

ACCOMMODATION AT WORK: LESSONS FROM THE AMERICANS WITH DISABILITIES ACT AND POSSIBILITIES FOR ALLEVIATING THE AMERICAN WORKER TIME CRUNCH

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INTRODUCTION

America is hard at work. While American employees traditionally have exhibited a strong work ethic, the past few decades have ushered in a remarkable increase in the overall amount of work effort in the United States. Two parallel forces have led this surge. First, many individuals—primarily women—who were full-time caregivers in the past, now

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divide their time between family care and market work.¹ Second, this larger cadre of workers is putting in significantly more time at work per person. The average full-time American employee now works approximately 160 more hours each year than he or she worked 30 years ago.²

Many scholars have written about the work/family phenomenon.³ Professor Rachel Arnow-Richman has joined this dialogue with her contribution to this symposium. She examines the possibility of using an accommodation model of workplace regulation as a vehicle for easing the work/family tug of war.⁴ She chronicles how accommodation requirements embodied in existing employment statutes, notably the Americans with Disabilities Act (ADA)⁵ and the Family and Medical Leave Act (FMLA),⁶ have failed to live up to their intended promise.⁷ She concludes, accordingly, that a direct mandate of caregiver paid leave would better serve to ease the problem of competing work and family demands than would an accommodation based alternative.⁸

I agree with most of Professor Arnow-Richman's analysis but find two points of departure. While I agree that some courts have construed the *substance* of the ADA's reasonable accommodation requirement narrowly, I believe that, as a matter of *procedure*, the ADA's interactive process has created a laudable revolution in how disability-related issues are addressed at work. In addition, the current worker time crunch goes beyond the countervailing tensions posed by the work/family divide. While caregivers face particularly acute problems, American workers of all stripes are increasingly compelled to spend more time at work. Given this broader problem, a broader solution also is in order.

Part I of this article briefly summarizes Professor Arnow-Richman's analysis and conclusions. Part II describes the competing pressures of

¹ See *infra* notes 35–41 and accompanying text.

² See LAWRENCE MISHEL ET AL., *THE STATE OF WORKING AMERICA 2002/2003* 117 tbl.2.1 (2003).

³ See, e.g., Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 *TEX. J. WOMEN & L.* 37 (1995); Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 *COLUM. J. GENDER & L.* 77 (2000); ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997); JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991); Vicki Schultz, *Essay, Life's Work*, 100 *COLUM. L. REV.* 1881 (2000); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

⁴ Professor Arnow-Richman has also previously written on the subject. See Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 *TEX. J. WOMEN & L.* 345 (2003).

⁵ Equal Opportunity for Individuals with Disabilities (Americans with Disabilities Act), 42 U.S.C. § 12101–12213 (2000).

⁶ Family and Medical Leave Act, 29 U.S.C. § 2601–2654 (2000).

⁷ See Arnow-Richman, *supra* note 4, at 362–73.

⁸ See *id.* at 402–09.

work and family, as well as the FMLA's current family care leave provision. Part III examines both the negative and positive attributes of the accommodation approach to workplace regulation in light of the experience provided under the ADA. Part IV then turns to the broader worker time crunch problem and proposes a statutory provision for paid leave that could be used for caregiving as well as for other purposes.

I. ACCOMMODATION SUBVERTED

Professor Arnow-Richman's article examines the feasibility of adopting an accommodation framework as a means of alleviating the work/family time crunch.⁹ Commentators have increasingly championed the accommodation device for this role.¹⁰ While the ADA contains the most notable accommodation requirement,¹¹ Professor Arnow-Richman defines the notion of accommodation more broadly to encompass "affirmative behavior by employers designed to allow women the opportunity to participate fully in market work."¹² An accommodation, as such, goes beyond the negative anti-discrimination prohibition of some employment statutes¹³ to compel employers to take "active steps" to promote functional equality.¹⁴

Professor Arnow-Richman's stated purpose in writing this article is to "expose[] the limitations of mandated accommodation as a unitary strategy for redressing workplace disadvantage attributable to care-giving."¹⁵ She finds that an accommodation framework is unlikely to serve this purpose adequately for two reasons. First, she points to decisions construing the ADA and the FMLA in which courts demonstrate a reluctance to interpret the accommodation mandate beyond formal equality principles.¹⁶ She opines that while accommodations are a potentially powerful tool for reformulating workplace relationships, the ADA and the FMLA have not effectuated wide-scale changes in work structures or

⁹ See generally Arnow-Richman, *supra* note 4.

¹⁰ See, e.g., Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 Wis. L. Rev. 1443 (2001).

¹¹ See *infra* Part III.A and accompanying text.

¹² Arnow-Richman, *supra* note 4, at 347 (footnote omitted).

¹³ Title VII, for example, prohibits employers from discriminating "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2000). The Age Discrimination in Employment Act (ADEA) uses similar language in banning discrimination because of age. See 29 U.S.C. § 623(a)(1) (2000) ("It shall be unlawful for an employer to . . . discriminate against any individual . . . because of such individual's age.").

¹⁴ Arnow-Richman, *supra* note 4, at 348.

¹⁵ *Id.* at 349.

¹⁶ *Id.* at 363-73.

norms.¹⁷ She concludes that a caregiver accommodation mandate would likely receive a similar limiting construction.¹⁸

Professor Arnow-Richman believes that employer attitudes present a second obstacle to the potential success of a caregiver accommodation requirement. In the past few decades, the competitive pressures of the global economy have led employers to abandon internal labor markets for more short-term employment relationships.¹⁹ In these more contingent arrangements, employers seek to maximize productivity while minimizing obligations to employees.²⁰ In this climate, employers have an economic incentive to make accommodation requirements politically unfeasible and practically unworkable.²¹

Because of these impediments to a potential accommodation solution, Professor Arnow-Richman suggests an alternative in the form of a government-facilitated wage replacement program. She proposes the adoption of an insurance-based federal caregiver replacement program financed with contributions from both employers and employees.²² She suggests such a program should incorporate incentives for employers to adopt innovative approaches to voluntary caregiver accommodations.²³ She also maintains that labor law reform is necessary in order to revitalize collective action as a means of facilitating work/family benefits on the ground floor of the employment relationship.²⁴

I agree with most of Professor Arnow-Richman's analysis. The time pressures faced by working caregivers, particularly female caregivers, often deter successful participation in market work.²⁵ The FMLA's unpaid leave accommodation provides an inadequate remedy to this work attachment gap problem that disproportionately afflicts female workers.²⁶ Professor Arnow-Richman correctly posits that the courts have undercut the potential of the ADA's reasonable accommodation device through a cramped equal treatment vision of anti-discrimination law.²⁷ As a result, I also agree that an accommodation approach is not the best potential vehicle for closing the female worker attachment gap. Finally, as I have written elsewhere, I share Professor Arnow-Richman's

¹⁷ *Id.* at 363, 373.

