

# The Gender Bind: Men as Inauthentic Caregivers

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*Almost twenty years after the enactment of the Family and Medical Leave Act (FMLA), an ostensibly gender-neutral statute, companies are still less likely to offer paternity leave than they are to offer maternity leave. Although women have traditionally faced discrimination in the workplace because they are viewed as inauthentic workers—not fully committed to paid employment—men face the corresponding problem and are viewed as inauthentic caregivers. Men who seek family leave transgress gender norms and risk workplace discrimination and stereotyping. This article makes explicit how the social and cultural contexts in which the FMLA is applied interact to maintain the status quo and produce gendered outcomes at work and at home. The FMLA was expected to promote workplace gender equality by providing gender-neutral leave and thus reduce employers' expectations that women are more costly than men because they require special accommodations. Unfortunately, women continue to take significantly more leave than men to care for a newborn child or sick relative. This article argues that the view of men as providers first and caregivers second encourages discrimination against male caregivers and interacts with overwork and inflexible work schedules to contribute to stereotypical divisions of labor within families. This article further proposes policies, including paid family leave, to promote co-equal caregiving and breadwinning between men and women.*

## I. INTRODUCTION

In the great “Mommy Wars” of the early twenty-first century, men are notably absent.<sup>1</sup> One analysis of articles on the “opt-out” revolution<sup>2</sup> found that there were 315 mentions of mothers but only twenty-five mentions of fathers.<sup>3</sup> In sixty-four percent of the articles surveyed, the husband was described as a breadwinner who made it possible for his wife to stay home.<sup>4</sup> There was almost

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1. See generally JANE SMILEY ET AL., MOMMY WARS: STAY-AT-HOME AND CAREER MOMS FACE OFF ON THEIR CHOICES, THEIR LIVES, THEIR FAMILIES (Leslie Morgan Steiner ed., 2006) (defining “Mommy Wars” as a dilemma mothers face between their careers and family, which causes them to be competitive and hostile towards one another) [hereinafter MOMMY WARS].

2. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42 (terming the “opt-out revolution” to describe women who left high-powered careers to stay home with their children).

3. JOAN C. WILLIAMS ET AL., WORKLIFE LAW, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 34 (2006), <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>.

4. JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 32

no discussion of men's role in family caregiving or the conflicts that male caregivers face.<sup>5</sup> Instead, the work-family conflict has been seen through the lens of women's responsibilities.<sup>6</sup> With few exceptions, there has been little analysis of men as caretakers<sup>7</sup> of their own children.<sup>8</sup>

Further, when men's work-family conflict is discussed, it is rarely placed within the context of the couple;<sup>9</sup> there is little substantive discussion of how men's and women's work-life decisions interact to produce gendered outcomes. As Professor and Director of the Center for Work Life Law Joan Williams notes, in what she terms the "dominant family ecology," men are considered primarily breadwinners and women are considered to be primarily caretakers, and husbands could not perform as ideal workers without the flow of care work from their wives.<sup>10</sup> Yet the continued assumption that men operate within the confines of this dominant family ecology disadvantages both men and women. Today, most families need two wage-earners to make ends meet, making a couple-level analysis especially important. Women who do not have a "wife" at home are disadvantaged in a workplace that increasingly requires constant availability.<sup>11</sup> It is easier to stay late at work, go in to work with only a few hours' notice, and answer e-mails on the weekends if you have a partner who is able to make sure that the children are picked up from school, that there are

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(2010).

5. See generally Belkin, *supra* note 2; Nancy Gibbs, *Viewpoint: Bring on the Daddy Wars*, TIME, Feb. 27, 2006, <http://www.time.com/time/nation/article/0,8599,1168125,00.html>; see also Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1.

6. See, e.g., David Brooks, *The Year of Domesticity*, N.Y. TIMES, Jan. 1, 2006, at C8; see also Anne-Marie Slaughter, *Why Women Still Can't Have it All*, ATLANTIC MONTHLY, July-Aug. 2012, at 85.

7. I hesitate to use the phrase primary caretaker because it suggests that there is one primary caretaker, with all other caretakers as helpers or secondary. As will be discussed, this categorization helps perpetuate the gendered division of caretaking by automatically classifying women as the primary caretakers. However, elevating men to the level of primary caretaker at the expense of women's "primary" caretaking role does little to solve the problem. Asking men to make the same trade-offs that women must now make in order to have a career and family will do little to alleviate the problem of gender inequity in the work-force and does not serve the best interests of children or society. Instead, I envision a world in which men and women are co-equal caregivers of their children.

8. A LexisNexis search for journal articles with the words "paternity leave" in the summary yields a mere 12 articles. In contrast, the same search for the phrase "maternity leave" yields 68 articles.

9. There are exceptions, of course. See, e.g., SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD SUCCESS (2007); PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME (2007).

10. Joan Williams, "It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate, 102 COLUM. L. REV. 812, 821 (2002).

11. This is true in both blue- and white-collar jobs. Mandatory overtime and work schedules that are provided a few days in advance and that may have only starting but not stopping times mean that blue-collar workers may have little control over their own schedules and no way of predicting what their hours will be, even from day to day. A similar change has occurred in white-collar and executive jobs. Communication technology that has made it easier to work from home has also made it easier for work to be demanded at any hour of the day. Law firm associates, for example, are often literally expected to be available twenty-four hours a day, with partners e-mailing assignments at 9:00 PM at night with the expectation they will be completed by the next morning. People also continue to be accessible while they are on vacation and even out of the country, as mobile phones have international access.

groceries in the refrigerator, and that the housework gets done.<sup>12</sup>

Nevertheless, gender differences in employment and wages do not become marked until the arrival of children, when caregiving demands begin to conflict dramatically with work demands.<sup>13</sup> Further, although many men no longer maintain the primary breadwinner role, they nevertheless retain a secondary role as caregivers; they are the helpers, not the ones responsible for caregiving.<sup>14</sup> But men who want to participate fully in family life face discrimination in the workplace, including the denial of leave and potentially greater harm to their careers than women in the same position.<sup>15</sup> According to Professor Williams,

Ironically, maintaining an ideal-worker norm designed around traditional notions of male life patterns results in gender discrimination against men, too. Expecting full-time, uninterrupted work from men assumes that they have a free-flow of domestic support (i.e., a housewife), which has the effect of policing men into an outdated, stereotypical gender role. When men break from this expectation and are penalized at work—for example, retaliated against for taking family and medical leave—they too experience unlawful gender discrimination.<sup>16</sup>

Even when company policies offer equitable family leave benefits for men and women, the workplace culture often discourages men from using these benefits.<sup>17</sup>

Moreover, women's greater responsibility to family caregiving leads to the view that they are "inauthentic workers," inhabiting jobs and careers only partially while their true interests lie in the home.<sup>18</sup> In the past, this view of women workers helped protective legislation that limited women's working hours and regulated their working conditions withstand constitutional challenges in the *Lochner* era.<sup>19</sup> In these cases, the belief that women were

12. See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 66 (2000) ("Whereas women typically have little trouble stepping onto the bottom rungs of job ladders that lead to high-level managerial and professional jobs, they are blocked from promotion by job requirements that require workers to have gender privileges few women enjoy [such as] access to a flow of family work from a spouse . . .").

13. ANDREA DOUCET, DO MEN MOTHER? 5 (2006).

14. *Id.* at 6.

15. See generally MARTIN H. MALIN ET AL., WORKLIFE LAW, WORK/FAMILY CONFLICT, UNION STYLE: LABOR ARBITRATIONS INVOLVING FAMILY CARE (2004), <http://www.worklifelaw.org/pubs/conflictunionstyle.pdf>; MARY C. STILL, WORKLIFE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 5 (2006), [http://www.law.yale.edu/documents/pdf/FRD\\_report\\_FINAL1.pdf](http://www.law.yale.edu/documents/pdf/FRD_report_FINAL1.pdf).

16. Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend in Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 174 (2006).

17. See, e.g., MINDY FRIED, TAKING TIME: PARENTAL LEAVE POLICY AND CORPORATE CULTURE 91–93 (1998) (explaining that male employees often lack knowledge about benefits, even though the company's family leave policies may be the same for both men and women).

18. See Vicki Schultz, *Essay: Life's Work*, 100 COLUM. L. REV. 1881 (2000) for a discussion of how the courts have treated women as inauthentic workers. See also WILLIAMS, *supra* note 12, at 64–113 (discussing the problems women face in living up to the ideal worker norm).

19. Schultz, *supra* note 18, at 1898.

caregivers first and workers second helped justify paying men, but not women, a family wage.<sup>20</sup> The belief that a man's primary, albeit not sole, role in the family is wage-earner continues to be prevalent<sup>21</sup> and helps reinforce a definition of father as provider and not caregiver.<sup>22</sup>

Women have faced discrimination in the workplace because they are viewed as inauthentic workers—not fully committed to paid employment.<sup>23</sup> Men, though, face a corresponding problem: they are viewed as inauthentic caregivers. As fathers, their role is to provide financially for the family. Just as a good mother must be a caregiver first, a good father must be a provider first<sup>24</sup> and caregiver second. In fact, the United States Census Bureau considers caregiving by fathers while a child's mother is at work to be a "child care arrangement."<sup>25</sup> The Census Bureau treats caregiving by mothers as the default by asking the question "Who's Minding the Kids?" when mothers are not.<sup>26</sup> Thus, the Census Bureau places a father's caregiving in the same category as a babysitter's,<sup>27</sup> underscoring the way in which men's caregiving is treated as something done to help mothers rather than as a primary responsibility of fatherhood.

