledges that employers have constructed the work environment around a narrow vision of an able-bodied employee and that “antidiscrimination” requires restructuring the workplace away from an able-bodied norm. Because the work/family conflicts

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228. Id. § 12111(8).
229. See id. § 12111(9)(B).
230. Id.; see also 29 C.F.R. §§ 1630.2(o)(2)(i)-(ii) (2000) (listing typical accommodations, including facility modification and job restructuring); 29 C.F.R. pt 1630 app. § 1630.2(o) (listing typical accommodations, including “permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment,” “[p]roviding personal assistants,” or “[m]aking employer provided transportation accessible, and providing reserved parking spaces”); EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 3.10, at 111-16 to 111-33 (1992) (providing examples of accommodations). The ADA does not require any accommodations that would impose an “undue hardship” on the employer. See 42 U.S.C. §§ 12111(10), 12112(5)(A).
231. 29 C.F.R. pt 1630 app. § 1630.2(o).
232. See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 DUKE L.J. 1, 38-39 (1996) (arguing that the ADA’s accommodation duty “incorporates a more explicit understanding of the contingency of existing job configurations”); Stewart J. Schwab & Steven L. Willbom, Reasonable Accommodation of Workplace Disabilities, 44 WILL. & MARY L. REV. 1197, 1202, 1283-84 (2003) (arguing that under Title VII, “the employer defines the job as it wishes,” while the ADA “asks employers to restructure the jobs themselves”).
233. See Michelle A. Travis, Leveling the Playing Field or Stacking the Deck? The “Unfair
facing women workers similarly result in significant part from employers constructing the work environment around a narrow vision of a worker (typically male) who lacks caregiving responsibilities, an accommodation duty is a promising approach. Requiring an employer to accommodate caregiving provides a direct antidiscrimination theory for questioning basic work structures that disadvantage workers (typically women) with significant caregiving obligations. Because the accommodation concept explicitly requires employers to restructure the workplace, an accommodation duty may be the ultimate answer to the work/family conflicts that disproportionately burden women workers. Moreover, if Congress enacted new accommodation legislation, the employer’s duty could be drafted as a gender-neutral obligation to accommodate all caregivers, rather than just accommodating women. In theory, a gender-neutral caregiving accommodation duty has the potential to ameliorate the work/family conflicts felt disproportionately by women, without essentializing either women’s or men’s roles with regard to paid or unpaid work.

An accommodation duty is particularly attractive because it coherently can be described as a form of equal opportunity, rather than being equated with traditional forms of affirmative action or preferential treatment, which are often hard to sell to the public. In the disability context, the ADA

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235. See Travis, Leveling the Playing Field, supra note 233, at 955-63; see also Peter David
lists an employer’s failure to accommodate as a form of discrimination.\textsuperscript{236} When the workplace is designed around unstated majority norms, nondiscrimination requires more than just passively avoiding bias: it requires actively modifying the workplace to allow members of the non-majority an equal chance to compete.\textsuperscript{237} In that light, the duty to accommodate may be conceptualized as an additional method “by which barriers to the equal employment opportunity of an individual . . . are removed or alleviated.”\textsuperscript{238}

For these reasons, the accommodation concept should, in theory, work well in the context of work/family conflicts, and an accommodation duty indeed may be the correct long-term solution. However, the practical viability of that approach in the short-term is questionable. Using the accommodation concept to address women’s caregiving role is currently problematic because many people remain unconvinced that accommodation is a form of equal opportunity. The ADA has been less effective than many had hoped in part because it is viewed as a social welfare statute, rather than an antidiscrimination law.\textsuperscript{239} The press, the public, and many legal scholars explicitly label accommodation as a form of preference or affirmative action,\textsuperscript{240} which engenders less public support than equal opportunity.\textsuperscript{241}
The Supreme Court contributed to this problem in one recent ADA case, *US Airways, Inc. v. Barnett*, in which the Court’s correct assessment of the ADA’s accommodation duty as “necessary to achieve the Act’s basic equal opportunity goal,” was eclipsed by the Court’s repeated reference to accommodations as “preferences.”242

Equating accommodation with preference or with traditional forms of affirmative action—rather than describing accommodation as part of a broader conception of equal opportunity that goes beyond mere formal equality—already is contributing to a backlash against the ADA,243 and the same risk would exist in the work/family context. Once accommodation is labeled as a bare “preference,” it risks engendering resentment by those who are not accommodated and, in turn, it risks further devaluing and stigmatizing the qualities associated with the beneficiaries’ right to accommodation in the first place.244 Workers without caregiving responsibilities become resentful when they feel that workers with children are receiving preferential treatment.245 Employers may respond by not hiring those who are most likely to need caregiving accommodations, which may exclude even more women from the workplace.246 While a new...
accommodation duty could be drafted formally in gender-neutral terms, the coworker and employer backlash likely would be directed informally at women, based on the assumption that women will be more likely than men to seek such accommodations. Alternatively, “preferential treatment” may translate into paternalism, as the beneficiaries are viewed as uniquely in need of extra assistance or protection. Paternalism, like resentment, could lead to further limits on women’s opportunities and roles.

The fact that accommodation is equated too readily with preference also means that such an approach risks reviving the “sameness/difference” or “equal treatment/special treatment” debate that periodically has divided feminist thought. If accommodation is conceptualized instead as a form of “active nondiscrimination”—i.e., as an additional form of equal opportunity beyond mere formal equality—then it could bridge that gap by using terms that should resonate, at least in part, with both camps. However, if the debate in the disability context is any indication, accommodation may be characterized too easily as solely a “difference” or “special treatment” approach, which may alienate feminists who characterize their philosophies in other terms. While nearly all feminist scholarship supports more than just formal equality, the “equal

accommodate childcare places unique burdens on women without children who are subjected to increased statistical discrimination); Smith, supra note 203, at 1484-86 (noting that accommodation for work/family conflicts “may cause adverse consequences for employees,” because “employers may seek to avoid some of the associated costs by refusing to hire workers who are most likely to require and request accommodation—i.e., women”); see also Calloway, supra note 234, at 23 (making a similar argument regarding accommodating pregnancy, which “may deter employers from hiring women”). Of course, not hiring women because they may require greater accommodation also could constitute discrimination, but rational employers may still take that step because of the difficulty in proving a failure-to-hire case. See Smith, supra note 203, at 1485 n.224; Michelle A. Travis, Perceived Disabilities, Social Cognition, and “Innocent Mistakes,” 55 VAND. L. REV. 481, 557-58 & 555 n.388 (2002) [hereinafter Travis, Perceived Disabilities].

247. See Dowd, Work and Family, supra note 78, at 115 (arguing that accommodating women’s caregiving role in the workplace “may simply reconstitute that role in a new and more oppressive patriarchy”); cf. Calloway, supra note 234, at 22 (advocating pregnancy accommodation, but acknowledging that “[h]ighlighting differences stereotypes gender roles and provides a justification for imposing harmful limitations on women”); Novkov, supra note 203, at 194 (arguing with respect to pregnancy that “[w]hat appears to be preference may easily blur into unwanted paternalism,” since “[d]ifference . . . is viewed as a detriment requiring compensation” and is “denigrated and devalued”).

248. See Linda Hassberg, Comment, Toward Gender Equality: Testing the Application of a Broader Discrimination Standard in the Workplace, 40 BUFF. L. REV. 217, 222-29 (1992) (summarizing the “special treatment” versus “equal treatment” debate within the feminist legal community); Issacharoff & Rosenblum, supra note 234, at 2178 (describing the 1980s divide in feminist jurisprudence between “equality” and “difference” approaches to women’s workplace integration); Williams, “It’s Snowing Down South,” supra note 13, at 813-15 (2002) (chronicling this debate in the 1980s); Williams, Special Treatment, supra note 210, at 280-85 (describing the “sameness/difference debate”).

249. See Travis, Leveling the Playing Field, supra note 233, at 962.

250. See Williams, Special Treatment, supra note 210, at 296-301 (arguing that all of the “major figures in feminism . . . stress the need to reduce structural barriers and eliminate institutional practices designed around male norms that systematically discourage full participation by women”).
treatment/special treatment” dichotomy retains the power to divide. This risk is likely to be less if an employer’s obligation to restructure the workplace around a caregiving norm can be located within existing disparate impact theory, which more easily is viewed as part of core antidiscrimination law.

Another advantage to using disparate impact theory to identify an employer’s obligation to restructure workplace norms, rather than trying to add to Title VII an ADA-like accommodation duty in the present political climate, is that disparate impact theory could result in more widespread structural change. In an ADA case, an employer typically meets its accommodation duty by providing a person-specific workplace modification. The employer engages in an interactive process with the disabled individual to identify changes in the way that particular individual will perform the job. Frequently, the accommodation is an individual exception to a workplace practice, policy, or rule. As the Supreme Court noted in Barnett, an accommodation may allow a disabled worker “to violate a rule that others must obey.” For example, if an individual’s condition makes commuting impossible, an employer may allow the individual to telecommute as an exception to the practice of requiring employees to work at the central worksite. While the accommodation is effective in recognizing that the practice unnecessarily excludes individuals with certain characteristics, the employer otherwise is allowed to keep the practice in place. That fact may contribute to coworkers’ resentment and the feeling that accommodations represent bare preferential treatment or affirmative action, rather than a form of equal opportunity.

In contrast, disparate impact theory can attack the legitimacy of the practice itself. If a facially neutral practice disproportionately impacts women, a court may require the employer to discontinue the practice altogether, unless the practice is “job related” and “consistent with business necessity.” For example, if a practice requiring employees to work at the
central worksite excludes women disproportionately because of women’s disproportionate caregiving responsibilities, a court may require the employer to eliminate that practice, unless the employer demonstrates its necessity. Even if the employer makes that showing, the employer still must abandon the practice if a less discriminatory alternative—e.g., providing equitable telecommuting options—is available.\footnote{257}

Because disparate impact theory eliminates the underlying practice, rather than merely granting individual exceptions, it can result in broader changes in the organization of work. Moreover, requiring the employer to eliminate the offending practice allows members of the majority group who do not fit the majority norms—e.g., male workers who have or who want to have significant caregiving responsibilities—to benefit from the workplace restructuring as well. In addition, although women’s current disproportionate caregiving responsibilities may be the impetus for the disparate impact challenge, once the offending practice is eliminated, both women and men may take advantage of the restructured workplace to balance paid work with activities other than carework. Accordingly, at least in its final result, disparate impact theory does not necessarily require a privileging of childcare contributions over other social endeavors.\footnote{258} Thus, despite the short-term risk of reinforcing gender stereotypes by characterizing work/family conflicts as discrimination against women, the disparate impact theory provides the long-term potential for creating a workplace that facilitates a blurring of traditional gender roles.\footnote{259} While a newly-legislated accommodation theory could begin with gender-neutral terminology, the connection between accommodation and preferential treatment or affirmative action risks further stigmatizing and devaluing women who are, at least currently, the most likely to seek those accommodations.\footnote{260} Thus, despite the very real limitations of


\footnote{256. Cf. Schwab & Willbom, supra note 232, at 1238 (“The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everyone, not just the protected group.”); Andrew C. Spiropoulos, Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean, 74 N.C. L. Rev. 1479, 1481 (1996) (noting that the remedy for a successful disparate impact claim is to enjoin the employer from using the challenged practice).}


\footnote{258. Cf. Case, supra note 245, at 1767 (arguing that workplace accommodation of childcare "privileg[es]... family matters over an employee’s other life concerns").}

\footnote{259. Cf. Rhode, supra note 72, at 835 (arguing that restructuring the workplace for work/life balance is "clearly a women’s issue," but the result is still "an ideal in which both sexes have a common stake"); see Reva B. Siegel, Note, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 YALE L.J. 929, 929-30 (1985) (arguing that the disparate impact theory requires workplace restructuring "with reference to female, as well as male, reproductive norms"); Schultz, Life’s Work, supra note 14, at 1931-32 (explaining how rights obtained by women, older workers, racial, ethnic, and sexual minorities, "have extended the benefits of work more broadly to other people").}

\footnote{260. Recent economic analysis by Professor Christine Jolls arguably has mooted this entire section by demonstrating the prevalence of childcare accommodations. See Christine Jolls, Women, Work, and Welfare: The Economics of Maternity Leave, 78 CRIM. L. REV. 1411, 1429-30 (1994).}
antidiscrimination law, pushing the envelope of antidiscrimination doctrine remains a useful and immediately available approach to addressing work/family conflicts.\textsuperscript{261}

IV. REALIZING TITLE VII'S PROHIBITIVE AND TRANSFORMATIVE POTENTIAL

This Section uses telecommuting to illustrate how to address work/family conflicts by mining further space within existing Title VII doctrine.\textsuperscript{262} Specifically, this Section identifies when and how courts...
should be able to apply sex discrimination law to prohibit employers from structuring telecommuting in ways that magnify gender inequalities. Of course, if courts endorse this application, employers rationally may respond by eliminating telecommuting altogether and requiring workers to perform all of their work at the central worksite. For women who are unable to meet that requirement because of caregiving or other domestic responsibilities, a lack of labor market power, and a lack of alternative support structures, that result may be worse than allowing employers to use exploitative telecommuting arrangements in the first place. Such a rational substitution effect by employers could end up harming the very people who are supposed to be helped by a broad application of Title VII. To address that risk, this Part also identifies when and how courts should be able to characterize an employer’s denial of telecommuting programs as sex discrimination.

The result of this dual application of Title VII should be to compel employers to provide equitably-designed telecommuting options. The goal is not to eliminate telecommuting, but to require employers to structure telecommuting in ways that do not magnify gender inequalities related to current conflicts between paid and unpaid work. In the end, using sex-specific claims of discrimination should help transform the workplace around a gender-neutral caregiving worker norm, which should benefit many more individuals than just the women plaintiffs who would be initiating these structural changes.

In applying Title VII to telecommuting, this analysis will highlight

263. Cf. Chamallas, Part-Time Work, supra note 200, at 733-36 (noting that one risk of using sex discrimination laws to challenge inequitable part-time work is that it “may result in a shrinkage of part-time opportunities,” making women even worse off); Arne L. Kalleberg, Part-Time Work and Workers in the United States: Correlates and Policy Issues, 52 WASH. & LEE L. REV. 771, 794 (1995) (encouraging the use of Title VII to require equitable part-time work to help women workers, but noting that employers may respond by eliminating part-time work entirely).

264. Of course, this dual application of Title VII in the telecommuting context leaves the ultimate risk that employers’ substitution effect will be to avoid hiring women in the first place. See Case, supra note 245, at 1758-59 (arguing that restructuring the workplace to facilitate childcare risks increased statistical discrimination against women); cf. Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 583-84 (7th Cir. 2000) (refusing to apply the disparate impact model to attendance policies because of the risk that “[f]irms would be deterred from employing women of childbearing age”). While such a response would be actionable discrimination, rational employers still may take that approach because it is more difficult for plaintiffs to prove discrimination in hiring. See Travis, Perceived Disabilities, supra note 246, at 557-58 & 558 n.388. However, for a plaintiff to challenge an employer’s ban on telecommuting in the first place, the ban may not be “job related” and “consistent with business necessity,” which means that such a lawsuit would highlight for employers the positive cost/benefit analysis from allowing equitable telecommuting options. See infra Part IV.B.2. Moreover, such a substitution effect is less likely when disparate impact claims are involved, because they do not expose the employer to the risk of compensatory or punitive damages. See 42 U.S.C. §§ 1981a(a)(1), 1981a(b); see also Travis, Perceived Disabilities, supra note 246, at 558 n.389 (citing empirical work suggesting that employers may respond to antidiscrimination laws by refusing to hire members of the protected group primarily when they face compensatory or punitive damages).
three general ways in which courts are failing to realize Title VII's full prohibitive and transformative potential. First, courts tend to compartmentalize the disparate treatment and disparate impact models, rather than exploring how both models may work together to require an employer to restructure a workplace around gender-neutral norms. Second, courts tend to falsely dichotomize internal and external causes of women's workplace inequality, and courts overuse the "external" characterization to deny women a remedy against employers. Third, courts tend to falsely dichotomize employer acts and omissions, and courts often incorrectly deem "omissions" to be outside the scope of Title VII. The following analysis of telecommuting will highlight ways in which these three errors are contributing to Title VII's current failure to make headway with work/family conflicts.

