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## HOURS EQUITY IS THE NEW PAY EQUITY

NANTIYA RUAN\* & NANCY REICHMAN\*\*

“[S]he’s part time, where is she going to go?”

—Manager of female low-wage worker, in *Capruso v. Hartford Financial Service Group, Inc.*<sup>1</sup>

“Scheduling is a form of compensation. It is a very tangible benefit to employees, but the costs are hidden and don’t appear as a line item on any budget.”

—Lisa Disselkamp, Workforce Management Technology Consultant, Athena Enterprises<sup>2</sup>

### I. INTRODUCTION

AT the dawning of the fifty-year anniversary of the Equal Pay Act of 1963 (EPA),<sup>3</sup> as well as Title VII of the Civil Rights Act of 1964 (Title VII), it is time to change the way we think about pay equity. Workplace fairness between women and men should no longer be framed merely by total disparities in *pay*, but also by disparities in *hours* given to women seeking as much work as their male counterparts. Doing so recognizes the realities of many female workers in today’s workplace and addresses the shortfalls thus far absent from the civil rights conversation about pay equity.

Today’s workforce is filled with part-time, female contingent workers who are at the mercy of their supervisors as to the number and scheduling of hours they work. The number of part-time workers has steadily increased over the last decade, with involuntary part-time workers (those forced to downgrade from full-time to part-time because of economic con-

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1. No. 01 Civ. 4250(RLC), 2003 WL 1872653, at \*5 (S.D.N.Y. Apr. 10, 2003).

2. JOAN C. WILLIAMS & PENELOPE HUANG, IMPROVING WORK-LIFE FIT IN HOURLY JOBS: AN UNDERUTILIZED COST-CUTTING STRATEGY IN A GLOBALIZED WORLD 24 (2011), *available at* <http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf> (quoting LISA DISSELKAMP, NO BOUNDARIES: HOW TO USE TIME AND LABOR MANAGEMENT TECHNOLOGY TO WIN THE RACE FOR PROFITS AND PRODUCTIVITY (2009)).

3. Equal Pay Act of 1963, 29 U.S.C. 206(d) (1964).

ditions or the employer's needs) numbering 8.2 million<sup>4</sup> and the total number of part-time workers exceeding 27 million. Two-thirds of part-time workers are women, and as the Congressional Joint Economic Committee has recognized, the gender pay gap is partly driven by the earning penalty for part-time work, which pays less per hour than the same or equivalent work done by full-timers.<sup>5</sup>

One under-examined factor in this pay inequity is the power of scheduling that employer supervisors have over their part-time work force. From the outside, supervisors seemingly make capricious decisions on whom to schedule, when, and for how many hours. When individual supervisors make these unilateral decisions without regard to employment standards or criteria, they appear to do so with little oversight and guidance, which can lead to discriminatory bias based on gender. This gender bias can be motivated (consciously or unconsciously) by societal stereotypes casting women as less than "ideal workers"<sup>6</sup> with weak commitment to the workplace because of outside caregiving responsibilities. Such bias (both conscious and unconscious) can lead to women being scheduled both fewer hours and in less desirable timeslots.

From a doctrinal standpoint, however, the current statutory regimes seem ill suited to address these disparities. The Fair Labor Standards Act (FLSA) of 1938 merely mandates minimum and overtime wages without addressing minimum or required hours;<sup>7</sup> the EPA does not cover hours equity but only addresses pay rate; and Title VII's anti-discrimination mandate rarely reaches the issue of scheduling and is therefore sorely underdeveloped. Moreover, due to recent Supreme Court decisions dramatically restricting employment discrimination class actions, bringing aggregate litigation for low-wage workers will be an uphill battle, and attorneys are unlikely to take on cases for relatively low damages.<sup>8</sup>

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4. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Economic News Release: Employment Situation Summary* (Nov. 8, 2013), <http://www.bls.gov/news.release/empst.nr0.htm>.

5. See JOINT ECON. COMM., 111TH CONG., *THE EARNINGS PENALTY FOR PART-TIME WORK: AN OBSTACLE TO EQUAL PAY* (2010), available at [http://www.jec.senate.gov/public/?a=Files.Serve&File\\_id=74203874-3821-44e4-b369-4efbe14d8745](http://www.jec.senate.gov/public/?a=Files.Serve&File_id=74203874-3821-44e4-b369-4efbe14d8745).

6. See CECILIA L. RIDGEWAY, *FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD* (2011) (discussing persistence of stereotypes at work); Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 173 (2006).

7. See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues* (2009), <http://www.dol.gov/whd/regs/compliance/whdfs70.pdf>. "The Act does not preclude an employer from lowering an employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work." *Id.*

8. See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Conception*, 7 DUKE J. OF CON. L. & PUB. POL'Y 73 (2011); Judith Resnik, *Fairness in Num-*

This Article makes the case for changing the way we think about pay equity. Because our workforce is filled with part-time workers, advocates for low-wage workers should focus not only on pay inequities and living wages, but also on hours equity. Hours equity would provide much-needed stability to scheduling that would allow female part-time workers to have a reliable schedule with guaranteed hours so that they make an expected amount of pay.

Part II describes the experience of many female low-wage workers in retail America. Based on a composite from the authors' interviews with non-profit agencies dedicated to fair employment practices, as well as low-wage workers themselves, the story of Anna represents the plight of part-time work and the difficulties women faced in an unstable scheduling environment.

Part III explores the modern workplace and the part-time worker's place in it. Because of employers' strict adherence to minimizing labor costs and the contingent nature of part-time, low-wage work, today's workplace is a precarious place without assurances of guaranteed compensation.

Part IV outlines and analyzes the different statutory frameworks meant to regulate workplace fairness: the FLSA, the EPA, and Title VII's disparate treatment and disparate impact provisions. While each holds potential to address scheduling shortfalls, without amendment, the only current statutory framework that allows for address of the harms stemming from hours inequity is Title VII.

Finally, Part V provides potential solutions to address the scheduling shortfalls: lobbying for statutory gap-filling; community organizing and collective action; and renewed public regulation and enforcement.

## II. HOURS INEQUITY: THE EXPERIENCE OF FEMALE PART-TIME WORKERS

Anna was thrilled to land a full-time job as an associate at a big box retailer after months of searching for employment.<sup>9</sup> Her pay, \$8.50 per hour, hardly covered her expenses. Still, she was happy to have a job in this competitive job market with high unemployment. Sharing wage information was strongly discouraged by her employer, but John, another asso-

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bers: *A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

9. This fact scenario is a realistic representation of the female low-wage retail workers employed by large private chain stores, as described by workers and community organizers. See Confidential Fieldnotes and Interviews with Community Organizers and Retail Associates, in Denver, Colorado (Spring 2013) (on file with authors). For a similar account of how scheduling can negatively affect women and their responsibilities, see Lawrence S. Root & Alford A. Young Jr., *Workplace Flexibility and Worker Agency: Finding Short-Term Flexibility Within a Highly Structured Workplace*, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 86, 91 (2011) ("At the time Jan was interviewed, her shift at Sylvania had been changed to afternoons, which disrupted her already-tenuous work-family balance. 'I've been playing charades ever since and now I'm not doing too well. Child care is a nightmare now.'").

ciate hired at the same time, had inadvertently disclosed that he was making the same. With no family to support, John's paycheck would surely go much further. Even so, she was grateful for her schedule that allowed her to get her two small children off to school before she started work. Working these hours, she could demonstrate her work ethic to the daytime supervisors who were reported to be the pipeline for advancement. After-school care would take a substantial chunk out of her paycheck, but for the first time in years, Anna had a stable job. She was looking forward to promotions and pay raises that might make it possible to afford the insurance benefits her employer offered.

Several times in her first two months she was scheduled for significantly less than the forty hours she was promised, but she was not overly concerned as she was back on track the following week and she was not scheduled for hours that would greatly interfere with her family obligations. Three months later, however, things changed. Anna was scheduled to start work at 5 AM, instead of 9 AM, as she had requested. Anna reached out to her mother and sister to help her with morning child care. While they could help out that first week, they could not commit for additional weeks. They, too, were low-wage workers and their schedules changed constantly. When she mentioned this to John, the associate hired at the same time as Anna, he bragged that he always got the schedule he asked for.

Anna approached her supervisor to see when she could get back to the schedule she requested. Her supervisor reminded her that when she was hired, she had agreed to "open availability," meaning that she was available for any shifts offered between 5 AM and 10 PM, seven days a week. If this were no longer the case, her supervisor said, her status needed to change to part-time. Fearful of losing full-time work, she agreed to her original availability, calling on neighbors, family, and friends for help with child care, all the while hoping that she would soon have a more stable and desirable schedule. This was not the case. Anna's request for a schedule that might accommodate her child care needs appeared to have serious consequences. Soon after the discussion with her supervisor, her schedule became more erratic and each week her hours were reduced by five to ten hours less than the expected forty. Finding it impossible to arrange child care for her children in the face of this fluctuating work schedule, Anna was forced to become a part-time worker with no guarantee about how much money she would earn in a given week and far fewer opportunities for advancement. John, with less variability in his schedule and better able to accommodate changes, received pay raises and promotions.

Anna's story is surprisingly common and not just in big box retail stores. Low-wage workers across a range of work settings rarely have the luxury to "choose" a work schedule that suits their needs and, instead, find themselves hostage to the specific hours assigned by their employer super-

visor.<sup>10</sup> The scheduling challenges these workers confront include rigid schedules that offer workers no control over the number of hours they work or their starting or stopping times; hours assigned with no advance notice; and fluctuations in hours from week to week.<sup>11</sup> Rigid schedules do not allow workers to handle the unexpected, including sick children, babysitters who are late or fail to show up, or transportation malfunctions, without fear of losing their job. Variable schedules undermine even the best efforts at managing caregiving, looking for additional work to supplement one's income, or pursuing educational opportunities.<sup>12</sup> Across a range of her empirical studies, Professor Lisa Dodson finds that low-wage working women make "crisis decisions" in the face of irregular schedules, mandatory overtime, a lack of sick or personal leave, required evening and weekend hours, and little or no flexibility.<sup>13</sup> When they attempt to negotiate a schedule change to accommodate parental obligations, these women are not only "met with a particular stigma . . . that of unworthy reproducers,"<sup>14</sup> they are often assumed to be lying about their obligations to others.<sup>15</sup> Although some companies, like Anna's, allow employees to make scheduling requests, research suggests that they face "repercussions in the form of reduced hours or being assigned undesirable shifts when they took advantage of policies allowing them to request scheduling preferences. Thus without minimum hour guarantees or normative pressures to provide them, workers may in effect pay for the opportunity to control their nonwork schedule."<sup>16</sup> Too often, female low-wage workers are met with reduced work just when they need it most.

"Scheduling shortfalls" is the term we use for the scheduling problems low-wage workers face and for female, part-time workers who face shortfalls because of the gender bias at play, scheduling discrimina-

10. See generally Elaine McCrate, *Flexibility for Whom? Control over Work Schedule Variability in the US*, 18 FEMINIST ECON. 39 (2012) (delineating difficulties for low-wage women workers in workplace).

11. See LIZ WATSON & JENNIFER E. SWANBERG, FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS: A FRAMEWORK FOR A NATIONAL CONVERSATION 1, 8 (2011), available at [http://workplaceflexibility2010.org/images/uploads/whats\\_new/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf](http://workplaceflexibility2010.org/images/uploads/whats_new/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf).

12. See, e.g., Françoise Carré & Chris Tilly, *America's Biggest Low-Wage Industry: Continuity and Change in Retail Jobs* (Ctr. for Soc. Pol'y Publ'ns., Working Paper No. 2009-6, 2008).

13. See Lisa Dodson, *Stereotyping Low-Wage Mothers Who Have Work and Family Conflicts*, 69 J. SOC. ISSUES 257, 264 (2013) (citing numerous examples of women workers needing to make sacrifices in personal lives due to low-wage working situations).

14. *Id.* at 274.

15. See *id.* at 267 (discussing negative consequences of attempting to negotiate schedules for low-wage women workers).

16. Susan J. Lambert, Anna Haley-Lock & Julia R. Henly, *Schedule Flexibility in Hourly Jobs: Unanticipated Consequences and Promising Directions*, 15(3) COMMUNITY, WORK & FAM. 293, 305 (2012) [hereinafter *Schedule Flexibility*] (internal citation omitted).

tion ought to be recognized as providing redress. Anna's story demonstrates the number of ways that schedules fall short. Workers may be hired with the promise of a certain number of hours, only to find that they are never scheduled for those hours. Or, like Anna, they may start with a certain number of hours per week and gradually see that number reduced. Scheduling shortfalls also occur when workers consistently receive less desirable shifts that they do not request. Not only did Anna receive a schedule that was unworkable given her family obligations, but her complaints led her managers to see her as less than the "ideal worker," which led to fewer promotions and pay increases.

Receiving fewer than expected hours to work and less pay as a result can wreak havoc when rents are due and food needs to be on the table. It is difficult enough for low-wage workers to earn a living that would allow them to make ends meet, even when they are lucky enough to get full-time hours. Scheduling shortfalls take a particularly troubling toll on female head of households as they attempt to pay for and manage child care. As an example of such inequities, a survey of 200 mothers working in the restaurant industry found half had unpredictable and erratic schedules, two out of five had a last minute schedule shift which impacted child care, and a third said that child care impaired their ability to work desirable shifts.<sup>17</sup> Strikingly, nearly a third of the forty percent of single income mothers who pay for child care use up half their income to do so.<sup>18</sup> Even when they can find and afford child care, mothers who work unpredictable hours cannot hold spaces for their children when their own work and income varies from week to week.<sup>19</sup> Getting to work, particularly when work is scheduled during non-standard hours, is challenging for low-wage workers who rely on "off peak" public transportation schedules that increase already long commute times.<sup>20</sup>

Rarely discussed by scholars concerned about the impact of hours variability is the connection between scheduling and pay equity. Anna's story raises a number of troubling questions. While Anna and John initially received the same pay for the same work, the emerging differences in the hours they were scheduled to work lead to significant differences in weekly earnings, a key measure of pay inequity. Thus, a key empirical question is whether hours are allocated in a way that has a disparate im-

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17. See THE RESTAURANT OPPORTUNITIES CTRS. UNITED, *THE THIRD SHIFT: CHILD CARE NEEDS AND ACCESS FOR WORKING MOTHERS IN RESTAURANTS* 3 (2013), available at <http://www.scribd.com/doc/161943672/The-Third-Shift-Child-Care-Needs-and-Access-for-Working-Mothers-in-Restaurants> (surveying women about low-wage working conditions in restaurants, specifically in context of impact on scheduling and family life).

18. See Stephanie Bornstein, *Work, Family and Discrimination at the Bottom of the Ladder*, 19 *GEO. J. ON POVERTY, L. & POL'Y* 1, 8 (2012).

19. See WATSON & SWANBERG, *supra* note 11, at 8 (discussing impact of constantly changing schedules on feasibility and financing of child care).