Men who treat caregiving as a primary concern face discrimination and hostility in the workplace.<sup>28</sup> Despite the enactment of the Family and Medical Leave Act (FMLA) in 1993, which provides eligible employees with twelve weeks of job-protected unpaid leave,<sup>29</sup> companies are less likely to offer paternity leave than they are to offer maternity leave.<sup>30</sup> Further, maternity leaves are usually longer and more likely to be paid than paternity leaves.<sup>31</sup> Men who use paternity leave policies may be viewed negatively and thought to be taking "vacation" rather than actually caring for their own child.<sup>32</sup>

According to Professor Williams, "the family dynamics that drive women out of their jobs often stem from workplace norms and practices that pressure men into breadwinner roles and women out of them. Workplaces not only

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20. *Id.*

21. Shawn L. Christiansen & Rob Palkovitz, *Why the "Good Provider" Role Still Matters: Providing as a Form of Paternal Involvement*, 22 J. FAM. ISSUES 84, 85 (2001).

22. See WILLIAMS, *supra* note 12, at 3–4.

23. Schultz, *supra* note 18, at 1892–1918.

24. WILLIAMS, *supra* note 12, at 27.

25. U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2005/SUMMER 2006 3 (2010), <http://www.census.gov/prod/2010pubs/p70-121.pdf>; see also KJ Dell'Antonia, *The Census Bureau Counts Fathers as 'Child Care'*, MOTHERLODE (Feb. 8, 2012, 12:36 PM), <http://parenting.blogs.nytimes.com/2012/02/08/the-census-bureau-counts-fathers-as-child-care/>.

26. U.S. CENSUS BUREAU, *supra* note 25, at 3.

27. *Id.*

28. STILL, *supra* note 15, at 5.

29. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-54 (2006).

30. ELLEN GALINSKY ET AL., FAMILIES & WORK INST., 2008 NATIONAL STUDY OF EMPLOYERS 19 (2008), <http://familiesandwork.org/site/research/reports/2008nse.pdf>.

31. *Id.* at 17.

32. WILLIAMS, *supra* note 4, at 81 (quoting a male professor who requested parental leave stating that he was "met with a sneering denial by [the department] chair, who said that, while another male colleague at Berkeley may have enjoyed that 'vacation,' our department couldn't spare my teaching services").

produce widgets. They also produce gender.”<sup>33</sup> In other words, how workplaces are structured—whether they leave room for both men and women to participate in family life—affects how family life, and thus gender, is structured. The law similarly shapes workplaces and workplace policies, both directly and indirectly influencing family life. However, how the law shapes family life depends on the cultural and social context of the law. That is, a law’s effect on family life necessarily depends on the workplace and family structures upon which the law acts. Thus, a “gender-neutral” law such as the FMLA may produce anything but gender-neutral results. If a law aims to promote gender equity, it must be designed to account for and even counteract prevailing social and cultural norms.

This article seeks to illuminate how the social context in which the FMLA applies interacts with the law to maintain the status quo and produce gendered outcomes. The FMLA was intended to, in part, promote workplace gender equality by providing gender-neutral leave and thus reduce employers’ expectations that women are more costly than men because they take maternity leave.<sup>34</sup> Unfortunately, the FMLA failed to operate as a true anti-discrimination statute. Almost twenty years after it was enacted, companies still provide greater maternity leave benefits, and men are still significantly less likely to take leave to care for a newborn child or sick family member.<sup>35</sup>

In the first section of this paper, I discuss the FMLA and why it failed to promote gender equality in the workplace. In the second section, I argue that the view of men as providers first and caregivers second encourages discrimination against male caregivers. The third section discusses how overwork and inflexible work schedules contribute to stereotypical divisions of labor within families and reinforce the view of men as inauthentic caregivers. Finally, the fourth section contends that a new focus on men as caregivers is necessary to promote workplace equality and gender equity within families, allowing both men and women to live full lives that include both work and family life. I suggest policies to promote such co-equal caregiving and breadwinning between men and women.

## I. THE FMLA AND GENDER INEQUALITY

### A. The Family and Medical Leave Act

The Family and Medical Leave Act was the first major piece of legislation signed by Bill Clinton in 1993.<sup>36</sup> The goals of the FMLA were quite lofty. The FMLA was intended to be, in part, an anti-discrimination measure that would

33. *Id.* at 2.

34. 29 U.S.C. § 2601(b) (2006) (“It is the purpose of this Act . . . [t]o accomplish the purposes [of the FMLA] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis . . .”).

35. See discussion *infra* Part II.

36. WILL AITCHISON, THE FMLA: UNDERSTANDING THE FAMILY AND MEDICAL LEAVE ACT 10–11 (2003).

promote gender equality in the workplace by providing women and men with the ability to take job-protected leave to care for sick family members or at the birth of a child.<sup>37</sup> Congress recognized that the increase in single-parent and dual-earner households necessitated some form of job-protected leave.<sup>38</sup> Moreover, “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men . . . .”<sup>39</sup> Therefore, the FMLA aimed to give women the ability to combine work and family responsibilities.<sup>40</sup>

Yet in providing gender-neutral benefits, Congress also intended to encourage gender equity in caregiving and remove any incentive for employers to favor men over women in hiring and promotion.<sup>41</sup> In the first significant case involving the FMLA, Justice Rehnquist stated:

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decision on stereotypes.<sup>42</sup>

But despite its stated goals and the expectation that the FMLA would be revolutionary, its effect has been relatively small.<sup>43</sup> The FMLA covers employees in companies with fifty or more workers.<sup>44</sup> Covered employees receive twelve weeks of job-protected unpaid leave to care for a newborn child, an ailing parent, an older child or spouse, and for their own illnesses.<sup>45</sup> During this leave period, employers must continue to provide healthcare benefits.<sup>46</sup> In addition, in order to be eligible to take FMLA-protected leave, an employee working at a covered organization must have worked for the employer for twelve months and at least 1,250 hours over the previous twelve months.<sup>47</sup> Unsurprisingly, given these restraints, only forty-six percent of employees in the United States are actually covered by the Act.<sup>48</sup>

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37. *Id.* at 11–13.

38. 29 U.S.C. § 2601(a)(1) (2006).

39. AITCHISON, *supra* note 36, at 12.

40. 29 U.S.C. § 2601(a)(5) (2006).

41. Of course, gender specific leave would very likely have been found to be unconstitutional.

42. Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003).

43. AITCHISON, *supra* note 36, at 2–3.

44. *Id.* at 35.

45. 29 U.S.C. § 2601.

46. 29 U.S.C. § 2614(c)(1).

47. AITCHISON, *supra* note 36, at 30–31.

48. DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE 2-5 to -8 (2000), <http://www.dol.gov/whd/fmla/toc.htm>.

Almost two-thirds of companies covered by the FMLA changed their policies to comply with the Act.<sup>49</sup> The most common change, cited by sixty-nine percent of the firms, was to allow fathers to take time to care for a sick or newborn child.<sup>50</sup> Because more covered firms offered maternity leave but not paternity leave, the Act had a greater effect on the availability of paternity leave.<sup>51</sup> However, women are still more likely to take leave than men at the birth of a child or to care for a sick family member.<sup>52</sup>

As critics of the FMLA note, the Act's actual effect on leave-taking has been fairly small, first, because less than half of workers are actually covered.<sup>53</sup> Second, the lack of paid leave discourages many employees who need leave from taking it.<sup>54</sup> Only those who can either afford to go without pay or who are eligible for paid leave can take FMLA-covered leave. Third, the limitation on job-protected leave for time off to care for a newborn or adopted child within the first year or to care for a family member with a serious health condition excludes the vast majority of reasons a person would need to take leave.<sup>55</sup> Parents cannot take leave to care for a child who is too sick to go to school but does not have a serious health condition, nor can they take leave because of childcare problems.<sup>56</sup> They cannot take leave to attend a parent-teacher conference or other school function.<sup>57</sup> Thus, despite grand pronouncements that the FMLA keeps parents from having to choose between caring for a child and going to work, the FMLA provides little functional relief for families trying to balance work and family. Many parents remain, in the words of Professor Williams, "one sick child away from being fired."<sup>58</sup>

In upholding the FMLA and abrogating the states' Eleventh Amendment immunity in *Nevada Department of Human Resources v. Hibbs*, the Supreme Court acknowledged the FMLA as a statute that sought to promote equality by providing men equal access to and responsibility for caregiving.<sup>59</sup> According to Justice Rehnquist's majority opinion, "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave."<sup>60</sup> Employers may be reluctant to hire or

49. Jane Waldfogel, *Family Leave Coverage in the 1990's*, MONTHLY LAB. REV., Oct. 1999, at 13, 14.

50. *Id.*

51. *Id.*

52. See discussion *infra* p. 9.

53. *Id.*

54. *Id.*

55. This is based on simple math. Most children will have more minor illnesses and need to visit the dentist, get a flu shot or other vaccines, and have a check-up more often in the time between when they turn one and eighteen than they will have a serious medical condition as defined by the FMLA.

56. AITCHISON, *supra* note 36, at 56.

57. See generally *id.*

58. JOAN C. WILLIAMS ET AL., WORKLIFE LAW, *One Sick Child Away From Being Fired: When "Opting Out" Is Not an Option* 5 (2006), <http://www.worklifelaw.org/pubs/onesickchild.pdf>.

59. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003).

60. *Id.* at 736.

promote women because they expect women to take time off to care for the family, but they are also more resistant to offering men any form of accommodation for family responsibilities.