¹⁸ *See id.* at 373.

¹⁹ *See* Arnow-Richman, *supra* note 4, at 380-86; Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 366-69 (2002).

²⁰ *See* Arnow-Richman, *supra* note 4, at 383-86; Befort, *supra* note 19, at 368-69.

²¹ *See* Arnow-Richman, *supra* note 4, at 383-86.

²² *Id.* at 403-09.

²³ *Id.* at 407-09.

²⁴ *Id.* at 409-16.

²⁵ *See infra* notes 35-41 and accompanying text.

²⁶ *See infra* notes 54-56 and accompanying text.

²⁷ *See infra* Part III.B.

belief that labor law reform is sorely needed in order to rebalance the playing field of labor-management relations in the United States.²⁸

However, my analysis diverges from that of Professor Arnow-Richman in two respects. First, while many courts have narrowly construed the substantive provisions of the ADA, I believe that the statute nonetheless has produced a revolutionary change in workplace procedural norms by compelling an interactive dialogue between employees and employers for the purpose of identifying potentially appropriate accommodations that enable disabled employees to participate in the workforce.²⁹ Second, while the caregiver time problem is particularly troublesome, American workers today generally experience a more pervasive time crunch problem.³⁰ I envision, accordingly, a broader reform that would sweep more widely in providing paid leave for American workers.

II. THE WORKING FAMILY CAREGIVER AND THE FMLA

Previously configured models of the American family are no longer the norm. The stereotypical family of 1950 consisted of a married couple with three children: the father, as the breadwinner, worked outside the home, and the mother, as caregiver, stayed (worked) at home with the children.³¹ Today, less than 15% of American households consist of a married couple with only a male earner.³² About 60% of all married couples are composed of dual-earner couples.³³ More than seven million families are now headed by a single parent.³⁴

One of the most significant characteristics of the new work/family structure is that women, the principal caregivers of the 1950 model, have joined men in working outside the home.³⁵ The participation of women

²⁸ See Befort, *supra* note 19, at 410–15, 432–52.

²⁹ See *infra* Part III.C.

³⁰ See *infra* Part IV.A-C.

³¹ BRADLEY K. GOOGINS, *WORK/FAMILY CONFLICTS: PRIVATE LIVES—PUBLIC RESPONSES* 3 (1991).

³² Jerry A. Jacobs & Kathleen Gerson, *Do Americans Feel Overworked? Comparing Ideal and Actual Working Time*, in *WORK & FAMILY: RESEARCH INFORMING POLICY* 71, 74 (Toby L. Parcel & Daniel B. Cornfield, eds., 2000).

³³ Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 459 (1998). The percentage of dual-earner couples increased from 35.9% of married couples in 1970 to 59.5% in 1997. *Id.*

³⁴ GOOGINS, *supra* note 31, at 34. The decrease in marriage rates, increase in divorce, and growing proportion of births to unwed mothers has created a rise in single-parent homes. Monica Kirkpatrick Johnson & Jeylan T. Mortimer, *Work-Family Orientations and Attainments in the Early Life Course*, in *WORK & FAMILY: RESEARCH INFORMING POLICY* 215, 216 (Toby L. Parcel & Daniel B. Cornfield, eds., 2000); see generally Amy G. Cox & Harriet B. Presser, *Nonstandard Employment Schedules Among American Mothers*, in *WORK & FAMILY: RESEARCH INFORMING POLICY* 97 (Toby L. Parcel & Daniel B. Cornfield, eds., 2000).

³⁵ See 29 U.S.C. § 2601(a)(5)-(6) (recognizing in FMLA preamble that society has traditionally placed the burden of caring for family members on women).

in the American labor force essentially has doubled since 1950.³⁶ Of particular significance for work/family relationships is that this increase cuts across the diversity of family configurations. For example, in 1950, 23% of married women and 46% of single women participated in the labor force.³⁷ By 1999, these percentages rose to 61% participation for married women and 69% participation for unmarried women.³⁸ The labor force participation of women with children likewise mirrors this overall trend. In 1950, only 12% of women with children under the age of six worked outside the home, but as of 1999, 64% did so.³⁹

Thus, in the new stereotypical arrangement of the twenty-first century, both mom and dad are at work. Yet, with women still bearing the bulk of family caregiving chores,⁴⁰ the competing pressures of work and family serve to dampen disproportionately the long-term work attachment of female workers.⁴¹

The federal government's principal attempt at providing some balance to the pressures of work and family was the enactment of the Family and Medical Leave Act of 1993.⁴² The FMLA entitles eligible employees to a total of twelve weeks of leave per 12-month period: (a) to care for a newborn child or a child newly placed with the employee for adoption or foster care; (b) to care for an employee's child, parent, or spouse with a serious health condition; or (c) to care for an employee's own serious health condition.⁴³ The FMLA requires the employer to maintain health insurance coverage during the leave period⁴⁴ and to return the employee to his or her previous position or to a position with

³⁶ See HANDBOOK OF U.S. LABOR STATISTICS: EMPLOYMENT, EARNINGS, PRICES, PRODUCTIVITY, AND OTHER LABOR DATA 43, tbl.1-7 (Eva E. Jacobs ed., 4th ed. 2000) (showing 33.9% of working age females participated in the civilian labor force in 1950 compared to 60.0% in 1999).

³⁷ JODY HEYMANN, *THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT* 213 fig.A.1 (2000) (reporting data from the U.S. Census Bureau).

³⁸ *Id.*

³⁹ *Id.* at 214 fig.A.2; see also SYLVIA ANN HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* 112 (1986). Similarly, 28% of women with school-aged children worked outside the home in 1950, compared with 79% in 1999. HEYMANN, *supra* note 37, at 214 fig.A.2.

⁴⁰ See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U. L. REV.* 65, 70 (1998) (noting that women perform more home labor and caregiving duties than men regardless of their employment status outside of the home).

⁴¹ See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 *U. MICH. J.L. REFORM* 371, 386-87 (2001).

⁴² 29 U.S.C. § 2601-2654 (2000).

⁴³ *Id.* § 2612(a)(1). The FMLA applies only to employers with 50 or more employees, *id.* § 2611(4)(A)(i), and only to employees who have worked for the employer for at least 12 months and 1,250 hours during the preceding twelve-month period, *id.* § 2611(2)(A).