20. See *id.* (examining impact of variable work schedules on transportation).

pact on the lives of women and people of color, or are distributed in a way that is consistent with or undermines pay equity principles.<sup>21</sup>

### III. THE STRUCTURE OF WORK TODAY

Scheduling shortfalls are part of a paradigmatic change in the employment relationship from one that is stable and long-term to one that is both more short-term and precarious.<sup>22</sup> Because workers are less likely to have long-term tenure at any particular place of employment, employers feel a reduced obligation to provide such “benefits” as a promised minimum number of hours or a consistent schedule. This is true especially where there is a premium to reducing labor costs in increasingly tight corporate budgets. So while some workers benefit from “employee flexibility” to accommodate family needs, many part-time, contingent workers suffer from increasing employer-driven “flexibility” that results in fewer and less stable hours.

#### A. *Changing Employment Relationships*<sup>23</sup>

Prior to 1970, workers were employed in firms modeled around internal labor market structures (ILMS) that were “closed, inwardly focused and hierarchically governed.”<sup>24</sup> ILMS tended to favor internal hiring practices that rewarded seniority and offered non-wage benefits to insure loyalty and tenure. William Whyte’s “organization man,” the over-conforming, loyal employee who spent his career at one firm and worked his way up the ladder toward a secure retirement, has become a symbolic representation of this form of employment. The internalization of labor that his story represents was possible because of sustained economic growth and general stability.<sup>25</sup> Strong unions and collective bargaining agree-

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21. The authors are currently engaged in just such an empirical project, interviewing female, part-time, low-wage workers about their schedules and scheduling practices of their employers.

22. See generally Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447 (2008) (offering explanation for shift in types of employment relationships in broader context); Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313 (2007) (discussing changing nature of employment relationships).

23. Many different terms are used to characterize this type of work, including: precarious, casual, flexible, nonstandard, or contingent. See Dennis Arnold & Joseph R. Bongiovi, *Precarious, Informalizing, and Flexible Work Transforming Concepts and Understandings*, 57 AM. BEHAV. SCIENTIST 289, 289 (2013) (identifying specific aspects of changing employment relationships).

24. Matthew Bidwell et al., *The Employment Relationship and Inequality: How and Why Changes in Employment Practices Are Reshaping Rewards in Organizations*, 7 ACAD. MGMT. ANNALS 61, 62 (2013).

25. See Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 1–22 (2009) (discussing institutional and structural factors giving rise to precarious working situations).

ments were important to establish the reciprocal relationships between employer and employee that defined this era of employment.<sup>26</sup>

Since the 1980s, ILMs have been replaced by systems of employment that allow employers to adapt to changing economic and institutional pressures, most significantly the increased competition that pressures organizations to manage costs.<sup>27</sup> Cost containment often rests on the backs of workers as employers view payment for labor that exceeds narrow definitions of demand as an unnecessary expense.<sup>28</sup> Rather than imposing significant layoffs, employers reduce the hours of the workforce as a whole and then subsidize the resulting reduction in earnings with public programs.<sup>29</sup> Referred to as “internal labor flexibility,” “just in time scheduling,” or “employer driven flexibility,” workplaces that embrace this model “hire or fire workers, or increase or lower their wages according to business needs and worker performance.”<sup>30</sup> Professors Lambert, Haley-Lock, and Henly demonstrate that:

The goal of minimizing outlays for labor by holding managers accountable for making sure labor allocations do not exceed ongoing business demand—by week, day, and for some firms, hour—creates a situation ripe for workers experiencing too few rather than too many hours and fluctuating work times rather than rigid ones.<sup>31</sup>

These changing employment relationships have emerged within the spatial restructuring of work on a global scale. Advances in technology have made it possible for goods, capital, and people to circulate with unprecedented speed across borders, no longer tied to time and space. Free from the spatial and temporal constraints and with the entry of new, densely populated countries into the global economy, employers are better able to seek out cheap labor wherever they can. Gone is a sense of loyalty or commitment. Employment is a transaction rather than a relationship, an arrangement that can be altered or broken on a moment’s notice.<sup>32</sup>

The profound restructuring of employment also includes major companies shedding off the functions of workforce management to other net-

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26. See Bidwell et al., *supra* note 24, at 66 (noting study’s findings that seniority based practices were initially adopted in unionized industries).

27. See *id.* at 62 (examining evolution of structural and economic concerns for employers).

28. See *Schedule Flexibility*, *supra* note 16, at 295 (discussing employer concerns about costs and expenses in relation to pay).

29. See Arnold & Bongiovi, *supra* note 23, at 295 (discussing goal of employers to avoid layoffs and indicating that consequences of this strategy fall upon hours for workers).

30. *Id.*

31. *Schedule Flexibility*, *supra* note 16, at 296.

32. See Dau-Schmidt & Haley, *supra* note 22 (conceiving of employment as transaction and discussing implications).

works of organizations. Professor Weil describes this as “fissured employment,” in which employers contract out, outsource, or subcontract their business functions to shift labor costs and liabilities to smaller businesses or third-party labor intermediaries.<sup>33</sup> Introducing an intermediary into the mix of employment relationships transforms it from a hierarchical firm-employee relationship into a market-based triadic exchange,<sup>34</sup> not only affecting where and how regulators must look to enforce workplace fairness, but also where, when, and how workers can challenge policies they feel are unfair<sup>35</sup> and how regulatory agencies can intervene.<sup>36</sup> Within these market-driven employment practices, the conditions of work are evaluated as part of the “business case” rather than normative compliance with government regulation.<sup>37</sup>

Changing metrics for assessing corporate success, in particular the increasing significance of shareholder value, provided momentum for the change to more transactional, market-mediated, and fissured employment. Shareholder value is grounded in a “portfolio theory of the firm” that conceptualizes firms as bundles of assets rather than discrete, bounded organizational entities whose sole purpose is to increase value, defined in terms of the short time profits associated with appreciating share price.<sup>38</sup> Today, firms are conceptualized less in terms of relationships and more as streams of cash flow that can be shuffled and transformed when economic conditions change.<sup>39</sup> Managing labor costs is an important strategy in the financialization of the firm, and when combined with a shift in public policy away from an emphasis on achieving full employment to a focus on price stability, has produced the domestic deregulation

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33. See ERIN HATTON, *THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPs IN POSTWAR AMERICA* (2011) (providing parallel discussion of rise of temp industry); DAVID WEIL, *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 9* (2010) (detailing conclusions about workplace conditions resulting from employers distributing workplace functions to other organizations).

34. See Bidwell et al., *supra* note 24, at 70 (describing effect of adding intermediary into employment relationship).

35. See Timothy P. Glynn, *Taking the Employer out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 5 EMP. RTS. & EMP. POL’Y J. 101, 111 (2011) (delineating recourse options for workers dealing with unjust policies).

36. See WEIL, *supra* note 33, at 9 (clarifying role of administrative agencies in implementing workplace fairness).

37. See generally FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009); Rocio Bonet et al., *Labor Market Intermediaries and the New Paradigm for Human Resources*, 7 ACAD. MGMT. ANNALS 341 (2013) (expanding further upon notion of market-driven workplace initiatives).

38. See Gerald F. Davis, *The Rise and Fall of Finance and the End of the Society of Organizations*, 23 ACAD. OF MGMT. PERSP. 27, 33–34 (2009) (clarifying “portfolio theory of the firm” and implications of this model for workplace relationships).

39. See GRETA R. KRIPPNER, *CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE* 7–9 (2012).

lation of industries and the outsourcing of production to low-wage countries, policies that have weakened the bargaining power of workers.

The decline in union density<sup>40</sup> is certainly a cause and consequence of shifting work arrangements as well. The percentage of workers represented by unions fell to 11.3% in 2012, the lowest percentage since 1916, according to the Bureau of Labor Statistics.<sup>41</sup> Without the process of collective bargaining, workers are left to negotiate on their own. Workers have neither the power nor information to challenge employer practices. The effect of the lack of unionization for employee control over scheduling is clearly demonstrated by cross-country comparison. In Germany and Denmark, for example, collective bargaining agreements require employers to provide significantly greater advance notice of schedules (twenty-six and sixteen weeks respectfully).<sup>42</sup>

### B. *Hours Instability in Low-Wage Part-Time Work*

In the face of market-mediated, transactional employment, work has become “uncertain, unpredictable, and risky,”<sup>43</sup> particularly so for today’s low-wage workers. Trapped in models that prioritize containing labor costs, many low-wage workers are forced to adapt to non-standard, often variable and unpredictable scheduling.<sup>44</sup> Advances in scheduling technologies make this possible. Software allows employers to track activities in

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40. See Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513–14 (2011) (discussing relationship between inequality and unions).

41. See Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES (Jan. 24, 2013), [http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?\\_r=0](http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?_r=0) (further elaborating impact of unions on workplace relationships); U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *Economic News Release: Union Members Summary* (Jan. 23, 2013), <http://www.bls.gov/news.release/union2.nr0.htm>.

42. See Françoise Carré & Chris Tilly, *A Framework for International Comparative Analysis of the Determinants of Job Quality*, in ARE BAD JOBS INEVITABLE? TRENDS, DETERMINANTS AND RESPONSES TO JOB QUALITY IN THE TWENTY-FIRST CENTURY 84 (Chris Warhurst et al. eds., 2012) (discussing comparative collective bargaining systems).

43. Kalleberg, *supra* note 25, at 2.

44. See *Schedule Flexibility*, *supra* note 16 (discussing scheduling challenges and overall predicament of low-wage workers); Susan J. Lambert, *Making a Difference for Hourly Employees*, in WORK-LIFE POLICIES 175–76 (Ann C. Crouter & Alan Booth eds., 2009) [hereinafter Lambert, *Making a Difference*] (discussing specific issues for hourly employees in context of family and organizational dynamics); Susan J. Lambert, *Passing the Buck: Labor Flexibility Practices that Transfer Risk onto Hourly Workers*, 61 HUM. REL. 1203 (2008) [hereinafter Lambert, *Passing the Buck*] (elaborating on nature of incentives causing employers to reduce hours and flexibility for workers); Jennifer E. Swanberg et al., *Schedule Control, Supervisor Support and Work Engagement: A Winning Combination for Workers in Hourly Jobs?*, 79 J. VOCATIONAL BEHAV. 613 (2011) [hereinafter *Schedule Control*] (suggesting institutional and organizational responses to lower workplace flexibility for hourly workers); Jennifer E. Swanberg et al., *Workplace Flexibility for Hourly Lower-Wage Employees: A Strategic Business Practice Within One National Retail Firm*, 11 PSYCHOLOGIST-MANAGER J. (2008) (examining flexible work options offered to workers in lower-wage hourly posi-

fifteen-minute increments (or less) and to adjust staffing levels daily to respond just-in-time.<sup>45</sup> The move to just-in-time scheduling and the hours instability it creates is most prevalent for workers in the retail section where businesses are expected to be open 24/7 and “nonstandard (and indeed variable) working hours are the norm.”<sup>46</sup> These precarious workers face real and perceived job insecurity,<sup>47</sup> earning volatility,<sup>48</sup> and a loss of workplace benefits,<sup>49</sup> along with the challenges of obtaining affordable and reliable child care, transportation to work, and access to education described earlier.

The workers that face the highest levels of unpredictability and variability in scheduling are part-time workers, a workforce that has increased steadily over the last decade. As noted earlier, two-thirds of part-time workers are women. In June 2013, the total number of part-time workers in the United States exceeded 28 million. Approximately 7.8 million workers were classified as involuntary part-time workers, forced to downgrade from full-time to part-time because of the economy.<sup>50</sup> Employment growth after the so-called Great Recession has come from lower-wage part-time jobs;<sup>51</sup> sixty percent of the jobs added nationally in July 2013 were part-time. In 2012, the National Employment Law Project found that lower-wage occupations constituted twenty-one percent of recession job losses, and fifty-eight percent of recovery growth, emphasizing the way that

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tions); WILLIAMS & HUANG, *supra* note 2 (discussing current implications of changes in workplace schedule flexibility to families of low-wage hourly workers).

45. See WATSON & SWANBERG, *supra* note 11, at 13 (discussing technology which allows employers to readily adjust schedules and make use of practices that prioritize labor cost containment).

46. Francoise Carré & Chris Tilly, *Short Hours, Long Hours: Hour Levels and Trends in the Retail Industry in the United States, Canada, and Mexico* 2 (Upjohn Inst. for Emp’t Research, Working Paper No. 12-183, 2012) [hereinafter *Short Hours*].

47. See Kalleberg, *supra* note 25, at 7 (explaining how working conditions foster job insecurity for low-wage hourly workers).

48. See Bruce Western et al., *Economic Insecurity and Social Stratification*, 38 ANN. REV. OF SOC. 341, 341, 344–45 (2012) (discussing, fully, economic insecurity among low-wage workers).

49. A recent study estimated that only twenty-six percent of large employers provided these benefits in 2011 compared with sixty-six percent in 1988. See KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2012 ANNUAL SURVEY 171 (2012), available at <http://kff.org/private-insurance/report/employer-health-benefits-2012-annual-survey/> (reporting conditions for low-wage workers and showing loss of benefits).

50. See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *Economic News Release: Employment Situation Summary* (Nov. 8, 2013), <http://www.bls.gov/news.release/empsit.nr0.htm> (noting that 7.8 million part-time workers were forced to downgrade from full-time positions).

51. See JOHN SCHMITT, CTR. FOR ECON. & POL’Y RESEARCH, *LOW-WAGE LESSONS 1* (2012); Annette Bernhardt, *The Role of Labor Market Regulation in Rebuilding Economic Opportunity in the U.S.*, 39 WORK & OCCUPATIONS 354, 355 (2012) (discussing impact of low-wage employment in wake of economic recession, especially with respect to job growth).

employment in the U.S. has shifted towards more precarious work.<sup>52</sup> The practice of controlling labor costs through the use of part-time workers and shortened minimum hours for full-time workers is expected to continue to grow to more than half the workforce in the years ahead.<sup>53</sup>

Part-time work is most often low-wage work. The Organization for Economic Cooperation and Development (OECD) reported that in 2009, one-fourth of U.S. workers were in low-wage jobs, the highest number in any of the OECD countries.<sup>54</sup> A job was defined as low-wage if workers earned less than two-thirds of the national median.<sup>55</sup> “The incidence of low-wage work in the United States was higher in 2010 (almost 27 percent) than it had been in 1979 (about 22 percent).”<sup>56</sup> The low-wage workforce has changed over the last three decades to include fewer teenagers (one in four in 1979 to less than one in eight in 2011), higher levels of education, and more men (thirty-five percent of low-wage workers in 1979 and forty-five percent in 2011), a reflection in part of the most recent recession.<sup>57</sup>

Although there is general consensus among management scholars that contingent employment relationships are becoming more prevalent, particularly in some sectors,<sup>58</sup> reliable estimates of the numbers of workers who face the hours instability associated with non-standard scheduling are hard to find. This is true, in part, because we do not yet have the vocabulary to adequately capture the “new normal” for the conditions these workers face.<sup>59</sup> While the Bureau of Labor Statistics provides data that distinguish working part-time for economic and non-economic reasons, there are few studies that “drill down” to the question of the kinds of schedules workers want and, most importantly, any differences between how many hours employees wish to work and what they are actually scheduled to work. In a recent Bureau of Labor Statistics Study, roughly twenty percent of female part-time workers and twenty-nine percent of male part-time workers were working part time for economic reasons, demonstrating

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52. See NAT'L EMP'T LAW PROJECT, *THE LOW-WAGE RECOVERY & GROWING INEQUALITY* 1 (2012), available at [http://www.nelp.org/page/-/Job\\_Creation/Low\\_WageRecovery2012.pdf?nocdn=1](http://www.nelp.org/page/-/Job_Creation/Low_WageRecovery2012.pdf?nocdn=1) (discussing employment statistics relevant to low-wage workers, particularly after recession).