Indeed, the history of state legislation demonstrates a historical commitment on the part of the states to tie women to the caregiving role and men to the provider role. According to data presented to Congress, several states offered leave for women that far exceeded compensation for any pregnancy-related disability.<sup>61</sup> As many as fifteen states gave women up to one year of maternity leave without providing a corresponding leave benefit for men.<sup>62</sup> According to the Court in *Hibbs*, leave beyond the first six weeks is for parenting and not disability.<sup>63</sup> The Court also found that while thirty-seven percent of private-sector employees received maternity leave, only eighteen percent received paternity leave.<sup>64</sup> Thus, "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread."<sup>65</sup> In *Hibbs*, the Court portrayed the FMLA as a statute that recognizes the need to redistribute caregiving responsibilities in order to achieve gender equality in the workplace.<sup>66</sup> Unfortunately, that goal has yet to be realized.<sup>67</sup>

The view of men as inauthentic caregivers is reflected in the dearth of cases in which a male plaintiff sought leave to care for a child or sick family member. Because of the multitude of FMLA litigation, I expected to find a large number of these cases.<sup>68</sup> However, after performing a thorough search and reviewing over 400 published cases, I found only fifteen cases in which a male plaintiff sought FMLA-protected leave to care for a sick family member, newborn, or adopted child.<sup>69</sup> In contrast, there were at least one hundred cases in which a female plaintiff sought FMLA-protected leave.<sup>70</sup> Similarly, a comprehensive survey of

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61. *Id.* at 731.

62. *Id.*

63. *Id.* at 731 & n.4.

64. *Id.* at 730.

65. *Id.*

66. Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 26–28 (2004).

67. *Id.* at 29.

68. See Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, LAW & SOC'Y REV. 869, 889 (1999) (explaining that between 1993 and 1997 there were 288 published trial-level opinions and fifty-eight appellate opinions in which the FMLA was being interpreted). A LexisNexis search of all federal cases in which the FMLA appears yields over 3,000 results. Narrowing the search to try to focus on cases in which the plaintiff is seeking leave to care for another person still produces a large volume of cases. Searching for FMLA within ten words of "father" yields forty-eight cases, within twenty words of "father" yields seventy-four cases, within twenty words of "mother" 116 cases, within twenty words of "spouse" 101 cases, within twenty words of "daughter" yields 142 cases, and within twenty words of "son" yields 171 cases.

69. See, e.g., Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003); Scamihorn v. General Truck Drivers, Local 952, 282 F.3d 1078 (9th Cir. 2002); Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001); Aubuchon v. Knauf Fiberglass, 240 F. Supp. 2d 859 (S.D. Ind. 2003), *aff'd* 359 F.3d 950 (7th Cir. 2004); Briones v. Genuine Parts Co., 225 F. Supp. 2d 711, 715 (E.D. La. 2002); Plumley v. S. Container, Inc., No. 00-140-P-C, 2001 WL 1188469 (D. Me. Oct. 9, 2001); Johnson v. Primerica, No. 94 Civ. 4869, 1996 WL 34148 (S.D.N.Y. Jan. 30, 1996).

70. See, e.g., Marchisheck v. San Mateo Cnty., 199 F.3d 1068 (9th Cir. 1999); Martyszenko v.

556 published and unpublished family responsibility discrimination cases from 1971 to 2004 found that only forty-three cases, or 7.73 percent, had a male plaintiff.<sup>71</sup>

The lack of male plaintiffs is informative. It suggests that men simply do not take family leave at the same rate as women. The exact number of men taking family leave and the duration of the leave is surprisingly hard to find, but it is possible to extrapolate that number from the data that is available. Women make up fifty-eight percent of the FMLA-protected leave-takers and men make up forty-two percent.<sup>72</sup> Of the men who take leave, fifty-eight percent take leave to care for their own serious health condition, but only forty-nine percent of the women leave-takers take leave to care for their own serious health condition.<sup>73</sup> Thus, forty-two percent of men take leave for someone else while fifty-one percent of women take leave to care for someone else. It is clear that a greater percentage of women than men take leave to care for a newborn child or sick family member.

Women with FMLA-protected maternity leave take the longest duration of leave, and leave-takers of any gender who care for a sick family member take the shortest duration of leave.<sup>74</sup> Thus, on average, women's maternity leave is longer than men's leave to care for a newborn child or sick family member.<sup>75</sup>

For the most part, the cases in which men seek FMLA-protected leave resemble the cases in which women seek FMLA-protected leave. That is, most cases primarily involve questions of procedure, such as whether the employee provided appropriate notice,<sup>76</sup> and questions of whether an illness met the requirements of a "serious health condition."<sup>77</sup> Some cases, discussed in greater detail below, rest on whether a person took leave "to care for" a family member, and therefore on the legal definition of "to care for."<sup>78</sup> And although female plaintiffs certainly encountered the question of whether their activities during leave qualified as caring for a sick family member, the ways in which courts discuss men's caregiving exemplifies how society views men as inauthentic

Safeway, Inc., 120 F.3d 120 (8th Cir. 1997); *Barrilleaux v. Thayer Lodging Grp., Inc.*, No. CIV. A. 97-3252, 1999 WL 155939 (E.D. La. March 19, 1999); *Gilbert v. Star Building Systems*, No. CIV-95-1932-L, 1996 WL 931315 (W.D. Okla. Nov. 15, 1996); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994).

71. *STILL*, *supra* note 15, at 8.

72. *CANTOR ET AL.*, *supra* note 48, at 2-3 ("Leave-takers are more likely to be female (58.1%) . . .").

73. *Id.*

74. *Id.* at 2-7.

75. *Id.* Because only women can be in the maternity leave category and maternity leave is the longest leave, men's leave to care for a newborn child or sick family member will be shorter.

76. *See, e.g.*, *Aubuchon v. Knauf Fiberglass*, 240 F. Supp. 2d 859 (S.D. Ind. 2003), *aff'd* 359 F.3d 950 (7th Cir. 2004); *Ozolins v. Northwood-Kensett Cmty. Sch. Dist.*, 40 F. Supp. 2d 1055 (N.D. Iowa 1999); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995).

77. *See, e.g.*, *Caldwell v. Holland of Tex., Inc.*, 208 F.3d 671 (8th Cir. 2000); *Pneumatics*, No. IP 99-1285-CT/G, 2000 WL 1911684 (S.D. Ind. Dec 4, 2000); *Ozolins*, 40 F. Supp. 2d 1055; *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994); *Raymond v. Albertson's Inc.*, 38 F.Supp.2d 866 (D. Nev. 1999); *Shober v. SMC Johnson v. Primerica*, No. 94 Civ. 4869, 1996 WL 34148 (S.D.N.Y. Jan. 30, 1996).

78. *See infra* p. 22.

caregivers.<sup>79</sup> While only one of the cases discussed below is explicitly a sex discrimination case, the other cases also illustrate the hostility that male caregivers face in the workplace.<sup>80</sup>

## B. Gender Roles

The lack of provision for paid paternity leave seriously affects men's leave-taking. For men, providing financially for the family is viewed as the baseline for fatherhood, just as providing care is the baseline for motherhood.<sup>81</sup> The role of the father is to provide financially, and caregiving is something extra that fathers do to "help out" mothers.<sup>82</sup> The centrality of the provider role to fatherhood undermines a view of fathers as caregivers.

Author and pundit Kate O'Beirne aptly sums up traditional gender role beliefs: "men show devotion to the family by working really hard. Women show devotion to the family by showing devotion to the family."<sup>83</sup> Research on the salience of the provider role for fathers supports the notion that being a "good provider" remains central to the definition of fatherhood and masculinity.<sup>84</sup> Since the Industrial Revolution, fatherhood has been defined largely in terms of breadwinning.<sup>85</sup> Good fathers provide materially for their children. Although expectations of how involved fathers will be with their children have changed over time, the provider role remains central to the definition of fatherhood.<sup>86</sup>

As a result, fathers who fail to provide economically for their children may feel that they are not "good fathers." One unemployed father describes his feelings of shame at not being able to provide materially for his family: "I know I ought to feel glad, being able to spend so much time with my kids while they're young . . . I just feel empty. I'm ashamed I can't provide them with everything they need."<sup>87</sup> For this father, failure to provide left him feeling ashamed even though he was able to spend more time with his children.

The centrality of breadwinning to masculinity and fatherhood, combined with societal expectations about men's roles, may lead men to overcommit to work. Men are often more reluctant than women to leave work early to care for children or to refuse assignments for personal reasons.<sup>88</sup> Research on attitudes toward male caregivers suggests that men correctly perceive that they will be judged more harshly than women for using family leave policies.<sup>89</sup> In fact, men's

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79. See, e.g., discussion *infra* pp. 16–18.

80. See *infra* pp. 13–24.

81. Christiansen & Palkovitz, *supra* note 21, at 85.

82. *Id.*

83. Rebecca Traister, *My Lunch with an Antifeminist Pundit*, SALON.COM (Jan. 17, 2006, 7:21 AM), [http://www.salon.com/2006/01/17/o\\_beirne/](http://www.salon.com/2006/01/17/o_beirne/).

84. Christiansen & Palkovitz, *supra* note 21, at 96.

85. NANCY E. DOWD, REDEFINING FATHERHOOD 37 (2000).

86. *Id.*

87. Christiansen & Palkovitz, *supra* note 21, at 96.

88. JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY 86 (2004).

89. See Julie Holliday Wayne & Bryanne L. Cordeiro, *Who Is a Good Organizational Citizen? Social Perception of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233 (2003).

beliefs about the provider role influence their decision making even before they are married or contemplating children.<sup>90</sup> Men who expect to be the primary provider for their family delay marriage until they believe that their income can adequately support a family.<sup>91</sup>

Research on men and women's gender roles demonstrates that in general, women's gender identity is more elastic than men's.<sup>92</sup> That is, women have more room than men to deviate from traditional gender stereotypes and still be considered feminine. Masculinity, in contrast, is more rigid.<sup>93</sup> Thus, women may wear pants or skirts, but a man in a dress is a man in drag.<sup>94</sup> Women may therefore find it easier to perform traditionally masculine tasks such as entering the workforce while men remain less comfortable taking on the traditionally female task of caregiving. This could help explain, in part, why men continue to provide less caregiving than women.<sup>95</sup>

Masculinity extends beyond an individual man's identity to encompass family and workplace practices.<sup>96</sup> According to psychologist Joseph Pleck, traditional definitions of masculinity require that men conform to culturally prescribed gender roles, and the violation of gender roles has greater consequences for men than for women.<sup>97</sup> For men more than for women, work is definitional.<sup>98</sup> What men do is part of who they are. Masculinity may also be defined in opposition to femininity.<sup>99</sup> Thus, caregiving, because it is usually

90. Heather L. Koball, *Crossing the Threshold: Men's Incomes, Attitudes Toward the Provider Role, and Marriage Timing*, 51 *SEX ROLES* 387, 393–94 (2004).