⁴⁴ *Id.* § 2614(c)(1).

equivalent benefits, pay, and other terms and conditions of employment following the end of the leave period.⁴⁵ Significantly, the FMLA mandated leave is unpaid in nature.⁴⁶

In 2001, the Department of Labor released the results of an eighteen-month survey on the use of FMLA leave.⁴⁷ This survey demonstrates that even eight years after the passage of the FMLA, only a small minority of workers take advantage of the FMLA's leave provisions. During the eighteen-month survey period, 16.5% of the U.S. employee population took leave time from work.⁴⁸ Of those employees covered by the FMLA, 18.3 % took leave under the Act, representing a total of 1.9% of all U.S. employees.⁴⁹ The length of leave taken by these employees varied greatly, with the majority of leave time ranging from 0 to 10 days.⁵⁰ The survey also showed that leave-takers were more likely to be female, married, and in higher income groups than workers in general.⁵¹ Although one of the primary objectives of the FMLA is to balance the needs of work and family,⁵² the most common reason that employees took leave, according to the survey, was not for a care-giving purpose, but to cope with their own serious health condition.⁵³

The Department of Labor survey also identified about 3.5 million people, or 2.4% of all employees, who reported that they needed leave

⁴⁵ *Id.* § 2614(a)(1).

⁴⁶ *Id.* § 2612(c). An employee may elect, or an employer may require, substitution of "accrued paid vacation leave, personal leave or family leave" when the leave is triggered by the birth or adoption of a child or the serious health condition of a family member. *Id.* § 2612(d)(2)(A). Accrued paid medical or sick leave may also be substituted when the purpose of the leave is triggered by a family member's or an employee's own serious health condition. *Id.* § 2612(d)(2)(B).

⁴⁷ See David Cantor et al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*, available at <http://www.dol.gov/asp/fmla/toc.htm> (last visited May 22, 2004).

⁴⁸ See *id.* at 2-2 tbl.2.1 (indicating that the total number of employees taking leave during the 2000 survey period was 23,830,000—a 0.5% increase over a comparable survey period ending in 1995).

⁴⁹ See *id.* at 3-14 tbl.3.5. Of the employees taking leave, 75.2% used leave once during the reference period, while 14.5% used leave twice, and 10.2% used leave at least three times. See *id.* at 2-3 fig.2.1.

⁵⁰ See *id.* at 2-4 fig.2.2 (reporting that 54.1% of employees who took leave took 0-10 days; 26.8% took 11-40 days; 9.2% took 41-60 days; and 9.9% of employees took leave beyond the 12 weeks (60 days) covered by the FMLA).

⁵¹ See *id.* § 2.1.3. The survey noted that females composed 46.8% of employees in the surveyed population, but 58.1% of all leave-takers. *Id.* at app. tbl.A2-2.4.

⁵² See 29 U.S.C. § 2601(b) (2000).

⁵³ See Cantor et al., *supra* note 47, at 2-5 tbl.2.3, 3-16 tbl.3.8 (indicating that 52.4% of employees who took general leave did so to care for their own health, and 37.8% of employees who took leave under FMLA did so for their own health reasons). In contrast, 18.5% of general leave-takers and 24.4% of FMLA leave-takers took leave to care for a newborn, a newly adopted, or newly placed foster child, and 11.5% of general leave and 13.5% of FMLA leave was taken to care for an ill child. *Id.*

for a qualifying reason, but were unable to take it.⁵⁴ The most commonly noted reason for not taking leave was inability to afford it, reported by 77.6% of employees needing leave.⁵⁵ The survey revealed that this group of “leave-needers” were disproportionately single, non-salaried, and with children living at home.⁵⁶

III. REASONABLE ACCOMMODATION UNDER THE ADA

The Americans with Disabilities Act, enacted by Congress in 1990, is the most recent federal anti-discrimination statute.⁵⁷ The ADA also is the most notable employment law statute utilizing an accommodation framework.

A. A DIFFERENT TREATMENT MODEL?

The ADA’s anti-discrimination formula differs from that of other federal anti-discrimination statutes. For example, under Title VII, an employer is prohibited from discriminating “because of [an] individual’s race, color, religion, sex, or national origin.”⁵⁸ The ADA’s anti-discrimination formula is more complicated than that of Title VII and other federal anti-discrimination statutes in two significant respects. First, only “qualified individual[s] with a disability” are protected under the ADA.⁵⁹ Second, in ascertaining whether an employer is acting in a discriminatory fashion under the ADA, the statute asks whether the employee is qualified for the job “with or without reasonable accommodation.”⁶⁰

Most anti-discrimination statutes embrace an *equal treatment* model of discrimination.⁶¹ Neither Title VII nor the ADEA generally impose any affirmative obligation on employers to assist employees in satisfac-

⁵⁴ See *id.* at 2–14 tbl.2.14.

⁵⁵ See *id.* at 2–16 tbl.2.17. In addition, 42.6 % of these workers decided not to take leave because they thought that doing so might hurt their chances at job advancement. *Id.*

⁵⁶ See *id.* § 2.2.3.

⁵⁷ Americans with Disabilities Act, 42 U.S.C. § 12101–12213 (2000).

⁵⁸ See 42 U.S.C. § 2000e-2(a) (2000). The Age Discrimination in Employment Act (ADEA) uses similar language in banning discrimination because of age. See 29 U.S.C. § 623(a)(1) (2000) (“It shall be unlawful for an employer to . . . discriminate against any individual . . . because of such individual’s age.”).

⁵⁹ See 42 U.S.C. § 12112(a). In contrast, “Title VII does not impose any class membership standing requirement.” Anyone, regardless of race, gender, or religion, can assert a claim of discrimination under that statute. See Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court’s Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 69 (1999).

⁶⁰ See 42 U.S.C. § 12111(8) (defining “qualified individual with a disability”); 42 U.S.C. § 12112(a).

⁶¹ For a discussion of the equal treatment model of anti-discrimination statutes, see generally Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237 (1971) (describing the “norm of color blindness” of the laws arising out of the Civil Rights Act); Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 515

torily performing the essential functions of the job.⁶² These statutes, instead, merely invoke a negative prohibition against employer actions that discriminate on the basis of certain specified traits.

The ADA arguably goes beyond the equal treatment model to require *different treatment* in terms of requiring employers to provide reasonable accommodations to otherwise qualified individuals with a disability.⁶³ Under this different treatment model, an employer who merely refrains from treating disabled employees differently than non-disabled employees may be engaging in prohibited discrimination.⁶⁴ As one article has noted, this concept of reasonable accommodation recognizes that “in order to treat some persons equally, we must treat them differently.”⁶⁵ This affirmative accommodation duty, as Professor Arnow-Richman notes, carries the potential for a powerful restructuring of employment norms and relationships.⁶⁶

B. SUBSTANTIVE SHORTCOMINGS OF THE ADA MODEL

Many commentators feel that the unique ADA framework has not lived up to its potential as a vehicle for fostering the rights of the disabled.⁶⁷ The most conspicuous limitation on the reach of the ADA has resulted from a series of decisions in which the Supreme Court has nar-

(1998) (describing the traditional civil rights paradigm as one requiring a “level playing field” for all workers).