53. See *Short Hours*, *supra* note 46, at 7 (explaining that trend of using low-wage working policies as method of controlling labor costs is likely to continue).

54. See SCHMITT, *supra* note 51, at 1 (discussing low-wage working statistics in comparative context).

55. See *id.* (discussing evolving definitions of low-wage employment).

56. *Id.* at 4.

57. See JOHN SCHMITT & JANELLE JONES, *CTR. FOR ECON. & POL'Y RESEARCH, LOW-WAGE WORKERS ARE OLDER AND BETTER EDUCATED THAN EVER* 2 (2012) (analyzing demographic changes in low-wage workforce).

58. See Bidwell et al., *supra* note 24, at 70 (examining significant changes in nature of employment relationships).

59. See generally Brian W. Ward, *Implications of Using Different Measures of Work Shift in Survey Research*, 5 J. APPLIED SOC. SCI. 62 (2011) (discussing challenges of using existing survey methods and data to accurately provide statistics concerning non-standard work shifts).

a desire for more hours.<sup>60</sup> Further, analyses of the 2004 Current Population Survey revealed that nearly one in five workers (eighteen percent of respondents) worked a non-standard shift, including a “regular” night shift.<sup>61</sup> Similarly, Professors Tuttle and Garr’s analysis of the 2008 National Study of the Changing Workforce revealed that twenty-six percent of respondents reported working flexible schedules or shift work, some by choice.<sup>62</sup> In a study of the retail work force in New York City, nearly sixty percent of those surveyed were hired as part-time, temporary, or holiday workers; only seventeen percent had a fixed schedule.<sup>63</sup> A majority of the New York City retail workers report that their hours vary from week to week; forty percent face changes without their consent.<sup>64</sup>

Unfortunately, inconsistencies in the measurement of nonstandard work make comparability across studies difficult.<sup>65</sup> This problem is compounded by the fact that the experiences of workers do not fit neatly into study categories. For example, studies that ask respondents to identify a particular schedule that best describes their work in a given period of time fail to recognize that workers in retail and service often move in and out of work schedule types. Fifty percent of the mothers responding to the Fragile Families and Child Wellbeing Study (that allowed respondents to report more than one schedule) indicated that they worked both standard and nonstandard schedules in their current job.<sup>66</sup>

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60. See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, TABLE 22 (2012), <http://www.bls.gov/cps/cpsaat22.pdf> (defining part-time work as working less than thirty-four hours per week and noting that 4,022 of 20,236 female part-time workers and 3,981 of 13,616 male part-time workers did so for economic reasons).

61. See Ariel Kalil, Kathleen M. Ziol-Guest & Jodie Levin Epstein, *Nonstandard Work and Marital Instability: Evidence from the National Longitudinal Survey of Youth*, 72 J. MARRIAGE & FAM. 1289, 1289 (incorporating data from 2004 Current Population Survey).

62. See Robert Tuttle & Michael Garr, *Shift Work and Work to Family Fit: Does Schedule Control Matter?*, 33 J. FAM. ECON. ISSUES 261, 264 (2012) (observing that fifteen percent of respondents worked evenings, nights, split shifts or rotating schedules, while twelve percent of respondents worked flexible schedules).

63. See STEPHANIE LUCE & NAOKI FUJITA, MURPHY INST., CITY UNIV. OF N.Y. & RETAIL ACTION PROJECT, DISCOUNTED JOBS: HOW RETAILERS SELL WORKERS SHORT 3 (2012), available at [http://retailactionproject.org/wp-content/uploads/2012/03/7-75\\_RAP%over\\_lowres.pdf](http://retailactionproject.org/wp-content/uploads/2012/03/7-75_RAP%over_lowres.pdf) (describing results of study conducted by Retail Action Project that surveyed 436 retail workers in New York City in Fall 2011).

64. See *id.* at 9 (observing further that when workers requested shift changes, their managers often punished them by assigning less overall work hours or less favorable shifts).

65. See Rachel Dunifon et al., *Measuring Maternal Nonstandard Work in Survey Data*, 75 J. MARRIAGE FAM. 523, 524 (2013) (“Additionally, accurate estimates of the prevalence of nonstandard work are difficult to determine when one survey allows for a more expansive definition of nonstandard work than another.”).

66. See *id.* at 524 (contrasting this survey with others that only allow respondents to choose one type of shift, standard or nonstandard, that best describes their work schedule).

C. *Scheduling Shortfalls and Pay Equity*

Part-time and variable schedules have particular consequences for the financial well being of families in which women are the primary wage earners. To start, part-time workers face an earnings penalty compared to full-time workers; they are paid less per hour than the same or equivalent work done by full-timers.<sup>67</sup> Nearly two-thirds of those part-time workers who are paid less are women, and more than one-third of women work part-time, according to an analysis by the U.S. Congressional Joint Economic Committee.<sup>68</sup> A U.S. Government Accountability Office (GAO) analysis of the gender pay gaps among low-wage workers found that while hourly wages were similar for men and women in 2009, the annual personal earnings of women were less than men, regardless of marital status or the presence of children in the household, in part because women worked fewer hours.<sup>69</sup> Professors Budig and Hodges find the motherhood penalty to be largest among the lowest-wage workers, also explained, in part, by hours.<sup>70</sup>

But do mothers always work fewer hours by choice? Recent studies, including estimates of the number of part-time workers who work part-time involuntarily, suggest otherwise. Professor Swanberg reports unpublished data from the CitiSales project that thirty-three percent of full-time and forty-three percent of part-time workers would like to work more hours.<sup>71</sup> Shortfalls in hours occur because they are either not offered or

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67. See JOINT ECON. COMM., *supra* note 5, at 2 (“Part-time workers across a spectrum of occupations earn hourly wages below those of full-time workers, which contributes to the wage gap between men and women. For example, for every dollar of earnings a full-time worker receives in a sales or related occupation, a part-time worker receives 58 cents.”); see also Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 780–82 (1995) (showing that this is so even on pro-rata basis and controlling for age, race, organizational size, occupational prestige, and tenure).

68. See JOINT ECON. COMM., 113TH CONG., FACT SHEET: 4TH ANNIVERSARY OF THE FAIR PAY ACT OF 2009, at 2 (2013), available at [http://www.jec.senate.gov/public/?a=Files.Serve&File\\_id=66769080-37f9-4e7a-b2fa-7ac208d9f575](http://www.jec.senate.gov/public/?a=Files.Serve&File_id=66769080-37f9-4e7a-b2fa-7ac208d9f575)) (emphasizing that as result of Fair Pay Act women employed part-time are disproportionately subject to earnings penalties).

69. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-10, GENDER PAY DIFFERENCES: PROGRESS MADE, BUT WOMEN REMAIN OVERREPRESENTED AMONG LOW WAGE WORKERS 24 (2011), available at <http://www.gao.gov/assets/590/585721.pdf> (observing considerable hours disparities between men and women because many more women worked part-time than men).

70. See Michelle J. Budig & Melissa J. Hodges, *Differences in Disadvantage: Variation in the Motherhood Penalty Across White Women's Earnings Distribution*, 75 AM. SOC. REV. 705, 707 (2010) (“Differences in work hours and weeks worked per year will therefore account for a larger proportion of the motherhood wage gap at the lower end of the women's earning distribution.”).

71. See WATSON & SWANBERG, *supra* note 11, at 23 (noting that most survey respondents elaborated that additional hours were not available or could not be reconciled with family responsibilities). The CitiSales study included interviews with employees and senior management within 388 stores. See UNIV. OF KY., *CitiSales Study—Research Design*, <http://www.uky.edu/Centers/iwin/citisales/study-design.html> (last visited Jan. 2, 2014).

they must be turned down because they cannot be planned for in advance, contributing to both weekly and annual pay gaps.

Pay inequity and the scheduling challenges that may exacerbate it is a family issue as more and more primary wage earners are women and part-time workers. Professor Shaefer estimates that the percentage of part-time workers who are primary wage earners has grown substantially over the last several decades to thirty-six percent of all part-time workers in 2007.<sup>72</sup> Not all part-time, primary workers do so voluntarily. Ten percent of part-time wage earners are primary earners who are working part-time because of economic conditions beyond their control.<sup>73</sup> A recent study by the Pew Research Center revealed a record forty percent of all households with children under the age of eighteen include mothers who were either the sole or primary source of income for the family, compared to eleven percent in 1960. Sixty-three percent of the so-called “breadwinner moms” were single mothers.<sup>74</sup>

#### IV. THE CASE FOR HOURS EQUITY IN THE LAW

To address the growing pay gap facing female workers, the law needs to shift from a narrow focus on minimum wage and antidiscrimination efforts towards a larger lens of “pay equity” as “hours parity.” As witnessed in Parts II and III, hourly workers face a growing irregularity of schedules that injects instability in the number of hours and timing of hours worked. This instability has significant negative consequences for hourly workers, who are disproportionately female.

In examining the pay inequities between female and male earners, there are two under-developed dimensions of this pay gap. First, there exists an earnings penalty for part-time work, where part-time workers earn less per hour than their full-time counterparts in the same job. Second, because of sex stereotypes, female hourly workers receive fewer and less desirable scheduled shifts. Both of these dimensions work to increase the gender pay gap. With this growing inequity is also the reality that the worker protection laws put in place between fifty and seventy-five years ago have not kept up with today’s changing workplace and workers’ needs, creating a protection gap alongside the pay gap.

##### A. *The Protection Gap in Wage and Hour Law*

While our workplaces have changed dramatically over the last century, the federal statutory regime put in place to regulate the wages and

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72. See H. Luke Shaefer, *Part-Time Workers: Some Key Differences Between Primary and Secondary Earners*, MONTHLY LAB. REV. 3 (Oct. 2009).

73. See *id.* at 6 chrt.1 (acknowledging that author calculated these figures based on 2008 Current Population Survey Annual Social and Economic Supplement).

74. See WENDY WANG ET AL., PEW RESEARCH CTR., BREADWINNER MOMS 1 (2013), available at [http://www.pewsocialtrends.org/files/2013/05/Breadwinner\\_moms\\_final.pdf](http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf) (noting that this study analyzed U.S. Census Bureau data).

hours of American workers has hardly changed at all.<sup>75</sup> Passed as part of the New Deal legislation during a time of unprecedented unemployment, the Fair Labor Standards Act of 1938 (FLSA) had the dual purpose of protecting workers from job insecurity and unemployment, while also protecting the gainfully (and luckily) employed from chronic overwork.<sup>76</sup> The congressional intent was for employers to “spread the work” by employing more people working non-abusive hours.<sup>77</sup> As President Roosevelt testified in support of the Act: “A self-supporting and self-respecting democracy can plead no . . . economic reason for chiseling workers’ wages or stretching workers’ hours.”<sup>78</sup>

Enacted to address those goals, the FLSA regulates two aspects of work: minimum wage and overtime.<sup>79</sup> It established a minimum wage “floor”<sup>80</sup> for most workers,<sup>81</sup> and mandated premium overtime pay for work exceeding forty hours in a workweek, with exceptions for certain

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75. See Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 357 (2013) [hereinafter Ruan, *Same Law*] (referring specifically to Fair Labor Standards Act of 1938 and noting that it “was enacted during a time when workers desired more leisure time away from their jobs but also wanted protection from job insecurity and unemployment.”).

76. See Scott Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 2–3 (2001) (“Workers desired more freedom (time) from their jobs for personal, home, community, and cultural life. They were also concerned about unemployment, arguing that employers should ‘spread the work’ by employing more people working shorter hours, rather than employing fewer people working longer hours.”).

77. See *id.* (observing that FLSA addressed issues of overwork, underpay, and spreading hours among more employees).

78. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV. 22, 30 (1978) (quoting 7 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 209–14 (Random House 1937)).

79. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2012) (providing section 206 to govern minimum wage requirements and section 207 to govern overtime requirements). Indicative of the time of enactment, the FLSA also prohibited child labor and required employers to keep accurate time records. See *id.* §§ 211(c), 212 (providing record keeping requirement and child labor provisions respectively).

80. States can go above this minimum wage “floor,” and often do, but cannot statutorily go below it.

81. The FLSA does not cover all workers; for many low-wage earners, the FLSA simply does not apply. For example, home health care workers subject to the FLSA’s companionship exemption are not covered by the minimum wage protection. Similarly, agricultural workers and live-in domestic workers are not subject to overtime requirements. And tipped employees can have their wages reduced by half of the minimum floor with only minimum tip generation. See Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 555, 561 (2007) (citing 29 U.S.C. § 213(b)(12), (21) (2000)).

types of administrative, managerial, and professional work.<sup>82</sup> Although seventy-five years post-enactment, the FLSA remains the primary wage protection law of our country,<sup>83</sup> and as several commentators have noted,<sup>84</sup> it is beginning to show its age. “Overwhelming workloads” and the need to regulate overtime continues to be worrisome mainly to salaried professionals, who are exempt from overtime pay. And while premium overtime pay is an important part of one’s take home pay for the hourly workers who can get it,<sup>85</sup> for most hourly workers, “undertime,” not overtime, is the growing concern.

As currently structured, the FLSA fails to address the “hours” need. Much like the economic impetus of the Great Depression that spurred the push for the FLSA, today’s working poor struggling in a slack economy lack legal protection for hours promised but undelivered. The FLSA focuses on compensation for “work performed” as opposed to “work promised.” State laws go only part way in filling this gap in wage and hour protection. For hourly workers that are scheduled and report to work just to be summarily sent home, some states provide a minimum number of

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82. See 29 U.S.C. §§ 207, 213 (2012) (providing respectively for overtime pay and exemptions from minimum wage and overtime requirements for certain white-collar professions).

83. But such calls to action have gone unheeded as the FLSA’s wage protections have only been amended once (in the 1940s) with little current discussion of legislative fixes. See Portal to Portal Pay Act, 29 U.S.C. §§ 251–62 (2012) (amending various aspects of original FLSA).

84. See Miller, *supra* note 76, at 46–77 (examining “Overworked American” thesis and maximum hours permissible under FLSA); Ruan, *Same Law, supra* note 75, at 358 (discussing various scholarly criticisms of FLSA, specifically highlighting those focused on need for it to be updated to provide for employer flexibility, worker compensatory time, and expansion of its protections to new categories of workers); David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74, 79–110, 126–36 (1999) (discussing major arguments for and against comp time reform and concluding comp time reform might diminish workers’ rights); Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW 321, 331–41 (1996) (analyzing various exemptions under FLSA used by employers to minimize use of overtime and need for reform in this area); Gretchen Agena, Comment, *What’s So “Fair” About It?: The Need to Amend the Fair Labor Standards Act*, 39 HOUS. L. REV. 1119, 1126–56 (2002) (commenting on need to reform FLSA’s Duties Test and Salary Test); Ashley M. Rothe, Comment, *Blackberys and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?*, 54 ST. LOUIS U. L.J. 709, 726, 732 (2010) (articulating need for reform of FLSA exemptions to cover employees who utilize modern technology and work more from home).