A. Disparate Treatment Theory

Under the disparate treatment theory, an employee may prove intentional discrimination by showing that the employer made a decision about a term, condition, or privilege of employment "because of" the employee's sex. The employee's status as a woman need only be a "motivating factor," not the sole reason, for the employer's decision. In some cases, the way that an employer implements a telecommuting program could constitute intentional sex discrimination under this model. As noted above, employers tend to target jobs that are made up primarily or entirely of women for cost-cutting forms of telecommuting, in which the workers end up with reduced pay, benefits, training, advancement opportunities, and job security. To state an intentional discrimination case using the disparate treatment model, a female worker would need to show that her sex actually played a role in the employer's decision-making process regarding these telecommuting arrangements, not just that the employer was aware that the negative results of its business decisions would fall disproportionately on women. For example, if the employer selects an individual or job category for this type of telecommuting because the individual is a woman or because the job category is made up of women, or if the employer decides to structure telecommuting programs to casualize workers because they are women, that is evidence of intentional sex discrimination.

266. Id. § 2000e-2(m).
267. See AFSCME v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985) ("It is insufficient for a plaintiff alleging discrimination under the disparate treatment theory to show the employer was merely aware of the adverse consequences the policy would have on a protected group.").
268. Cf. Chamallas, Part-Time Work, supra note 200, at 711-18 (suggesting that if an employer "purposefully used part-time status as a device to keep the wages of women employees
While this often will be impossible to prove, women may be able to make this showing for some particularly egregious telecommuting programs. Several of the case studies mentioned above regarding insurance companies may fall into this category. One insurance company offered its women workers a telecommuting program in lieu of providing maternity leaves, and the telecommuting program involved a loss of benefits, health care, pension plans, paid sick leave, vacation time, and training and advancement opportunities. The fact that the company’s decision about how to implement its telecommuting program was based in part on the desire to eliminate maternity leaves—which exclusively affect women—is evidence of intentional sex discrimination. Another insurance company similarly may have targeted insurance claims processors for telecommuting in part because that job was filled mostly by mothers. The employer promised the women that telecommuting would allow them to better coordinate their work and family lives, but once the women joined the telecommuting program, they quickly found themselves without benefits and working up to fifteen hours a day as the company repeatedly increased its processing quotas.

The 114-firm survey in North Carolina found similar evidence that some employers structure exploitative telecommuting arrangements in part to take advantage of the labor market restrictions associated with the “female family role.” Many of the managers in that survey selected clerical positions for cost-cutting telecommuting programs that substituted part-time, piece-rate positions for previously full-time positions with benefits because they knew that those positions were filled primarily with women who had conflicting work and family demands. The researchers concluded that the decision-makers felt justified in organizing their telecommuting programs in ways that further marginalized women workers because of the decision-makers’ belief that mothers with young children lack significant labor market alternatives and “do and should prefer to be at home.”

While these employers may have had legitimate needs to reduce costs,
deciding to structure telecommuting programs to exploit women with domestic responsibilities as the means for achieving those business objectives is evidence of intentional sex discrimination. In these examples, employers did more than just select particular job categories for telecommuting to reduce overhead and labor costs with the knowledge that the jobs were filled primarily by women with domestic responsibilities. Rather, that knowledge appeared to have been an impetus for the employers’ decisions. When employers deliberately play a causal role in retrenching the gendered nature of work/family conflicts, that conduct is a form of sex discrimination, regardless of the underlying business motivations.\textsuperscript{277} That should be the case even if some male workers in the same job category also are subjected to the exploitative form of telecommuting. Just because there are some similarly-situated men does not negate the employer’s discriminatory intent, which exists if the employer uses the predominance of women in a particular job category as a reason to select that job for such treatment.

Even if an employer does not select an individual or a job category for cost-cutting forms of telecommuting because the individual or members of the job category are women, employers still may be liable for intentional sex discrimination if they treat female telecommuters worse than similarly-situated males. If an employer acts on sex stereotypes when assessing the performance of female telecommuters—such as assuming that female telecommuters are less committed to work than on-site workers, but not making that assumption about male telecommuters—that is evidence of intentional discrimination.\textsuperscript{278} Data suggests that employers often act on negative stereotypes about workers with primary childcare responsibility.\textsuperscript{279} For example, employers tend to scrutinize the performance of parents more critically than others by attributing absenteeism or slow work pace to the workers’ parental responsibility (which is viewed as a lack of job commitment), rather than identifying short-term or situational causes as employers do for workers who are not primary parents.\textsuperscript{280} If employers equate female but not male telecommuters with “parents,” then these stereotypes may be targeted specifically at women who telecommute.

If women successfully start challenging the way that employers implement exploitative telecommuting programs as a form of intentional sex discrimination, then employers rationally may respond by eliminating telecommuting altogether and requiring workers to perform all work at the

\textsuperscript{277} Title VII does not provide a general cost-based defense to discrimination claims. See infra note 454 and accompanying text.

\textsuperscript{278} See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that the use of sex stereotypes constitutes intentional discrimination).

\textsuperscript{279} See Abrams, Gender Discrimination, supra note 73, at 1222.

\textsuperscript{280} See id.
Because that may be an even more undesirable state of affairs, the next question is whether an employer’s refusal to provide telecommuting options also could constitute intentional discrimination against women.

Courts have characterized telecommuting as an employment condition or benefit, which means that denying a telecommuting request because of an employee’s sex should fall squarely within Title VII’s disparate treatment theory. If an employer allowed a male employee to telecommute, but did not allow a similarly-situated female employee to telecommute, that could constitute intentional sex discrimination. An employer might make such a decision because of prejudice against women or because of sex-stereotyped beliefs. For example, the employer might view a telecommuter’s “absence” from the workplace as a negative for women but not for men, based on stereotypic assumptions that a woman’s desire to telecommute indicates a greater commitment to family than to work.

Employee surveys provide some indirect evidence that such sex-stereotyping exists. One study of nearly 600 non-telecommuting employees in San Diego found that 92 per cent of women and 83 per cent of men wanted to telecommute for some part of the workweek. However, the women were significantly more likely than the men to report that their supervisors would not want them to telecommute and to report concern that telecommuting would cause a lack of visibility that might harm their careers. Other studies also have found that women are more worried than men that being “out of sight” in a telecommuting relationship will have adverse career effects. Given this risk of differential treatment of male and female telecommuters, attorneys are starting to advise employers that if they permit some employees to telecommute, they should use uniform selection and evaluation criteria to help avoid potential discrimination.

281. See, e.g., Tarin v. County of Los Angeles, 123 F.3d 1259, 1263-64 (9th Cir. 1997) (indicating that the denial of an employee’s request to telecommute is an adverse employment action subject to discrimination analysis, but dismissing the employee’s claim that her employer limited her telecommuting privileges in retaliation for filing a Title VII charge due to lack of factual support); see also Head, supra note 46 (stating that “[m]ost employees view the opportunity to work out of their home as a benefit or perk; thus an employee who has requested and been denied a telecommuting arrangement may allege that the employer discriminated in refusing to offer such an opportunity”).


283. See Telecommuting Differences, supra note 167.

284. See id.

285. See Perin, supra note 29, at 242-43, 251, 252, 257 (describing a study of 100 telecommuters finding that “women are less confident that being ‘out of sight’ will not adversely affect their careers”); cf. Yap & Tng, supra note 25, at 232 (surveying hundreds of female computer professionals in Singapore and finding that one concern about telecommuting was that the lack of visibility would harm their career development).
suits.\textsuperscript{286}

The more difficult case is when an employer refuses to allow any of its employees to telecommute. To state an intentional discrimination claim, a woman who is not allowed to telecommute must prove that the refusal was because she is a woman, which is difficult to do without a male comparator who received the benefit. If there is evidence that the employer decided not to allow any telecommuting arrangements in order to make it more difficult for women to succeed, or because of fears about women using telecommuting to prioritize family over work, or for any other sex-specific reason, then a blanket prohibition on telecommuting could constitute sex discrimination. Even facially neutral policies can support an intentional discrimination claim if an employer has sex-specific motives for adopting the policy.\textsuperscript{287}

However, without evidence of a sex-specific reason for adopting a general prohibition on telecommuting, it will be difficult for women to claim that the lack of telecommuting options constitutes intentional discrimination. In that case, the strongest argument would be to characterize a general prohibition on telecommuting as itself an act of sex-stereotyping. Women could argue that an employer’s belief that work can only be performed at the central worksite is based on invidious generalizations about the experiences of men, who more readily can rely on spouses to perform all of their caregiving and other domestic work.\textsuperscript{288} While such a theory is plausible, courts are likely to hold that discrimination requires affirmative conduct by the employer and that the “lack” of a particular work option is not “conduct.”\textsuperscript{289} That judicial response, while predictable, would be erroneous. An employer’s decision to require all employees to be physically present at a central worksite during all working hours is as much a form of employer “conduct” as is the manner in which an employer implements an existing telecommuting program.\textsuperscript{290} Both decisions should be subject to discrimination analysis.

Yet, even if courts avoided that common analytical error, they likely still would reject a sex-stereotyping challenge to a telecommuting

\begin{itemize}
\item \textsuperscript{287} See Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1257 (6th Cir. 1981).
\item \textsuperscript{288} Cf. Abrams, Gender Discrimination, supra note 73, at 1232 (arguing that Title VII’s ban on sex-stereotyping should apply to any requirements “based on the experience of a single, dominant group within the workplace,” which means that requirements “such as unlimited time commitment or frequent travel” may violate Title VII because they represent “invidious generalizations of the experience of a dominant group—men who could rely on spouses to take responsibility for child care”).
\item \textsuperscript{289} See Dowd, Work and Family, supra note 78, at 141–42 (arguing that Title VII cannot “reach cases in which an employer has failed to adopt any policy” (emphasis in original)).
\item \textsuperscript{290} For a complete discussion of this issue, see infra notes 368-392 and accompanying text.
\end{itemize}
prohibition. Unless an employer’s decision that all work must be performed at a central worksite is based on a conscious connection between that particular organizational structure and male workers, it will be difficult to prove the requisite intent. While the decision certainly is “conduct” that should be subject to discrimination analysis, it often will be impossible to prove that it is an act of sex-stereotyping. This particular type of employer conduct may be characterized more readily as a form of unintentional discrimination, using the disparate impact model described below. The disparate impact model is more promising in the context of an employer’s general prohibition on telecommuting because that model focuses solely on the effects of the employment decision, not on what motivated the decision-making process.

Another potential problem with all of the intentional sex discrimination theories is that an employer’s decision about structuring telecommuting or prohibiting telecommuting may not be motivated by facts or stereotypes about “women.” Instead, employers’ decisions may be motivated more specifically by facts or stereotypes about “women with childcare responsibilities,” or more generally by facts or stereotypes about “parents.” Both of these alternative motives could make it difficult to characterize the employer’s conduct as intentional discrimination on the basis of “sex.”

If an employer structures a telecommuting program or prohibits telecommuting altogether because of facts or stereotypes about “women with childcare responsibilities,” then plaintiffs may use a “sex-plus” discrimination theory. The Supreme Court endorsed a sex-plus disparate treatment theory in 1971 in Phillips v. Martin Marietta. In Phillips, the employer had refused to hire mothers of school-aged children, but not fathers of school-aged children. The Court held that making decisions based on an employee’s sex plus another characteristic is still sex discrimination. Even if the employer disadvantages only a subset of women, the employer is liable for intentional sex discrimination because only women (albeit not all women) are harmed.

292. See id. at 543.
293. See id. at 544.
294. See id.; accord Fisher v. Vassar College, 114 F.3d 1332, 1335 (2d Cir. 1997) (en banc) (stating that a Title VII claim “may arise if an employer discriminates against an individual because of sex plus another characteristic, such as . . . parental status”), cert. denied, 522 U.S. 1075 (1998); Schallop v. N.Y. State Dep’t of Law, 20 F. Supp. 2d 384, 400-02 (N.D.N.Y. 1998) (holding that “[i]t is well established that gender combined with a second characteristic may constitute discrimination against a protected group for purposes of Title VII”); Trezza v. The Hartford, Inc., 98 Civ. 2205, 1998 WL 912101, at *6-7 (S.D.N.Y. Dec. 28, 1998) (applying the sex-plus theory to an employer that failed to promote mothers but not fathers without children); Moore v. Ala. State Univ., 980 F. Supp. 426, 434 (M.D. Ala. 1997) (applying the sex-plus theory to a vice president’s refusal to consider the plaintiff for a promotion because she was a married woman with a child); Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 673, 677-78 (S.D.N.Y. 1995) (applying the sex-plus theory where a high-ranking
Under this theory, a woman should be able to state an intentional sex discrimination claim if she can prove that her employer adopted an exploitative form of telecommuting, or barred telecommuting altogether, because of beliefs or assumptions about women with domestic responsibilities. For example, if an insurance company selects a category of claims processors for cost-cutting forms of telecommuting because the job is made up primarily of mothers—because the employer believes that mothers prioritize family over career, or because the employer believes it more easily can take advantage of mothers’ work/family conflicts and lack of labor market power—that should constitute sex-plus discrimination in violation of Title VII.295

Despite this potential that the sex-plus theory has in the work/family conflict arena, lower courts thus far have applied the theory narrowly and inconsistently. Many courts have required direct evidence of an employer’s animus against working mothers, which is often impossible in jobs made up entirely of women.296 The fact that employers often impose exploitative forms of telecommuting in positions filled solely by women therefore could defeat the use of the sex-plus theory. For this theory to work, courts must stop allowing employers to use the sex-segregated nature of the workplace—which is itself the result of discriminatory practices—as grounds for avoiding an intentional discrimination claim. Courts must recognize that intent may be demonstrated in ways other than comparing the treatment of women to similarly-situated men.297

Other courts have limited the sex-plus theory by requiring the “plus” characteristic to be an immutable physical trait or the exercise of a fundamental right.298 In Willingham v. Macon Telegraph Publishing Co., for example, the Fifth Circuit refused to apply the sex-plus theory to an employment decision-maker disliked women with children); cf. Williams, Market Work, supra note 78, at 327-28 (arguing that the sex-plus theory has “tremendous potential” for addressing work/family conflicts).

295. See Martha Chamallas, Mothers and Disparate Treatment: The Ghost of Martin Marietta, 44 VILL. L. REV. 337, 338, 342 (1999) [hereinafter Chamallas, Mothers] (arguing that courts should apply the sex-plus theory when employers “presume that once a woman has her first child, or a subsequent child, she will drop out of the workforce,” or when employers “assume that working mothers are less committed to their jobs, or less interested in advancement,” or when employers presume “that a woman will place her family obligations before her responsibilities on the job”); see also Smith, supra note 203, at 1456-59 (noting that “Title VII does offer parents some protection when discrimination based on parental status is coupled with one of its prohibited factors, most commonly gender”).

296. See Chamallas, Mothers, supra note 295, at 353; see, e.g., Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738-39 (7th Cir. 1994) (denying liability under the sex-plus theory because the female plaintiff did not identify a male employee who also had the “plus” characteristic to act as a comparator); Bass v. Chemical Banking Corp., No. 94 CIV. 8833, 1996 WL 374151, at *5 (S.D.N.Y. July 2, 1996) (same).