⁶² A limited duty of reasonable accommodation arises under these two statutes only with respect to religion, which is a protected trait under Title VII. That statute, similar to the ADA, provides that an employer must “reasonably accommodate” the religious observances and practices of its employees up to the point of “undue hardship.” See 42 U.S.C. § 2000e(j). The reasonable accommodation duty for religious observances, however, is much more limited than the accommodation duty mandated by the ADA. The Supreme Court has ruled that an employer need not incur more than a de minimis hardship in providing an accommodation for religious purposes. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

⁶³ For a discussion of how the ADA adopts a different treatment model of anti-discrimination law, see Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 *BERKELEY J. EMP. & LAB. L.* 19, 40–44 (2000) (noting that the “ADA relies on a different treatment vision of equality”); Miller, *supra* note 61, at 514, 516–21 (describing the new civil rights paradigm as one that “recasts the notion of a ‘level’ playing field into one of an ‘accessible’ playing field”).

⁶⁴ See Miller, *supra* note 61, at 514 (“For disabled people who need reasonable accommodations in order to perform the essential functions of their jobs, ‘equal’ treatment is tantamount to a barrier to employment, not a gateway.”); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 *BUFF. L. REV.* 123, 146 (1998) (“[I]t is impossible to deny that for disability, if for no other characteristic, perfectly equal treatment can constitute discrimination.”).

⁶⁵ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring), quoted in Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 *DUKE L.J.* 1, 10 (1996).

⁶⁶ See Arnow-Richman, *supra* note 4, at 347, 358–62.

⁶⁷ See, e.g., Diller, *supra* note 63, at 22 (suggesting that the federal courts currently are engaged in “some kind of judicial backlash against the ADA”); see also Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 *HARV. C.R.-C.L. L. REV.* 99,

rowed the class of protected “disabled” employees.⁶⁸ The judiciary has also been reluctant to give free rein to the different treatment view of the ADA’s reasonable accommodation mandate, vetoing, in a number of decisions, otherwise plausible accommodations because they appear to go beyond formal equality principles to resemble affirmative action measures.⁶⁹

The Seventh Circuit’s decision in *Equal Employment Opportunity Commission (EEOC) v. Humiston-Keeling, Inc.*⁷⁰ provides a prime example. The employee, Nancy Cook Houser, started work for the employer as a picker—a warehouse position requiring employees to pick pharmaceutical products from a shelf to a conveyor belt.⁷¹ A work accident resulted in “tennis elbow” injury to her right arm.⁷² Despite the employer’s numerous attempts at accommodation, Houser became unable to perform the essential functions of the picker position.⁷³ Houser then applied for several office jobs within the company, but in each case, the employer selected another employee to transfer into the position.⁷⁴

In affirming a grant of summary judgment for the employer, the Seventh Circuit expressly rejected the EEOC’s view that a disabled employee should be afforded priority in filling vacant positions.⁷⁵ The court, in a decision authored by Judge Posner, criticized the EEOC’s position as giving “bonus points” to individuals with disabilities even where an employee’s disability puts her at no disadvantage in bidding for an open position.⁷⁶ Such a result, according to Judge Posner, would constitute “affirmative action with a vengeance.”⁷⁷ The court instead concluded that “the ADA does not require an employer to reassign a

109 (1999) (finding, based on empirical analysis of court decisions, that defendant employers prevail in 92.7% of all ADA cases).

⁶⁸ See *Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184 (2002); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

⁶⁹ See Arnow-Richman, *supra* note 4, at 363–73 (discussing cases under the ADA and FMLA in which courts have restricted the affirmative nature of statutory accommodation mandates).

⁷⁰ 227 F.3d 1024 (7th Cir. 2000). Judicial concerns about the preferential nature of ADA reasonable accommodations most commonly arise with respect to requests by disabled employees for reassignment to other positions. See Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1056–59 (2000).

⁷¹ *Humiston-Keeling*, 227 F.3d at 1026.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1026–27.

⁷⁵ *Id.* at 1027 (rejecting EEOC contention that, when reassigning as accommodation, the “disabled person [is required to] be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job”).

⁷⁶ *Humiston-Keeling, Inc.*, 227 F.3d at 1027.

⁷⁷ *Id.* at 1029.

disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question."⁷⁸

Although the Tenth Circuit reached a different conclusion in a similar reassignment context,⁷⁹ other courts have echoed the anti-affirmative action rhetoric of the *Humiston-Keeling, Inc.* decision. The Fifth Circuit in *Daugherty v. City of El Paso*⁸⁰ aptly summarized the anti-preference viewpoint as follows:

[W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.⁸¹

The Supreme Court has recently grappled with the matter of reassignment and preferences in *US Airways, Inc. v. Barnett*.⁸² In that case, an employee sought a transfer to a vacant position, but his employer, US Airways, denied the request on the grounds that such a reassignment would violate its long-standing seniority policy.⁸³ Under this unilaterally established policy, employees with greater seniority received a preference in bidding to transfer into covered positions for which they were otherwise qualified.⁸⁴

US Airways argued that the ADA requires only the equal treatment of individuals with disabilities, not preferential treatment, such as an exemption from a disability-neutral workplace rule that applies to all employees.⁸⁵ The *Barnett* majority rejected this argument, stating, "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'"⁸⁶ Recognizing that a request for preferential treatment does not create an "automatic exemption" from

⁷⁸ *Id.*

⁷⁹ See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1169 (10th Cir. 1999) (holding that the ADA may require reassignment to a vacant position as a reasonable accommodation "so long as the employee is qualified for the job and it does not impose an undue burden on the employer").

⁸⁰ 56 F.3d 695 (5th Cir. 1995).

⁸¹ *Id.* at 700.

⁸² 535 U.S. 391 (2002).

⁸³ *Id.* at 395.

⁸⁴ *Id.*

⁸⁵ See *id.* at 397.