91. *Id.*

92. *See, e.g.*, SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 150 (1993) (“During childhood, the cultural asymmetry between male gender-boundary-crossers and female gender-boundary-crossers can be seen in the merciless teasing of sissies, as opposed to the benign neglect or even open admiration of tomboys. Asymmetry can also be seen in dress and play codes for children: although a girl can now wear almost any item of clothing and play with almost any toy without so much as an eyebrow being raised by her social community, let a boy even once have the urge to try on a princess costume in the dress-up corner of his nursery school, and his parents and teachers will instantly schedule a conference to discuss the adequacy of his gender identity . . . . Although theoretically, women are also subject to this kind of internal threat, the androcentrism in American culture now allows females to so freely express many impulses that are culturally defined as masculine (including, for example, the impulses to political leadership and athletic mastery) that there are probably not nearly so many repressed masculine impulses in the psyches of women as there are repressed feminine impulses in the psyches of men.”).

93. *Id.*

94. *Id.*; *see also* Sarah Manley, *Lessons from a Halloween Costume*, *N.Y. TIMES* (Oct. 31, 2011, 5:47 PM), <http://well.blogs.nytimes.com/2011/10/31/lessons-from-a-halloween-costume/> (describing the experience of her son who dressed up as Daphne from *Scooby Doo* for Halloween).

95. *See, e.g.*, BEM, *supra* note 92, at 166 (“[T]he cultural definition of a real man makes males feel much more insecure about the adequacy of their gender than females, for the definition unrealistically requires them not only to suppress every human impulse with even the slightest hint of femininity but also to attain the kind of power and privilege in their social community that will produce respectful deference in women and less powerful men.”).

96. DOWD, *supra* note 85, at 182–83.

97. Joseph H. Pleck et al., *Masculinity Ideology and Its Correlates*, in *THE GENDER AND PSYCHOLOGY READER* 308, 310–13 (Blythe McVicker Clinchy & Julie K. Norem eds., 1998).

98. DOWD, *supra* note 85, at 209.

99. Sandra Lipsitz Bem, *Enculturation and Self-Construction: The Gendered Personality*, in *THE GENDER AND PSYCHOLOGY READER*, 413, 423 (Blythe McVicker Clinchy & Julie K. Norem eds., 1998).

done by women, is viewed as “feminine.” Because male gender roles are more rigid than female gender roles, men may have a harder time redefining traditionally feminine tasks as consistent with masculine identities.<sup>100</sup>

For at least one hundred years, masculinity has been defined by paid labor participation and the ability to provide and care for a family.<sup>101</sup> The provider role is an important part of the definition of fatherhood.<sup>102</sup> Therefore, paid employment may be more central to men’s sense of themselves as men than paid employment is to women’s sense of themselves as women.<sup>103</sup> Although for women, paid employment is consistent with femininity, femininity is not defined by participation in paid work.<sup>104</sup>

Pressure to conform to the provider role and to traditional masculinity may also be exerted from the outside. Society judges when men use family leave policies.<sup>105</sup> As a result, men find it harder than women to respond to non-economic family responsibilities.<sup>106</sup> Nevertheless, in today’s world, men are expected to participate in caregiving, even if caregiving is not considered to be their primary responsibility.<sup>107</sup> This leaves men in a similar place as women, expected to fulfill traditional gender roles (breadwinner for men and caregiver for women) while also taking on new responsibilities. Thus, despite the FMLA’s promise of gender-neutral leave policies to combat sex discrimination, men are treated as inauthentic caregivers, just as women are treated as inauthentic workers.

## II. MALE CAREGIVERS IN THE WORKPLACE

Men who want to fully participate in family caregiving as well as work confront many of the same problems that women have dealt with for years. Most workplaces presume an “ideal worker” who is available at the employer’s discretion, often outside of the previously standard nine-to-five workday, and who benefits from the caregiving work of a stay-at-home spouse.<sup>108</sup> Even though this ideal is no longer explicitly articulated, the standard structure of work requires that employees act like “ideal workers” even when they do not have a

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100. This is not to say that masculinity and male gender roles are unchangeable or that men never identify with traditionally female tasks. Instead, the point is simply that men may have a harder time than women in reconceptualizing their gender roles.

101. ROBERT GRISWOLD, *FATHERHOOD IN AMERICA* 13–17, 33, 35–36 (1993).

102. *Id.* at 244 (“Fatherhood and manhood were inextricably linked in American culture: men organized their lives and their identity around fatherly breadwinning.”).

103. This is not to say that paid employment is not central women’s identity, it is just not central to women’s gender role identity.

104. See Rose Melendez, *Police Officer*, in *HARD-HATTED WOMEN: STORIES OF STRUGGLE AND SUCCESS IN THE TRADES* 71–80 (Molly Martin ed., 1998) (showing an example of how women may incorporate non-traditional jobs into their conceptualization of themselves as women).

105. See, e.g., WILLIAMS, *supra* note 4, at 80.

106. *Id.*

107. E.g., FRIED, *supra* note 17, at 66; see also GRISWOLD, *supra* note 101, at 244 (describing a father who wants to be involved with his children’s caregiving, yet states, “I thought as a man you couldn’t raise children. It never came to my mind that children could be raised by their father and live with their father. I always thought it was a natural thinking for kids to be raised by their mother”).

108. WILLIAMS, *supra* note 4, at 80.

stay-at-home spouse.<sup>109</sup> Men who try to take leave to care for children or other family members may, like women, be considered less dedicated to their work.<sup>110</sup> Male caregivers, though, often have an extra hurdle to overcome when trying to take leave: the “mommy track,” such as part-time or flexible work hours, may not be available to them, as many workplace cultures assume that caregiving is women’s work.<sup>111</sup> Indeed, as in the case of *Knussman v. Maryland*, employers may assume that men cannot be the primary caregiver of their own children.<sup>112</sup> Men who take family leave are often thought to be on vacation because employers and co-workers cannot conceive of men as real caregivers for their children.<sup>113</sup> The courts may also treat men’s caregiving as secondary or supplemental to the mother’s caregiving, even when they recognize that men have the right to take leave.<sup>114</sup>

#### A. Male Caregivers: Discrimination and Hostility in the Workplace

Male caregivers face surprisingly overt discrimination in the workplace, including being eligible for fewer leave benefits than women. As Professor Martin Malin wrote in a 1994,

First, employers often do not provide parental leave for men, and when they do, they often hide it under generalized classifications causing many men to overlook its availability. Second, parental leave for men is almost always unpaid; this makes it financially impossible for the father, who is saddled with the traditional role of primary breadwinner, to use it. Third, fathers who wish to take even unpaid parental leave are deterred by a high level of workplace hostility.<sup>115</sup>

Despite the intervening years and subsequent rulings, such as *Knussman v. Maryland*,<sup>116</sup> that plainly state that family and parental leave must be offered to men and women, workplaces regularly provide different paternity and maternity benefits.<sup>117</sup> According to a 2008 study by the Families and Work Institute, fifty-two percent of employers offer some pay replacement during

109. *Id.*

110. *Id.*

111. *Id.* at 80, 88.

112. See *Knussman v. Maryland*, 272 F.3d 625, 628 (4th Cir. 2001). The employer rejected the male employee’s request to take leave to spend time with his newborn. *Id.*

113. WILLIAMS, *supra* note 4, at 80.

114. See discussion *infra* pp. 20–24.

115. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1049 (1994).

116. See *Knussman*, 272 F.3d at 636 (holding that “gender classifications based upon typical general roles in the raising and nurturing of children” is unconstitutional without a substantial government interest); see also discussion *infra* pp. 16–18.

117. GALINSKY ET AL., *supra* note 30, at 19; see also DEBORAH L. RHODE, ABA COMM’N OF WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 18 (2001), <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf> (finding that only ten to fifteen percent of law firms and Fortune 1000 companies offer the men and women the same parental leave). The way the research is aggregated makes it very hard to parse out exactly what is going on. Some amount of additional leave provided to women who give birth can be accounted for by the need for pregnancy related leave and not simply time off to care for a child. However, the policies are often opaque in their wording. See discussion *infra* p. 15.

maternity leave while only sixteen percent of employers offer pay replacement for paternity leave.<sup>118</sup> Another study found that nine out of ten law firms had separate paternity and maternity leave policies that either gave men less leave than women or required men to prove that they were the “primary caregiver” in order to receive the parental leave.<sup>119</sup>

**Table 1: Caregiving Leave in 2008<sup>120</sup>**

Leave Policies	Fewer than 12 weeks	12 Weeks	More than 12 Weeks
Maternity Leave	15%	63%	22%
Paternity Leave	24%	63%	13%
Adoption or foster care leave	19%	67%	14%
Care of seriously ill family members	16%	69%	15%

**Table 2: Replacement Pay During Leave in 2008<sup>121</sup>**

	At Least Some Replacement Pay During Leaves	“Some Pay” By Employer Size	
		Small (50 to 99 employees)	Large (1,000 or more)
<b>Maternity Leave</b>	52%	48%	76%
<b>Paternity Leave</b>	16%	17%	17%

Additionally, companies state benefits in gendered terms. For example, the recruiting website for one law firm states that “[u]nder certain circumstances . . . we do allow associates to work part-time, for example, in connection with our maternity leave policy.”<sup>122</sup> Even if part-time work is technically available for paternity leave, the language certainly suggests that part-time paternity leave is discouraged. Another firm’s recruiting website states:

**Maternity Leave . . .**

McDermott offers 12 weeks paid maternity leave at 100% compensation, effective immediately upon joining the Firm . . . . Adoption Leave, Maternity Leave, Short Term Disability, Paternity Leave and FMLA are administered concurrently. . . .