85. See, e.g., *Misra v. Decision One Mortg. Co.*, 673 F. Supp. 2d 987, 991 (C.D. Cal. 2008) (noting defendants misrepresented to employees that they were exempt and not entitled to overtime pay); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D. Pa. 1984) (observing that plaintiffs alleged affirmative misrepresentations by employer about overtime which were sufficient to toll statute of limitations applicable to their claims); *Gentry v. Superior Court*, 165 P.3d 556, 567 (Cal. 2007) (“The likelihood of employee unawareness is even greater when, as alleged in the present case, the employer does not simply fail to pay overtime but affirmatively tells its employees that they are not eligible for overtime.”).

hours to be paid to those workers.<sup>86</sup> While over a dozen states have such “reporting pay” statutes, most provide only minimum coverage (e.g., two hours at minimum wage) and cover a narrow worker population.<sup>87</sup> Similarly, a smaller handful of states provide a minimum number of hours for workers who are *not* scheduled but called in to work during their “off days.”<sup>88</sup>

As employers in the new labor economy move to scheduling practices that embrace labor “flexibility” by sending people home early and calling them in when needed (in order to lower labor costs), more hourly employees are finding themselves scheduled to be “on call.”<sup>89</sup> However, under the FLSA and state wage and hour laws, “on call” time is only compensable in certain, narrow circumstances, limited to times when workers are “engaged to be waiting” as opposed to “waiting to be engaged.”<sup>90</sup> Because hourly workers are often afforded some measure of freedom during their “on call” time (thanks largely to technology such as smart phones), the hours spent are rarely compensable.<sup>91</sup>

As scheduling practices become more attuned to labor costs and sales fluctuations,<sup>92</sup> part-time hourly workers find their hours become less sta-

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86. See Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work: Legal Remedies for Unpredictable Work Hours and Income Instability* 19 (Univ. of Denver Sturm Coll. of Law Legal Research Paper Series, Working Paper No. 13-43, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2327903](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327903) (“[S]end-home provisions require a minimum number of hours of pay for workers who appear for a scheduled shift but are then sent home early due to a lack of available work or slow customer traffic.”).

87. See *id.* at 31–32 (observing that “the majority of states require two hours of guaranteed pay,” and that “[s]ome states’ call-in pay laws apply only to particular categories of workers”).

88. See *id.* at 30 (“States’ call-in pay laws generally resemble call-in provisions in union contracts, requiring a designated number of hours of pay for workers who are summoned to work during non-scheduled times.”).

89. See *id.* at 39 (“[S]ome restaurant managers already maintain a large pool of on-call wait staff ready to come to work when customer demand requires.”).

90. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 136–37 (1944) (holding that neither FLSA nor common law expressly precluded waiting time from being considered working time under FLSA, but noting that such determinations of whether waiting time is compensable under FLSA will be determined on case-by-case basis).

91. See, e.g., *Renfro v. City of Emporia*, 948 F.2d 1529, 1538 (10th Cir. 1991) (holding that district court properly found that city firefighters should receive overtime compensation for on-call time, given specific facts at hand that made it difficult for firefighters to pursue other interests during on-call time); *Cent. Mo. Tel. Co. v. Conwell*, 170 F.2d 641, 646 (8th Cir. 1948) (holding that plaintiffs were on duty for all hours which they may have had to respond to calls and should receive overtime pay despite frequent long periods of inactivity and rest); *Campbell v. Jones & Laughlin Steel Corp.*, 70 F. Supp. 996, 998 (W.D. Pa. 1947) (holding that plaintiffs should be compensated for overtime pay when required to be at work premises, despite intermittent periods of rest).

92. See *Schedule Flexibility*, *supra* note 16, at 298 (“When labor costs are mostly variable and employers can incur additional costs when employees work more but not fewer hours, logic dictates that work hours will be scarce rather than overly abundant and schedules erratic rather than fixed.”).

ble and often reduced. But federal wage laws, and with little exception, state wage laws, fail to address those fluctuations and reductions, and instead, leave the “hours” out of “wage and hour” protection.

### B. *The Protection Gap in Equal Pay Law*

Although pay equity has been a theme of gender rights litigation and feminist jurisprudence for at least the past half century, equity in hours distribution is rarely part of the conversation. Yet, women disproportionately feel the scheduling fluctuations and shortfalls facing part-time workers. First, women make up the vast majority of all part-time work done in this country.<sup>93</sup> But another dimension of the pay equity issue is that hours are often given to male workers because of the sex stereotypes at play in today’s workforce. The disparity felt by female part-time workers who lose hours to their male counterparts is not adequately addressed in the current pay equity argument.

The EPA came into being during the mid-twentieth century’s fight for women’s equality, although “[t]he idea of equal pay for equal work ‘dates from the early days of the factory system when women were introduced to industrial labor.’”<sup>94</sup> It prohibits discriminatory payment of lower wages to individuals who perform work substantially equal to work performed by those of the opposite sex.<sup>95</sup> The EPA predates the Civil Rights Act of 1964 by one year; it was codified in the FLSA, which originally made its claims subject to all FLSA exemptions.<sup>96</sup> Today, for purposes of the EPA, the white-collar exemption was eliminated, allowing professional, executive, and administrative employees to bring EPA claims.<sup>97</sup> Additionally, pursuant to the FLSA’s unique collective action mechanism, Rule 23 class actions are not permitted.<sup>98</sup> Instead, plaintiffs seeking collective action must

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93. JOINT ECON. COMM., *supra* note 5, at 1 (noting that in 2009, sixty-four percent of all part-time workers were women).

94. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17, 28 (2010) (citing BUREAU OF NAT’L AFFAIRS, EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, at 3 (1963)).

95. See 29 U.S.C. § 206(d)(1) (2012) (“No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than [that paid to] . . . the opposite sex . . .”). Under the EPA, any employer subject to the minimum wage provisions of the FLSA must refrain from paying female employees unequal wages for equal work. The EPA also extends to executive, administrative, and professional employees who are exempted from FLSA coverage for most purposes. See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 437–38 (2d ed. 1983).

96. 109 CONG. REC. H9182, 9193 (daily ed. May 23, 1963) (statement of Rep. St. George) (“[T]he prohibition against discrimination because of sex is placed under the Fair Labor Standards Act, with the act’s established coverage of employers and employees. All of the Fair Labor Standards exemptions apply . . .”).

97. See Education Amendments, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 235, 375 (1972) (codified as amended at 29 U.S.C. § 213(a)(1) (2012)).

98. See 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

bring a claim on their own behalf and all others “similarly situated,” and each affected employee must “opt in” to the case by filing a consent form<sup>99</sup>—a significant “second-class” status as compared to other class actions.<sup>100</sup>

To state a *prima facie* case under the EPA, a female claimant must prove that her job is substantially equal to that of a male worker who receives a higher wage in the same establishment: “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .”<sup>101</sup> All three factors—skill, effort, and responsibility—must be satisfied. Once the claimant makes the requisite showing that she is being paid at a lower rate than her male counterpart for equal work, the burden shifts to the employer to justify the disparity.<sup>102</sup> The EPA provides for four affirmative defenses: unequal pay is lawful if the disparity is the result of payments made pursuant to a: (1) seniority system; (2) merit system; (3) system measuring earnings by quantity or quality of production; or (4) if the disparity is based on any factor other than sex.<sup>103</sup>

In claims of lower hourly rates of part-time workers as compared to their full-time counterparts, although part-time workers are technically covered under the EPA,<sup>104</sup> courts are divided as to whether the practice of paying part-time workers at a lower hourly rate than full-time workers implicates the EPA.<sup>105</sup> When a female part-time worker is paid at a lower

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99. *See id.* “Under the FLSA, typical class actions are not permitted.” Eisenberg, *supra* note 94, at 29 n.102 (citing 29 U.S.C. § 216(b) (2006)). “Each individual plaintiff must file a consent form to ‘opt-in’ to the action.” *Id.*

100. *See generally* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523 (2012) (discussing differences between court interpretations of collective action under FLSA and Rule 23 class actions and analyzing negative effect that collective action rules of FLSA have on low income plaintiffs in FLSA litigation).

101. 29 U.S.C. § 206(d)(1). While the EPA applies equally to both women and men, the author here uses an example from the perspective of a female claimant.

102. *See* *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974) (“All of the many lower courts that have considered this question have so held, and this view is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.”).

103. 29 U.S.C. § 206(d)(1)(i)–(iv).

104. The courts have uniformly construed the EPA to cover part-time workers. *See, e.g.,* *Lanegan-Grimm v. Library Ass’n*, 560 F. Supp. 486, 488, 493–94 (D. Or. 1983) (holding that plaintiff part-time worker sufficiently stated claim under Equal Pay Act, showing she had not been compensated equal pay for equal work); *EEOC v. Sch. Bd.*, 1980 U.S. Dist. LEXIS 16971, at \*1–2 (W.D. Pa. Oct. 31, 1980) (holding that plaintiff part-time female custodians qualified for relief under EPA by showing unequal pay for equal work), *aff’d mem. sub nom. Marshall v. Sch. Bd.*, 661 F.2d 914 (3d Cir. 1981).

105. *Compare* *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 620–21 (E.D. Va. 2003) (concluding that part-time female worker could compare herself with full-time male worker for purposes of establishing *prima facie* case under

hourly rate than a full-time male worker, their employer can raise the fourth affirmative defense (“based on any other factor other than sex”) to justify the disparity.<sup>106</sup> The employer will raise the defense to say that the pay disparity is based on the part-time status, which constitutes a “factor other than sex.”<sup>107</sup> “Although many part-time workers could successfully state prima facie cases of discrimination under the EPA,” their claims are often not successful when the employer raises the fourth affirmative defense.<sup>108</sup>

But, sometimes, courts see the gender pay equity issues at play in such a dynamic.<sup>109</sup> As the federal district court found in *Lovell v. BBNT Solutions, Inc.*,<sup>110</sup> if part-time workers who brought EPA claims are prohibited from presenting comparative evidence of treatment of full-time workers, “such a rule would allow an employer to avoid the EPA’s strictures by simply employing women in jobs with slightly reduced-hour schedules and paying them at a lower rate than their male counterparts,” thereby “completely subvert[ing] the EPA’s purpose.”<sup>111</sup>

A more commonly successful EPA claim exists when female part-time workers know about, and can prove that, their hourly rate is lower than their male part-time counter-parts—as long as they work in the same enterprise and can also prove that their work is structurally the same.<sup>112</sup>

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EPA), with *EEOC v. Altmeyer’s Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987) (concluding that EEOC could not establish sex-based pay discrimination by comparing part-time worker with full-time worker); see also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, COMPLIANCE MANUAL § 10(IV)(F)(2)(h) (2000), available at <http://www.eeoc.gov/policy/docs/compensation.html> (“[P]ayment of disproportionately lower wages and benefits to part-time and temporary workers affects women more than men. For this reason, investigators should scrutinize closely employer assertions of part-time or temporary status as a factor other than sex that explains a compensation disparity.”).

106. See Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 739 (1986).

107. See *id.* (creating difficult burden for female part-time workers in providing their lower pay is based on gender).

108. *Id.*

109. See Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Car[e]ers” in the Workplace*, 13 DUKE J. GENDER L. & POL’Y 31, 37–39 (2006) (discussing case law under EPA allowing part-time workers to compare themselves to full-time workers for purposes of stating claim under EPA).

110. 295 F. Supp. 2d 611 (E.D. Va. 2003).

111. *Id.* at 621 (allowing issue of whether plaintiff, who was working reduced hours—approximately three-quarters of full-time hours—performed substantially equal work to her full-time counterpart to go to jury).

112. See Chamallas, *supra* note 106, at 740 (noting that interpretation of fourth affirmative defense in EPA promulgated by Wage and Hour Administrator of Department of Labor “clearly outlaws paying female part-time workers a lower hourly wage than male part-time workers doing identical work”); Williams & Westfall, *supra* note 109, at 39 (“[I]f a female plaintiff who works part-time brings a Title VII or Equal Pay Act claim and seeks to prove her case circumstantially, she would be required . . . to produce comparative evidence of favorable treatment of

On the issue of claims of scheduling discrimination, where male part-time workers are given better and more hours, the inequity would have to be viewed in terms of total compensation of part-time work instead of hourly units. For pay disparity in part-time work, courts look at the singular unit of an hour for pay by comparing the hourly rates. What, instead, if courts look at pay disparity in total number of hours given by the employer, much as they do when examining salary differentials between male and female professionals? In other words, could courts analyze shortfalls in scheduling of hours as a pay disparity issue? How would a female hourly worker make an EPA argument for disparity in scheduled hours of part-time workers? That male (part-time or full-time) workers were given more hours than their female counterparts because they were deemed a better, more “ideal”<sup>113</sup> worker?

Perhaps, female hourly workers can prove scheduling discrimination based on the sex stereotypes that motivated the scheduling shortfalls. There is evidence to support the finding that sex stereotypes play an important role in hours allocation. Managers and supervisors who give more hours to men because they are the main “breadwinners” might not even be consciously engaging in overt bias.<sup>114</sup> As one team of social science researchers found in 1986, female and male part-time workers are perceived differently: “For women, part-time employment is generally associated with substantial domestic obligations, and female part-time employees are consequently perceived as similar to homemakers . . . .”<sup>115</sup> In contrast, part-time employment in men is associated with difficulty in finding full-time employment.<sup>116</sup> More recent studies support the conclusion that these stereotypes remain in place today.<sup>117</sup> Such stereotypes motivate managers to rely upon their male part-time workers as the “ideal” worker supporting his family, while female part-time workers are left with filling scheduling holes around the ideal workers.

In fact, the U.S. Supreme Court has noted the role sex stereotypes can place in the workplace. In *Nevada Department of Human Resources v.*

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male part-time workers. . . . [In most workplaces] no such comparators exist because no males work part-time.”).

113. See Nicole Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiving Conundrum for “Real” Workers*, 39 STETSON L. REV. 777, 777–78 (2010) (explaining that female workers are often compared to ideal workers and struggle to meet that idealized version).

114. See Marion Crain, “Where Have All the Cowboys Gone?” *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1940 (1999) (explaining that incentive structures urge employees to work more hours).

115. Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCHOL. OF WOMEN Q. 252, 260–61 (1986).

116. *Id.*

117. See Porter, *supra* note 113, at 828–29 (noting that part-time worker is often synonymous with working mother); Lambert, *Making a Difference*, *supra* note 44, at 176 (recognizing that stratification of hourly workforce often gives workers of color, women with young children, and less educated individuals fewer opportunities for capturing benefits).