⁸⁶ *Id.* at 398 (emphasis in original).

the reasonable accommodation requirement,⁸⁷ the *Barnett* Court nonetheless concluded that reassignment would not be reasonable in the run of cases in which it would conflict with the rules of a seniority system.⁸⁸ Although a disabled employee might be able to overcome this presumption by presenting evidence of special circumstances,⁸⁹ the practical bottom line of the *Barnett* decision is that equal treatment under a seniority policy will almost always prevail over the preferential reassignment accommodation provided by the ADA.⁹⁰

This line of reassignment cases, accordingly, exhibits a judicial reluctance to construe the ADA reasonable accommodation requirement as embodying a different treatment model of discrimination. By importing equal treatment notions, these courts have undercut the transformative potential of the accommodation mandate. To use Professor Arnow-Richman's phrase, these courts have "subverted" the potential of the ADA's accommodation framework.⁹¹

C. THE INTERACTIVE PROCESS — IGNITING A PROCEDURAL REVOLUTION

While the ADA accommodation model may not have produced a revolution in the substantive law arena, it is far from a bust. Indeed, a revolution of quite a different sort has occurred in the procedural arena. The interactive process contemplated by the ADA is a unique procedural device that has launched untold numbers of successful workplace accommodations.

While the ADA itself is silent as to the manner by which parties should identify the availability of a reasonable accommodation, the regulations interpreting the ADA state "it may be necessary for the [employer] to initiate an informal, interactive process with the [disabled] individual."⁹² The objective of this dialogue is to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."⁹³

The EEOC's Interpretive Guidance provides more detail as to the suggested structure of this process. The Guidance states that it should be

⁸⁷ *Id.*

⁸⁸ *Id.* at 402–03.

⁸⁹ *Id.* at 405. The Court described, as an example of such "special circumstances," the situation in which an employer does not routinely adhere to the terms of an espoused seniority policy, thereby reducing employee reliance expectations in such a policy. *Id.*

⁹⁰ See Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 973 (2003).

⁹¹ See Arnow-Richman, *supra* note 4.

⁹² 29 C.F.R. § 1630.2(o)(3) (2003).

⁹³ *Id.*

a “flexible” process that involves the “individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation.”⁹⁴ The Guidance goes on to recommend that the parties jointly engage in a four-step “problem solving approach” in which the employer should:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.⁹⁵

In contrast to the substantive law of accommodation under the ADA, most courts are favorably disposed toward this procedural component of the reasonable accommodation obligation. Most circuit courts that have considered the issue have ruled that an employer has an affirmative obligation to engage in the interactive process once it has been put on notice that an accommodation may be necessary.⁹⁶ The courts are divided with respect to the appropriate consequences for failing to engage in the interactive process. While at least one circuit court decision has suggested that independent liability may exist under the ADA for a party who fails to participate in the interactive process,⁹⁷ most courts hold that liability will arise only where an employer has failed to implement a reasonable accommodation that would enable a disabled em-

⁹⁴ 29 C.F.R. app. § 1630.9 (2003).

⁹⁵ *Id.*

⁹⁶ *See, e.g.,* Barnett v. U.S. Airways, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000), *vacated by* US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (see discussion *supra* notes 73-80 and accompanying text); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 312 (3rd Cir. 1999). Some other circuit court decisions, however, have found that participation in the interactive process is not mandatory. These courts point out that the statute only mandates the provision of a reasonable accommodation if there is evidence that one exists. *See, e.g.,* Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997); White v. York Int’l Corp., 45 F.3d 357, 363 (10th Cir. 1995).

⁹⁷ *See* Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135–36 (7th Cir. 1996).

ployee to perform adequately in the workplace.⁹⁸ Taking a somewhat different tack, a growing number of circuit courts have ruled that an employer's failure to engage in the interactive process ordinarily should warrant a trial court's refusal to grant an employer's motion for summary judgment.⁹⁹ Some courts reach this conclusion on the grounds that a failure to participate in the interactive process constitutes evidence of bad faith,¹⁰⁰ while others conclude that an employer's failure to consult shifts the "burden of production concerning the *availability* of a reasonable accommodation from the employee to the employer."¹⁰¹

The ADA's interactive process has launched a quiet revolution that gets little coverage in the case reporter system. All over the United States, disabled employees and human resources managers are joining together to invent mutually acceptable workplace solutions in the form of reasonable accommodations.¹⁰² The alternative dispute resolution format of the interactive process facilitates a creative and cooperative search for win-win outcomes. The prospect of litigation in the absence of a voluntary resolution provides a powerful incentive for both parties to conduct this search in good faith. The interactive process, in short, has significantly transformed procedural structures and norms impacting the disabled.

D. A BETTER MODEL FOR EASING WORK/FAMILY TIME PRESSURES

The scorecard for the ADA accommodation requirement shows mixed results. While the different treatment notion of accommodation has not transformed substantive law to the extent that some disability advocates had hoped, the interactive process has succeeded in transforming the manner in which disability issues are considered and resolved short of litigation.

Finding this mixed outcome does not mean that I disagree with Professor Arnow-Richman in her suggestion that an accommodation approach is not the best means of addressing the caregiver time crunch

⁹⁸ See, e.g., *Kvorjak v. Maine*, 259 F.3d 48, 53 (1st Cir. 2001); *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000).

⁹⁹ See, e.g., *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1256 (9th Cir. 2001) (citing *Barnett*, 228 F.3d at 1113-14); *Fjellestad*, 188 F.3d at 952; *Taylor*, 184 F.3d at 317-18.

¹⁰⁰ See *Fjellestad*, 188 F.3d at 952; *Taylor*, 184 F.3d at 317-18.

¹⁰¹ *Mays v. Principi*, 301 F.3d 866, 870 (7th Cir. 2002) (emphasis in original). See also *Morton*, 272 F.3d at 1256.

¹⁰² See generally Hope A. Comisky, *Guidelines for Successfully Engaging in the Interactive Process to Find a Reasonable Accommodation Under the Americans with Disabilities Act*, 13 LAB. LAW. 499 (1998) (advising employers on how to conduct the interactive process for identifying possible reasonable accommodations under the ADA); Jathan W. Janove, *Skating Through the Minefield*, HR MAG., Mar. 2003, at 107; Howard A. Simon & Alison J. Morbey, *The ADA's "Interactive Process" for Determining Reasonable Accommodations: How Much Interaction Is Enough?*, 24 EMPLOYEE REL. L.J. 5 (1998).

problem. Her observation that a less defined accommodation approach is more prone to judicial and employer resistance remains accurate.¹⁰³ As a practical matter, Congress had little choice in the ADA other than to use an accommodation approach to deal with the multi-faceted needs of individuals with different impairments of varying intensity. But, in the context of addressing employee concerns with respect to the competing needs of family and work, a more specific statutory approach is both possible and preferable.