118. GALINSKY ET AL., *supra* note 30, at 19.

119. Keith Cunningham, *Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family*, 53 STAN. L. REV. 967, 977 (2001).

120. GALINSKY ET AL., *supra* note 30, at 17.

121. *Id.* at 19.

122. *Sidley Austin LLP Careers: Benefits*, SIDLEY AUSTIN LLP, <http://www.sidley.com/careers/northamerica/losangeles/benefits/> (last visited Nov. 14, 2012).

**[Paternity] Leave Policy . . .**

McDermott offers 4 weeks paid paternity leave at 100% compensation for the birth or adoption of a child to all full-time Associates . . . . This benefit is effective immediately upon joining the Firm.<sup>123</sup>

Thus, anyone looking at the stated policy would believe that women are allowed to take longer leaves than men and are more likely to be able to work part-time. This sends an important message, not only to the firm's actual employees but also to any potential employees, that women's caregiving will be afforded greater accommodation and flexibility.

Law schools also provide different paternity and maternity leave policies. A 2006 study of law schools found that seventy-three percent offered at least six to eight weeks of paid family leave to women but only fifty-eight percent provided the same amount of leave to men.<sup>124</sup> Further, even when companies do not make explicit gender distinctions in their leave policies, policies that provide different benefits for primary and secondary caregivers may similarly discourage men from taking as much leave as women. Because women give birth and breastfeed, it is harder for men to claim primary caregiver status immediately after the birth of a child.<sup>125</sup> Because the secondary caregiver is able to take less leave than the primary caregiver and it is easier for women to be considered the primary caregiver than men, men are likely to take shorter caregiving leave than women.

Moreover, policies that require men, but not women, to prove that they are the primary caregiver reinforce the view of men as inauthentic caregivers. For a man to take paternity leave under these policies, he must demonstrate that he wants to do what the company clearly views as "women's work."<sup>126</sup> This demonstration may be particularly damaging to his career in companies or company cultures where masculinity is highly valued. A recent lawsuit filed in Massachusetts highlights this problem.<sup>127</sup> According to the complaint, a male lawyer was fired as retaliation for taking paternity leave, which was not

123. See *Careers at McDermott*, MCDERMOTT WILL & EMERY, <http://careers.mwe.com/Uslawstudents/uniGC.aspx?xpST=GCUSLaw&key=990c3de4-1169-40ba-ad60-7ad785fab46b&activeEntry=3ce42cad-45db-4a45-8d6c-9519fb1b21c4> (last visited Nov. 14, 2012). Although maternity leave includes disability leave, eight weeks difference in leave policies can be accounted for exclusively by a birth mother's pregnancy related disability. Further, the inclusion of adoption in the explanation of leave benefits suggests that adoptive mothers are still eligible for the twelve weeks paid leave.

124. Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661, 711 (2006). The amount of paid leave varied considerably by law school type. Private schools were almost twice as likely as public schools to offer a semester off at 100% pay. All of the first- and second-tier law schools, as ranked by U.S. News & World Reports, offered some wage replacement for family leave, while only thirty-one percent of third- and fourth-tier law schools offered some form of family leave. *Id.* at 706.

125. See, e.g., *Knussman v. Maryland*, 272 F.3d 625, 629 (4th Cir. 2001). Although the court ultimately ruled in favor of the Plaintiff, Maryland state trooper Howard Knussman. Knussman was originally told by the Maryland Department of Personnel that father's could only take leave as secondary care givers because they "couldn't breast feed a baby." *Id.* This demonstrates the extra hurdle that men may have to overcome in demonstrating that they are the primary caregivers.

126. Cunningham, *supra* note 119, at 977.

127. *Ayanna v. Dechert LLP*, 840 F. Supp. 2d 453, 455 (D. Mass. 2012).

consistent with the “macho” stereotype that men at the firm were expected to fulfill.<sup>128</sup>

A man who takes paternity leave thus faces the problem of entering the “mommy track” and engaging in gender atypical behavior.<sup>129</sup> Further, by prioritizing family caregiving, he may be seen as abdicating the role of provider.<sup>130</sup> Thus, because good fathers are those who take financial care of their children, he becomes, by definition, a bad father. Additionally, when fathers fulfill the breadwinner role, employers hold them to lower punctuality and performance standards than mothers, while men who signal that “they have caregiving responsibilities [and] encounter harsh workplace penalties.”<sup>131</sup> One study found that men who took even a short work absence because of a family conflict were recommended for fewer rewards and had lower performance ratings.<sup>132</sup>

The Fourth Circuit case of *Knussman v. Maryland* provides a surprisingly clear example of the overt discrimination male caregivers confront when trying to take family leave.<sup>133</sup> Knussman, a state trooper with the Maryland State Police (MSP), requested four to eight weeks of paid family leave to care for his wife and newborn child.<sup>134</sup> Shortly before Knussman’s daughter was born, Knussman learned of a new policy that would allow “primary caregivers” to “use, without certification of illness or disability, up to 30 days of accrued sick leave to care for [a] child.”<sup>135</sup> When Knussman inquired about using the “nurturing leave,” he was told that “only birth mothers could qualify as primary caregivers; fathers would only be permitted to take leave as secondary caregivers since ‘they couldn’t breast feed a baby.’”<sup>136</sup> Instead of primary caregiver leave, Knussman applied for and received ten days of paid sick leave under the provision for secondary caregivers.<sup>137</sup>

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128. *Id.*

129. See generally MOMMY WARS, *supra* note 1.

130. David John Petroski & Paige P. Edley, *Stay-At-Home Fathers: Masculinity, Family, Work, and Gender Stereotypes*, 16 ELECTRONIC J. COMM. ¶ 10 (2006), available at <http://www.cios.org/EJCPUBLIC/016/3/01634.html> (“There are people who look askance upon males who are not the primary breadwinners . . . . Some see the stay-at-home dads’ role as ‘doing nothing,’ perhaps being an incompetent employee or a henpecked husband. Other misguided notions are associated with disrespect for a male who burdens his wife with the financial responsibilities of supporting a family.”).

131. WILLIAMS, *supra* note 4, at 93; see also Adam Butler & Amie Skattebo, *What is Acceptable for Women May Not Be For Men: The Effect of Family Conflicts with Work on Job-Performance Ratings*, 77 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 553, 557–58 (2004); Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 744 (2004).

132. Tammy D. Allen & Joyce E. A. Russell, *Parental Leave of Absence: Some Not So Family-Friendly Implications*, 29 J. APPLIED SOC. PSYCHOL. 166, 179–80 (1999).

133. See *Knussman v. Maryland*, 272 F.3d 625, 629–30 (4th Cir. 2001). Here, an employer denied a male employee sick leave, claiming that he was not the primary caregiver to his child even though his wife was sick. *Id.*

134. *Id.* at 628.

135. *Id.* (citing MD. CODE ANN., State Pers. & Pens. §§ 7-502(b)(3), 7-508 (1994)).

136. *Id.* at 628–29.

137. *Id.* at 629.

After the birth of their daughter, Kimberly Knussman experienced continuing health problems, and Knussman requested that his leave be extended to thirty days, stating that he was his daughter's primary caregiver.<sup>138</sup> He argued that "given his wife's condition following delivery, he was performing the majority of the essential functions such as diaper changing, feeding, bathing and taking the child to the doctor."<sup>139</sup> On the day before his ten day leave ended, Knussman's immediate supervisor told him that he might be eligible for additional leave to care for his wife under the paid family sick leave policy.<sup>140</sup> When Knussman again contacted the MSP Personnel Management Division, he was told, "'God made women to have babies and, unless [Knussman] could have a baby, there is no way [he] could be primary care [giver],' and that his wife had to be 'in a coma or dead,' for Knussman to qualify as the primary caregiver."<sup>141</sup> Knussman submitted a letter to the MSP Personnel Management Division from Kimberly Knussman's doctor to support his request for family sick leave, but the MSP considered the letter to be insufficient to justify family sick leave.<sup>142</sup> The Knussmans' case was further complicated because Kimberly Knussman was also a state employee, and according to the provision in Maryland law that allowed state employees to take leave to care for a newborn, only one employee in a family could qualify as a primary caregiver.<sup>143</sup> Knussman then pursued a formal grievance, after which Knussman's Assistant Commanding Officer found that:

All indications are that Mrs. Knussman was capable of providing for the care and nurturing of their child after birth. She was off on maternity leave from December 9, 1994 when the child was born until January 23, 1995 when she was certified fit for full time work, a period equivalent to the 30 days allowed by the statute involved in this matter. Additionally, there was nothing offered to indicate that she was unwilling or otherwise unable to provide care for the child. Basically speaking, she was receiving all of the benefits afforded by the statute.

Taking into consideration all of these facts, Mrs. Knussman has to be identified as the primary caregiver in this instance. Tfc. Knussman has not shown any difference between himself and Mrs. Knussman in skill, talent or ability in providing care and nurturing for the child. Since Mrs. Knussman was already receiving benefits equal to those specified for primary caregivers according to statute, there is no reason to extend similar primary care benefits [to] Tfc. Knussman. He was afforded benefits of [a] secondary care provider as he was rightfully entitled. While Tfc. Knussman may have desired the designation as primary, he has failed to justify the claim.<sup>144</sup>

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 629-30 (citations omitted).

142. *Id.* at 629 n.5.

143. *Id.* at 631.

144. *Id.* at 630-31.