*Hibbs*,<sup>118</sup> the Court examined a family leave policy and held that the state's administration of leave benefits fostered "the pervasive sex-role stereotype that caring for family members is women's work" and "fostered employers' stereotypical views about women's commitment to work and their value as employees."<sup>119</sup>

Scholars have remarked that sex and family caregiving responsibility stereotypes increasingly have found their way into a variety of employment litigations.<sup>120</sup> Whether the EPA can be expanded to include hours parity as part of the statutory charge of protecting against pay disparities would require a broadening of the concept of "pay" to include total compensation, as opposed to hourly rates. Given the focus on compensation for "work performed" as opposed to "work promised" in the FLSA, such a reading is unlikely without further legislation.

### C. *Closing the Protection Gap Through Antidiscrimination Law*

Employment decisions based on sex stereotypes can violate the second major federal antidiscrimination legislation based on gender—Title VII—even "when an employer acts upon such stereotypes unconsciously or reflexively."<sup>121</sup> Title VII prohibits discrimination based on "sex," as well as other protected categories including race, color, religion, and national origin.<sup>122</sup> For some types of claims, the practice is lawful if it is "job related for the position in question and consistent with business necessity,"<sup>123</sup> and no alternative practice with less adverse effect exists.<sup>124</sup>

Enacted one year after the EPA, Title VII was also born in the Civil Rights Era. "The primary political impetus for Title VII stemmed from the civil rights crisis that erupted in Birmingham, Alabama in the early 1960s when the city's unapologetic police chief unleashed fire hoses and police

118. 538 U.S. 721 (2003).

119. *Id.* at 738.

120. *See Chamallas, supra* note 106, at 737 (explaining that most courts have been reluctant to find that less pay for predominantly female jobs created sex discrimination claim); Williams & Bornstein, *supra* note 6, at 172 (citing four-hundred percent increase in family responsibilities discrimination from 1996 to 2006, as compared to last decade).

121. EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), *available at* <http://www.eeoc.gov/policy/docs/caregiving.html>.

122. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

123. *Id.* § 2000e-2(k)(1)(A)(i).

124. *See id.* § 2002e-2(k)(1)(A)(ii) (explaining that complaining party must demonstrate alternative employment practice exists and respondent refuses to adopt such alternative employment practice).

dogs to quash a peaceful antidiscrimination protest.”<sup>125</sup> Public support for government action to protect racial minorities from such denigration grew as television coverage broadcasted night after night of the horrific scenes playing out in the South. In response, “literally overnight,” the Kennedy Administration crafted the first draft of a federal civil rights bill.<sup>126</sup> As the political process of passing the bill played out, the proposed civil rights law was substantially reworked to pass both Houses of Congress.

As is well documented, the language and protections changed dramatically as conservative opponents proposed liberal amendments in a strategic attempt to kill the bill.<sup>127</sup> Many commentators believe that one of the attempts to kill the civil rights bill included adding “sex” as a protected category.<sup>128</sup> Others maintain that: “Such authors and commentators are wrong. The prevailing conclusions misconstrue the complete story behind the battle to add ‘sex’ in Title VII. . . . Congress added sex as a result of subtle political pressure from individuals, who for varying reasons, were serious about protecting the rights of women.”<sup>129</sup>

Regardless, “the intense congressional debates that accompanied the bill’s passage illustrate the competing interests, bitter battles and various values that undergird the legislation.”<sup>130</sup> It also helps to explain the complexity of the law and the acknowledged difficulties in the judicially-created complex burden-shifting framework that has been borne from that history and compromise.<sup>131</sup>

125. David A. Forkner & Kent M. Kostka, *Unanimously Weaving a Tangled Web*: Walters, Robinson, *Title VII*, and the Need for Holistic Statutory Interpretation, 36 HARV. J. ON LEGIS. 161, 166–67 (1999) (citing Norbert A. Schlei, *Foreword*, in BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vii, viii (2d ed. 1983)).

126. See *id.* (explaining that drafters finished proposal for federal civil rights bill in two days).

127. See Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–38 (1997) (noting that Congress’s addition of sex to Title VII’s prohibitions was widely seen as joke).

128. See, e.g., Vicki Schultz & Stephen Peterson, *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, 1084–85 (1992) (explaining that prohibiting sex discrimination was viewed as joke, instead of sincere response to well-established sex discrimination in labor market).

129. Bird, *supra* note 127, at 138.

130. Forkner & Kostka, *supra* note 125, at 167 (citing CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985)).

131. See Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 491 (2006) (recognizing that Congress has forced courts to try to determine type of causation required by disparate treatment law); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 751 (2006) (acknowledging that few courts have attempted to dismantle standard business practices without stronger statutory mandate); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 940 (2005) (explaining that many aspects of Title VII, such as

In addressing part-time hourly workers, Title VII currently has very little precedent. Yet there are two Title VII frameworks and both have potential for remedy: disparate treatment theory and disparate impact theory. Disparate treatment theory has potential to address the scheduling shortfalls that female hourly workers face when their managers allocate more and better hours to their male counterparts based on sex stereotypes about family obligations. Disparate impact theory holds promise for remedying both scheduling discrimination (when company practices are at the heart of the inequity), as well as the earnings penalty felt (mostly) by female part-time workers who are paid an hourly rate lower than their full-time counterparts. As discussed below, even within Title VII's current framework, courts should conceptualize gender discrimination as protecting female hourly workers from discrimination in scheduling.

### 1. *Disparate Treatment Theory*

Title VII prohibits disparate treatment on the basis of sex (among other protected categories) with regard to all “terms and conditions of employment.”<sup>132</sup> As legal commentators have noted, the Supreme Court has never been precise in defining what constitutes disparate treatment.<sup>133</sup> But it clearly requires causation: adverse employment decisions are prohibited only where they occur “because of” protected characteristics, including sex.<sup>134</sup> “Yet, the words ‘because of’ do not tell us what type of causation is required”<sup>135</sup> and courts struggle with the concept because there is no “literal direct evidence of a state of mind.”<sup>136</sup> As Professor Charles Sullivan has opined:

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how sufficiently linked specific trait must be to race or sex to count as discrimination, remain unclear); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 8 (2005) (noting that Title VII case law has analytical errors).

132. 42 U.S.C. § 2000e-2 (2012).

133. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985–86 (1988) (“[D]isparate treatment cases, which involve ‘the most easily understood type of discrimination . . . .’”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977) (“‘Disparate treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”); Allen R. Kamp, *Ricci v. Destefano and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. U. L. REV. 1, 6 n.42 (2011) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)) (indicating disparate treatment of men and women in employment includes “requiring people to work in a discriminatorily hostile or abusive environment”).

134. Katz, *supra* note 131, at 491 (illuminating ambiguity in applying Title VII when employers rely on both legitimate and illegitimate reasons for firing employee).

135. *Id.*

136. Kamp, *supra* note 133, at 7 (citing Michael Zimmer, *The Employer’s Strategy in Gross v. FBL Financials*, CONCURRING OPINIONS (Nov. 4, 2009, 10:43 AM), <http://www.concurringopinions.com/archives/2009/11/the-employers-strategy-in-gross-v-fbl-financials.html>).

Disparate treatment doctrine, whether individual or systemic, relies ultimately on a finding of intent or motive to discriminate, and no consensus exists as to what those concepts embrace or, indeed, whether they are synonymous. Certain core conduct is clearly prohibited, namely conscious decision making to exclude members of particular races either because of animus or other reasons. But the extent to which less conscious influences count is unclear forty years after Title VII's passage, and equally unclear is when a trait will be viewed as sufficiently linked to race or sex to count as race or gender discrimination based on that trait.<sup>137</sup>

Female hourly workers that face hours discrimination based on their managers' preference to give better and more hours to male workers might be able to prove that the schedule shortcomings they face are *because* of their gender, if given enough evidence of sex stereotyping or other discriminatory animus by the manager. But that only gets them part way towards establishing a disparate treatment claim. In sum, there are three potential shortcomings. First, to make a prima facie showing, a plaintiff must provide proof of a "tangible" or "adverse" employment action, which currently does not include scheduling changes. Second, because the disparate treatment framework is based on an equal treatment model, courts often require comparator evidence, which might be lacking given the high percentage of part-time work in gender-segregated workplaces. Lastly, because workplaces that require part-time employees (such as retail and other service providers) use scheduling models that emphasize flexibility and reduction of labor costs, courts currently view part-time work as part of a desirable, flexible workplace. This ignores the scheduling discrimination or hours equity issue, and instead, as currently conceptualized, excludes it from protection by Title VII.

a. Hourly Workers' Scheduling Shortfalls as Adverse Employment Actions

In making a prima facie case of disparate treatment discrimination where the female plaintiff is relying upon circumstantial evidence to prove that she was treated differently because of her sex, courts rely on the familiar *McDonnell Douglas*<sup>138</sup> burden-shifting framework: a plaintiff must first make a "showing that she was a qualified member of a protected class and was subjected to an adverse employment action in contrast with similarly situated employees outside the protected class."<sup>139</sup> The burden then shifts to the employer to show that there is a legitimate, non-discriminatory rea-

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137. Sullivan, *supra* note 131, at 940.

138. 411 U.S. 792 (1973).

139. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

son for the adverse action, which can be rebutted by the plaintiff showing that the employer's reason was pretext for discrimination.<sup>140</sup>

Although the prima facie showing is deemed "not onerous,"<sup>141</sup> federal courts approach the adverse employment action element from very different standpoints.<sup>142</sup> Several courts have a broad view of the types of actions that meet the standard, requiring merely a "tangible" employment action, such as a negative performance review.<sup>143</sup> Others take a "restrictive" view, requiring that the plaintiff suffer an "ultimate employment action," such as a termination.<sup>144</sup> Another subset of courts adopts the "intermediate" position as to what constitutes an adverse employment ac-

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140. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981) (describing basic allocation of burdens and order of presentation in Title VII case involving discriminatory treatment).

141. *Id.*

142. See *Ray v. Henderson*, 217 F.3d 1234, 1240–41 (9th Cir. 2000) (explaining that circuit courts were split in determining what constitutes adverse employment action); see also Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 623 n.3 (2003) (noting three different circuit frameworks for adverse employment actions).

143. See *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002) (stating adverse action requirement is met whenever financial terms of employment are diminished, transfer significantly reduces career prospects, job is changed in some other way that injures employee's career, or where working conditions are changed so as to cause "significantly negative alteration in [the] workplace environment"). But see *Longstreet v. Ill. Dep't of Corr.*, 276 F.3d 379, 383–84 (7th Cir. 2002) (holding that employee's "negative performance evaluations and [the requirement that she] substantiate . . . her absences from work [as] illness-related" were not "tangible job consequences and therefore . . . not adverse employment actions . . . under Title VII"); *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 612–13 (7th Cir. 2001) (finding that neither unfavorable performance evaluations nor oral or written reprimands sufficiently implicated tangible job consequences, even though "each . . . reprimand brought [plaintiff] closer to termination," absent evidence of any "immediate consequence of the reprimands"); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (requiring that retaliation must be "tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment").

144. See *Soledad v. U.S. Dep't of Treasury*, 304 F.3d 500, 507 (5th Cir. 2002) ("[L]ateral transfer . . . with no change in pay is not the type of ultimate employment action necessary for an adverse employment action . . . in a retaliation claim." (citation omitted)); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) ("[A]ction complained of may have had a tangential effect on [plaintiff's] employment, [the employer's action must] rise to the level of an ultimate employment decision to be actionable under Title VII."); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (holding that only "ultimate employment decisions" are actionable); see also *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 691–92 (8th Cir. 2001) (holding that, even if employee received poor performance review as result of her report of sexual harassment, "a negative review is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment"); *Cross v. Cleaver*, 142 F.3d 1059, 1073 (8th Cir. 1998) (finding that in order to make out prima facie case of retaliation, employee must suffer "ultimate employment decision").

tion.<sup>145</sup> But even in decisions that adopt the broadest view, harms deemed actionable are overwhelmingly narrowly construed.<sup>146</sup>

While courts typically find compensation reduction to be sufficiently adverse in nature to meet the legal standard,<sup>147</sup> changes to scheduling shifts are often not.<sup>148</sup> Accordingly, part-time female plaintiffs who can effectively argue that unwanted schedule changes come in the form of hour reduction resulting in total compensation loss will be successful in showing an adverse employment action. And as long as they can show through competent evidence that they wanted those hours and were denied them because of their gender, a disparate treatment claim should be met.

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145. See *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002) (holding that to make out prima facie case of discrimination, plaintiff must allege “a materially adverse change in the terms or conditions of . . . employment” and “[r]eassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions”); *Traylor v. Brown*, 295 F.3d 783, 788–90 (7th Cir. 2002) (quoting *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996)) (requiring that, to establish prima facie case, plaintiff must do more than show she was treated differently than other employees, but rather, must prove that “she suffered a materially adverse employment action,” which is defined as “more disruptive than a mere inconvenience or an alteration of job responsibilities”); *Weeks v. N.Y. State Div. of Parole*, 273 F.3d 76, 86–87 (2d Cir. 2001) (affirming district court’s granting of motion to dismiss because alleged claims, which included filing grievance, notice of discipline and counseling memo, and transferring plaintiff to another office failed to state prima facie case that she suffered “material” harm to term, condition or privilege of employment), *abrogated by Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002) (“[A] charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.”); *Harlston v. McDonnell-Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (“Changes in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make out a prima facie case.”); *Crady v. Liberty Nat’l Bank & Trust Co. of Ind.*, 993 F.2d 132, 135 (7th Cir. 1993) (finding that “materially adverse employment action” is element of prima facie case under Title VII).

146. See *Levinson*, *supra* note 142, at 634–36 (citing various cases where Title VII’s reach has been limited by courts, such as to circumstances involving only ultimate employment decisions); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1126 (1998) (“[T]here is a real and growing disarray concerning which improperly motivated employment decisions are legally actionable.”).

147. See, e.g., *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (“[R]etaliatory conduct must be serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment . . . [to] constitute [an] ‘adverse employment action.’”).

148. See, e.g., *Watts v. Kroger Co.*, 170 F.3d 505, 511–12 (5th Cir. 1999) (finding that allegations that employer changed employee’s work schedule and asked employee to perform new tasks after she filed complaint about her supervisor did not rise to level of adverse employment action because neither change in schedule nor new tasks affected employee’s salary; there is not adverse employment action where pay, benefits, and level of responsibility remain same).

For claims of undesirable scheduling changes in the form of undesirable and variable shifts, there are a handful of courts willing to find such schedule changes actionable, as long as the plaintiff can effectively prove that the change was a “material and adverse” change in the terms and conditions of employment.<sup>149</sup> For example, in *Spees v. James Marine, Inc.*,<sup>150</sup> the Sixth Circuit held that the plaintiff suffered an adverse employment action when she was forced to take the night shift because it “adversely affected her ability to raise her daughter as a single mother.”<sup>151</sup> Part-time workers must show that the change: occurred because they were women, was “more than a mere inconvenience,” and resulted in a substantial harm to them.