297. This point is explored more fully in the Section on disparate impact theory. See infra Part IV.B.

298. See Kessler, supra note 234, at 392-93 (compiling cases in which courts have struggled to draw a consistent line for which “plus” characteristics are immutable or related to a fundamental right).
employer’s policy that required men but not women to have short hair. The Fifth Circuit held that the policy was not discriminatory because hairstyle is not immutable, nor is it related to the exercise of a fundamental right, such as the right to marry or have a child. Because the caregiving and other domestic responsibilities that create greater work/family conflicts for women are not “immutable” physical characteristics, and it is unclear whether they always would qualify as the exercise of a “fundamental right,” courts may refuse to apply the sex-plus theory in the telecommuting context. That does not mean that such a case is not worth pursuing. There is no basis in the Supreme Court’s Phillips opinion for lower courts to limit the sex-plus theory in this manner. If women can convince courts that intentionally disadvantaging any subset of women is sex discrimination, then the sex-plus theory could have a greater transformative effect in attacking inequitable telecommuting arrangements.

If, however, an employer structures a telecommuting program or bans telecommuting altogether not because of facts or stereotypes about “mothers” in particular, but instead because of facts or stereotypes about “parents” in general, then stating an intentional sex discrimination claim will be more difficult. Parents are not a protected class under Title VII, and because parents are a subset of both women and men, the sex-plus theory is unavailable. In that situation, women should turn to the disparate impact model. Decisions that disadvantage “parents” currently may result in greater harm to women than to men, which could support a disparate impact claim even if sex was not a motivating factor in the employer’s decision-making process.

While this analysis reveals the potential for intentional discrimination claims to help force employers to provide equitable telecommuting options, the role of the disparate treatment model is limited. In addition to cases in

299. See 507 F.2d 1084, 1091-92 (5th Cir. 1975) (en banc).
300. See id.; see also Jarrell v. E. Airlines, Inc., 577 F.2d 869, 870 (4th Cir. 1978) (adopting the lower court’s opinion, 430 F. Supp. 884 (1977), holding the sex-plus theory inapplicable to an airline’s weight requirement because weight is neither immutable nor is it linked to the exercise of a fundamental right).
301. See Phillips v. Martin Marietta, 400 U.S. 542, 543-44 (1971). The Court stated that the lower court erred in reading Title VII “as permitting one hiring policy for women and another for men—each having pre-school-age children,” because Title VII “requires that persons of like qualifications be given employment opportunities irrespective of their sex.” Id.
302. See Piantanida v. Wyman Ctr., Inc., 927 F. Supp. 1226, 1237-38 (E.D. Mo. 1996), aff’d, 116 F.3d 340 (8th Cir. 1997) (granting the employer summary judgment in a sex-plus claim by framing the plaintiff’s allegation as discrimination against parents, rather than against mothers); Payseur v. Grainger, 1989 WL 152583, at *1 (N.D. Ill. Nov. 28, 1989) (granting the employer summary judgment on a disparate treatment claim by framing the plaintiff’s allegation as discrimination against “people” with childcare responsibilities, which is not a protected class because “either parent may care for a child”); see also Dowd, Work and Family, supra note 78, at 115 (questioning Title VII’s ability to address work/family conflicts because “the focus on women fails to deal with the workplace structure’s hostility towards parents”).
which employers are targeting parents in general, there will also be cases in which women will be unable to show that an employer’s telecommuting decisions are related consciously in any way to women, caregiving, or other domestic tasks. An employer may select a job category for an exploitative telecommuting program without any indication that the category’s gender make-up motivated the selection process. An employer may prohibit telecommuting because the employer believes that it cannot supervise workers remotely, not to disadvantage women or because of any stereotypes about working mothers. Accordingly, even a broad application of the disparate treatment model will be only one part of a litigation strategy for realizing Title VII’s full prohibitive and transformative potential.

B. Disparate Impact Theory

Title VII’s disparate impact theory prohibits employers from using facially neutral practices that disproportionately affect the employment opportunities of members of a protected class. This model focuses on inequitable results and does not require discriminatory intent. Accordingly, this model appears well-suited to address aspects of women’s inequality that stem from structural aspects of the workplace that help create, reframe, or amplify women’s work/family conflicts.

To state a prima facie case using the disparate impact model, a plaintiff must demonstrate that a facially neutral employment practice causes women to experience substantially different opportunities or employment status than men. If the plaintiff meets that burden, then the employer may state an affirmative defense by proving that the practice is “job related” and “consistent with business necessity.” If the employer meets that burden,
the employee still may succeed by demonstrating that a less discriminatory alternative employment practice serves the employer’s business needs. If the plaintiff succeeds in a disparate impact case, a court may require the employer to eliminate the offending practice. For example, if an exploitative form of telecommuting disparately impacts women, a court could require the employer to eliminate that type of telecommuting arrangement. Conversely, if an employer’s ban on telecommuting disparately impacts women, a court could require the employer to lift its ban. As the following analysis will show, the result of such a dual application of Title VII’s disparate impact model would be to require employers to provide equitable telecommuting options when feasible, which ultimately would benefit all workers who face significant conflicts between work and family demands.

1. The Plaintiff’s Prima Facie Case

To state a prima facie case, women must identify “a particular employment practice” and demonstrate that it “causes a disparate impact on the basis of... sex.” While plaintiffs may meet this burden through statistical evidence, the Supreme Court has rejected the use of strict mathematical formulas. The disparity need only be “sufficiently substantial” to raise “an inference of causation.”

With respect to exploitative telecommuting programs, employers may argue as a threshold matter that plaintiffs cannot state a prima facie case because telecommuting does not constitute a “particular employment practice.” On one hand, employers may characterize the implementation of a telecommuting program as a one-time, cost-cutting decision, rather than as a “practice.” In Ilhardt v. Sara Lee Corporation, the Seventh Circuit used that reasoning to reject a woman’s disparate impact claim challenging pay rate for day-shift workers who were mostly women); Williams, Unbending Gender, supra note 12, at 102-04 (arguing that employers should not be able to use part-time status as a “factor other than sex” to defend lower hourly pay rates for part-timers who are mostly women); Chamallas, Part-Time Work, supra note 200, at 738, 749-55 (same).


308. See Griggs, 401 U.S. at 431 (holding that “[i]f an employment practice which operates to exclude [members of a protected class] cannot be shown to be related to job performance, the practice is prohibited”); see also Schwab & Willborn, supra note 232, at 1238 (explaining that “[t]he standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy for everyone”); Spiropoulos, supra note 256, at 1481 (noting that the remedy for a disparate impact claim is to enjoin the employer from using the challenged practice).


310. See Watson, 487 U.S. at 994-95.

311. Id. at 995; see also Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (holding that a disparate impact plaintiff only needs to show a “significantly discriminatory pattern”).
an employer’s selection of part-time workers for a reduction-in-force.\textsuperscript{312} The court held that a reduction-in-force was “an isolated incident, not a regular occurrence,” and that “a one-time decision . . . can hardly be called an employment practice.”\textsuperscript{313} That reasoning should not apply to telecommuting, however, because the employer continues to implement the related changes in pay, benefits, monitoring, training, advancement, and employment status long after the initial selection of a female job category for a telecommuting regime.

On the other hand, employers may characterize telecommuting arrangements as too “complex” and “multifaceted” to constitute a particular, identifiable practice.\textsuperscript{314} The Ninth Circuit used that reasoning when it refused to apply the disparate impact theory to an employer’s compensation system in \textit{AFSCME v. Washington}.\textsuperscript{315} However, other courts have rejected that reasoning,\textsuperscript{316} and such an argument should now be obsolete. Congress has since enacted the Civil Rights Act of 1991, which amended Title VII to allow the disparate impact model to apply to an entire “decisionmaking process,” if the elements of that process are “not capable of separation for analysis.”\textsuperscript{317} Therefore, women should be able to apply the disparate impact theory to a telecommuting program, as long as they can show that the program causes disparate effects.

There are several ways that women may demonstrate disparate effects. First, they may argue that creating a two-tiered telecommuting structure disproportionately harms women workers. As explained above, employers often use telecommuting to casualize female-dominated jobs (by increasing performance quotas and reducing pay, benefits, training, job security, and promotion opportunities), while using telecommuting as a benefit for male-dominated jobs (by providing greater autonomy and flexibility and no changes in employment status). By implementing this two-tiered telecommuting structure, employers are magnifying the distance between women and men in the labor market and reinforcing the existing sex-stratification in the workplace. Such evidence should support a prima facie violation of Title VII’s prohibition on practices that “limit, segregate, or classify” employees “in any way” that tends to deprive women of employment opportunities “or otherwise adversely affect [their] status as an

\begin{footnotes}
\item[312.] See 118 F.3d 1151, 1156 (7th Cir. 1997).
\item[313.] Id.
\item[315.] See id.
\item[317.] P.L. 102-166, § 105(b) (codified at 42 U.S.C. § 2000e-2(k)(1)(B)(ii)).
\end{footnotes}
employee."  

Although Title VII’s broad language appears to encompass this situation, women who attempt to state a disparate impact case may face resistance by courts that refuse to view data from different job categories as relevant evidence. Courts may view these telecommuting cases as disfavored “comparative worth” claims, which challenge the practice of compensating female-dominated jobs less than dissimilar male-dominated jobs that are of equal value to the employer. But cases challenging the effect of two-tiered telecommuting arrangements do not rely on a comparative worth theory. The plaintiffs would not be pointing to the differential effects of telecommuting on non-similarly-situated male and female workers to prove that the female workers are providing the employer similar value, but as evidence that the employer’s telecommuting practices “tend to deprive [women]... of employment opportunities or otherwise adversely affect [their] status,” which Title VII deems unlawful.

If courts nevertheless refuse to entertain evidence of the differential treatment of women and men at various levels of the workplace hierarchy, women will need to find other ways to demonstrate the disparate effects of exploitative telecommuting programs. A second approach to stating a prima facie case would be for women to show that employers treat telecommuters worse than non-telecommuters who are performing the same job. Such locational discrimination affects women disproportionately because women make up the majority of telecommuters in non-professionals jobs. There is considerable evidence that telecommuters in non-professional positions receive less pay, benefits, and job security than their similarly-situated office counterparts. Employers also tend to

319. See, e.g., AFSCME, 770 F.2d at 1404.
320. Cf. Christensen, supra note 29, at 188-90, 195 (using the phrase “place discrimination” to describe this phenomenon, and arguing that “[w]orkers at home should be treated and paid in exactly the same fashion as those who work in the offices”).
321. See, e.g., Calabrese, supra note 46, at 169, 174 (noting that women telecommuters typically receive less pay, benefits, and job security than those doing the same work in the central office); Christensen, supra note 29, at 188-89 (describing examples of “place discrimination” in which women telecommuters received less pay and benefits than when performing the same work in the central office); Reymers, supra note 24 (citing evidence that many women end up with less paid benefits and staff support when they begin telecommuting); cf. Huws, THE NEW HOMEWORKERS, supra note 71, at 8, 29, 34-37, 39-40, 43 (describing a Great Britain study finding that women telecommuters with several years of experience working as on-site computer professionals ended up with less pay, benefits, and job security than on-site workers doing comparable work with comparable qualifications); Huws, ET AL., supra note 61, at 123-24 (citing data from Great Britain indicating that while women telecommuters often earn less than their on-site counterparts, men telecommuters often earn more than their on-site counterparts); Phizacklea & Wolkowitz, supra note 12, at 66 (describing a Great Britain study finding that female clerical workers who telecommute are “clearly disadvantaged as compared to their office counterparts,” particularly due to the lack of benefits); Fothergill, supra note 25, at 333-37 (describing a Great Britain study finding that women telecommuters had lower rates of pay and benefits
promote telecommuters at a lower rate than similar on-site workers.\textsuperscript{322} Employers also may overlook telecommuters when assigning desirable tasks,\textsuperscript{323} and employers often are less forgiving of the same mistake made by a telecommuter than by a similar worker who performs on-site.\textsuperscript{324} Because women make up a greater proportion of the telecommuting population in many job categories, attorneys are starting to recognize the risks involved in such locational discrimination. Practitioners are starting to advise employers to keep telecommuters “on an equal footing with other employees,”\textsuperscript{325} and an employer’s failure to do so should support a prima facie disparate impact claim.\textsuperscript{326}

This second approach may not be viable in situations where the

\textsuperscript{322} See, e.g., Christensen, supra note 29, at 188-89 (describing an insurance company that did not consider women for training and promotion once they began telecommuting); Kevin M. Fitzgerald, Telecommuting and the Law, SMALL BUS. REP. Sept. 1994, at 14, 17 (noting that telecommuters often miss out on promotions); Roseman, supra note 25 (explaining that telecommuters can be “overlooked for promotions”); cf. Huws, THE NEW HOMEWORKERS, supra note 71, at 8, 29, 34-37, 39-40, 43 (describing a Great Britain study finding that women telecommuters with several years of experience working as on-site computer professionals had fewer promotion opportunities than on-site workers doing comparable work with comparable qualifications); Fothergill, supra note 25, at 333-37 (describing a Great Britain study finding that women telecommuters had fewer advancement opportunities than on-site workers doing similar work). This differential promotion rate likely is due in part to an over-emphasis on “face-time” in promotion decisions. See Handbook, supra note 25 (reporting a study finding that nearly one-third of telecommuters reported a decrease in their perceived visibility at work, and reporting “loss of visibility before promotion periods” as a disadvantage of telecommuting); Ingle, supra note 37, at 6 (explaining that “[a]bsence from the main workplace is also perceived to reduce chances for career advancement”); Perin, supra note 29, at 242-43, 251-52, 257 (finding evidence that office presence plays a significant role in promotion decisions from a study of 100 telecommuting professionals); Reymers, supra note 24 (“Employees believe that their continuous office presence is necessary for promotion.”). Even companies that are formally committed to family-friendly policies will communicate informally that advancement requires adherence to the “traditional face time mentality.” Crain, supra note 78, at 1958-59.

\textsuperscript{323} See, e.g., NILLES, MANAGING TELEWORK, supra note 25, 28 (noting complaints from telecommuters at Apple Computer that “managers tend to overlook telecommuters when it comes to assigning tasks”).

\textsuperscript{324} See, e.g., Reymers, supra note 24 (finding in one study of telecommuters that “managers were less forgiving about missed deadlines than if they were visible in the office, where managers were likely to justify delays as being ‘everyday problems’” (quoting Perin, supra note 29, at 249)).

\textsuperscript{325} See, e.g., Fitzgerald, supra note 322, at 17 (advising employers to adopt telecommuting policies that ensure equal treatment of telecommuters and non-telecommuters in order to avoid discrimination claims).

\textsuperscript{326} Others have made a similar argument with respect to Title VII and part-time work. Just as employers use locational discrimination when designing telecommuting arrangements for the predominantly female telecommuting workforce, employers use temporal discrimination when designing part-time arrangements for the predominantly female part-time workforce, by using lower hourly rates of pay, benefits, and advancement, which scholars have argued also violates Title VII. See, e.g., WILLIAMS, UNBENDING GENDER, supra note 12, at 104-07; Kalleberg, supra note 263, at 780, 782-83, 796-97 (1995); Williams, Market Work, supra note 78, at 328-33.
employer has structured its telecommuting program to eliminate all similarly-situated on-site workers. Employers often impose cost-cutting forms of telecommuting on an entire job category, leaving women telecommuters without any evidence of ongoing locational discrimination. In that case, a third approach to stating a disparate impact case would be to compare women’s telecommuting experience to men’s telecommuting experience within the same job category, if the job category is not made up entirely of women. If, for example, female telecommuters advance in their paid work at a slower rate than male telecommuters, that may support a disparate impact challenge to a telecommuting program.