The court ultimately found in favor of Knussman, stating that MSP's classification of Knussman as the secondary caregiver because he was a father was an impermissible sex-based classification rooted in stereotypes and overgeneralizations about men's and women's roles.<sup>145</sup> Thus, according to the court, providing different family leave to men and women is sex-discrimination. However, despite this holding, companies continue to offer gendered family leave benefits.<sup>146</sup>

In addition, the inflexible structure of the current workplace makes it hard for men to fulfill the dual roles of provider and caregiver. Legal scholar Nancy E. Dowd aptly notes that "If men have children, their linear uninterrupted, upward progression at work and the kinds of work they do requires a family worker who does a disproportionate share of the family work, and allows for father's separation from the family in order to be . . . the 'ideal worker.'"<sup>147</sup> Arlie Russell Hochschild's sociological study of a large American corporation supports Dowd's observation.<sup>148</sup> One of the senior managers, "Bill Denton," whose real name was not used in order to protect his identity, describes the importance of having a stay-at-home wife to his success:

We made a bargain. If I was going to be as successful as we both wanted, I was going to have to spend tremendous amounts of time at it. Her end of the bargain was that she wouldn't go out to work. So I was able to take the good stuff and she did the hard work – the car pools, dinner, gymnastics lessons . . . I really had it made. I worked very long hours and Emily just managed things. I never had to worry about getting the laundry, figuring out how to get the kids here and there.<sup>149</sup>

The men in Hochschild's study, who had stay-at-home wives and who never had to worry about the laundry, implemented new family-friendly policies at "Amerco."<sup>150</sup> Not surprisingly, they had a hard time understanding the time pressures younger workers faced, even though they acknowledged that not many women would be willing to make the same choices their wives had made.<sup>151</sup> Although Denton genuinely recognized the importance of work-family balance, he could not empathize with the problem.<sup>152</sup> The senior managers at Amerco were mostly men who worked very long hours and were married to

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145. *Id.* at 639.

146. *See generally* Malin, *supra* note 115.

147. DOWD, *supra* note 85, at 208.

148. ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 58 (1997) (describing the way that a male executive's wife and secretary made it possible for him to work without interruption: "Like other top executives Bill told none of those stories so commonly heard from employees farther down the Amerco hierarchy—about disappearing cats, suddenly feverish children, emergency calls from elderly relatives, or missing babysitters. In a polite way, Bill's wife and secretary patrolled Bill's time, keeping a vigilant eye out for time-thieves or unauthorized time-squatters.").

149. *Id.* at 68.

150. *Id.* at 63.

151. *Id.* at 59.

152. *See id.* at 61 (noting that the executives in charge of implementing the policies "were to understand a mass of employees whose concerns were so different from theirs that they might have been living on another planet").

women who managed all of the household responsibilities because they were not engaged in paid labor.<sup>153</sup> Bill Denton and the other upper-level male managers at Amerco could work the long hours required to achieve success in their professions because they had wives who took care of the family.<sup>154</sup>

Similarly, many of the lawyers, both male and female, who reach positions of influence in their organizations did not have significant family obligations and often expected others to make the same personal sacrifices they did to succeed.<sup>155</sup> According to Deborah Rhode, “I had to give up a lot. You [should] too” is a frequent refrain among legal managers.<sup>156</sup> Few male lawyers choose a reduced schedule and most feel that it would be harmful to their careers to ask for more than a few weeks leave.<sup>157</sup> One male lawyer explained that it may be “okay [for men] to say that they would like to spend more time with the kids, but it is not okay to do it, except once in a while.”<sup>158</sup> Thus, the culture of many companies discourages family caregiving participation by men. Time spent in family caregiving is seen as indicating a lack of commitment to work.<sup>159</sup>

Moreover, men who do not participate in caregiving for their own families may not believe that other men can actually be the primary caregivers to their children. For example, although many of the senior managers at Amerco reported that they regretted spending so little time with their children, they had a hard time imagining men as actual caregivers.<sup>160</sup> When engineer “Sam Hyatt” took a two-week paternity leave after the birth of his first child, most of his male co-workers did not conceive of Sam as the actual primary caregiver to his son during that time.<sup>161</sup> They viewed his paternity leave as a vacation and imagined him sitting around watching television.<sup>162</sup> Others resented Sam because they felt pressure from their own wives to increase their family activities.<sup>163</sup> Sam did receive support from some male colleagues.<sup>164</sup> A few of the younger men saw Sam as helping ease the way for more men to take paternity leave in the future, and a few of the older men wished that they had a similar opportunity.<sup>165</sup>

Yet despite Sam’s initial involvement and commitment to childrearing, the

153. *Id.* at 66–72.

154. *Id.* at 61.

155. RHODE, *supra* note 117, at 18.

156. *Id.*

157. *Id.*

158. *Id.*

159. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 99 (2001) (“A majority of managers believe that part-time schedules and even brief parental leaves are inappropriate for men.”).

160. *See id.* at 66. One executive who had reportedly kept a young engineer from taking paternity leave responded to Hochschild’s question of whether he had enough time with his children when they were growing up by saying, “No. No. Well, the youngest one, yes. But I didn’t bond well with my oldest child. Being ambitious person I was, I worked incredibly long hours when first started.” He went on to say, in response to the question of whether he would do things differently, “I don’t know. I can’t answer that. Probably not.” *Id.*

161. *Id.* at 118.

162. *Id.*

163. *Id.*

164. HOCHSCHILD, *supra* note 148, at 118–19.

165. *Id.*

pressures of having a two-career family eventually became too much. His wife, a chemical engineer at Amerco, started working part-time.<sup>166</sup> Although Sam said that he would have been happy to be the one working part-time, he also felt that this would not have been possible at Amerco.<sup>167</sup> Women could work part-time, but men could not. Sam was concerned that his superiors questioned his work commitment and, although they said family was important to them, expected their male employees to treat work as the top priority in their lives.<sup>168</sup> Additionally, other men who requested paternity leave encountered resistance and were encouraged to use their vacation time.<sup>169</sup>

Sam's experiences are consistent with research that has found that men who leave work to take care of family responsibilities are judged more harshly than women who leave work for the same reason.<sup>170</sup> Additionally, Sam's experiences exemplify empirical research on paternity leave. Only ten to fifteen percent of law firms and Fortune 1000 companies offer men and women the same parental leave.<sup>171</sup> It is generally less acceptable for men than women to seek reduced work schedules for the purpose of caring for their families.<sup>172</sup>

Almost twenty years after the passage of the FMLA, which provides for gender-neutral family leave, companies continue to offer less generous paternity leave benefits. Men continue to face discrimination when they request time to provide care and discouragement when they try to use the leave that is technically available to them. When men do take time to provide care, particularly for a newborn, they are viewed as secondary, not primary, caregivers. These policies and attitudes perpetuate a gendered division of labor and keep men from participating fully in family life.

## B. Men as Secondary Caregivers

Men who provide family care are viewed as secondary caregivers who supplement the care provided by others, usually their wives.<sup>173</sup> Often society sees men as "babysitting" their own children and men must prove that they are actually providing care to be labeled caregivers.<sup>174</sup> Otherwise, their care only replaces the care that the mother would otherwise be giving. Even when the courts recognize men's caregiving claims as legitimate, men are still viewed as supplemental rather than primary caregivers.<sup>175</sup> Primary caregiver fathers do not "father" in the popular parlance; they "mother" and are viewed as Mr. Moms displaying "their feminine side."<sup>176</sup> The title of Andrea Doucet's books

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166. *Id.* at 119.

167. *Id.*

168. *Id.* at 119–20.

169. *Id.* at 120.

170. Wayne & Cordeiro, *supra* note 91, at 242–43.

171. RHODE, *supra* note 117, at 18.

172. *Id.*

173. *See, e.g.,* Briones v. Genuine Parts Co., 225 F. Supp. 2d 711, 715 (E.D. La. 2002) (characterizing plaintiff's FMLA leave request as a request "to baby-sit his healthy children").

174. *See, e.g., id.*; *see also* U.S. CENSUS BUREAU, *supra* note 25.

175. Briones, 225 F. Supp. 2d at 715.

176. *See* WILLIAMS, *supra* note 4, at 104–05 ("A primary-caregiver father is 'Mr. Mom.' We code

succinctly states the problem by asking “*Do Men Mother?*”<sup>177</sup> That question makes no sense if one understands fathering to entail caregiving in the same way as mothering.

In *Briones v. Genuine Parts Co.*, a father requested FMLA leave in order to care for his children while his wife cared for their hospitalized son.<sup>178</sup> His employer argued that caring for healthy children was not an FMLA-qualifying event.<sup>179</sup> Although the court ultimately found that the “scope of the protections afforded by the Act is broad enough to encompass Briones’ claim” and allowed the case to proceed,<sup>180</sup> the language the court uses in describing Briones’ caregiving activities is informative. According to the court, “Although Briones did request leave to baby-sit his healthy children, he did so only because his wife’s presence was required at the hospital in order to care for their child who *did* suffer from a serious health condition.”<sup>181</sup> Even as the court recognizes Briones’ need to care for his own children and criticizes Genuine Parts’ dismissive attitude towards Briones’ claim, it nevertheless characterizes Briones as *babysitting* his own children.<sup>182</sup> The term babysitting implies that when caring for his own children, he is nevertheless merely substituting for the care that should be provided by his wife. In other words, someone usually babysits another’s child, and babysitters are not parents but the person who is watching a child *for* the parents. To call Briones’ care babysitting is to say that he was watching his own children *for* the mother rather than because caring for the children is part of what he should do as a father.