One hindrance to being able to prove scheduling discrimination in this way is that employers might let go of complaining part-time workers, barring their ability to gather evidence of disparate treatment. In service industries that employ cadres of part-time hourly workers, managers, and supervisors engage in “informal lay offs” to avoid “formal” terminations that trigger adverse employment actions. Professor Lambert, who conducts empirical-based research studies on hourly work, calls this practice “workloading,” noting that it allows “managers to reduce the number of workers for whom they were expected to provide hours without the need for formal action.”<sup>152</sup> While this practice advantages employers (who can more easily match labor costs to sales fluctuations), it disadvantages employees, both because of the loss of pay but also because it forestalls Title VII action by avoiding the formal termination procedure that triggers obvious adverse employment actions, hiding them from Title VII scrutiny. In such cases, courts should take their cues from EPA decisions, such as *Lovell v. BBNT Solutions, Inc.*, recognizing that “such a rule would allow an employer to avoid the EPA’s strictures by simply employing women in jobs with slightly reduced-hour schedules and paying them at a lower rate than their male counterparts,” which would “completely subvert the EPA’s purpose.”<sup>153</sup>

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149. *See, e.g.*, *Ginger v. Dist. of Columbia*, 527 F.3d 1340, 1344 (D.C. Cir. 2008) (“As the officers convincingly argue, inconvenience resulting from a less favorable schedule can render an employment action ‘adverse’ even if the employee’s responsibilities and wages are left unchanged.”); *Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001) (holding transfer to night shift as adverse employment action because “the change in hours interfered with [the plaintiff’s] education”).

150. 671 F.3d 380 (6th Cir. 2010).

151. *Id.* at 392.

152. *See* Lambert, *Passing the Buck*, *supra* note 44, at 1220–21 (“This practice had the additional advantage of maintaining a ready pool of workers who could be put back on the schedule when demand increased.”).

153. *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 621 (E.D. Va. 2003) (allowing issue of whether plaintiff, who was working reduced hours—approximately three-quarters of full-time hours—performed substantially equal work to her full-time counterpart to go to jury).

b. Finding Hourly Female Workers' Comparators

At its core, disparate treatment theory rests on the equal treatment doctrine, whereby an "employer must treat women like men only if the women are similarly situated to the men."<sup>154</sup> If a worker gets to the final stage of the *McDonnell Douglas* burden-shifting framework, the plaintiff employee must prove pretext, where the courts often require proof of comparative evidence that the employer treated other similarly situated employees more favorably than the plaintiff employee.<sup>155</sup> Comparator employees are similarly situated to the plaintiff employee when they have "similar jobs and display similar conduct."<sup>156</sup>

Again, courts are split as to how "similarly situated" the plaintiff and comparator must be, with some courts holding that they "need not be identical," but rather "similar in all material respects,"<sup>157</sup> while others demand that they be "nearly identical" in "all relevant respects."<sup>158</sup> The Eleventh Circuit, which has adopted a more restrictive approach to comparator evidence, held that requiring "identical" evidence keeps "courts from second-guessing employers' reasonable decisions and confusing apples with oranges."<sup>159</sup>

Accordingly, most courts reviewing Title VII gender disparate treatment cases require some showing of comparator evidence in order to successfully prove pretext. In the case of part-time hourly female workers, proving that a male counterpart received hours that the female wanted is a difficult, if not impossible, standard. Even under the less rigorous "similar in all material respects" standard, employers can easily show that managers made rational choices around scheduling needs that have nothing to do with gender, such as seniority, shift rotations, reliability, job experience, and others. This is especially problematic in gender-segregated workforces, such as cashiers or wait staff where the predominant class of workers are female. Finding male part-time counterparts might be impossible because they are nonexistent.

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154. See Porter, *supra* note 113, at 791 (citing Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118, 1142-43 (1986)).

155. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713 n.2 (1983) (recognizing that plaintiff provided sufficient evidence to demonstrate white persons were consistently promoted and detailed over him and all other black persons); *Burke-Fowler v. Orange Cnty.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (reiterating elements of *McDonnell Douglas* analysis); *Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 641 (9th Cir. 2003) ("Employees in supervisory positions are generally deemed not to be similarly situated to lower level employees."); *Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir. 1991) (requiring plaintiff to show preferential treatment was given to younger employee under "nearly identical circumstances").

156. *Vasquez*, 349 F.3d at 641.

157. *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1157 (9th Cir. 2010) (internal quotation marks omitted).

158. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004).

159. *Burke-Fowler*, 447 F.3d at 1323.

However, another avenue exists for certain types of cases where comparator evidence is lacking. A handful of courts (and several scholars) have argued that comparator evidence “is not required by Title VII jurisprudence”<sup>160</sup> in cases of family responsibility discrimination (FRD), where plaintiffs sue their employers for discriminating against them based on their responsibilities to care for family members.<sup>161</sup> In those situations, comparative evidence is difficult, if not impossible.<sup>162</sup> In fact, the Equal Employment Opportunity Commission (EEOC) recently endorsed FRD discrimination as a legitimate cause of action under Title VII.<sup>163</sup> But again, there are limitations to FRD claims as applied to female hourly workers losing out on hours to their male counterparts. Even FRD claims must prove that the workers suffered an adverse employment action because of their sex, on top of proving that gender stereotypes operated to their disadvantage. While sex stereotype evidence is helpful in showing pretext, hourly workers will have difficulty proving the prima facie case to begin with.

c. Scheduling Shortfalls Affecting Female Part-Time Workers Is Not a “Choice”

Although the U.S. Supreme Court has recognized that “schedule changes matter to mothers,”<sup>164</sup> most courts recognize part-time work, in the scanty handful of cases that do examine it, as a “choice” made by women to balance work and family. This “flexibility” is attractive to family caregivers who need a workplace that can accommodate their responsibilities, and courts are clear that choosing a part-time, flexible path is not protected by antidiscrimination law because workers place themselves on

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160. Joan C. Williams & Stephanie Bornstein, *The Evolution of “Fred”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1350–51 (2008).

161. See Joan C. Williams & Cynthia Thomas Calvert, *Introduction*, in WORKLIFE LAW’S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION (2006) (discussing family responsibilities discrimination (FRD)). FRD includes pregnancy discrimination, discrimination against mothers (and in more limited circumstances, fathers), and discrimination against workers with other family caregiving responsibilities. FRD cases got a shot in the arm when the EEOC issued its 2007 Enforcement Guidance on caregiver discrimination. See EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> [hereinafter EEOC ENFORCEMENT GUIDANCE].

162. See Williams & Calvert, *supra* note 161 (describing difficulty in obtaining comparative evidence).

163. See EEOC ENFORCEMENT GUIDANCE, *supra* note 161 (“Employment decisions based on stereotypes violate Title VII.”).

164. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006) (“A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children.”).

such a path deliberately for the flexibility it can provide.<sup>165</sup> Sex stereotypes play an important role in the courts' view that part-time work is a "choice" that Title VII does not protect. Legal scholars, such as Professor Martha Chamallas, have persuasively argued that the inferior status of part-time work "stems in part from sex discrimination."<sup>166</sup>

This line of reasoning muddies the water for future scheduling discrimination cases because the courts fail to differentiate between workers for whom part-time work is voluntary versus involuntary (meaning they want more hours or full-time status but are denied from those positions or hours). Courts continue to insist that part-time status is a life-style choice of women looking for flexible work conditions.<sup>167</sup>

But, as witnessed in Parts II and III, (and what is not currently recognized by the courts is that) for many part-time female workers, part-time status is not a "choice" and in fact, many would take additional hours for added compensation if available. Social science researchers have convincingly shown that women are disproportionately affected by inconsistent scheduling practices, and would choose more hours if offered.<sup>168</sup> Because they work without any minimum hours guarantee, unrequested reduction of hours is not legally protected.

Moreover, any forced "flexibility" comes at a high price when one considers the need for stable schedules to allow for planning of child care, education, and other part-time work. Instead, it is the employers who benefit from flexible scheduling. In scheduling part-time hourly workers, employers have "a great deal of built-in flexibility to adjust hours downward in part-time jobs,"<sup>169</sup> and can do so without fear of Title VII exposure, even when they "flex out" mainly women because work in a part-time job is seen as a "choice" women make.

In sum, disparate treatment is a viable avenue for redress, not only based on the current legal precedent where evidence in discriminatory animus based on family caregiving responsibilities is actionable, but also for female hourly workers whose main claim is that they suffer hours ineq-

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165. See *Capruso v. Hartford Fin. Serv. Grp., Inc.*, No. 01 Civ. 4250 (RLC), 2003 WL 1872653, at \*5 (S.D.N.Y. Apr. 10, 2003) ("Title VII does not prohibit discrimination based solely on one's choice to work part time.").

166. Chamallas, *supra* note 106, at 711.

167. See *Meyer v. United Air Lines, Inc.*, 950 F. Supp. 874, 877 (N.D. Ill. 1997) ("As valid as these concerns may be, they still are 'personal reasons unrelated to the job.'" (citing *U.S. v. City of Chicago*, 853 F.2d 572, 579 (7th Cir. 1988))); *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1278 (4th Cir. 1985) (standing for proposition that discrimination is not present "when the quit is motivated by personal reasons unrelated to the job or as a matter of personal convenience").

168. See *Schedule Flexibility*, *supra* note 16, at 310 ("Even if workers are grateful for the opportunity to restrict their work hours, they may not be fully aware that they risk an earnings penalty when they restrict their availability for work, and if they are aware, their family responsibilities may limit their ability to choose otherwise."); *McCrate*, *supra* note 10 (providing empirical evidence to demonstrate that women are disproportionately affected by inconsistent scheduling practices).

169. Lambert, *Passing the Buck*, *supra* note 44, at 1214.

uities and “undertime” in disparate proportion to their male counterparts. It requires, however, specific evidence of discriminatory motive because of the workers’ gender, which is a difficult evidentiary hurdle.

## 2. *Disparate Impact Theory*

If some female part-time workers find it difficult to prove that managers intentionally schedule female hourly workers differently because of their sex or make decisions influenced by sex stereotypes, might scheduling practices violate Title VII’s other theory—one that does not require intentional discrimination, but instead, bans practices that result in unintended, but very real, disparities for women?

In contrast to the deliberate or intentional (if sometimes unconscious) discrimination at the heart of disparate treatment, disparate impact theory prohibits employer practices that negatively impact protected classes, including women, regardless of their intent. The Supreme Court in *Griggs v. Duke Power Co.*<sup>170</sup> first approved the theory in 1971,<sup>171</sup> and the Court continued to endorse the analysis in subsequent cases.<sup>172</sup> A sea change occurred in 1989, when the Court changed course and severely restricted the disparate impact analysis in *Wards Cove Packing Co. v. Atonio*.<sup>173</sup> Congress quickly rejected *Wards Cove* in the Civil Rights Act of 1991, by adopting statutory language defining the burden of proof under disparate impact theory and restoring the burden-shifting to a pre-*Wards Cove* standard.<sup>174</sup> However, Congress did codify the “specific practice” requirement, stating that the plaintiff must demonstrate that “each particular challenged employment practice causes a disparate impact.”<sup>175</sup>

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170. 401 U.S. 424 (1970).

171. *See id.* at 424–31, 436 (disapproving of employer’s use of high school diploma requirement and written tests that had severe racial disparate impact where employer had not evaluated whether these requirements were “reasonable measure of job performance”).

172. *See, e.g.,* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989–91 (1988) (holding that disparate impact analysis can be used to challenge subjective decision-making processes that produce significant racially disparate impact); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 427–34 (1975) (applying *Griggs* to disapprove employer’s use of written tests with severe racial disparate impact without considering whether tests measured job performance).

173. 490 U.S. 642, 658–59 (1989) (holding that employers need only offer evidence of “business justification” for challenged business practice and that plaintiffs in disparate impact cases have burden of proof in rebutting employer’s proffered business justification).

174. *See* 29 U.S.C. §§ 621–34 (2012) (providing rules regarding applicable burdens in employment discrimination cases).

175. 42 U.S.C. § 2000e-2(k)(B)(i). However, the 1991 Act did provide a narrow exception to the specific practice requirement. For cases where the plaintiff “can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.” *Id.*

Proving disparate impact, although returned to its originally intended analysis, remains a daunting challenge to plaintiffs.<sup>176</sup> It requires both sophisticated statistical analysis to show disparate effects and identification of the “specific practice” causing these effects.<sup>177</sup> Legal commentators agree that although vitally important in combating “invidious acts of prejudiced decision-making,” today, it is “very rare for plaintiffs other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII on a disparate impact theory.”<sup>178</sup> This remains especially true for low-wage hourly workers, because first, the statistical analysis is expensive and out of reach for most low-wage workers absent well-funded impact litigation, and second, the scheduling practices of employers in service industries are not likely to be a “specific practice” causing the effects, as required under current law.

a. Statistical Proof (and Class Litigation) Should Be Made Available to Low-Wage Hourly Workers

With regard to scheduling, to prove discrimination under this theory, plaintiffs would have to provide statistically significant evidence that more hours and preferred schedules were allocated to male hourly workers over female hourly workers in a given worksite. First, statistical analysis required to demonstrate the disparate effects is both hard to prove and not cheap to come by. Proving discrimination through statistical proof requires exacting evidence to a statistically significant degree demonstrating disparity. In order to have probative value, statistics need not reach “the level of scientific certainty,” but must be of “legal significance.”<sup>179</sup> Such statistics must take into account both the appropriate labor pool and the significant nondiscriminatory factors, typically through a multiple regression analysis.<sup>180</sup>

Any multiple regression analysis that must take into account the relevant labor pool (of the particular service industry job market) and other nondiscriminatory factors (such as preferences, requests, seniority, and experience) is set up to fail because of the high proof standard and because

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176. See Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115, 142–43 (2010) (describing difficulties demonstrating disparate impact); Selmi, *supra* note 131, at 734–43 (analyzing difficulty of proving disparate impact cases).

177. See *Smith v. City of Jackson*, 544 U.S. 228, 239–40 (2005) (holding that plaintiffs failed to identify with sufficient precision exact “practice” that caused disparate impact on basis of age in city’s formula for raising salaries of junior public safety officers to compete with other jurisdictions).

178. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analyses*, 63 FLA. L. REV. 251, 257–58 (2011).

179. See *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (noting that plaintiff’s burden is to “prove discrimination by a preponderance of the evidence,” not with “scientific certainty”).

180. See, e.g., *Lavin-McElency v. Marist Coll.*, 239 F.3d 476, 482 (2d Cir. 2001) (“It is undisputed that multiple regression analysis . . . is a scientifically valid statistical technique for identifying discrimination.”).

of the multiple factors involved in managerial scheduling decisions.<sup>181</sup> Moreover, even if that statistical proof was likely to be found, obtaining it is costly and outside the resources of most hourly workers. The statistical analysis is usually drawn by an expert retained by a lawyer, who passes the costs on to the defendant (if successful) or absorbs the costs (if unsuccessful).<sup>182</sup> That necessarily means that individual litigation of disparate impact claims is nearly impossible because lawyers are not willing to take on that magnitude of risk unless they can aggregate claims, making class actions the only realistic avenue of redress. Courts, including the Supreme Court, recognize this, acknowledging the importance of aggregate litigation as the only means of relief where a plaintiff's claim is too small economically to support individual litigation and "private attorney generals" are needed to diffuse the costs and risks among the class.<sup>183</sup>

But class actions have come under attack in recent years, and as a result, savvy plaintiffs' lawyers wanting to tackle untried legal theories are likely to be thin on the ground. First, in *Wal-Mart Stores, Inc. v. Dukes*,<sup>184</sup> the Supreme Court heightened the standard for commonality in class ac-

181. In fact, having a significant amount of discretion in making decisions in workers' scheduling is an explicit element in what makes one a manager for purposes of the FLSA. See *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 507 (6th Cir. 2007) (providing that scheduling is important managerial function).