This third approach will be difficult if no similarly-situated male telecommuters exist. In some situations, the job categories selected for exploitative telecommuting programs are made up entirely of women, leaving the women neither with the option of using better-off male telecommuters as comparators, nor with a current group of similarly-situated on-site workers from which to identify gendered effects. In that case, proving discrimination against female telecommuters would require comparing the status of those very women before-and-after the employer imposed the telecommuting regime. There is abundant evidence that the terms and conditions of women’s employment become worse when employers switch them from on-site workers to telecommuters, even when the women continue to perform the same job. That itself should be enough to state a prima facie case.

Courts may reject this third approach by demanding data comparing the effect of an employer’s practice on currently-employed, similarly-situated males. The problem with that type of demand is that it renders the disparate impact model useless whenever women are employed at a single-sex workplace or in a single-sex job category. The district court’s opinion in O’Hara v. Mt. Vernon Board of Education illustrates this error. In O’Hara, the court dismissed a woman’s claim that the employer’s facially neutral parental leave policy requiring workers to forego substantial work opportunities had a disparate impact on women. The court required the plaintiff to submit evidence not just that the practice “affects more female employees,” but that the effect is “disproportionate” to that experienced by men. Because similarly-situated male employees did not exist at the plaintiff’s worksite to provide such comparative data, the court left the plaintiff with no possible way to state a disparate impact claim. That type of reasoning could prevent many women from challenging the effects of

327. See supra Part II.C.I.
329. Id. at 886-87 & 887 n.19 (internal quote omitted).
330. Id. at 887 n.19 (emphasis omitted).
telecommuting, given that employers tend to target female jobs for exploitative telecommuting practices.

Courts that use the single-sex nature of a workplace or job category to preclude Title VII claims are ignoring the Supreme Court’s reasoning in *County of Washington v. Gunther*. In that case, involving a claim of sex discrimination in compensation, the Court held that women are not barred from relief under Title VII just because the employer has not "also employed a man in an equal job in the same establishment, at a higher rate of pay." The Court rejected a construction of Title VII that would "leave remediless all victims of discrimination who hold jobs never held by men." The Seventh Circuit’s opinion in *Scherr v. Woodland School Community Consolidated* is one example of a correct application of the disparate impact model to a sex-segregated workplace consistent with the Supreme Court’s mandate in *Gunther*. The plaintiff in *Scherr* alleged that the employer’s sick leave policy had a disparate impact on pregnant women, but no similarly situated non-pregnant comparators existed. The court held that rather than comparing the policy’s impact on protected class members with the impact on “hypothetical” others with “identical needs,” the prima facie case should compare the policy’s “actual coverage” with what members of the protected class “actual[ly] need” to obtain equal opportunities. Under that reasoning, women in female-dominated jobs

332. Id. at 178-79 & 179 n.19.
333. Id. at 179.
334. 867 F.2d 974 (7th Cir. 1989).
335. See id. at 983.
336. Id. (citing *California Federal Saving & Loan Ass’n v. Guerra*, 479 U.S. 272, 288-89 (1987), which held that Title VII, as amended by the Pregnancy Discrimination Act of 1978, did not conflict with a state law providing pregnant women leave and reinstatement rights, in part because Title VII’s goal is to equally enable men and women to participate in paid labor and in family life). The district court nevertheless dismissed the plaintiff’s disparate impact claim on remand because she failed to make even the type of showing suggested by the Seventh Circuit, and the Seventh Circuit affirmed that dismissal on appeal in *Maganuco v. Leyden Community High School*, 939 F.2d 440, 443-45 (7th Cir. 1991) (noting that “a policy which does not provide adequate leave to accommodate the period of disability associated with pregnancy” would be “vulnerable under a disparate-impact theory of liability under Title VII”). See also Fisher v. Vassar, 70 F.3d 1420, 1447 n.12 (2d Cir. 1995)(stating that when a woman “establishes by evidence that there are no [similarly situated] males and that it is unlikely that there would be any, then it may be that the complaintant would be able to prevail by providing some other evidence of discrimination) reh’g en banc, 114 F.3d 1332 (1997), cert. denied, 522 U.S. 1075 (1998); cf. Dowd, *Maternity Leave*, supra note 79, at 719-20 (describing an approach to antidiscrimination law that “measures equality not by determining whether women derive the same benefits or detriments as men, but rather whether the structure of the workplace equally affects men and women in terms of employment opportunity”); Minow, supra note 225, at 10, 12, 18, 41-42 (arguing that because *Guerra* “shifted from a narrow workplace comparison to a broader comparison of men and women in their full familial roles,” it provided the foundation for a new “equality norm” that requires “no difference in the abilities of men and women to work and have a family”).
should be able to state a prima facie case challenging exploitative telecommuting programs by showing how those programs interact with their caregiving and domestic responsibilities to affect their job status and limit their employment opportunities.

Otherwise, employers in a sex-segregated workplace perpetually could shield from legal review the discriminatory effects of present-day practices. As others have noted, the sex-stratification of the workplace "is neither accidental, nor the simple expression of conventional role preferences." 337 It is the result of historic workplace discrimination. Women should not be excluded from Title VII’s current antidiscrimination protection just because historically they have been excluded discriminatorily from jobs held by men. Indeed, the Supreme Court has emphasized that Title VII’s promise is to "break down old patterns of segregation and hierarchy." 338 Employers should not be able to use those very patterns to shield current practices from disparate impact review. 339

When courts do use the sex-segregated nature of the workplace to defeat a disparate impact claim, they often describe their decisions in terms of an evidentiary shortfall in the plaintiff’s prima facie case. 340 This is an example of falsely dichotomizing internal and external causes of women’s workplace inequality and using the latter characterization to place employers beyond the reach of antidiscrimination law. Courts are correct that Title VII requires proof that the particular employment practice "caused" the disparate effect on women. However, by dichotomizing causes internal and external to the workplace, courts have gutted Title VII’s transformative potential when women’s workplace inequality stems from the structural and organizational incompatibility between paid and unpaid work.

In general, courts accomplish this result in two primary ways. First, courts characterize the source of women’s workplace inequality as “the market,” which courts view as external to the workplace and therefore not “caused” by the employment practice at issue. 341 In the context of

337. Siegel, supra note 259, at 951-52.
339. Cf. Siegel, supra note 259, at 951-52 (arguing that “[t]he sex segregation of the workplace should not be invoked to bar disparate impact claims” under the Pregnancy Discrimination Act, which added pregnancy to Title VII’s protected statuses, because the sex segregation is “the product of attitudes and practices it is the object of Title VII to proscribe”).
341. See Nelson & Bridges, supra note 73, at 1-2, 13, 15, 49, 67-69, 309-10 (explaining how the market defense has dominated cases challenging the gender wage gap and how courts have used “the market” to locate women’s workplace inequality “outside the employing organization” and beyond the reach of antidiscrimination law); Chamallas, Part-Time Work, supra note 200, at 766-68 (explaining that courts “allow employers to act in accordance with economic realities and the laws of supply and demand, even if such action results in lower wages for predominantly female jobs,” because “the
exploitative telecommuting arrangements, this means that courts may reject a woman’s disparate impact claim by concluding that the labor market compels the selection of female-dominated jobs for cost-cutting forms of telecommuting. Second, courts characterize women’s workplace inequality as “caused” by women’s own “choice” or “lack of interest” in well-paying, male-dominated positions, which courts similarly view as external to the employer. Under that theory, courts may reject disparate impact claims by concluding that the women themselves are responsible for choosing job categories and work arrangements that allow them to pursue their own personal interests in caregiving.

These causation arguments lack foundation either in law or in fact. Legally, the causation requirement in the disparate impact model cannot require proof that the employer is the sole cause of a disparate effect on women. By definition, every disparate impact case requires multiple causes that are both internal and external to the employer. An employer’s facially neutral practice (internal) could not have a disparate effect on a group of workers if that group did not differ in some way from another group (external). The differential employment results are therefore always the result of the interaction between the employer’s practice and some market, not the employer, is seen to create the economic reality”); Dowd, Work and Family, supra note 78, at 139 (arguing that discrimination law has limited ability to address work/family conflicts because of the law’s “inability to reach cases in which an employer . . . has merely incorporated market or industry standards”); see also AFSCME, 770 F.2d at 1407 (rejecting a disparate treatment claim challenging pay differentials in male- and female-dominated jobs by attributing the differentials to the “market,” and holding that Title VII “does not obligate [an employer] to eliminate an economic inequality that it did not create”); Am. Nurses’ Ass’n v. Ill., 783 F.2d 716, 719-20 (7th Cir. 1986) (articulating the dominant market view of the between-job gender wage gap).

See NELSON & BRIDGES, supra note 73, at 1-2, 67-69 (explaining how courts have endorsed “choice” as part of a neoclassical economic analysis to explain “the concentration of women in some jobs and men in others,” thereby placing aspects of women’s workplace inequality beyond the scope of antidiscrimination law); Nancy E. Dowd, Work and Family: Restructuring the Workplace, 32 Ariz. L. Rev. 431, 431 (1990) (explaining how women’s workplace inequality is “rationalized by an ideology of individual choice”); Schultz & Petterson, supra note 73, at 1074 (describing how “employers seek to rationalize women’s occupational segregation and under-representation in top jobs” by arguing that such results are caused “from protected class members’ own lack of interest”); Williams, Market Work, supra note 78, at 330-31 (1999) (explaining employers’ argument that “whatever the documented disparities between men and women, they are caused not by discrimination but by women’s lack of interest in the jobs in question”); see, e.g., EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 312-14, 319-22 (7th Cir. 1986) (rejecting a discrimination claim regarding women’s under-representation in high-paying commission sales jobs by reasoning that women were not interested in such jobs).

See Lye, supra note 305, at 318, 323-24, 338 (using Green v. Miss. Pac. R.R., 523 F.2d 1290, 1298-99 (8th Cir. 1975), as an example to argue that the disparate impact model should apply even when the disparity is caused by things “beyond the employer’s control”); Ramona L. Paetzold & Steven L. Willborn, Deconstructing Disparate Impact: A View of the Model Through New Lenses, 74 N.C. L. Rev. 325, 353-54 (1995) (using Griggs, 401 U.S. 424, as an example to argue that all disparate impact cases should “ignore causes external to the employer that contribute to the impact”); Powers, supra note 316, at 193 (arguing that “whether an employer created a particular difference between . . . genders is irrelevant” to a disparate impact claim).
characteristic that distinguishes one group from another: a characteristic that may be physical, social, or cultural in nature.

In the context of race-based disparate impact claims, courts typically have no difficulty with this multi-causal reality. In the Supreme Court's original opinion recognizing the disparate impact theory in *Griggs v. Duke Power Co.*, the employer violated Title VII by requiring applicants to have a high school diploma, which at that time excluded Black applicants at a higher rate than White applicants. Obviously, the disparate impact was caused *both* by the employer's particular hiring practice *and* by the social conditions that had resulted in a lower percentage of Blacks than Whites receiving diplomas, but the Court still required the employer to eliminate the offending practice. Similarly, in *Green v. Missouri Pacific Railroad*, the Eighth Circuit upheld a disparate impact challenge to an employer's policy of not hiring applicants who had been convicted of certain crimes, which at that time also excluded Black applicants at a higher rate than Whites. Although the differential effect necessarily resulted in part from the applicants' prior conduct, the court struck down the employer's practice because of its disparate impact on a protected group.

The results of these cases are consistent with Congress's goal of removing "artificial, arbitrary, and unnecessary barriers to employment."

There is no viable basis in the Supreme Court's disparate impact jurisprudence, the statutory language, or the legislative history for treating the causation element differently in the work/family conflict arena. When a facially neutral practice makes employment advancement incompatible with significant childcare responsibilities, that practice will have a disparate impact on women because women currently perform the bulk of domestic work. Proving that women perform more carework than men should be the end of the inquiry for the prima facie case, just as proof that Black applicants had a lower high school graduation rate than White applicants ended the prima facie inquiry in *Griggs*, and proof that Black applicants had a higher conviction rate than White applicants ended the prima facie inquiry in *Green*. The "why" of the current disparity between women's and men's carework should be irrelevant to stating a prima facie case, just as the "why" of the graduation disparity was irrelevant in *Griggs*, and the "why" of the conviction disparity was irrelevant in *Green*. Accordingly, courts

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344. 401 U.S. 424.
345. 523 F.2d at 1298-99.
346. *See id.*
348. *Cf. Lye, supra* note 305, at 318, 338 (arguing that the "relevant inquiry" in a disparate impact case "is not why but whether the alleged disparity exists," because the goal is "to level the playing field whenever protected groups, for whatever reason—structural inequities, biological differences, or personal backgrounds—performed at disparate rates under facially neutral selection criteria").
should not be able to point to “market forces” or women’s “preferences” to defeat a woman’s challenge to the disparate effects of exploitative telecommuting arrangements.\(^{349}\)

Thus far, however, courts have tended to view gender roles differently from race, which allows the multi-causal nature of carework to become a major stumbling block in sex-based disparate impact claims. Courts are far more likely to use employees' alleged “choice” or “lack of interest” to deny sex-based disparate impact claims than they are to deny race-based claims,\(^{350}\) and citing “the market” as the source of workplace inequalities has become a mainstay only in sex-based discrimination claims. Thus, while women certainly should continue their attempts to disabuse courts of this legal error in cases challenging exploitative telecommuting arrangements, women also should be armed with an alternative litigation strategy.

The telecommuting data lays the foundation for such an alternative: an approach that attacks the factual rather than the legal basis of courts’ causation analysis. As explained above, the data indicates that employers themselves are creating, shaping, and retrenching the gendered nature of the work/family conflicts that disadvantage women telecommuters. Employers target female-dominated jobs for involuntary telecommuting arrangements in a workplace that already has been segregated hierarchically by sex. Employers structure such arrangements to reduce women’s power in the paid labor market while simultaneously reinforcing women’s family roles by relocating them back into the home. Because this research identifies significant sources of the gendered nature of telecommuting and work/family conflicts within the workplace itself, this research provides an empirical basis for overcoming the artificial “causation” barrier that courts have constructed. It therefore should allow women to mine more space within Title VII’s disparate impact theory, even if courts continue incorrectly to interpret the causation element differently in sex- and race-based claims.

This specific data on telecommuting is consistent with and bolstered by Robert L. Nelson’s and William P. Bridges’ broader empirical work.\(^{351}\)

Using in-depth case studies, Nelson and Bridges demonstrated that much of

\(^{349}\) Cf. Frug, \textit{supra} note 202, at 55-57, 61, 63, 66 (arguing that the fact that “women as a class bear a disproportionate amount of child care responsibilities” should be sufficient to state disparate impact claims challenging aspects of traditional work schedules that are “both too inflexible and too long for a parent with primary child care responsibility”); Chamallas, \textit{Part-Time Work, supra} note 200, at 766-68, 774 (arguing that employers should not be able to point to “the market” to avoid a disparate impact challenge).

\(^{350}\) See Schultz & Petterson, \textit{supra} note 73, at 1081, 1120-1128; see also Schultz, \textit{Telling Stories, supra} note 16, at 1771-99 (documenting courts’ willingness to accept the lack of interest defense more readily in race than in sex discrimination claims).

\(^{351}\) See generally \textit{NELSON \& BRIDGES, supra} note 73 (studying the cause of the gender pay gap).
the current between-job gender pay gap cannot be explained by external market forces. Instead, gender pay differences result largely from individual employers’ own organizational processes. While those processes are not explicitly gendered, they are the “naturalized” products of historically gendered relations within the organization, which are often invisible to the current decision-makers. Those decision-makers typically are unaware of the ways in which bureaucratic personnel systems, such as internal labor markets, mediate between and decouple internal wage schedules from external labor market prices, “leaving much of the invidious effect of occupational gender segregation sheltered from the competitive discipline of the market.”