IV. THE AMERICAN WORKER TIME CRUNCH

The problem of balancing work and non-work time demands is not limited solely to caregivers. American workers generally are experiencing a significant and growing time crunch problem. This observation is not meant to denigrate the particularly heavy time demands on working caregivers nor downplay how these time demands contribute to a work attachment gap for women workers. It is meant, instead, to suggest that the American worker time crunch problem is pervasive in nature and that broad-based reform to assist workers generally, including caregivers, should be considered.

A. THE NUMBERS

The number of hours worked by American employees has increased dramatically in the past few decades.¹⁰⁴ In 1967, the average employee worked 1,716 hours annually.¹⁰⁵ This figure rose to 1,878 by 2000, representing an addition of 162 more hours of work per year.¹⁰⁶ Similarly, American employees in 2000 worked an average of 47.0 weeks per year, up from 43.5 in 1967.¹⁰⁷

These increases are compounded for dual-income families in which both parents work. The average married-couple family worked almost

¹⁰³ See *supra* notes 15–21 and accompanying text.

¹⁰⁴ See Barry Bluestone & Stephen Rose, *The Macroeconomics of Work Time*, 56 REV. SOC. ECON. 425 (1998); SCHOR, *supra* note 3, at 30 tbl.2.2 (noting that the number of hours worked per week increased from 39.8 in 1969 to 40.7 in 1987 and that the number of weeks worked per year has increased from 43.9 in 1969 to 47.1 in 1987). While some researchers dispute the findings that workers are increasing their hours, most of these studies show only that average *weekly* hours are not increasing but do not look to the increases in *annual* hours. See Bluestone & Rose, *supra*, at 427; Jacobs & Gerson, *supra* note 32, at 74.

¹⁰⁵ See MISHEL ET AL., *supra* note 2, at 117 tbl.2.1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Not only are employees on the job for more hours annually, but there also has been an increase in the proportion of employees working long hours. See Jacobs & Gerson, *supra* note 32, at 74 (noting an increase in the number of employees working in excess of 50 hours per week).

twelve more weeks per year in 2000 than in 1969.¹⁰⁸ In 1979, these families worked an average of 3,331 hours per year—a figure that increased to 3,719 hours by 2000, representing an increase of 388 hours.¹⁰⁹ These increases are particularly pronounced for middle-income families, who have added 660 hours, or 16 weeks of full-time work, since 1979.¹¹⁰

Comparatively, the United States leads the industrialized world in hours worked.¹¹¹ While that honor once belonged to Japan, American employees now on average work almost two weeks more per year than their Japanese counterparts.¹¹² The numbers are even more dramatic when the comparison turns to European countries. As of 2002, for example, the average American employee worked approximately 400 more hours per year than did workers in Germany and France.¹¹³

Much of this divergence flows from the fact that Americans have access to less vacation and leave time than do workers in other countries. Nearly all Western European countries statutorily mandate minimum annual vacation periods of four to six weeks.¹¹⁴ In contrast, the average American worker in private industry has only two weeks of paid vacation per year.¹¹⁵ Similarly, the parental leave provisions adopted by most other industrialized nations tend to guarantee longer periods of leave than

¹⁰⁸ MISHÉL ET AL., *supra* note 2, at 99 tbl.1.26 (noting rise from 80.4 weeks worked per year in 1969 to 92.3 weeks worked per year in 2000; the weeks are aggregated for each parent in the household, so with 52 weeks per year, a two-parent family can work up to 104 weeks per year, *id.* at 98).

¹⁰⁹ *Id.* at 100 tbl.1.27.

¹¹⁰ *Id.* at 99.

¹¹¹ See Bureau of Nat'l Affairs, *American Employees Surpass Japanese, Lead Industrialized World in Hours Worked*, 17 BNA HUM. RESOURCES REP. 1147 (Oct. 25, 1999); Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 ENVTL. L. REP. 10909, 10920 (2000) (citing *The Future of Work*, THE ECONOMIST, Jan. 29, 2000, at 92).

¹¹² See Bureau of Nat'l Affairs, *supra* note 111, at 1147.

¹¹³ See University of Groningen Growth and Development Centre and The Conference Board, *Total Economy Database: Hours* (February 2004), at <http://www.eco.rug.nl/ggdc/dseries/hours.shtml> (last visited May 22, 2004) (reporting the annual hours worked per person employed in 2002 to be 1,873 in the United States, 1,444 in Germany, and 1,486 in France). While individual working time is on the rise for American employees, many European countries are exploring initiatives to reduce working hours. See, e.g., Annik De Rongé & Michel Molitor, *The Reduction of Working Hours in Belgium: Stakes and Confrontations*, in WORKING TIME IN TRANSITION: THE POLITICAL ECONOMY OF WORKING HOURS IN INDUSTRIAL NATIONS 149 (Hinrichs et al. eds., 1991) (documenting union pressure to reduce workweek hours); Stephen E. Tallent, *France*, in INTERNATIONAL LABOR AND EMPLOYMENT LAWS 3-1, 3-9 (William L. Keller ed., Supp. 2002) (discussing the adoption of legislation in France in 1998 reducing the work week from 39 to 35 hours).

¹¹⁴ See Bookspan, *supra* note 3, at 73.

¹¹⁵ See SHEILA B. KAMERMAN & ALFRED J. KAHN, THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE 58 (1987). See also ELLEN GALINSKY ET AL., FEELING OVERWORKED: WHEN WORK BECOMES TOO MUCH 30 (2001) (reporting the results of a survey in which 26% of U.S. employees agreed that they do not take all of the vacation they are entitled to because of job demands).

does the FMLA,¹¹⁶ while also providing employees with some type of financial compensation during their respective leave periods.¹¹⁷

B. FACTORS CONTRIBUTING TO THE WORKER TIME CRUNCH

1. *Employee Financial Need*

Since the 1970's, the real hourly wages earned by American employees have fallen, particularly for low-wage, nonwhite-collar workers.¹¹⁸ Many employees, accordingly, are working more hours in order to maintain household income levels.¹¹⁹ Production and non-supervisory workers, for example, "must now work six more weeks annually to maintain the same standard of living as comparable workers had in 1973."¹²⁰ Similarly, many families must have two individuals working in order to support an adequate lifestyle.¹²¹ Over the past thirty years, contributions to family income by previously non-working spouses have increased significantly.¹²² During the 1980's, for example, families in the lower 60% of total income would have experienced real losses if not for the contributions of these working spouses.¹²³

2. *Employer Financial Incentives*

Employers also have financial incentives to squeeze more working time out of their employees. One such incentive prompts employers to require salaried employees to work longer hours. Salaried employees receive a set amount of compensation regardless of the number of hours worked and are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA).¹²⁴ Thus, employers do not incur increased costs

¹¹⁶ See Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 341 (1993) (noting that the minimum length of parental leave mandated in other industrialized nations generally ranges from five to eighteen months).