There is also no discussion in the case as to why Briones’ wife, but not Briones himself, was needed at the hospital. Again, this omission indicates an assumption that a sick child needs the care of a mother but not a father. Although Briones amended his claim to say that he was at the hospital during the day and with his children at night (he worked nights), the court assumed that he was only helping his wife care for their children.<sup>183</sup> Briones’ caregiving responsibilities arose because his wife had an additional obligation to care for his sick child, not because he had a primary obligation to provide care.<sup>184</sup> This view of men’s caregiving roles relegates men to “helpers” and contributes to the conception of men as inauthentic caregivers even while recognizing men as substitute caregivers.

The court’s findings in *Briones v. Genuine Parts Co.* contrast with a district

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him as a woman in order to avoid destabilizing our deeply held association of nurturance with possession of a vagina.”).

177. DOUCET, *supra* note 13.

178. *Briones*, 225 F. Supp. 2d at 712.

179. *Id.* at 713.

180. *Id.* at 716.

181. *Id.* at 715.

182. *Id.*

183. Note that to qualify for FMLA leave, Briones must have in fact been providing for care for his sick child, which can include simply being at the hospital, but which excludes caring for his other children so that his wife could be at the hospital. What is important in this analysis is how the court conceptualized and understood Briones’ caregiving.

184. *Id.* at 712.

court's reasoning in *Greenwald v. Tambrands*.<sup>185</sup> In *Greenwald*, Mark Greenwald's stay-at-home wife, who cared for their three children, became "overwhelmed with stress, anxiety, and depression" in response to a myriad of severe health problems experienced by close members of her family.<sup>186</sup> Mark Greenwald requested FMLA leave to care for his wife.<sup>187</sup> Although the court allowed the case to proceed, it was careful to state "that the FMLA requires Plaintiff to be providing care for his wife. Any additional childcare burden placed upon Plaintiff as a result of his wife's condition is not covered activity under the FMLA as it is undisputed that none of the children have a 'serious health condition.'"<sup>188</sup> Mrs. Greenwald's statement though, clarifies the importance of her husband's help to her own well-being:

[Mark] did prepare food for me and brought it to me in bed if I had stayed in my room. He purchased my prescriptions and brought them to me in bed if I was there. He got my baths ready for me. He encouraged me to take showers, to come downstairs, and to get involved in family activities. In addition, he assisted me by doing all of the regular household and childcare activities I would have previously done. Without his help, it is likely that I would have had a nervous breakdown.<sup>189</sup>

Mark Greenwald clearly provided care for his wife, which included housework and childcare. Because his wife usually provided the care for their children, her illness created a childcare need.

However, caring for his children, who were not sick, would not have qualified Mark for FMLA-protected leave.<sup>190</sup> In order to qualify, he had to provide care to his wife, *in addition* to performing the housework and caring for the children so that she could take care of herself. Taking over traditional caregiving responsibilities to let his wife recover was not considered caregiving of his wife by the court.<sup>191</sup> According to the Department of Labor's regulations, "to care for" a family member with a serious health condition, the individual requesting leave must "provide either physical or psychological care" for the sick family member.<sup>192</sup> An individual only provides care "when the family member is unable to care for *his/her own basic medical, hygienic, or nutritional needs or safety*."<sup>193</sup> Therefore, providing care for children so that his wife could recover would not qualify Mark's leave as FMLA-protected.<sup>194</sup>

*Aubuchon v. Knauf Fiberglass* demonstrates the general hostility men face

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185. *Greenwald v. Tambrands, Inc.*, 366 F. Supp. 2d 195 (D. Me. 2005).

186. *Id.* at 199.

187. *Id.* at 199–200.

188. *Id.* at 204 n.7.

189. *Id.* at 204.

190. *Id.* at 204 n.7.

191. *See id.* ("Any additional childcare burden placed upon Plaintiff as a result of his wife's condition is not covered activity under the FMLA . . .").

192. 29 C.F.R. § 825.124(a) (2012).

193. 29 C.F.R. § 825.124(b) (2012) (emphasis added).

194. *See, e.g., Pang v. Beverly Hospital, Inc.*, 94 Cal. Rptr. 2d 643 (Cal. App. 2000) (holding that helping her elderly mother move from a two-story house to a one-story apartment did not qualify the plaintiff for FMLA protected leave).

when they take family leave, particularly when that leave relates to pregnancy or childbirth.<sup>195</sup> In that case, an Indiana district court found that Steve Aubuchon, who took leave when his wife gave birth, was not covered by the FMLA because he did not give timely notice.<sup>196</sup> The FMLA requires “when it is foreseeable” that an employee give thirty days’ notice of the intent to take leave unless providing such notice is not practicable.<sup>197</sup> Aubuchon’s wife, was pregnant with a “due date” of August 19, 2000. She did not have the baby on that date. Rather, she “experienced false labor.”<sup>198</sup> On August 21, Aubuchon told his employer via voicemail that his wife was going to go into labor.<sup>199</sup> On September 1, he submitted the Health Care Provider Certification form required by his employer and identified “[p]regnancy—[a]ny period of incapacity due to pregnancy or prenatal care” as the reason he was requesting leave.<sup>200</sup> The medical note accompanying the request stated, “Stephanie Aubuchon is pregnant/due this month any day. Steve is assisting his wife at home with their first child.”<sup>201</sup> Aubuchon’s leave request was denied and he was subsequently fired.<sup>202</sup> Moreover, the court granted Knauf summary judgment because Aubuchon did not give Knauf thirty days’ notice of his need for leave.<sup>203</sup> According to the court, even if Stephanie Aubuchon experienced complications related to pregnancy, as Aubuchon claimed, he did not provide enough information to Knauf to put them on notice that there had been a change in circumstances.<sup>204</sup>

It seems impossible that, had Stephanie Aubuchon been the one requesting the leave, the court would have come to the same conclusion. Knauf knew in advance that Stephanie Aubuchon was pregnant.<sup>205</sup> Even if Aubuchon never intended to take any time off in order to care for his wife during and after delivery or to care for his newborn child, it seems likely that changed circumstances in his wife’s condition would make leave necessary, even if those changed circumstances did not rise to the level of an actual pregnancy complication. Stephanie Aubuchon experienced several weeks of “false labor” of which Aubuchon informed his employer.<sup>206</sup> In response to Aubuchon’s notice, his direct supervisor wrote in his notes that Aubuchon could not take leave until his wife actually delivered.<sup>207</sup>

The court’s reasoning in this case is overly formalistic, relying on the fact that Aubuchon checked only pregnancy and serious health condition on the FMLA form and did not provide additional information about any complications

195. *Aubuchon v. Knauf Fiberglass*, 240 F. Supp. 859 (S.D. Ind. 2003), *aff’d* 359 F.3d 950 (7th Cir. 2004).

196. *Id.* at 869.

197. 29 U.S.C. §2612(e)(1) & (2) (2006).

198. *Aubuchon*, 240 F. Supp. at 861.

199. *Id.* at 862.

200. *Id.*

201. *Id.*

202. *Id.* at 862–63.

203. *Id.* at 869.

204. *Id.*

205. *Id.* at 861–62.

206. *Id.* at 861.

207. *Id.* at 862 n.2.

that would have necessitated leave.<sup>208</sup> The court treats pregnancy, and allows Knauf to treat pregnancy, as something that only involves the pregnant woman to the exclusion of the father. Knauf's involvement with his wife's pregnancy is deemed unnecessary.

When children are involved, the courts tend to treat men as secondary caregivers who assist their wives in providing care. Even when courts recognize the legitimacy of men's leave claims, they see men as "babysitting" their own children or treat childcare as an unnecessary part of caregiving. Men's participation in pregnancy and newborn care is viewed as incidental and requires additional proof that would not be required of women. Certainly, the biological fact that women are the ones who get pregnant means that women's involvement with childbirth is different than men's. However, a father's presence at doctor's appointments, during labor and delivery, and after a child is born should be viewed as normal and even expected. Fathers should not have to prove that they are involved in pregnancy simply because they are not pregnant. Requiring such proof renders fatherhood secondary to motherhood and treats as natural, rather than culturally constructed, the notion that fathers are secondary caregivers.

### III. OVERWORK AND WORKPLACE INFLEXIBILITY

The treatment of men as secondary caregivers interacts with overwork and workplace inflexibility to perpetuate gender disparities in the workplace; the need to fulfill the provider role keeps fathers tied to jobs that leave little time for caregiving.<sup>209</sup> Men, more than women, prioritize the financial rewards of jobs.<sup>210</sup> However, men, just like women, find work exhausting, and desire a more balanced life and a job that provides autonomy and flexibility.<sup>211</sup> At the same time, the pressure to work longer hours and job inflexibility contribute to workplace sex disparities.<sup>212</sup> As the number of hours required to succeed increases, so does the need for a stay-at-home parent or, at least, a parent with a flexible and thus less monetarily rewarding, job. The burden of overwork falls differently on men and women. Women are more likely than men to report that they will leave jobs that require extreme hours.<sup>213</sup> This may be, in part, due to the fact that they have more caregiving responsibilities than men. Men are less likely than women to provide unpaid family caregiving work and, regardless of whether their wives work outside the home, they are also less likely to perform childcare or housekeeping.<sup>214</sup>

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208. *Id.* at 869.

209. *See e.g.*, WILLIAMS, *supra* note 4, at 81.

210. HEWLETT, *supra* note 9, at 2.

211. WILLIAMS, *supra* note 4, at 81 (explaining that "men who work fifty to sixty hours weekly would prefer to work an average of thirteen fewer hours a week; those working sixty or more hours would prefer to work a stunning twenty-five hours fewer").

212. *See* HEWLETT, *supra* note 9, at 76 ("Fifty-seven percent of women but only 48 percent of men in extreme jobs report that they expect to work at the high level for one year or less.").

213. *Id.*

214. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 372 (2001).