By identifying specific organizational practices that help generate gender pay differences, Nelson and Bridges have blurred courts’ all too comfortable dichotomy between internal and external causes for women's workplace inequality. By proving that a significant portion of the gender wage gap “arises inside or is perpetrated by employment organizations,” Nelson and Bridges have provided a factual basis for undermining courts’ causation analysis, which typically rests on the unproven assumption that the market dictates employers’ decisions.

Telecommuting arrangements are overlaid on the backdrop of the existing occupational segregation and pay differentials that were the focus of the Nelson and Bridges study. Because Nelson and Bridges have demonstrated that individual employers are responsible for much of the existing sex stratification within their own organizations, their research should prevent employers from relying on that existing hierarchy to defend the structure of two-tiered telecommuting arrangements. In other words, employers should not be able to argue that “the market” compels the selection of female-dominated jobs at the lower end of the workplace hierarchy for cost-cutting forms of telecommuting, because the sex-stratified backdrop was itself the result of internal organizational practices.

The telecommuting data similarly undermines employers’ ability to invoke employee “choice” as an external cause of women telecommuters’ plight. The fact that many women seek out or accept second-class telecommuting arrangements does not mean that their decisions are entirely independent from and unconstrained by employers’ internal employment practices. As sociologists have explained, “the apparent support for

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352. See id. at 2-3, 8, 9, 14, 51, 310, 313-15.
353. See id. at 2-3, 8, 313-15.
354. Id. at 9.
355. Id. at 76.
356. See id. at 2-3, 8, 14.
357. Id. at 51.
358. Cf. Schultz & Petterson, supra note 73, at 1078 (arguing that the “choice” defense is
homework voiced by many women workers can only be understood with an eye toward the broader context of economic, social, and political powerlessness from which women make the ‘choice’ to become homeworkers.”

Telecommuting has emerged as the only practical option for many women without childcare alternatives, “in the face of a set of constraining factors which limit their freedom on the job market.” This is most evident when employers substitute exploitative telecommuting regimes for maternity and other leave policies.

This specific research on telecommuting also is consistent with broader empirical work regarding the source of women’s job preferences. Vicki Schultz has demonstrated that occupational sex segregation continues to exist, “not because most women bring to the workworld fixed preferences for traditionally female jobs, but rather because employers structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally male jobs.”

Schultz and others have used such empirical data to argue that women’s connection with carework does not arise from forces entirely beyond the employer’s control, such as “early socialization” or “innate preferences,” and that employers themselves play a role in shaping women’s work identities and goals.

particularly weak when women’s lack of interest did not arise independently of the employer’s influence).

359. DANGLER, HIDDEN IN THE HOME, supra note 49, at 120.

360. Id. at 117 (arguing that telecommuting results from women’s “[I]imited job opportunities . . . combined with the need to manage the double burden of paid work and family responsibilities”); see also Boris & Daniels, supra note 118, at 6 (arguing that the fact “[t]hat homework presents itself as a more flexible and attractive option for working mothers is itself a commentary on the structure of our political economy, which provides working mothers with so few options”); Calabrese, supra note 46, at 183 (explaining that while those workers who possess “highly leverageable skills” can benefit from telecommuting, female workers in lower occupational strata “are more likely than men to be forced into the ‘choice’ of homework due to child-rearing demands”); Gurstein, supra note 52 (arguing that telecommuting is a “survival strategy” for many women, not a “panacea for unresolved tensions in the work and domestic spheres”). This was highlighted in a national survey of 14,000 female clerical workers, which found that although women liked telecommuting “better than not working,” most found that combining waged work and childcare was stressful and isolating. See Christensen, supra note 29, at 184, 193. When women’s reported satisfaction was “gauged in contrast to their existing options,” the researchers found that telecommuting was “better than nonemployment,” but “far from ideal.” See id. at 193. While 53% of the people surveyed were already telecommuting and another 42% wanted to telecommute, the pursuit of telecommuting was largely a response to “a society that offers working mothers few options for flexibility in combining work and family.” See id. at 184, 194.

361. Schultz, Telling Stories, supra note 16, at 1816; see also Schultz & Petterson, supra note 73, at 1078, 1081 (arguing that women’s alleged “choice” to perform the bulk of carework does not arise from forces entirely beyond the employer’s control).

362. Schultz & Petterson, supra note 73, at 1080 (“By portraying segregation as the expression of women’s . . . preexisting job preferences, and by attributing their preferences to social and cultural forces beyond employers’ control, the lack of interest defense privatizes job segregation and places it beyond the responsibility of employers and courts.”); see also WILLIAMS, UNBENDING GENDER, supra note 12, at 14-15, 37-39, 106, 115-39 (arguing that employers should not be able to use women’s
While accepting "choice" rhetoric as a defense to discrimination claims perpetuates the sex stereotypes that facilitated women's economic disadvantage in the first place,\(^{363}\) denying women's "choice" risks devaluing women's caregiving activities and denying their autonomy.\(^{364}\) However, identifying the ways in which employers use telecommuting to create the gendered nature of work/family conflicts should not necessarily undermine the importance of women's carework. Instead, this research merely demonstrates the flaw in drawing a strict dichotomy between employee choice and employer control. The research on the gendered effects of telecommuting merely pushes the causal analysis toward the internal end of what is conceptualized more accurately as a continuum, thereby making it harder for courts to reject a woman's prima facie disparate impact case. Thinking in terms of a causal continuum should reduce the risk of dividing feminist scholars in the way that dichotomous causal thinking tends to do,\(^{365}\) while providing a rational basis for prioritizing the use of sex discrimination law as a tool for addressing women's inequality.\(^{366}\)

\(^{363}\) See Schultz, Telling Stories, supra note 16, at 1757, 1778-79; Schultz & Petterson, supra note 73, at 1081; Joan Williams, Deconstructing Gender, 87 MICH. L. REV. 797, 814 (1989).

\(^{364}\) See Kessler, supra note 234, at 376-77 (critiquing feminist proposals in the work/family arena for not focusing enough "on the fundamental importance and value to society of women's caregiving labor," and for focusing too much "on characterizing women's experiences of caregiving as a condition of impaired agency"); Williams, "It's Snowing Down South," supra note 13, at 824-26 (arguing that feminist theories that focus highly on internal workplace causes of work/family conflicts devalue women's caregiving role).

\(^{365}\) See Vagins, supra note 72, at 81-82 (describing the debate between those who espouse the "human capital model," which attributes women's occupational segregation to voluntary choice, and those who espouse the "institutional barrier approach," which attributes women's workplace inequality to factors beyond their control). Compare Schultz, Life's Work, supra note 14, at 1893-1900 (criticizing conventional feminist scholarship for viewing "women's domestic orientation" as "fixed by the time we enter the labor force," and ignoring internal causes of the gendered nature of work/family conflicts such as "sexist dynamics in labor markets and firms") with Williams, "It's Snowing Down South," supra note 13, at 819, 824-26 (citing research on the persistence of women's "commitments to caregiving and other traditionally feminine gender performances," to argue that Vicki Schultz's scholarship ignores external causes of the gendered nature of work/family conflicts). In reality, neither Schultz nor Williams state that work/family conflicts have solely external or solely internal causes. See Schultz, Telling Stories, supra note 16, at 1816 (using the word, "primarily," to describe her internal causal attributions); Williams, "It's Snowing Down South," supra note 13, at 824 (endorsing a "multicausal model"). However, by not explicitly characterizing the discussion in terms of a continuum, their positions too easily get described as fundamentally at odds with one another.

\(^{366}\) Cf. Schultz, Life's Work, supra note 14, at 1884 (explaining that feminists who believe "that it is women's position within families, rather than the workworld, that is the primary cause of women's economic disadvantage" will prioritize public redistributive efforts, while feminists who believe that aspects of the workplace are the primary cause will prioritize the use of antidiscrimination law).
If this tool begins to work and women begin stating disparate impact claims challenging exploitative telecommuting arrangements, employers may respond by eliminating telecommuting options. Once again, such organizational rigidity could exacerbate women’s work/family conflicts even more. However, if courts interpret the prima facie elements correctly, women also should be able to state a disparate impact claim challenging an employer’s prohibition on telecommuting. Such a claim would allege that requiring full-time physical presence at a central worksite disproportionately excludes or hinders women’s advancement because it is structurally incompatible with the carework and domestic responsibilities currently performed primarily by women. If this claim succeeds, it should address the concerns of feminist scholars who resist solutions that merely allow women to advance when they are able to look exactly like men.367 This type of claim could transform the workplace itself by forcing employers to provide equitable telecommuting options whenever employers cannot justify the traditional requirement of full-time face-time in the office.

The first difficulty in challenging an employer’s prohibition on telecommuting is with the prima facie element requiring the plaintiff to identify a “particular employment practice.”368 Courts are likely to characterize an employer’s requirement of full-time physical presence at a central worksite as the lack of a telecommuting policy. In turn, courts are likely to view the lack of a telecommuting policy as the absence of an employment practice, thereby leaving the plaintiff with nothing “particular” to challenge.

Courts have dismissed disparate impact claims in other contexts using this distinction between employment practices and the lack thereof, or between employer acts and omissions. For example, in EEOC v. Chicago Miniature Lamp Works, the Seventh Circuit rejected the plaintiffs’ race-based disparate impact claim alleging that hiring new workers based on the word-of-mouth of incumbent employees perpetuated the workforce’s existing racial imbalance.369 The court held that “passive reliance on employee word-of-mouth recruiting” did not constitute “a particular employment practice.”370 Although hiring based on employee word-of-mouth is just as much a form of employer conduct as hiring based on any

367. See, e.g., Jendi B. Reiter, Accommodating Pregnancy and Breastfeeding in the Workplace: Beyond the Civil Rights Paradigm, 9 TEX. J. WOMEN & L. 1, 19 (1999) (criticizing proposals requiring women to “conform to an artificial male norm” to obtain workplace equality); Williams, Reconstructive Feminism, supra note 78, at 96 (arguing that “[a]llowing women the ‘choice’ to perform as ideal workers without the privileges that support male ideal workers is not equality”).
369. See 947 F.2d 292, 304-05 (7th Cir. 1991).
370. Id. at 305.
other criteria, the court held that “for the purposes of disparate impact, a more affirmative act by the employer must be shown.”371

Courts have used this reasoning repeatedly to reject claims alleging that inadequate leave provisions have a disparate impact on women due to pregnancy.372 In these cases, courts misconstrue the particular way that an employer organizes the when and where of work performance as a definition of the work itself.373 The Seventh Circuit illustrated this confusion in *Dormeyer v. Comerica Bank-Illinois*, when it rejected a claim that the employer’s rigid attendance rules disparately affected pregnant women.374 Rather than characterizing the attendance rules as “practices” subject to disparate impact analysis, the court characterized them as “requirements” of the job.375 In so doing, the court mistakenly viewed the employer’s decision about when work is performed as the required work itself, which insulated the decision from disparate impact review.376 A similar result could occur in the telecommuting context if a court inaccurately characterizes full-time physical presence at a central worksite as part of an employee’s actual work, rather than as a mutable policy regarding where the work is performed.

While this analytical error is all too common, feminist scholars should not use it as a reason to turn away from disparate impact claims as a tool for addressing work/family conflicts. The statute makes no distinction between employer acts and omissions. To the contrary, Title VII’s basic antidiscrimination mandate makes it unlawful to “limit” employees because of their sex “in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [the individual’s] status as an employee.”377 The Supreme Court opinion that first recognized the disparate impact theory also made no such

371. *Id.*

372. *See*, e.g., *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 859-62 (5th Cir. 2002) (rejecting a disparate impact claim alleging that the lack of leave during the first 90 days of work disproportionately excluded women due to pregnancy, by holding that antidiscrimination law does not require an affirmative “guarantee”); *Rhett v. Carnegie Ctr. Assocs.*, 129 F.3d 290, 296-97 (3d Cir. 1997) (refusing to apply the disparate impact model to a claim alleging that the employer did not offer leave or take other steps to allow pregnant women to work); *Troupe v. Mays Dep’ t Stores, Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (same).

373. *See Dowd, Work and Family*, *supra* note 78, at 141-42 (arguing that Title VII cannot address women’s work/family conflicts because of its “inability to reach cases in which an employer has failed to adopt any policy” (emphasis in original)); *Kessler, supra* note 234, at 412-15 (arguing that Title VII’s disparate impact theory has limited ability to address women’s work/family conflicts because courts fail to characterize the lack of an affirmative policy as employer conduct subject to discrimination analysis).

374. *See* 223 F.3d 579, 583-84 (7th Cir. 2000).

375. *Id.* (emphasis omitted).

376. *See* *id.* (blurring together the attendance rules that an employer imposes on an employee’s work performance with “the work for which she had been hired”).

In *Griggs*, the Court located the disparate impact theory within Title VII's basic antidiscrimination mandate and as part of Congress's equal opportunity objective. The Court held that meeting that objective requires "the removal of artificial, arbitrary, and unnecessary barriers to employment," whenever those barriers have a discriminatory effect on a historically disadvantaged group. The Court indicated that all such barriers should be subject to disparate impact review whenever they operate as "built-in headwinds" for the members of a protected class. Congress endorsed that broad view in 1991, when it amended Title VII to codify the disparate impact model and directed courts to interpret the statute in accord with *Griggs*.

A few courts have taken Title VII's objectives seriously by recognizing correctly that the absence of an employment policy—which necessarily equates to the selection of a particular alternative—is indeed a "practice" subject to disparate impact review. For example, in *Abraham v. Graphic Arts International Union*, the D.C. Circuit refused to dismiss a claim alleging that an employer's lack of disability leave had a disparate impact on women because of pregnancy. The court held that the "lack" of a policy can violate Title VII in the same way as the "unequal application" of an existing policy. "It takes little imagination," explained the court, "to see that an omission may in particular circumstances be as invidious as positive action."