182. See Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL'Y J. 395, 396-400 (2006) (addressing risk to plaintiffs' attorneys and named plaintiffs).

183. See Nantiya Ruan, *What's Left to Remedy Wage Theft?: How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1118 (2012) [hereinafter Ruan, *Remedy Wage Theft*] ("The courts, including the U.S. Supreme Court, routinely recognize the importance of aggregate litigation because it often remains the only means of judicial relief where a plaintiff's claim is too small economically to support individual litigation."); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (internal quotation marks omitted)); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually."); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950 LBSJCF, 2011 WL 2671813, at \*4 (S.D.N.Y. Jul. 7, 2011) ("In this case, the plaintiff would be foreclosed from bringing her pattern or practice claim . . . by the practicality of economic pressures limiting the value of her claim compared with the cost of prosecuting it . . ."); *Mascol v. E & L Transp., Inc.*, CV-03-3343 CPS, 2005 WL 1541045, at \*7 (E.D.N.Y. June 29, 2005) (holding "the class action form is superior to alternative methods of adjudicating this controversy" because claims were negative value); *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 725 (N.J. 2007) ("Because of the very real likelihood that class members will not bring individual actions, class actions are 'often the superior form of adjudication when the claims of the individual class members are small.'").

184. 131 S. Ct. 2554 (2011).

tion certification, making it more difficult for plaintiffs to prove class commonalities when separate, independent decision-makers are involved.<sup>185</sup> The Supreme Court reversed the lower court's certification of Title VII gender discrimination claims based on a theory that individual managers' unbridled discretionary decision-making was influenced by impermissible gender stereotyping, resulting in statistically significant pay disparities.<sup>186</sup> The *Dukes* Court found that the commonality requirement was not satisfied on the record before it and held that to satisfy Rule 23(a)(2), plaintiffs only need to identify one common question of law or fact, but that question must be central to the validity of each class member's claim.<sup>187</sup> With regard to statistical proof, the Court, in dicta, cast doubt on the lower court's conclusion that *Daubert* did not apply to expert testimony at the class certification stage.<sup>188</sup>

Second, in *Behrend v. Comcast Corp.*,<sup>189</sup> the Supreme Court revisited the Rule 23(b)(3) predominance inquiry in the context of damages, holding that "the proper standard for evaluating certification" requires a showing "that damages are capable of measurement on a classwide basis."<sup>190</sup> In *Comcast*, an antitrust class action, the district court and Third Circuit did not credit defendant's challenge to plaintiffs' regression model because "those arguments would also be pertinent to the merits determination."<sup>191</sup> The Supreme Court reversed class certification, holding that the Third Circuit should not have "simply concluded that respondents provided a method to measure and quantify damages on a classwide basis," without deciding "whether the methodology [was] a just and reasonable inference or speculative."<sup>192</sup>

Lastly, in *AT&T Mobility LLC v. Concepcion*,<sup>193</sup> the Supreme Court examined the viability of mandatory arbitration clauses that prohibit class actions, and determined that mandating individual arbitration is consis-

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185. *See id.* (providing that evidence of gender-based decision-making by supervisors "does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common").

186. *See id.* at 2547 (describing circumstances giving rise to litigation).

187. *See id.* at 2551 ("Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.").

188. *See id.* at 2553–54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, [the expert's] testimony does nothing to advance respondents' case.").

189. 133 S. Ct. 1426 (2013).

190. *Id.* at 1432.

191. *Id.* at 1433.

192. *Id.* at 1433 (internal quotation marks and citations omitted) (emphasis added).

193. 131 S. Ct. 1740 (2011).

tent with federal labor policy.<sup>194</sup> The plaintiffs in *Concepcion* brought a class consumer fraud suit, but the defendant moved to compel arbitration, which included a class waiver.<sup>195</sup> The Court upheld the arbitration clause, including the class waiver, finding that “[a]rbitration is poorly suited to the higher stakes of class litigation” because, in part, “class arbitration greatly increases risk to defendants.”<sup>196</sup> As one of this Article’s authors has explained, changing the forum from public litigation to private arbitration and prohibiting aggregation of claims incentivizes unscrupulous employers to profit from the work of hourly workers by closing “the doors of justice on low-wage workers.”<sup>197</sup>

Together, this recent litany of Supreme Court class action decisions reflects the growing judicial hostility towards class treatment. As Justice Kagan recently recognized in a dissenting opinion: “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”<sup>198</sup> Such judicial hostility casts doubt on the likelihood of success of worker class actions moving forward. Given the importance that aggregating claims has for low-wage workers, this hostility has significant consequences.

#### b. Recognizing Scheduling as a Specific Practice

Disparate impact claims brought by hourly workers for scheduling disparities might fail under the specific practice requirement because of the plaintiffs’ inability to show a specific employment practice that disadvantages female part-time workers.<sup>199</sup> In order to make a successful disparate

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194. *See id.* at 1748 (“Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”).

195. *See id.* at 1744 (describing circumstances giving rise to litigation).

196. *Id.* at 1751–52 (providing reasons why arbitration is poorly suited for class litigation).

197. Ruan, *Remedy Wage Theft*, *supra* note 183, at 1105 (listing factors that disenfranchise low-wage workers). This argument is even more important given the recent Supreme Court decision of *American Express Co. v. Italian Colors Restaurant*, where, in an antitrust class action, the Court declined to apply the “effective-vindication rule,” that recognizes when an arbitration mandate is a barrier to the vindication of meritorious federal claims, requiring it insulates wrongdoers from liability. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting). As Justice Kagan noted in her dissent, “the majority disregards our decisions’ central tenet: An arbitration clause may not thwart federal law, irrespective of exactly how it does so. Because the Court today prevents the effective vindication of federal statutory rights,” joined by Justices Ginsberg and Breyer. *Id.* at 2313.

198. *Am. Express Co.*, 133 S. Ct. at 2320.

199. *See Brown v. Super K-Mart*, No. 98 C 3498, 1999 U.S. Dist. LEXIS 9525, at \*13 (N.D. Ill. June 14, 1999) (finding that full-time and part-time employees are not similarly situated); *LaRocco v. Nalco Chem. Co.*, No. 96 CV 3980, 1999 WL 199251, at \*13 (N.D. Ill. Mar. 30, 1999) (holding that full-time and part-time employees are not comparable); *Schallop v. N.Y. State Dep’t of Law*, 20 F. Supp. 2d

impact claim, plaintiffs are required to show “each particular challenged employment practice causes a disparate impact.”<sup>200</sup> This exacting standard results in many disparate impact cases failing at the proof stage because the plaintiff could not identify a specific employment practice that linked statistical differences to sex. “For example, employees who base disparate impact claims on managers’ preferences<sup>201</sup> or on informal practices<sup>202</sup> as opposed to company policy often see their claims fail because of the specific practice requirement.”<sup>203</sup>

With regard to earnings penalties for part-time work as compared to full-time work, courts analyzing the specific practice requirement will likely require that part-time workers make a specific showing of particular scheduling practices with statistical proof to have caused the disparate impact. Allowing managerial subjectivity in decisions regarding scheduling could be seen as an informal practice unable to have redress under this theory. Moreover, courts may require that the workers be similarly situated to other part-time workers in their claims. For example, in *Payne v. Huntington Union Free School District*,<sup>204</sup> the federal district court held that a part-time, temporary employee must compare herself with other part-time, temporary employees, and not full-time employees, in granting summary judgment against her.<sup>205</sup>

In the case of a female part-time worker comparing herself to other male part-time workers in claiming a disparate impact in scheduling shortfalls, the plaintiff would also have an uphill battle. She would have to necessarily rely upon managerial preferences and informal practices because few workplaces have a formalized corporate policy that can be successfully challenged under this theory.<sup>206</sup> Instead, managers would likely

384, 403 (N.D.N.Y. 1998) (“Comparing women working part-time with men working full-time provides no guidance because it is impossible to discern from those statistics whether any disparity is based on gender or on part-time status, a classification not protected.”); *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1285 (N.D. Ill. 1986) (requiring “a specific, facially neutral practice of the employer which disproportionately excludes members of a protected group”).

200. 42 U.S.C. § 2000e-2(k)(B)(i) (2012).

201. *See, e.g., Gullet v. Town of Normal*, 156 F. App’x 837, 842 (7th Cir. 2005) (holding that hiring male full-time street maintenance worker from all-male waste division was not company policy but rather manager’s preference, and thus female plaintiff did not establish specific employment practice).

202. *See, e.g., Mathis v. Wachovia*, 509 F. Supp. 2d 1125, 1143 (N.D. Fla. 2007) (holding that absence of policy to investigate apparent racial inequities is not considered company policy sufficient to meet specific employment practice requirement).

203. Linos, *supra* note 176, at 142 (noting frequent failure of disparate impact claims based on informal practices or manager preferences).

204. 219 F. Supp. 2d 273 (E.D.N.Y. 2002).

205. *See id.* at 281 (stating court’s holding).

206. Any theory that individualized decision-making is a specific corporate policy in violation of Title VII would probably fail, given the theory’s demise in *Wal-Mart v. Dukes*. For a further discussion of *Wal-Mart v. Dukes*, see *supra* notes 184–88.

successfully assert that they used other preferences (such as reliability, experience, and seniority) to defeat the specific practice claim. For example, in *Gullet v. Town of Normal*,<sup>207</sup> a circuit court held that hiring a male full-time street maintenance worker from an all-male waste division was not a company policy but rather a manager's preference, and thus the female plaintiff did not establish a specific employment practice.<sup>208</sup> Accordingly, disparate impact claims will be an unlikely source of protection for scheduling discrimination and earnings penalties until the courts recognize that scheduling is a specific employer practice with significant consequences for workers, and that procedural barriers should be breached if they prevent the vindication of substantive rights.<sup>209</sup>

#### V. REMEDYING THE SCHEDULING SHORTFALLS AND RECOGNIZING HOURS EQUITY

The pay inequity between women and men is not just about a woman making a percentage of every dollar that a man makes. In today's workforce, where nearly two-thirds of the part-time workforce are women, the pay gap is exacerbated by both the earnings penalty of part-time work (where part-time workers make less per hour than their full-time counterparts) and female part-time workers suffering fewer scheduled hours because of discriminatory sex stereotypes at play. With only minor reconceptualizing, legal protection for female hourly workers can be more comprehensive and effective. But if courts fail to incorporate scheduling shortfalls into their understanding of current antidiscrimination laws, this Part suggests statutory fixes to specifically address these important issues and highlights the need for renewed advocacy for part-time low-wage workers. Three potential avenues to address and combat these underdeveloped components of the gender pay gap are identified below: statutory redress; community organizing and collective action; and renewed public regulation and enforcement.

##### A. Existing Legal Remedies and Statutory Fixes

Addressing the pay inequities of female hourly workers is unlikely to enjoy much success without legal remedies available to combat the discrimination they face. The federal statutes addressed in Part IV can be

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207. 156 F. App'x 837 (7th Cir. 2005).

208. *See id.* at 842 (stating court's holding).

209. Courts have recognized that procedural rules that prohibit the adjudication of substantive rights ought to be amended to allow such claims, but those cases are in the clear minority and are often overturned. *See, e.g., In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 218 (2d Cir. 2012) (holding that class action waiver in agreement between American Express and merchants "would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery"); *In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) (same); *In re Am. Express Merchs.' Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) (same).

employed more expansively in impact litigation efforts, while others need amending to fully represent female hourly workers' needs.

First, existing worker rights laws could be a source of redress for hourly workers if they were able to find private or government attorneys open to challenging harmful scheduling practices. At the state level, reporting pay laws can assist part-time workers with additional wages when sent home or called in to work, while also educating and encouraging employers to adopt fairer scheduling practices.<sup>210</sup>

At the federal level, impact litigation challenging the disparate treatment of female hourly workers in the preferential scheduling of hours to male workers should be brought under Title VII. As explained in Part IV, such an attempt might fail unless courts are persuaded by social science and other evidence that sex stereotyping remains rampant in today's workplace. Similarly, disparate impact challenges under Title VII to the corporate practice of paying full-time workers more per hour than part-time workers could be challenged. Innovative and well-funded legal advocates that have the resources to retain expert statistical analysis and data collection might be able to successfully argue that the practice of paying part-time workers less per hour for the same work, while non-discriminatory on its face, has a disparate effect on female hourly workers. These suits would be challenging, but with the right clients, evidence, resources, and creative lawyering, these impact litigations could move the law in the direction of hourly worker protection.

Second, legislative efforts to address the pay gap specifically, and part-time work generally, would have a tremendous effect on pay inequities. The FLSA is due for a face-lift. Recent legislative efforts to amend the FLSA have been solely focused on eliminating and curtailing overtime premium pay. The most recent attempt is the confusingly named "Working Families Flexibility Act," which would allow employers to pay their workers nothing extra for overtime work, other than the potentially empty promise of compensatory time that can only be used at the employer's discretion.<sup>211</sup> Instead, the efforts to amend the FLSA should specifically address the unfair labor practices of disparate hours allocation and scheduling fluctuations that negatively impact female hourly workers.

Legislative efforts could also focus on part-time work more generally. Prior scholars have recognized this hole. For example, Professor Nicole Porter suggests that Congress enact a "Part-Time Parity Act" to "alleviate the marginalization of part-time workers" by mandating that employers pay part-time workers proportional wages and fringe benefits at a propor-

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210. See Alexander, Haley-Lock & Ruan, *supra* note 86 (detailing "call-in" and "send-home" pay laws).

211. See H.R. 1406, 113th Cong. (2013), available at <http://www.govtrack.us/congress/bills/113/hr1406/text> ("An employee may receive, in accordance with this subsection and in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.").

tional rate as full-time employees performing equal work.<sup>212</sup> Such legislative efforts might not ultimately be successful, but even so, such efforts would raise public awareness about the pay inequities entrenched in our workplaces. One way to raise awareness would be for the federal government to update the 2001 Current Population Survey to provide meaningful, updated statistics on work hours and the desirability of more hours for part-time workers.<sup>213</sup>

Lastly, legal remedies are meaningless if low-wage hourly workers are unable to access them. For hourly workers unable to attain attorney representation for their individual claims, aggregating them with other workers is often the only way to have them addressed.<sup>214</sup> It is only through combining hourly workers' relatively small damage award with multiple similarly-situated workers, do class action attorneys have an incentive to become "private attorney[s] general" combating discriminatory workplace harms.<sup>215</sup> As class action practice comes under greater judicial scrutiny and the legal standards for class certification become more difficult to meet (as outlined in Part IV), fewer private plaintiffs' attorneys are willing to risk the high costs of these cases. Impact litigation nonprofits (such as the NAACP Legal Defense Fund, the Impact Fund, and National Employment Law Project) are needed to fill that hole in pushing employers to redress pay inequities.