¹¹⁷ See Lisa J. Gitnik, Note, *Will the Interaction of the Family and Medical Leave Act and the Americans with Disabilities Act Leave Employees with an "Undue Hardship?"*, 74 WASH. U. L.Q. 283, 311 n.151 (1996).

¹¹⁸ See PETER CAPPELLI ET AL., CHANGE AT WORK 181-84 (1997); MISHÉL ET AL., *supra* note 2, at 93-94; Sanford M. Jacoby, *Melting into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1233-34 (2000).

¹¹⁹ See Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 183 (2001) ("Median real family incomes went up more than 100% from 1947 to 1973, but since 1973 they have risen by only 10%.").

¹²⁰ Steinzor, *supra* note 111, at 10920.

¹²¹ See Bluestone & Rose, *supra* note 104, at 426; MISHÉL ET AL., *supra* note 2, at 97-98.

¹²² See MISHÉL ET AL., *supra* note 2, at 103 fig.1S (noting that the percentage of wives earnings to family income has risen to approximately 34% in 2000, up from 25% in 1974).

¹²³ *Id.* at 104.

¹²⁴ Fair Labor Standards Act of 1938, 29 U.S.C. § 201-219 (2000). The FLSA exempts executive, administrative, and professional employees who are paid on a salary basis from the Act's minimum wage and overtime pay requirements. *Id.* § 213(a)(1); 29 C.F.R. § 541.1-541.3 (2003).

by requiring salaried employees to work additional hours.¹²⁵ The number of employees working in exempt, salaried positions has virtually doubled since the FLSA was enacted in 1938.¹²⁶

Similarly, the increasing cost of employee benefits encourages employers to require longer work weeks.¹²⁷ The growth in such benefits has far outpaced that of wages in the past five decades. In 1948, employer-paid benefits accounted for only 5.1% of employee compensation, but by 2000, such benefits constituted 15.4% of compensation.¹²⁸ The costs of these fringe benefits are usually fixed for a full-time employee without regard to how many hours the employee actually works.¹²⁹ Thus, the hourly cost of employee benefits declines as the employee puts in more hours.¹³⁰ Since benefits are costly and constitute an increasing proportion of employee compensation, employers have an economic incentive to meet labor needs by increasing the number of hours rather than by increasing the number of employees.

C. IMPLICATIONS OF THE WORKER TIME CRUNCH

As employees spend more time at work and fewer families operate under the breadwinner/homemaker model, workers increasingly are caught in a serious time crunch. Work and family obligations are competing for a shrinking amount of free time—a trend particularly accentuated in single-parent and dual-earner families. On a daily basis workers must choose between work and family and attempt to negotiate solutions to these conflicting obligations. Recent surveys conducted by the Families and Work Institute reported that 60% of American workers sometimes felt overwhelmed by work¹³¹ and that 63% of American workers would prefer to work fewer hours.¹³²

The worker time crunch has several negative implications for American society. First, as employees spend more time at work, they spend less time caring for and interacting with other family members.¹³³ In

¹²⁵ Jacobs & Gerson, *supra* note 32, at 75.

¹²⁶ Jacobs & Gerson, *supra* note 33, at 461 (noting that 14.8% of workers were exempt managers or professionals in 1938, while that figure had risen to 28.3% by 1995).

¹²⁷ *See id.*

¹²⁸ MISHEL ET AL., *supra* note 2, at 120 tbl.2.2.

¹²⁹ *See* Jacobs & Gerson, *supra* note 32, at 75; Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 284 (2002).

¹³⁰ *See* Jacobs & Gerson, *supra* note 32, at 75; Smith, *supra* note 129, at 284.

¹³¹ GALINSKY ET AL., *supra* note 115, at 14.

¹³² JAMES T. BOND ET AL., THE 1997 NATIONAL STUDY OF THE CHANGING WORKFORCE 74-75 fig.5.2 (1998).

¹³³ *See* SYLVIA ANN HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN 26 (1991) (“While the proportion of adult life spent living with spouse and children stood at 62% in 1960, it is now 43%—the lowest in our history.”).

particular, the amount of parental time spent interacting with children has declined dramatically over the past 30 years,¹³⁴ with negative impacts on both emotional¹³⁵ and intellectual¹³⁶ development. Children increasingly spend long hours in day-care facilities¹³⁷ that are expensive¹³⁸ and hard to find.¹³⁹ Similar issues arise with respect to extended family members.¹⁴⁰ Today, one out of four U.S. families is responsible for the care of an elderly relative, and this number is rising.¹⁴¹

On the other side of the coin, family obligations also interfere with workplace productivity. With so many care-givers now participating in the labor force, family emergencies readily become workplace disruptions. In a recent study, Jody Heymann interviewed employees to ascertain how family obligations impacted work time and found that during the one-week interview period, 30% of the interviewed employees reduced work hours during at least one work day to meet the needs of family members, 12% needed to cut back on two or more days, and 5% needed to cut back on three or more days.¹⁴²

Today's employees, after meeting commitments to family and work, have little time remaining for anything else. The worker time crunch

¹³⁴ See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 111 (1988) (finding that between 1960 and 1986, parental time available to children fell ten hours per week in white households and 12 hours per week in black households); *The Future of Work*, *supra* note 111, at 92 (asserting that "[t]he average mother and father spends [sic] 22 hours less every week with their children than parents did in 1969").

¹³⁵ See Toby L. Parcel et al., *The Effects of Parental Work and Maternal Nonemployment on Children's Reading and Math Achievement*, in *WORK & FAMILY: RESEARCH INFORMING POLICY* 189, 191-92 (Toby L. Parcel & Daniel B. Cornfield eds., 2000).

¹³⁶ See *id.* at 194 ("[B]oth mother's and father's overtime hours negatively affected young children's verbal facility. Parents who work overtime hours may not spend as much time interacting or playing with their children as do parents who work 35 to 40 hours per week.").

¹³⁷ See generally Bookspan, *supra* note 3, at 46; GOOGINS, *supra* note 31, at 200-01.

¹³⁸ See Cox & Presser, *supra* note 34, at 97. The financial burden is particularly difficult for single-parent families, as they generally have less money for child-care and less flexibility in their employment than many married employees. *Id.* at 97-98.

¹³⁹ See Bookspan, *supra* note 3, at 46 (reporting that "forty-four states claim that the demand for child care [in their state] exceeds its availability."). See also Bureau of Labor Statistics, *Pilot Survey on the Incidence of Child Care Resource and Referral Services in June 2000*, BUREAU OF LABOR STATISTICS REP. 946, at 1 (November 2000) (reporting that, as of June 2000, only 13.8% of all civilian employees had access to child-care resources and referral services).