Similarly, in *Roberts v. United States Postmaster General*, the Eastern District of Texas held that the plaintiff stated a cognizable disparate impact claim challenging an employer's lack of sick leave for employees to care for...
for family members.\textsuperscript{366} The plaintiff alleged that “the failure of the defendant to allow employees to take time off to care for children” had a disparate impact on women, who were “forced to resign more often than men because of their more frequent role as child-rearers.”\textsuperscript{367} The court held that “[i]t is exactly this type of harm that Title VII seeks to redress”\textsuperscript{388} and the court therefore recognized that “failing to provide an adequate policy” is a practice subject to disparate impact review.\textsuperscript{389}

Although decisions like Abraham and Roberts are rare, they are not isolated events. Several other district courts also have done away with the illusory dichotomy between employment policies and the lack thereof—or between employer acts and omissions—by applying disparate impact analysis to both.\textsuperscript{390} These cases should encourage work/family scholars to continue pursuing disparate impact claims to restructure the workplace to advance women’s equality. Correcting courts’ mischaracterization of default organizational structures as “non-practices” would be a significant move toward realizing Title VII’s full transformative potential. By properly characterizing default workplace structures as “particular employment practices,” thereby subjecting them to disparate impact analysis, women could use Title VII not just as a shield to defend against active discrimination, but also as a sword to attack discrimination in its many passive forms.\textsuperscript{391} Because a successful disparate impact claim would require the employer to eliminate the practice in question, characterizing default structures as “practices” would be a key step in dismantling workplaces that are built around unstated male worker norms. In the telecommuting context, this reasoning should allow women to use an employer’s prohibition on telecommuting—i.e., the default requirement of full-time physical presence at a central worksite—as the “particular employment practice” in a disparate impact claim.\textsuperscript{392}

\textsuperscript{367} Id. at 289.
\textsuperscript{388} Id.
\textsuperscript{389} Id. (emphasis added).
\textsuperscript{390} See, e.g., EEOC v. Warshawsky & Co., 768 F. Supp. 647, 654-55 (N.D. Ill. 1991) (holding that not providing sick leave during the first year of employment was a practice that disparately impacted women because female first-year employees were 11 times more likely to be fired than male first-year employees).
\textsuperscript{391} The Third Circuit used this metaphor to limit Title VII’s transformative effect in Rhett v. Carnegie Center Associates, 129 F.3d 290, 297 (3d Cir. 1997), when it held that pregnant women can only use the Pregnancy Discrimination Act’s amendment to Title VII as “a shield against discrimination, not a sword.” See 129 F.3d at 297; cf. Stephanie M. Wildman, Privilege in the Workplace: The Missing Element in Antidiscrimination Law, 4 TEX. J. WOMEN & L. 171, 172 (1995) (arguing that “the very sense of the workplace has been defined, not by women,” and that for Title VII to work, it must focus not just on negative discrimination, but also on affirmative privilege).
\textsuperscript{392} Cf. Siegel, supra note 259, at 940-45 (arguing that inflexible job descriptions are employment practices that have a disparate impact on pregnant women); Williams, Market Work, supra note 78, at 330-33 (arguing that a promotion track requiring “the prototypical executive schedule[,] . . .
Of course, a prima facie case also requires women to show that the “practice” of prohibiting telecommuting actually causes a negative effect on their employment status or opportunities. Like all default employment structures that are designed around the unstated norm of a male worker who receives a constant flow of domestic services from a female partner, the requirement of full-time face-time disproportionately will exclude women who less frequently fit that model.393 When a workplace is built around a male worker norm, or designed to privilege characteristics more typically held by men, then simply maintaining the existing structure will have a discriminatory effect.394 As the Supreme Court stated in Griggs, the disparate impact theory exists to attack barriers that effectively “freeze” the status quo.395 The Roberts court applied this concept correctly when it endorsed a plaintiff’s disparate impact claim alleging that an employer’s failure to provide family care leave “forced [women] to resign more often than men because of their more frequent role as child-rearers.”396 Women relocation[,]... large amounts of overtime, training programs that occur in overtime, stringent sick leave policies that effectively preclude people with primary responsibility for child care and job ladders that severely penalize work interruptions” is a practice that should be subject to disparate impact analysis).

393. See WILLIAMS, UNBENDING GENDER, supra note 12, at 65-66, 76 (arguing that “scheduling market work around the flow of family work men enjoy but women do not” has a disparate impact on women); Abrams, Gender Discrimination, supra note 73, at 1223 (arguing that women are disproportionately excluded from the workplace, which was designed around male workers without primary child-rearing responsibility and with “wives who could take up the slack”); Crain, supra note 78, at 1932 (arguing that the labor market’s bias toward “standard work patterns” assumes “that the dominant family structure is a male breadwinner/female homemaker model”); Dowd, Work and Family, supra note 78, at 113 (arguing that women are disadvantaged by employment structures that “presume that the worker does not have family responsibilities or has a stay-at-home or secondary employee spouse who manages those responsibilities”); Vagins, supra note 72, at 80, 83, 85 (arguing that the current workplace structure “around a male-worker norm, in which the ideal worker is one that has no family responsibilities, or that has the privilege of hiring someone else to take care of home and child care duties,” has a disparate impact on women).

394. See Note, The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation, 106 HARV. L. REV. 1621, 1622 (1993); see also Wildman, supra note 391, at 181 (arguing that when the workplace “privileg[es] those with certain characteristics or behaviors,” employers “are discriminating against individuals who lack those characteristics and behaviors”); Williams, Special Treatment, supra note 210, at 318 (“Feminists have long recognized that [n]eutral treatment in a gendered world . . . does not operate in a neutral manner.” (alteration in original) (internal quote omitted)).


396. Roberts v. United States Postmaster Gen., 947 F. Supp. 282, 287-89 (E.D. Tex. 1996). Joan Williams has suggested a similar strategy for women to challenge the lack of part-time work. See WILLIAMS, UNBENDING GENDER, supra note 12, at 107-08. Williams argues that women may state a disparate impact case if “a large number of employees (disproportionately women) have requested to have their hours cut, that they left when these requests were turned down, and that a disproportionately low number of women now hold the jobs at issue.” Id. Evidence for these cases may be difficult to obtain at small employers. Cf. Lang v. Star Herald, 107 F.3d 1308, 1314 (8th Cir. 1997) (rejecting a claim that the lack of a short-term disability policy disparately impacted pregnant women because the employer’s small size made it impossible to provide sufficient statistical support). However, to be covered by Title VII in the first place, an employer must have at least 15 employees, see 42 U.S.C. §
similarly should be able to point to their more frequent role as primary caregivers to prove that a telecommuting ban disproportionately excludes them from certain positions or from advancing within the firm. While employers will raise the "market" and "choice" arguments to undermine the prima facie case, the correct causation analysis in a claim challenging a telecommuting prohibition should be similar to that discussed above for a claim challenging an existing exploitative telecommuting arrangement.

Applying the prima facie case consistent with Congress's broad objectives for the disparate impact theory in either type of telecommuting case will not unduly limit employers' managerial discretion. Stating a prima facie disparate impact case merely requires the employer to come forward and justify its exercise of that discretion when the result falls significantly more negatively on women than on men.

2. The Employer's Business Necessity Defense

If women successfully state a prima facie case challenging either the particular way that telecommuting is structured or an employer's refusal to allow telecommuting, the employer may defend itself by showing that its practice is "job related for the position in question and consistent with business necessity." Congress added that language to Title VII through The Civil Rights Act of 1991. The statute does not define "job related" or "business necessity," but Congress instructed courts to interpret the defense consistent with case law prior to the Supreme Court's 1989 decision in Wards Cove Packing Co. v. Atonio, in which the Court had changed course and greatly reduced the defendant's burden.

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200e(b), and the Supreme Court has not required strict mathematical formulas, but only evidence of a "sufficiently substantial" disparity to raise "an inference of causation," see Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988) (plurality opinion).

397. Others have made similar arguments for applying Title VII's disparate impact model to other default work structures. See, e.g., Abrams, Gender Discrimination, supra note 73, at 1223-24, 1227 ("[h]erculean time commitments, frequent travel, and stringent limits on absenteeism," and "the protracted evaluation period (often six to ten years) that precedes a promotion decision"); Dowd, Maternity Leave, supra note 79, at 735 ("no-leave or inadequate leave policies"); Kay, supra note 235, at 32 (no-leave or inadequate leave policies for pregnancy); Kovacic-Fleischer, supra note 234, at 356 (inadequate leaves for pregnancy, breastfeeding and childcare); Siegel, supra note 259, at 940-45 (inadequate leave policies); Williams, Reconstructive Feminism, supra note 78, at 91, 95-96, 160 (full-time work, extensive overtime, and the ability to relocate).


Court's pre-"Wards Cove" opinions all indicate that the defense should be a significant hurdle for employers, those cases were less clear in describing the specific elements of the defense.\textsuperscript{402} As a result, lower courts have applied the defense in different ways.\textsuperscript{403}

The approach that is most consistent with both the statutory language and the Court's pre-"Wards Cove" case law requires the employer to prove two distinct elements.\textsuperscript{404} First, the "job related" element requires proof that the employment practice significantly measures successful performance on required job behaviors.\textsuperscript{405} Second, the "business necessity" element requires proof that the particular job behaviors being measured, and the specific performance levels being selected, are significantly advancing a


\textsuperscript{403} See Alito, supra note 402, at 1023-36 (categorizing the diverse lower court interpretations of the business necessity defense); Lye, supra note 305, at 348-53.

\textsuperscript{404} See Alito, supra note 402, at 1029-36 (defending the appellate courts that have adopted this approach); Susan S. Grover, \textit{The Business Necessity Defense in Disparate Impact Discrimination Cases}, 30 Ga. L. Rev. 387, 392, 395-97 (1996) (arguing that the defense should use a "two-part test" that treats job relatedness and business necessity as separate elements); Spiropoulos, supra note 256, at 1513-14 (describing the interpretation that views "job related" as separate from "business necessity"); \textit{see also} Nolting v. Yellow Freight Sys., Inc., 799 F.2d 1192, 1198-99 (8th Cir. 1986) (upholding a jury instruction in an age discrimination case defining the defense to require proof that (1) the practice "was clearly related to the performance of work," and (2) the practice "significantly served" the employer's business reason).

Under this view, "an employment practice that accurately measures an aspect of job performance may nonetheless be struck down if it does not additionally serve a significant business purpose." Alito, supra note 402, at 1033. For example, an employer may show that a strength test is "job related" because it accurately predicts a worker's performance on a certain task. See id. However, the test may not be consistent with "business necessity" if it is performed very infrequently on the job because the test "does not substantially promote or significantly advance the employer's legitimate interest in proficient operation of the business." Id.; \textit{see also} Grover, supra, at 395-97 (providing a similar description of job relatedness and business necessity).

That interpretation is consistent with the pre-"Wards Cove" opinions in which the Supreme Court focused on independent proof of a "genuine business need" for the policy. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); \textit{see also} Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977) (linking business necessity with an employer's interests in safety or efficiency); Nashville Gas Co. v. Satty, 434 U.S. 136, 143 & n.5 (1977) (linking business necessity to the employer's "economic and efficiency interests"); Alito, supra note 402, at 1026-27, 1036 (linking the language from \textit{Dothard} regarding an employer's safety or efficiency interests to a proper interpretation of "business necessity" that goes beyond "job related").

\textsuperscript{405} In the Supreme Court's pre-"Wards Cove" opinions, the Court had held that the defense requires proof that the practice is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting 29 C.F.R. § 1607.4(c)), or that the practice is "demonstrably a reasonable measure of job performance," or is "significantly related" to successful performance of required job tasks, \textit{Griggs}, 401 U.S. at 426, 436; \textit{see also id.} at 431 (requiring a "demonstrable relationship to successful performance of the job"); \textit{id.} at 432 (requiring a "manifest relationship to the employment in question").
legitimate business need.\textsuperscript{406} While some of the Supreme Court’s pre-\textit{Wards Cove} opinions arguably treated “job related” and “business necessity” synonymously, lower courts should resolve that inconsistency in line with the post-\textit{Wards Cove} statutory language, which uses “and” to separate the two concepts.\textsuperscript{407} Accordingly, an employer only should be able to use this defense to support a telecommuting practice that disparately impacts women if the employer proves that its practice is related significantly to successful job performance \textit{and} that it significantly advances legitimate business needs.

Because courts originally developed the “job related” concept for tests that screen out job applicants,\textsuperscript{408} that element of the defense is under-theorized with respect to practices regarding how the workplace is structured. At its core, the “job related” element focuses on “measur[ing] the person for the job,”\textsuperscript{409} and it therefore should require a real link between the employer’s practice and the employees’ job performance. That link is missing when the challenged practice is implementing an exploitative telecommuting program in a female-dominated job. Structuring telecommuting to casualize women workers does not have any connection with ensuring adequate job performance. These telecommuting programs merely seek to obtain women’s performance at a lower short-term cost to the employer, which courts should conclude fails to meet the “job related” element of the defense.\textsuperscript{410}

If courts take the concept of business “necessity” seriously, they also should conclude that exploitative telecommuting arrangements fail to meet the second element of the defense. Employers will argue that

\textsuperscript{406} See Lanning v. Southeastern Penn. Transp. Auth., 181 F.3d 478, 489 (3d Cir. 1999) (holding that for an employer to use a timed running test as a hiring criteria, the employer had to prove not only that running skill correlates with transit officer performance, but also that the test’s cut-off score was selected “to measure the minimum qualifications necessary” for the job).

\textsuperscript{407} See 42 U.S.C. § 2000e-2(k)(1)(A)(i); Grover, supra note 404, at 396 (arguing that the “congressional choice of conjunctive language to join the two elements counsels in favor of requiring that both elements be met”); Lyc, supra note 305, at 355 (“Because the statute erects a conjunctive test, business goals must refer to something independent of job performance.”); Spiropoulos, supra note 256, at 1513 (noting that “[o]ther than the conflicting Supreme Court precedent, an interpreter of the Act is left with only the bare language of the Act”); see also Alito, supra note 402, at 1023-36 (explaining why this dual interpretation of the business necessity defense is the most appropriate in light of, among other things, the statutory language).

\textsuperscript{408} See, e.g., Dothard, 433 U.S. 321 (height and weight requirements); Washington v. Davis, 426 U.S. 229 (1976) (reading and verbal skills test); \textit{Albemarle Paper}, 422 U.S. 405 (written aptitude test); Griggs, 401 U.S. 424 (high school diploma requirement and professional aptitude tests).

\textsuperscript{409} See Griggs, 401 U.S. at 436.

\textsuperscript{410} Cf. Chamallas, \textit{Part-Time Work}, supra note 200, at 755-58, 755 n.258, 766-68, 774 (arguing that a defense based on “cost,” or on “inconvenience or expense,” or on “the market,” should fail in a disparate impact case because cost is “not premised on the job-related qualities of individual employees,” and “[t]he market rate is not so closely tied to actual or potential job performance to qualify as job-related”).
telecommuting programs that reduce women's pay, benefits, and job status are consistent with business necessity because they provide short-term financial savings. In \textit{Nashville Gas Co. v. Satty}, however, the Supreme Court indicated that the business necessity determination should be based on long-term costs as well as short-term gains.\textsuperscript{411} The Court noted that an employer would have difficulty raising a business necessity defense to a policy of forfeiting women's accumulated seniority when they take pregnancy leave.\textsuperscript{412} The Court reasoned that such a policy would undermine the long-term benefits of employee loyalty and cause women to be "less motivated to perform efficiently in their jobs because of the greater difficulty of advancing through the firm," thereby making the policy "conflict with [the employer's] own economic and efficiency interests."\textsuperscript{413} Under that reasoning, courts should reject most employers' claims of "business necessity," with respect to exploitative telecommuting regimes.

While this interpretation of the defense would be the most consistent with the Supreme Court's pre-\textit{Wards Cove} case law, courts increasingly have deferred to employers' business decisions.\textsuperscript{414} Courts particularly may be willing to ignore disparate impacts on women when cost-containment practices are involved, by assuming that all practices with a financial justification are unquestionably "job related," and/or by allowing "necessity" to be assessed based solely on short-term financial gains. If courts do continue to lower the bar on the employer's defense when cost-containment practices are involved, then courts at least should require employers to justify their selection of a \textit{particular} cost-containment method over other feasible alternatives, when the selected method disproportionately harms women. In other words, courts at least should require the employer to prove that there were no other viable cost-containment methods that would have had a less disparate impact on women than implementing cost-cutting telecommuting programs in female-dominated jobs. While that showing typically is viewed as part of the plaintiff's burden to prove a less discriminatory alternative employment practice once the employer has justified its existing practice,\textsuperscript{415} such proof should be part of the employer's initial defense stage if the employer wants to use the defense to support a cost-containment practice that has no link to actual job performance. While that approach still would fall short of the Court's original vision in \textit{Griggs}, it at least would retain some meaningful

\textsuperscript{411} See 434 U.S. 136, 143 & n.5 (1977) (dicta).
\textsuperscript{412} See id.
\textsuperscript{413} Id. at 143 n.5.
\textsuperscript{414} See Lye, supra note 305, at 345-48 (arguing that courts have eroded the disparate impact model by giving increased deference to employers' "individual entrepreneurial objectives").
content to both the "job related" and the "business necessity" elements of the defense, by only allowing practices that are motivated by short-term financial gains to be deemed job-relevant if there is a legitimate need to impose the costs on a particular, female-dominated job category.