B. *Legal Mobilization: The Call to Worker Centers, Worker Unions, and Collective Action*

The lack of legal rules that address problems of scheduling shortfalls and "the withdrawal of government's hands in the labor market"<sup>216</sup> create significant challenges for workers. As discussed earlier, a significant body

212. Porter, *supra* note 113, at 828–35 (outlining facets of Part-Time Parity Act to address caregiving discrimination faced by working mothers).

213. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Contingent and Alternative Employment Arrangements* (Feb. 2001), [http://www.bls.gov/news.release/history/conemp\\_05242001.txt](http://www.bls.gov/news.release/history/conemp_05242001.txt) (detailing labor statistics from February 1999 to February 2001).

214. See generally Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727 (2010) (recognizing need for, and advocating, collective litigation for under-represented groups, such as low-wage workers, to ensure adequate legal remedies); Ruan, *Remedy Wage Theft*, *supra* note 183, at 1115 ("Given the financial barriers to bringing individual private causes of action, aggregating low-wage workers' claims has been the primary source of private enforcement of wage theft.").

215. See James M. Fraser, Note, *Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 99, 102–03 (2004) (discussing benefits of aggregating claims); see also *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265, 1269 (M.D. Ala. 2004) ("Collective action treatment . . . reflects a policy in favor of judicial economy by which 'the judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.'" (quoting *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989))).

216. Bernhardt, *supra* note 51, at 356.

of scholarship describes how workplace law has become increasingly unfriendly to workers over the past decade. As importantly, the agencies charged with enforcing workplace law are underfunded and understaffed. In the ten years prior to 2007, the number of wage and hour investigators employed by the U.S. Department of Labor (DOL) decreased by more than twenty percent, and the total number of federal wage enforcement actions decreased by almost forty percent. Although the Obama Administration added 350 investigators in 2010, the number of personnel devoted to investigation falls short when compared to the 130 million workers covered. State enforcement is similarly constrained. The Policy Matters Ohio study of state enforcement of wage and hour laws calculated that there is one wage and hour investigator for every 146,000 workers.<sup>217</sup> Florida, for example, has only six DOL wage and hour investigators for the entire state and no state equivalent to a DOL to investigate wage and hour complaints.<sup>218</sup> Without resources, workplace regulators rely on workers to complain.<sup>219</sup> This is simply not enough in low-wage workplaces where “the threat of employer retaliation is too great to depend on individual workers to carry the weight.”<sup>220</sup>

Equally important (albeit beyond the scope of this Article) are larger, cultural and discursive frameworks for understanding the concepts of labor, work, and the employment relationship itself that may inhibit workplace complaints. Professors Vallas and Prener locate the current precariousness of work within a “culture of enterprise,” that combines the dual rhetoric of self-fulfillment and individual responsibility.<sup>221</sup> They suggest that workers have internalized the concept of “responsibilization,” or “the obligation of perfecting themselves, and of bringing out the full value of their human capital, the better to take advantage of the opportunities that exist for the entrepreneurial self.”<sup>222</sup> Placing responsibilization on the shoulders of employees in a context of unilateral employer control over the timing of and production of work most certainly works to the advantage of employers.<sup>223</sup> Taking on the problems as their own in this

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217. See ZACH SCHILLER & SARAH DECARLO, POLICY MATTERS OHIO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES 2 (2010), available at <http://www.policy-mattersohio.org/investigating-wage-theft-a-survey-of-the-states> (providing statistics to reach conclusion of one wage and hour investigator for every 146,000 workers).

218. See CYNTHIA S. HERNANDEZ & CAROL STEPICK, RESEARCH INST. ON SOC. & ECON. POL’Y CTR. FOR LABOR RESEARCH AND STUDIES FLA. INT’L UNIV., WAGE THEFT: AN ECONOMIC DRAIN TO FLORIDA 6–7 (2012), available at <http://urbanhabitat.org/node/6759>.

219. Cf. WEIL, *supra* note 33, at 8 (“Compounding these resource limitations is the fact that a significant percentage of [Wage and Hour Division] investigations arise from worker complaints.” (citation omitted)).

220. Bernhardt, *supra* note 51, at 363.

221. Steven Vallas & Christopher Prener, *Dualism, Job Polarization, and the Social Construction of Precarious Work*, 39 WORK & OCCUPATIONS 331, 347–48 (2012).

222. *Id.* at 343.

223. In her analysis of the Family and Medical Leave Act, Catherine Albiston reminds us that the time norms and production schedules we take for granted

way, workers may be less inclined to formally complain or to join worker associations that might collectively negotiate for them.

Tapping into the current structure of worker centers can be one road of advocacy for female hourly workers. Worker centers are “community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers.”<sup>224</sup> Located in many urban areas,<sup>225</sup> worker centers already are organizing and collaborating with other nonprofit advocacy and government bodies to advocate for important wage issues. “The National Employment Law Project, Interfaith Worker Justice, Make the Road in New York, the Employment Law Center, and the UCLA Center for Labor Research and Education in Los Angeles are a few examples of successful organizations that are already working to provide support for low-wage workers.”<sup>226</sup>

Thus far, worker centers have focused attention on the pressing need of immigrant worker populations, who suffer a disproportionate amount of wage abuses, including wage theft and unsafe work conditions.<sup>227</sup> However, worker centers are already beginning to partner with other community nonprofits to address systemic harms, rather than singularly focusing on individual cases and needs.<sup>228</sup> Centers across the country are celebrating great successes in drafting and helping to enact local legislation to

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were the product of historical contests over the meaning of work. See CATHERINE ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT* (2010); see also Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1085 (2010) (“[E]mployees in an at-will system remain subject at all times to employers’ unilateral changes in work structure—a reality that may more heavily burden caregivers whose personal responsibilities are likely to be schedule-dependent.”).

224. Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 419 (2005–2006).

225. In fact, one study estimated that in 2006, there were 139 worker centers in the United States. See Rebecca J. Livengood, *Organizing for Structural Change: The Potential and Promise of Worker Centers*, 48 HARV. C.R.-C.L. L. REV. 325, 328 (2013) (citing Fine, *supra* note 224, at 421).

226. Ruan, *Remedy Wage Theft*, *supra* note 183, at 1142; see also KIM BOBO, *WAGE THEFT IN AMERICA* 103–16 (2d ed. 2011) (detailing organizations that help low-wage workers fight wage theft).

227. See generally JENNIFER GORDON, *SUBURBAN SWEATSHOPS—THE FIGHT FOR IMMIGRANT RIGHTS* (2005) (discussing working conditions for immigrant workers and worker centers that advocate for improved working conditions and higher wages); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (addressing problems faced by immigrant workers on Long Island, failure of government and private groups to confront problems, and presenting new model as alternative); Emily Stein, *The Workplace Project*, 50 N.Y.L. SCH. L. REV. 607 (2005–2006) (analyzing “The Workplace Project,” an independent center that organizes members to combat mistreatment of immigrant workers).

228. See Fine, *supra* note 224, at 419 (noting partnerships between immigrant worker centers and African American communities); Livengood, *supra* note 225 (arguing that worker centers should shift focus away from individual cases and toward structural changes).

combat wage abuses,<sup>229</sup> and participating in impact litigation for worker rights.<sup>230</sup> Worker centers are primed to collaborate with women's rights organizations, such as 9to5 (advocates for working families),<sup>231</sup> to advocate for hourly workers, which could be an important tool in the fight for equal pay.

Moreover, unions are another potential source of part-time worker advocacy. Today's labor scholars study the unions' struggle to rebrand themselves and make themselves relevant in the twenty-first century,<sup>232</sup> given the declining rate of union membership.<sup>233</sup> While the traditional union structure might not meet the needs of part-time workers, "next wave organizing"<sup>234</sup> could include part-time and hourly worker advocacy, encouraging employers to provide equal hourly rates to full and part-time workers, as well as parity among female and male hourly worker schedules. Workers themselves are organizing outside the traditional union framework to bring attention to workplace fairness issues.

For example, established in 2011, Our Walmart is a worker-led organization advocating for change in the working conditions at Walmart stores.<sup>235</sup> A cornerstone of Our Walmart's action is a Declaration of Respect that calls on the Walmart Corporation to "publicly commit to respect" and "listen to its Associates and to recognize freedom of association

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229. See Fine, *supra* note 224, at 436 (citing New York and other legislative successes).

230. See Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Sues JBS Swift for Religious and National Origin Discrimination in Colorado and Nebraska (Aug. 31, 2010), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-31-10.cfm> (announcing lawsuit filed by EEOC on behalf of low-wage workers in religious discrimination class action).

231. See 9TO5: WINNING JUSTICE FOR WORKING WOMEN, [www.9to5.org](http://www.9to5.org) (last visited Nov. 9, 2013) (advocating for women in workplace).

232. See generally Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 N.Y.L. SCH. L. REV. 337 (2005) (addressing approaches and strategies used by unions to increase membership); Charles Heckscher, *Organizations, Movements, and Networks*, 50 N.Y.L. SCH. L. REV. 313 (2005) (arguing that labor unions must adapt to evolving nature of employer organizations and movements to succeed); Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515 (2005) (discussing paradigm shift of business organizations and necessity of labor organizations to follow suit).

233. In 2012, the rate of union membership in the private sector dropped from 6.9% to 6.6%; the combined rate of American workers (public and private) belonging to a union was 11.3%, down from 11.8% the previous year and the lowest figure ever since the Bureau of Labor Statistics started collecting the data in 1983, when the rate was 20.1%. See Economic News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Union Membership News Release (Jan. 23, 2013), <http://www.bls.gov/news.release/union2.htm> (providing union membership statistics).

234. See generally Seth Harris, *Don't Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 N.Y.L. SCH. L. REV. 303 (2005) (discussing "next wave organizing").

235. OUR WALMART: ORGANIZATION UNITED FOR RESPECT AT WALMART, <http://forrespect.org> (last visited Nov. 9, 2013).

and freedom of speech.”<sup>236</sup> It asks for increased wages (thirteen dollars an hour) and, importantly, dependable and predictable schedules, as well as affordable health care that would ensure that “no Associate has to rely on government assistance.” According to its members, these changes would allow workers to succeed in their careers, the company to succeed in business, and customers to receive great service and value. In October 2012, Our Walmart members went on strike, a first in the company’s fifty-year history.

Hourly workers, as non-unionized workers, can also rely upon labor laws to protect their right to act collectively to negotiate and advocate with their employers for fair scheduling practices and hourly rates. The National Labor Relations Act (NLRA) protects all workers, not just unionized employees, from employer action that impinges upon their right to concerted activity,<sup>237</sup> which might protect hourly workers in a variety of contexts. For example, the NLRA has been found to protect workers who communicate on social media sites from adverse action by their employers. In *In re Hispanics United of Buffalo*,<sup>238</sup> five employees were fired after making critical remarks about their employer on Facebook; the National Labor Review Board ordered their reinstatement because it violated their right to protected concerted activity.<sup>239</sup> When workers make complaints about their pay, work schedules, or other terms and conditions of employment, the NLRA might provide protection from retaliatory measures.<sup>240</sup> Given the recent judicial scrutiny imposed on class action litigation, employee-driven advocacy is needed more than ever to address growing pay inequities.

### C. *Renewed Government Attention to Wage Rights*

In 2009, the Obama Administration publicized its commitment to wage and hour enforcement, committing additional resources for hiring

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236. OUR WALMART: ORGANIZATION UNITED FOR RESPECT AT WALMART, *Declaration of Respect*, <http://forrespect.org/sign-the-declaration/> (last visited Nov. 9, 2013).

237. See 29 U.S.C. § 158 (2012) (prohibiting employers from interfering with employees’ ability to organize).

238. No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges Sept. 2, 2011).

239. See *id.*; see also *Aroostook Cnty. Reg’l Ophthalmology Ctr.*, 317 N.L.R.B. No. 32 (1995), *enf. denied on other grounds* 81 F.3d 209 (D.C. Cir. 1996) (holding employee complaints to each other concerning schedule changes constituted protected activity).

240. The argument that worker advocates should look to the NLRA for protected worker activity is strengthened by the fact that early courts looked to the NLRA in interpreting Title VII. See *Franks v. Bowman Transport. Co.*, 424 U.S. 747 (1976) (applying NLRA caselaw in Title VII case and requiring award of retroactive seniority); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (noting that backpay provision of Title VII was modeled on NLRA, then applying standard under NLRA to Title VII that backpay ordinarily should be rewarded).

more DOL Wage and Hour Division investigators,<sup>241</sup> engaging in a new “regulatory philosophy” of requiring employers to audit themselves to ensure they are complying with the law,<sup>242</sup> and voicing a renewed commitment to investigate the misclassification of employees and enforcement of wage and overtime laws.<sup>243</sup> It is hard to calculate the success of these initiatives, given that the latest report analyzing DOL enforcement measures dates back to 2008.

However, the Joint Economic Committee (tasked with reviewing economic conditions and analyzing the effectiveness of economic policy) reported on April 20, 2010, that the earnings penalty for part-time work is a significant obstacle to pay equity between women and men—a sure sign that the issue is at least on the federal government’s radar. With the help of advocates like Kim Bobo of the Interfaith Worker Justice group, who tirelessly lobbies the federal, state, and local governments to systemically address wage theft of low-wage workers,<sup>244</sup> government officials are already becoming aware of a variety of wage abuses. Including pay equity in hourly allocation and rates is the next topic for advocates to include in their fight against wage abuses.

## VI. CONCLUSION

Hours equity is the new pay equity. While many low-wage worker advocates focus on living wage and pay inequalities in their fight for workplace fairness, the modern workplace requires regulation and protection in scheduling shortfalls. Scheduling fluctuations make it impossible for part-time workers to plan, budget, take additional work or responsibilities, and generally wreak havoc on their lives. This is especially true for female workers, who disproportionately represent high numbers of part-time workers and who remain at the mercy of their supervisors in scheduling hours. Hours equity would provide much-needed stability to scheduling that would allow female part-time workers to have a reliable schedule with guaranteed hours so that they make an expected amount of pay. While

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241. See News Release, U.S. Dep’t of Labor, Statement by U.S. Secretary of Labor Hilda L. Solis on Wage and Hour Division’s Increased Enforcement and Outreach Efforts (Nov. 19, 2009), <http://www.dol.gov/opa/media/press/whd/whd20091452.htm>.

242. See U.S. DEP’T OF LABOR, *Regulatory Agenda Narrative* (Spring 2010), available at <http://www.dol.gov/regulations/2010RegNarrative.htm> (“Employers and others in the Department’s regulated communities must understand that the burden is on them to obey the law, not on the Labor Department to catch them violating the law.”).

243. See News Release, U.S. Dep’t of Labor, Statement of Secretary of Labor Hilda L. Solis on Introduction of Legislation Regarding Issue of Misclassification (Apr. 22, 2010), <http://www.dol.gov/opa/media/press/whd/WHD20100541.htm> (“I look forward to working with the Congress to address the important issue of misclassification of workers.”).

244. See BOBO, *supra* note 226, at 245–60 (providing avenues for addressing wage theft); INTERFAITH WORKER JUSTICE, <http://www.iwj.org> (last visited Nov. 9, 2013).

current statutory protections might not fully remedy these shortfalls, they have the potential to do so if courts reconceptualize hours equity as being worthy of protection. New remedies can and should be ordered to address this persistent problem facing many of our female workers today.