¹⁴⁰ See Susan Christopherson, *Trading Time for Consumption: The Failure of Working-Hours Reduction in the United States*, in *WORKING TIME IN TRANSITION: THE POLITICAL ECONOMY OF WORKING HOURS IN INDUSTRIAL NATIONS* 171, 181 (Karl Hinrichs et al. eds., 1991).

¹⁴¹ HEYMANN, *supra* note 37, at 2; see H.R. REP. NO. 103-8 (1993) (noting the demographic shift of an increasing aging population and the National Council on Aging's estimate that 20% to 25% of American workers have some caregiving responsibility for an older relative).

¹⁴² See HEYMANN, *supra* note 37, at 24.

translates into less leisure time¹⁴³ and lower participation rates in community clubs and activities.¹⁴⁴ Americans are even sleeping less and do not always get the amount of sleep optimal for health.¹⁴⁵

Finally, the time crunch has increased the stress of American workers both on and off the job.¹⁴⁶ Many workers feel overworked and unhappy.¹⁴⁷ And, overworked employees report less successful relationships with spouses, family, and friends.¹⁴⁸

D. A PROPOSED SOLUTION

American workers need the option of more time away from work and sufficient pay to make that non-work time practically accessible. Since an accommodation approach is likely to encounter significant resistance from both judicial and management sources,¹⁴⁹ legislation in the form of a defined substantive benefit is the most logical vehicle to accomplish this task.

The outline of such a legislative proposal is set out below. In a nutshell, this proposal would amend the Family and Medical Leave Act to provide that:

- (1) Covered employers must permit covered employees to take paid personal leave for two of the Act's twelve-week period of protected leave.
- (2) Upon a minimum of seven days advance notice, an employee may take all or part of the period of paid personal leave without restriction as to the reason or use of such personal leave time.
- (3) Pay for such leave should be provided in a manner and an amount similar to that provided for unemployment insurance purposes. That is, the pay should be provided from a government fund, payable at one-half of the employee's average weekly

¹⁴³ See generally Laura Pappano, *Running Out of Time: Are You Working More and Playing Less Than You Used to? Or Does It Just Feel That Way?*, BOSTON GLOBE, June 25, 2000, at 12.

¹⁴⁴ See Jerry A. Jacobs & Kathleen Gerson, *Who Are the Overworked Americans?*, 56 REV. SOC. ECON. 442, 456 (1998) (noting that working 50 to 60 hours a week limits participation in civil society).

¹⁴⁵ See SCHOR, *supra* note 3, at 11 (citing studies that a majority of Americans are getting 60 to 90 minutes less sleep a night than they should for optimal health and performance).

¹⁴⁶ See Pappano, *supra* note 143, at 12; SCHOR, *supra* note 3, at 11.

¹⁴⁷ See GALINSKY ET AL., *supra* note 115, at 49–54; Jacobs & Gerson, *supra* note 144, at 450–55.

¹⁴⁸ See GALINSKY ET AL., *supra* note 115, at 51–52; see also SCHOR, *supra* note 3, at 12 (indicating that many two-earner couples report less happiness and satisfaction resulting from the lack of available family time).

¹⁴⁹ See *supra* notes 15–21, 67–91 and accompanying text.

- wage, subject to a maximum equal to two-thirds of the applicable state-wide average weekly wage rate.
- (4) The government fund would be financed by equivalent one-third contributions from employees, employers, and general revenue. The employer's contribution would be a percentage payroll tax, rather than an experience-rated contribution. The employee's contribution also would be a percentage payroll tax similar to social security.
 - (5) Employers could opt out of the personal leave mandate by providing a minimum of four weeks of leave per year that may be taken by employees for care, sickness, or personal leave/vacation purposes. Employers that provide a minimum of three weeks of leave per year for such purposes would be obligated to provide and contribute towards only one week of paid personal leave time.

This proposal offers a number of advantages. The proposal provides a modest amount of compensation that will make leave for caregiving and other purposes more accessible.¹⁵⁰ It provides a flexible format for leave-taking that requires little government oversight, yet provides employers with advance notice for planning purposes. The proposal builds upon the existing FMLA framework, adopting both its coverage formula and its current twelve-week leave period. Employers are provided with a self-help mechanism to avoid administrative compliance difficulties. By addressing the American worker time crunch problem on a systemic basis, the proposal does not suffer from criticism that it would marginalize female caregivers. Finally, the proposal should not harm the competitive posture of American employers since the resulting period of paid leave or vacation is still less than international norms. Although American employers highly value flexibility in today's global economy,¹⁵¹ America's competitive edge should not depend upon sub-standard labor practices.¹⁵²

¹⁵⁰ See Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 154 (1998) (urging a wage replacement component of the FMLA to "further both gender equality and the right of every worker to participate in both work and family").

¹⁵¹ See Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 539-49 (2001).

¹⁵² See Befort, *supra* note 19, at 422-24, 460.

CONCLUSION

This article addresses issues of accommodation and time. On the former issue, I concur with Professor Arnow-Richman's observation that an accommodation approach to employment law reform is prone to resistance from the courts. Experience under the ADA illustrates a judicial reluctance to go beyond a traditional equal treatment view of discrimination to embrace a more affirmative different treatment model of discrimination. But this does not mean that the ADA's reasonable accommodation framework has been a failure. To the contrary, while the reasonable accommodation requirement may have fallen somewhat short of expectations on the substantive law front, it has launched a procedural revolution in fostering an interactive process by which employers and employees cooperatively work to identify suitable workplace accommodations. The impact of this procedural device is not as readily noticeable as the courts' substantive law limitations, but it may serve as the ADA's most significant contribution to this point.

Which brings us to the issue of time. American workers, quite simply, do not have enough time to tend to caregiving and other non-work needs. While this is a particularly acute problem for caregivers, the American worker time crunch is a problem of pandemic proportions. American workers of all stripes are required or pressured to spend ever-increasing amounts of time at work. The ADA model represents one possible format for accommodating non-work time demands. The first decade of experience under the ADA suggests that judicial and employer resistance would temper the substantive law advances of such an approach without necessarily conferring the procedural advantages of the ADA's interactive process. I agree with Professor Arnow-Richman that a more specific legislative approach is preferable as a vehicle for reducing the working caregiver time problem. However, I would aim more broadly. The pervasive nature of the American worker time crunch problem deserves a broader legislative solution. This article suggests one possible approach. Hopefully, this article will contribute to the ongoing debate about how American workers can obtain more time away from work.