That interpretation would not unduly limit employers' freedom to exercise business judgment because the disparate impact model only requires such justification when the plaintiff proves that the selected cost-containment practice disproportionally harms women. Title VII recognizes the legitimacy of employers' profit maximizing goal. But that recognition is not absolute. Title VII should not allow employers to structure or select among a variety of cost-cutting methods in ways that systematically disadvantage women.416

If courts interpret the business necessity defense correctly, then employers also should be unable to defend the reverse policy of denying all telecommuting options. Data indicates that, for many jobs, requiring full-time physical presence at a central worksite is neither job related nor consistent with business necessity.417 While there are some jobs that cannot be performed remotely, such as service jobs requiring frequent face-to-face contact with clients, employers tend to underestimate the number of jobs that are "telecommutable," at least for some portion of the work-week. This conclusion is bolstered by evidence that telecommuting tends to increase a worker's productivity,418 often between 8 to 40 per cent,419 and that

416. See 45C AM. JUR. 2D Job Discrimination § 2767 (1993) ("A determination of business necessity should focus on whether use of the practice in dispute is significantly more likely to produce an effective work force than other, less discriminatory alternatives, and must directly address the necessity of the practice for the particular job for which it is utilized."); cf. Williams, Market Work, supra note 78 at 333 (using this argument to assert that the design of a lengthy promotion track that severely punishes work interruptions and requires unlimited overtime has an unlawful disparate impact on women).

417. See, e.g., Nilles, Managing Telework, supra note 25, at 31 (explaining that expected technological innovations are likely to increase the percentage of jobs that are compatible with telework); Gurstein, supra note 52 (explaining that the "transformation of the economy from an industrial to a service economy has created many jobs that can be done independently of a centralized facility"); Risman & Tomaskovic-Devey, supra note 27, at 72 (explaining that as many as half of all information-sector jobs are compatible with telecommuting).

418. See Nilles, Managing Telework, supra note 25, at 12, 15, 155 (stating that telecommuting can increase productivity and employee effectiveness as measured by output quantity and quality); Brewer, supra note 66, at 100 (noting that many studies have found that telecommuters are more productive); Dumas, supra note 30, at 24 (noting that studies show telecommuters are more productive and efficient); Handbook, supra note 25 (listing productivity gains as a potential telecommuting benefit); Head, supra note 46 (same); Ingle, supra note 37, at 5 (same); New National Survey, supra note 30 (same); Langhoff, supra note 37 (reporting that telecommuters work longer hours and more workdays than the average employee); Reymer, supra note 24 ("All evidence suggests that the employee will be significantly more productive as a telecommuter." (emphasis in original)); Roseman, supra note 25 (stating that telecommuting increases employee output and improves profitability); cf. Williams, Unbending Gender, supra note 12, at 91-94 (providing evidence that flexible work arrangements increase employee productivity and work quality).

419. See Ingle, supra note 37, at 5; see also Dombrow, supra note 25, at 689 (stating that
telecommuters average 15 to 30 per cent higher productivity than their on-site counterparts. Major employers such as AT&T, Barclays Bank, Bell Atlantic, Blue Cross, J.C. Penney, Pacific Bell, and Xerox have all reported that telecommuting increased productivity by 20 to 100 per cent. In one survey, over 70 per cent of telecommuters reported that they became more productive when they began to telecommute. If this data is representative, then it should be difficult for many employers to argue that full-time office presence is related significantly to job performance.

In addition, the economic benefits that employers receive from equitable telecommuting programs typically outweigh the costs, which also will undermine many employers' claims that full-time face-time is consistent with business "necessity." First, telecommuting often reduces the need for office space, which can greatly reduce fixed costs for real estate, rent, utilities, and overhead. AT&T, for example, estimates that telecommuting reduced the company's real estate expenses worldwide by one million dollars between 1994 and 2000, while Merrill Lynch reports overhead savings of up to six thousand dollars per office, per year.
Second, telecommuting benefits employers by reducing worker absenteeism. Telecommuters use less sick leave, increasing their number of working days by approximately two per year. Surveys have found that employers can save 63 per cent of the costs of absenteeism for each employee who telecommutes.

Third, telecommuting reduces employee turnover, which reduces employers' recruiting and retraining costs. A recent multi-year study of over 300 telecommuters at a large, urban employer found concrete evidence of this benefit. While 23 per cent of the telecommuters reported having seriously considered quitting their job, nearly three-quarters of those individuals said that the ability to telecommute was a "moderate to decisive influence" on their decision to stay. The lower turnover may be showing that Pacific Bell reduced its floor space costs through the use of telecommuting).

425. See Dangler, Hidden in the Home, supra note 49, at 61 (reporting that telecommuting eliminates absenteeism and tardiness); Dumas, supra note 30, at 25 (reporting on Bell Atlantic's telecommuting program, which reduced absenteeism); Handbook, supra note 25 (listing case studies of various telecommuting programs that documented reduced absenteeism); Head, supra note 46 (listing reduced absenteeism as a benefit of telecommuting); Ingle, supra note 37, at 5 (same); Kundu, supra note 29 (noting research findings of decreased absenteeism with telecommuting); Richter & Meshulam, supra note 30, at 194-95 (citing data showing that Pacific Bell experienced reduced absenteeism by implementing telecommuting); cf. Williams, Unbending Gender, supra note 12, at 91, 107 (providing evidence that flexible work arrangements reduce absenteeism and tardiness); Vagins, supra note 72, at 90, 92 (noting that studies demonstrate that policies such as flextime and comp-time reduce absenteeism and tardiness).

426. See Nilles, Managing Telework, supra note 25, at 156; Pitman, supra note 25 (noting that studies show telecommuting reduces the use of sick days).

427. See Dombrow, supra note 25, at 690-91; Langhoff, supra note 37.

428. See Ingle, supra note 37, at 5.

429. See Nilles, Managing Telework, supra note 25, at 15, 157 (noting that one goal of telecommuting is to retain skilled employees, and stating that telecommuting decreases employee turnover); Dombrow, supra note 25, at 689-91 (reporting that telecommuting improves employee retention); Handbook, supra note 25 (listing better employee retention as a telecommuting benefit); Hogroian, supra note 44, at 2643 (describing telecommuting as a tool for employers to retain valuable workers); Ingle, supra note 37, at 5 (reporting reduced turnover as a telecommuting benefit); Kundu, supra note 29 (reporting retention of valuable employees as a telecommuting benefit); Langhoff, supra note 37 (citing lower turnover as a telecommuting benefit); Pitman, supra note 25 (noting that studies show telecommuting helps employers retain valuable employees); Roseman, supra note 25 (listing reduced turnover and retention of skilled employees as telecommuting benefits); Weijers, et al., supra note 146, at 1051 (citing a study of 19 Dutch firms finding that telecommuting decreased turnover); Williams, Unbending Gender, supra note 12, at 84-96 (providing evidence that flexible work arrangements reduce employee turnover). The costs of replacing a worker are substantial. See Williams, Unbending Gender, supra note 12, at 88-91 (estimating that replacing a skilled worker costs .75 to 1.5 times the worker's annual salary and providing evidence that flexible arrangements reduce employee turnover); Vagins, supra note 72, at 90, 92 (reporting that replacing a female executive costs 150% of her annual salary).

430. See Nilles, Managing Telework, supra note 25, at 136. The employer had over 45,000 employees, 40% of whom were information workers. See id. Participants came from over 20 departments. See id. Researchers gathered data using interviews and questionnaires at 9-month intervals. See id.

431. See id. at 157 (reporting that of the 23% of telecommuters who had seriously considered
attributed to the improved employee morale and increased job satisfaction that many workers experience in well-designed telecommuting arrangements. That fact is particularly important, as the Supreme Court has noted that a policy's relationship to employee loyalty and motivation is relevant to the business necessity assessment.

Finally, equitable telecommuting options also can make it easier for employers to recruit new employees when openings arise because employees tend to value the existence of flexible work arrangements. Telecommuting also can increase an employer's skilled labor pool by expanding the geographic boundaries for recruiting and including employees whose caregiving or other unpaid work make full-time physical presence at a central workplace impossible.

All of these economic benefits of telecommuting are likely to exceed the costs for many employers, particularly as technology becomes less expensive and as legislators promote tax incentives for establishing

432. See id. at 15 (stating that telecommuting may increase employee morale and reduce turnover); Dumas, supra note 30, at 25 (reporting on Bell Atlantic's telecommuting program, which found an increase in employee morale); Head, supra note 46 (listing reduced employee stress, enhanced quality of life, and employee loyalty and satisfaction as benefits of telecommuting); Ingle, supra note 37, at 5 (listing improved employee morale and reduced turnover as telecommuting benefits); Kundu, supra note 29 (noting research findings of improved morale and greater job satisfaction with telecommuting, and listing retention of employees as a telecommuting benefit); New National Survey, supra note 30 (listing increased employee morale as a perceived benefit of telecommuting); Roseman, supra note 25 (listing improved employee morale, reduced turnover, and retention of skilled employees as telecommuting benefits); cf. WILLIAMS, UNBENDING GENDER, supra note 12, at 91-94 (providing evidence that flexible work arrangements increase worker morale and loyalty).


434. See NILLES, MANAGING TELEWORK, supra note 25, at 8, 158 (advocating telecommuting to attract new workers); Dombrow, supra note 25, at 690-91 (stating that telecommuting improves employee recruiting); Handbook, supra note 25 (listing better recruitment as a telecommuting benefit); Head, supra note 46 (same); Hogroian, supra note 44, at 2643 (describing telecommuting as a tool for attracting valuable workers); Langhoff, supra note 37 (citing increased recruiting as a telecommuting benefit); Richter & Meshulam, supra note 30, at 194-95 (citing data showing that Pacific Bell experienced improved recruitment by implementing telecommuting); cf. WILLIAMS, UNBENDING GENDER, supra note 12, at 85 (citing a survey of 200 resource managers finding that two-thirds of them named family-supportive policies as the most important factor in attracting employees); Weijers, et al., supra note 146 at 1051 (citing a study of 19 Dutch organizations that found that telecommuting improved recruiting in a tight labor market).

435. See NILLES, MANAGING TELEWORK, supra note 25, at 8, 12 (explaining that a benefit of telecommuting is expanding the supply of competent workers); Langhoff, supra note 37 (explaining that telecommuting expands the radius of the labor pool); Pitman, supra note 25 (reporting that telecommuting allows employers to expand their labor pools); Reymers, supra note 24 (explaining that telecommuting can help employers find scarce skills); Roseman, supra note 25 (noting that telecommuting extends the geographic boundaries for recruiting); cf. WILLIAMS, UNBENDING GENDER, supra note 12, at 93 (providing evidence that flexible work arrangements increase the pool of competent workers).

436. See Olson, supra note 25, at 227 (explaining that the "lowered cost of telecommunications"
telecommuting arrangements. In addition to the required technology, however, employers may cite other potential costs from telecommuting, such as less control over confidential information, an increased risk of computer viruses, and the inability to monitor employee performance. But employers may reduce or eliminate those potential costs with careful planning, well-drafted policies and procedures, and technological controls. Accordingly, many employers should find it difficult to defend practices that prohibit telecommuting options altogether.

Some might question whether this data is accurate because such marked cost savings already should have convinced rational employers to adopt equitable telecommuting arrangements voluntarily. But, because telecommuting is associated so often with accommodating working mothers, employers are likely to view equitable telecommuting options as "corporate welfare," rather than thinking through these programs as a strategic business decision, particularly when female-dominated jobs are involved. While bringing the cost/benefit data to light in the course of a sex discrimination lawsuit runs the risk of reinforcing that misperception, a successful challenge to a workplace ban on telecommuting would require employers to experiment with non-discriminatory telecommuting programs and become convinced of the economic benefits firsthand.

437. See Hogroian, supra note 44, at 2643; see also Nadel, supra note 45, at 425 (describing a bill that would offer tax credits for expenses incurred in setting up telecommuting arrangements).

438. See, e.g., Handbook, supra note 25; see also Nadel, supra note 45, at 425 (listing lower productivity, reduced teamwork, and the difficulty of monitoring performance as employers' telecommuting concerns).

439. See Nilles, Managing Telework, supra note 25 (providing managers advice on organizing effective telecommuting programs); Jack M. Nilles, Making Telecommuting Happen: A Guide for Telemangers and Telecommuters (1994) (same); Poor, supra note 286 (advising employers on how to implement telecommuting to reduce legal and business risks); Fitzgerald, supra note 322, at 17 (advising employers on setting up telecommuting programs); Handbook, supra note 25 (giving practical advice about setting up telecommuting); Roseman, supra note 25 (explaining how to implement telecommuting).

440. But see Abrams, Cross-Dressing, supra note 207, at 757 (expressing doubt that evidence of the cost-savings associated with part-time and other flexible work arrangements will undermine an employer's business necessity defense, because "judges may view such studies as limited investigations of how particular policies affect certain indicia in specific workplaces").

441. See Crain, supra note 78, at 1952-53; see also Vagins, supra note 72, at 92 (arguing that "it is not likely that employers will recognize [the benefits of telecommuting] unless such benefits are clearly demonstrated by plaintiffs").

442. Cf. Chamallas, Part-Time Work, supra note 200, at 735 (arguing that using sex discrimination laws to force employers to provide equitable part-time arrangements might backfire by "reinforc[ing] societal attitudes that women should have primary responsibility for child care and housework").
3. The Plaintiff's Demonstration of an Alternative Employment Practice

Even if courts set the bar too low on the employer's affirmative defense, women still may succeed in requiring employers to implement equitable telecommuting programs. Title VII, as amended by the Civil Rights Act of 1991, allows a plaintiff to state a disparate impact case by demonstrating that the employer refused an "alternative employment practice," which a court may order the employer to adopt. Feminist scholars who argue that Title VII cannot address work/family conflicts because of its inability to restructure the workplace largely have ignored the transformative potential of this portion of the disparate impact model, which contemplates active judicial restructuring of the workplace around gender-neutral norms.

The Supreme Court shed doubt on this transformative potential in Wards Cove, when it noted that courts are "less competent than employers to restructure business practices," and concluded that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit." However, in suggesting that courts are not competent to restructure the workplace, Wards Cove quoted from a prior Supreme Court case involving a disparate treatment claim. In that prior case, Furnco Construction Corp. v. Waters, the Court had included a caveat, which stated that courts should hesitate to restructure business practices, "unless mandated to do so by Congress." Congress then enacted the Civil Rights Act of 1991 to overturn much of Wards Cove's narrowing of the disparate impact model and alignment of that model with the disparate treatment theory. In the 1991 Act, Congress codified the "alternative employment practice" concept and instructed courts to interpret the concept in accord with pre-Wards Cove law. In so doing, Congress rejected Wards Cove's


446. See id. (quoting Furnco, 438 U.S. at 578). Before the Supreme Court's application of Furnco to disparate impact cases in Wards Cove, some lower courts had correctly limited Furnco to disparate treatment cases. See, e.g., Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 n.10 (6th Cir. 1981).

447. 438 U.S. at 578 (emphasis added).

hesitancy to implement less discriminatory alternatives. The 1991 Act is exactly the type of Congressional mandate to restructure the workplace that the Court was seeking in *Furnco*. Thus, the alternative practices portion of the disparate impact model houses significant untapped potential for realizing Title VII’s full transformative effect.

For a plaintiff to establish an alternative employment practice, pre-*Wards Cove* precedent requires that the proposed alternative still serve the employer’s business interests and have a less disparate impact on the protected class than the employer’s current practice. It is unclear whether the plaintiff also must show that the alternative practice would impose no additional costs. The only pre-*Wards Cove* case in which the Court mentioned “cost” in connection with alternative practices was in the plurality opinion of *Watson v. Fort Worth Bank & Trust*. The *Watson* plurality noted that “[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.” One year later, the Court quoted that language in the *Wards Cove* majority opinion, but Congress directed courts to interpret the alternative practices concept in accord with pre-*Wards Cove* law. It is unclear whether pre-*Wards Cove* law includes the cost-related portion of the *Watson* plurality that a majority of the Court only endorsed in *Wards Cove*, or whether that was precisely the aspect of *Wards Cove* that Congress wanted to eliminate with the 1991 Act.

At a minimum, courts cannot interpret Congress’s silence on cost in the 1991 Act as endorsing only those alternative practices that are costless to implement. Congress certainly was aware that virtually all changes to employment practices will involve some initial administrative burdens. Moreover, both Congress and the Supreme Court have rejected a general cost defense to Title VII claims, and they have acknowledged that

449. The first Supreme Court case to mention this part of the disparate impact model was *Albemarle Paper Co. v. Moody*, which held that “[i]f an employer does then meet the burden of proving that its tests are job related, it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable ... effect [on a protected category], would also serve the employer’s legitimate interest in efficient and trustworthy workmanship.” See 422 U.S. 405, 425 (1975) (internal quotes omitted). The Court cited that language in two other pre-*Wards Cove* opinions: *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality opinion).

450. See 487 U.S. at 998. The Court did not mention cost in either of its prior two opinions that first described the alternative employment practice portion of the disparate impact model. See *Albemarle Paper*, 422 U.S. at 425; *Dothard*, 433 U.S. at 329.

451. 487 U.S. at 998 (plurality opinion).

452. See 490 U.S. at 661.

453. Vagins, supra note 72, at 89 (arguing that “[c]ourts should not interpret Congress’ [sic] silence on costs as precluding the removal of unintentional discrimination,” because “Congress must have clearly realized that eliminating discrimination might prove more costly in the short run”).
employers often must bear significant expense to eliminate discrimination. This is particularly important in the context of disparate impact claims. Employers should not be able to use a cost defense to avoid restructuring a malleable work practice that the employer itself constructed because the purpose of the disparate impact model is to eliminate practices that "freeze' the status quo." Allowing the employer to cite "costs" to retain a practice with discriminatory effects would continue to shift disproportionate costs onto women, while providing a “windfall” to men who remain insulated from competing with the women whom the practice excludes.

Even if Congress’s endorsement of pre-Wards Cove precedent is deemed to endorse the cost-related language in the Watson plurality, courts should read that ambiguous language consistent with Title VII’s overarching objectives. The Watson plurality only says that the costs and burdens on the employer are among the “[f]actors” that are “relevant” in determining if the alternative is consistent with business needs. The plurality was silent as to what types of costs and burdens to consider and exactly what weight they should hold. Even if courts are unwilling to ignore the costs of a proposed alternative entirely, courts at least should weigh the costs in light of Title VII’s goal of eliminating all “built-in headwinds” for protected class members. Some courts have used a reasonableness standard, which allows plaintiffs to meet their burden whenever the alternative practice is “practical” or does not impose “greatly increased costs.” Applying this standard, courts should focus on

454. *See*, e.g., *Ariz. Governing Comm. v. Norris*, 463 U.S. 1073, 1084 n.14 (1983) (rejecting a cost-based defense to discrimination claims); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 n.26 (1983) (same); *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978) (holding that neither Congress nor the courts have recognized a cost defense to Title VII claims); *see also* *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir. 1971) (requiring an employer to incur costs by refusing to allow customer preference as a basis for continuing discrimination against members of a non-preferred group), *cert. denied*, 404 U.S. 950 (1971); cf. Jolls, *supra* note 235, at 652-66 (arguing that the disparate impact model goes beyond just forcing economic rationality, by requiring employers to incur real financial costs to provide equal opportunity for non-similarly-situated employees); Rabin-Margalioth, *supra* note 260 (identifying many situations in which Title VII requires employers to incur costs to comply with the statute’s antidiscrimination mandates). Congress highlighted that point when amending Title VII to cover pregnancy discrimination in 1978. *See* Vagins, *supra* note 72, at 89-90 (quoting from the legislative history of the Pregnancy Discrimination Act as evidence that Title VII “does not allow discrimination merely because eliminating it will be costly”).

455. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971); *see also* *Note*, *supra* note 394, at 1624-25, 1633-34 (arguing that employers should incur costs for alternative practices because “employers have participated in the perpetuation of a discriminatory workplace that excludes women”).

456. *See* *Note*, *supra* note 394, at 1633-34.


458. *See* *Griggs*, 401 U.S. at 432.


a long-term cost/benefit analysis, rather than solely on the initial cost of implementing a new practice. Courts also should consider the ways that employers could shift costs to consumers, investors, or others. Under those parameters, women should be able to use the alternative practices portion of the disparate impact model in telecommuting cases in several ways. When challenging an exploitative telecommuting program, women may show that the employer could achieve a similar short-term reduction in labor and production costs by selecting non-female-dominated positions for telecommuting, or by adopting cost-cutting methods other than telecommuting. Alternatively, women may show that adopting equitable telecommuting arrangements for female-dominated jobs—i.e., arrangements that do not involve locational discrimination and job casualization—would serve the employer's business interests just as effectively, if one considers long-term costs and benefits, rather than just a snapshot of the cost savings at the moment of implementation. Women with caregiving responsibilities may prefer the latter strategy because it will help them achieve a more flexible workplace, and for that reason, women who want to challenge an employer's ban on telecommuting should use the same approach.

Thus far, plaintiffs rarely have used the alternative practices portion of the disparate impact model in any context, perhaps due to a lack of evidence of a proposed alternative's effects. Meeting the evidentiary burden

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461. The Supreme Court arguably endorsed a long-term cost/benefit analysis in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). The Satty Court indicated in dicta that an employer would have difficulty raising a business necessity defense to support forfeiting women workers' accumulated seniority when they take pregnancy leave. See id. at 143 & n.5. The Court indicated that such a policy would undermine worker loyalty and cause women to be "less motivated to perform efficiently in their jobs because of the greater difficulty of advancing through the firm," which would likely put the policy in "conflict with [the employer's] own economic and efficiency interests." Id.

462. See Note, supra note 394, at 1637; Vagins, supra note 72, at 92. Employers should not face significant competitive disadvantage by applying the disparate impact model in this way, if all major companies face the same obligations. See Note, supra note 394, at 1633-34. In addition, Title VII distinguishes between intentional and unintentional forms of discrimination, and an employer will not be subject to compensatory or punitive damage awards for a disparate impact violation. See 42 U.S.C. §§ 1981a(a)(1), 1981a(b).

463. Others have suggested different ways to use the alternative practices portion of the disparate impact model to restructure the workplace to address women's work/family conflicts. Cf. Williams, Unbending Gender, supra note 12, at 109-10 (suggesting that women propose new structures under the alternative practices portion of the disparate impact model to challenge extensive overtime and harsh penalties for taking time off from work); Abrams, Gender Discrimination, supra note 73, at 1228-30 (suggesting alternatives to the existing practices of full-time work, unlimited hours, and extended promotion tracks, which women could propose as alternative practices in a disparate impact case); Vagins, supra note 72, at 90, 92-93 (suggesting alternatives to the existing practices of extensive overtime and inflexible schedules, which women could propose as alternative practices in a disparate impact case); Frug, supra note 202, at 72 (suggesting work-sharing as a less discriminatory alternative to the practice of requiring unlimited work time).

464. See Note, supra note 394, at 1626-27 (noting that plaintiffs rarely assert alternative practices); Vagins, supra note 72, at 89 (noting that "plaintiffs' use of this device has not been extensive"); see also
should be increasingly viable in the telecommuting context, given the wealth of evidence that equitable telecommuting options increase worker productivity and retention, while reducing an employer’s fixed costs. All of the evidence that women may offer to undermine an employer’s business necessity defense also should be relevant in proving that equitable telecommuting programs are a cost-effective alternative, if the case reaches this stage.

In addition, there is now an entire industry of consulting firms that design cost-effective family-friendly work programs, which could provide plaintiffs with any necessary expertise. There are also many books and guides explaining how to implement telecommuting programs and documenting the benefits for employers. Researchers are developing methodologies for quantifying the economic impact of work/family initiatives, such as measuring the employer’s return on investment by analyzing the retention rate for new mothers who are given reasonable telecommuting options. Business experts at the Sloan Institute, for example, have used these methods to perform multi-year case studies proving the cost-effectiveness of reorganization techniques that help employees integrate work and family life. These case studies should provide relevant evidence, as courts have held that the use of a similar practice by another employer may prove the feasibility of a proposed alternative at the defendant-employer’s worksite. With this evidentiary basis, equitable telecommuting programs should be a viable alternative practice in a disparate impact claim.

4. The Remedy

When plaintiffs win a disparate impact claim, courts may order an

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Abrams, Gender Discrimination, supra note 73, at 1229 (suggesting that women will likely fail in using the alternative practices portion of the disparate impact model to restructure the workplace unless the alternatives are fully developed, with a detailed picture of “all the related costs and ripple effects”).

465. See WILLIAMS, UNBENDING GENDER, supra note 12, at 85.

466. See supra note 439.


468. See Lotte Bailyn’s Prescription for Business: Linking Personal Life and Work Can Revitalize Companies, at http://sloancf.mit.edu/cfsrch/buildDome.cfm?page=http://mitsloan.mit.edu/roi/summer97/life_work.html (last visited June 19, 1997) (on file with author) (describing a multi-year study at Xerox sites that were reorganized to help employees integrate work and family, finding that the changes actually boosted the bottom line).

employer to eliminate an offending practice and adopt a less discriminatory alternative. In the telecommuting context, this means that women may be able to use the disparate impact model to restructure the workplace and alleviate the work/family conflicts created and exacerbated by the existing workplace design. On one hand, employers’ use of telecommuting to the unique detriment of women may be characterized as a form of “active discrimination.” The appropriate remedy would be to stop structuring telecommuting in that manner—i.e., to require “passive nondiscrimination.” On the other hand, refusing to provide feasible telecommuting options may be characterized as a form of “passive discrimination,” because such an omission is really an act: the retention of a workplace structure that is built around a male worker norm. The appropriate remedy would be to start structuring the workplace around a gender-neutral norm by offering equitable telecommuting options whenever practical—i.e., to require “active nondiscrimination.” In combination, the ultimate result would be a more flexible workplace that allows all workers, not just women with caregiving responsibilities, to better balance their market work with other aspects of their lives.

V.

CONCLUSION

The bad news is that we may no longer believe the optimistic promises, like that in Working Mother magazine, about how “wonderful” telecommuting is for all “working moms.” For many women who face the most profound conflicts between waged and unwaged work, telecommuting technology has not acted as an independent variable to restructure the workplace around a caregiving worker norm, but instead has been adapted to the status quo. If the underlying assumptions about telecommuting continue to go unchallenged, telecommuting likely will become for many women a second generation mommy track that links flexibility with marginalization.

The good news is that the very existence of telecommuting helps advance the feminist project of denaturalizing current workplace structures, as telecommuting vividly illustrates the mutability of work and further blurs the false line between “work” and “home.” Telecommuting at least helps

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470. See Dumas, supra note 30, at 25.

471. See Calabrese, supra note 46, at 184 (arguing that “[t]he idea that electronic communication technology has arrived in recent years to provide a means for dissolving past gender-based inequities in domestic and marketplace divisions of labor is laudable only as well-intentioned complacency,” and that “[t]he danger in leaving this assumption unexamined is that the social history and institutional realities which forcefully shape technological development are not critically evaluated”); cf. Williams, Unbending Gender, supra note 12, at 94 (describing “first-generation mommy track policies” as flexible arrangements, such as part-time work, that linked flexibility with workplace marginalization).
make it possible to envision "a better and more equitable way for men and women to combine work and family life."\(^{472}\) In addition, the potential silver lining is that the telecommuting data may help denaturalize the gendered nature of work/family conflict itself. By documenting how employers create and retrench gender hierarchies, gender roles, and a gendered division of labor in the labor market and at home, this data should help overcome prior boundaries in sex discrimination doctrine. As a result, sex discrimination law may go further in actively restructuring the workplace by requiring employers to implement new technologies in gender-equalizing ways.

This conclusion should not further divide feminists and others who are working on work/family conflict issues. The telecommuting data helps prioritize the use of antidiscrimination doctrine to address work/family conflicts, by shifting one toward the end of the causal continuum that represents forces internal to the workplace. However, sex discrimination law in general—and telecommuting in particular—will never be a sole solution. A multifaceted problem requires a multifaceted response. Other tools may include publicly-subsidized or employer-provided childcare,\(^{473}\) leave policies and other flexible work arrangements, such as part-time work, flextime, and job sharing,\(^{474}\) a legislative reduction in the standard workweek,\(^{475}\) and extending legal protections equally to workers who do not

\(^{472}\) Dangler, Hidden in the Home, supra note 49, at 3.

\(^{473}\) See Abrams, Gender Discrimination, supra note 73, at 1196-97, 1238 (suggesting on-site childcare or vouchers for off-site childcare); Chamallas, Part-Time Work, supra note 200, at 735-36 (suggesting subsidized childcare); Christensen, supra note 29, at 194 (urging the creation of alternative forms of childcare); Cynthia B. Costello, The Clerical Homework Program at the Wisconsin Physicians Services Insurance Corporation, in Homework, supra note 12, at 198, 213 (arguing that for homework to be effective, it must be combined with the availability of "high-quality, inexpensive child care and after-school care"); Dowd, Resisting Essentialism, supra note 12, at 208 (suggesting "well-financed after-school care" and "universal, high-quality childcare"); Martha Albertson Fineman, Contract and Care, 76 Chi.-Kent L. Rev. 1403, 1405, 1437 (2001) (arguing for collective or public responsibility for carework, including income redistribution for childcare and other services); Frug, supra note 202, at 99-102 (proposing a variety of forms of child-rearing support programs); Olson, supra note 25, at 229 (highlighting the need for "improvements in affordable, adequate day care alternatives").

\(^{474}\) See Abrams, Gender Discrimination, supra note 73, at 1196-97, 1238 (suggesting leave days for childcare, flex-time, and part-time arrangements); Chamallas, Part-Time Work, supra note 200, at 735-36 (suggesting parenting leaves); Christensen, supra note 29, at 195 (proposing that equitable telecommuting options be combined with many other types of flexible work arrangements, including job sharing, part-time work, flextime, and parental leave); Dowd, Resisting Essentialism, supra note 12, at 208 (suggesting maternity leaves, parental leaves, leaves to care for sick children, quality part-time arrangements, and flextime); Frug, supra note 202, at 95-98 (proposing legislatively mandated flexible workweeks and equitable part-time arrangements).

\(^{475}\) See Chamallas, Part-Time Work, supra note 200, at 735-36 (proposing a shortening of the standard workweek as a partial solution to work/family conflicts); Crain, supra note 78, at 1932-46, 1948-49 (suggesting a reduction in the standard workweek to 35 hours with an increased overtime premium and no mandatory overtime, or requiring employers "to allow workers to bank hours or trade income for time," as possible solutions to work/family conflicts).
have "employee" status.\textsuperscript{476} Using all of these tools together to help restructure the workplace around gender-neutral caregiving worker norms eventually may help all of those concerned with work/life balance to force a broader questioning of the core corporate assumptions upon which economic privilege so heavily depends.\textsuperscript{477}

\textsuperscript{476} See Dangler, Hidden in the Home, supra note 49, at 166; Olson, supra note 25, at 229.

\textsuperscript{477} See Abrams, Cross-Dressing, supra note 207, at 759 (arguing that "the next step" is "to challenge the notion that norms of efficiency and productivity should figure centrally in assigning privilege to work patterns"); Dowd, Resisting Essentialism, supra note 12, at 201 (criticizing "inside strategies" for addressing work/family conflicts because they "implicitly adopt the values and work ethic, as well as organization of, the corporate firm as the starting point"); Crain, supra note 78, at 1898-99 (arguing that ultimate reforms must get rid of the assumption "that home and market, family and work are separate spheres which embody different sets of values and can be maintained in opposition to one another").