### A. Life at the Extremes: The Problem of Overwork

Sex disparities in the workplace are most acute in the “extreme jobs”<sup>215</sup> that require the longest hours.<sup>216</sup> In 2006, women held only 16.4 percent of corporate officer positions.<sup>217</sup> Women made up only 10 percent of the highest executive positions, and female chief executive officers (CEOs) led only eight Fortune 500 firms.<sup>218</sup> In 2008 and 2009, women held just 15.2 percent of board seats at Fortune 500 companies.<sup>219</sup> Although women comprise about half of all law school classes and thirty percent of the legal profession, they are only fifteen percent of law firm partners, five percent of managing partners, and fifteen percent of federal judges.<sup>220</sup>

Moreover, professional Americans are experiencing a “time famine.”<sup>221</sup> In recent years, the number of people who work more than fifty hours a week greatly increased.<sup>222</sup> A study of professional men and women by Sylvia Ann Hewlett found that at the extreme end, fifty-six percent of workers are

on the job 70 hours a week or more, 25 percent [are] on the job more than 80 hours a week and 9 percent are on the job a mind-numbing 100 plus hours a week. Fully 42 percent of people with extreme jobs say they are working an average of 16.6 hours more than five years ago—a stunning finding.<sup>223</sup>

What these hours mean in terms of overload is sobering. Add in a modest one hour commute, and a seventy hour workweek translates into leaving the house at seven a.m. and getting home at eight p.m. seven days a week. Such a schedule leaves little time—and little energy—for anything else.<sup>224</sup>

Both men and women cite lack of time for family and self as a major source of dissatisfaction and stress in their lives.<sup>225</sup> In one study, professional women’s

215. See HEWLETT, *supra* note 9, at 61 (noting that extreme jobs are well paid, require 60 hours or more per week, and have at least five of the following characteristics: “Unpredictable flow of work. Fast-paced work under tight deadlines. Inordinate scope of responsibility that amounts to more than one job. Work-related events outside regular work hours. Availability to clients 24/7. Responsibility for profit and loss. Responsibility for mentoring and recruiting. Large amount of travel. Large number of direct reports. Physical presence at workplace at least ten hours a day.” Extreme jobs can be found “in large manufacturing companies as well as in medicine and the law; in consulting, accounting, and the media as well as financial services.”).

216. See *id.* at 62 (showing that women make up only 20 percent of those who hold extreme jobs).

217. David Brady et al., *Sector, Size, Stability and Scandal: Explaining the Presence of Female Executives in Fortune 500 Firms*, 26 GENDER MANAGEMENT 84, 85 (2011).

218. *Id.*

219. *Id.*

220. Jonathan D. Glater, *Women Are Close to Being Majority of Law Students*, N.Y. TIMES, March 26, 2001 at 14; RHODE, *supra* note 117, at 14.

221. Sylvia Ann Hewlett, *Addressing the Time Crunch in Higher Earners*, in UNFINISHED WORK: BUILDING EQUALITY AND DEMOCRACY IN AN ERA OF WORKING FAMILIES 156, 160 (Jody Heymann & Christopher Beem eds., 2005).

222. *Id.* at 167.

223. HEWLETT, *supra* note 9, at 63.

224. *Id.*

225. DEBORAH L. RHODE, ABA COMM’N OF WOMEN IN THE PROFESSION, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE 18 (2001), <http://womenlaw.stanford.edu/pdf/balanced.lives.pdf>.

experiences led them to believe that “tinkering around at the margin would no longer” allow them to combine work with motherhood.<sup>226</sup> Another study found that 55.5 percent of women and 59.8 percent of men reported some conflict in balancing work, personal life, and family life.<sup>227</sup> Forty-seven percent of men and forty-two percent of women said that they experienced “a lot” or “some” interference between job and family life.<sup>228</sup>

One national study of worker preferences found that sixty percent of men and women would like to work less.<sup>229</sup> On average, men wanted to work 9.8 fewer hours per week, while women wanted to work 9.3 fewer hours a week.<sup>230</sup> Among those who worked more than fifty hours per week, eighty percent of men and ninety percent of the women wanted to work less.<sup>231</sup> Men who worked between fifty and sixty hours per week reported wanting to work 13.35 fewer hours per week.<sup>232</sup> Women in that category wanted to work 17.72 hours less per week.<sup>233</sup> People working over sixty hours per week wanted to work twenty-five fewer hours.<sup>234</sup>

The gap between ideal and actual work hours was greatest for the most educated workers, as they were more likely to be employed in managerial, professional or technical positions that require the greatest number of hours.<sup>235</sup> Indeed, higher paying professions that offer greater opportunities for advancement increase both the pressures to work more and the penalties for working less.<sup>236</sup> According to Jerry A. Jacobs and Kathleen Gerson in their book, *The Time Divide*, “exceptionally long workweeks are routinely required for career advancement, but not necessarily desired by those who experience them.”<sup>237</sup>

The experiences of lawyers in particular illustrate the negative effects of overwork. The time bind for lawyers is especially acute. They are working longer hours, cutting back on vacation, and spending less time with their families.<sup>238</sup> Law firm associates regularly work between sixty and seventy hours a week.<sup>239</sup> The median number of billable hours has reached 2000 to 2400 hours

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226. Hewlett, *supra* note 221, at 163–64.

227. JACOBS & GERSON, *supra* note 88, at 84.

228. *Id.*

229. *Id.* at 64.

230. *Id.* Gerson’s research further highlights the class disparity that recent work hour research has found. Although a greater percentage of people in the study wanted to work less, approximately twenty percent of men and women wanted to work more hours. This is consistent with other research that has found an increase in both the percentage of people working more than 50 hours per week and the percentage of people working part time. See Hewlett, *supra* note 221, at 166–67, for additional information on this trend.

231. JACOBS & GERSON, *supra* note 88, at 65–66.

232. *Id.* at 66.

233. *Id.*

234. *Id.*

235. *Id.* at 67.

236. *Id.* at 69.

237. *Id.*

238. See Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 269–70 (2000) (describing the adverse effects of billing pressures and the failure of attorneys to take vacations).

239. See *id.* at 295 (“[O]nly in the law do we define full-time work as 60 to 70 hours a week.”).

at large firms.<sup>240</sup> “[T]he single biggest complaint among attorneys is increasingly long workdays with decreasing time for personal and family life . . . .”<sup>241</sup> Over sixty percent of lawyers in general and seventy-four percent of lawyers at large firms report that billable hour pressure had “taken a toll” on their personal lives.<sup>242</sup> According to one study, the prevalence of major depressive disorders among lawyers exceeds ten percent, compared to three to five percent in the general population.<sup>243</sup> Lawyers were 3.6 times more likely to suffer from major depressive disorder than other groups with similar socio-demographic traits.<sup>244</sup> Additionally, overwork appears to be a major predictor of lawyer’s mental illness and unhappiness.<sup>245</sup> Lawyers who work less are happier, experience less stress, and experience fewer stress related physical complaints.<sup>246</sup>

The problem of overwork and its effect on gender equity emerges within the context of the family. If, on the whole, a couple works longer hours than they might have in the past, the strain of that extra work will be felt by the couple, even if the increased work hours come because the woman, but not the man, is working more hours. One study found that the average number of hours men work per week has not changed in thirty years.<sup>247</sup> In 1997 and 2008, men worked an average of forty-seven hours per week.<sup>248</sup> During that same time period the average number of hours women worked increased from thirty-nine hours per week in 1997 to forty-two hours in 2008.<sup>249</sup> Strains on family life occur not only because one person in the relationship works long hours but also because mothers and fathers now both work longer hours.

Further, even though on average men may work the same number of hours per week<sup>250</sup> as they did thirty years ago, the nature of work has changed significantly. Men report increased pressure to work very fast and very hard. In 2008, forty-one percent of men reported that that were contacted at least once a week by people from their workplace outside of normal work hours.<sup>251</sup>

Society allows women, but not men, to “choose” domesticity in order to escape unsatisfying work situations, leaving the role of breadwinner and provider to men.<sup>252</sup> In her study of men and fatherhood, Kathleen Gerson found

240. Nancy E. Dowd, *Resisting Essentialism and Hierarchy: A Critique of Work/Family Strategies for Women Lawyers*, 16 HARV. BLACKLETTER L.J. 185, 203 (2000); see also Fortney, *supra* note 240, at 204.

241. James J. Alfani & Joseph N. Van Vooren, *Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective*, 10 J.L. & HEALTH 61, 63 (1995–96).

242. Fortney, *supra* note 238, at 265.

243. William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1081 (1990).

244. *Id.* at 1083.

245. Fortney, *supra* note 238, at 264–68.

246. *Id.*

247. KERSTIN AUMANN, ELLEN GALINSKY & KENNETH MATOS, NATIONAL STUDY OF THE CHANGING WORKFORCE: THE NEW MALE MYSTIQUE 5 (2011).

248. *Id.*

249. *Id.*

250. The increase in work hours of extreme jobs for men has not translated into an increase in the number of hours men work, on average.

251. *Id.* at 6.

252. See, e.g., WILLIAMS, *supra* note 4, at 10 (“[A]ll-or-nothing workplaces push men out of caregiver roles as they push women out of their jobs.”).

that when men were forced into a primary breadwinning role, despite expectations of a more egalitarian arrangement, they justified the change from a more egalitarian to more traditional family structure in terms of providing for their children.<sup>253</sup> Although these men may have desired a less traditional arrangement in which they were not the sole breadwinners, they nevertheless took advantage of the freedom from domestic work that their status conferred.<sup>254</sup> One respondent stated, "There are things I hope I won't be doing . . . Changing diapers is not my great ambition in life, nor is sitting there for twenty minutes holding a bottle. I'm hoping I can just get the pleasure aspect and not too much of the dirty work."<sup>255</sup>

Other men, though, experienced anguish because they could not spend as much time in caregiving activities as they would like. One man described the disjunction he and his wife experienced when she stayed home with their children because he had the better paying job, even though he felt more inclined towards caregiving:

I think I could be more of a homebody than [my wife]. I have a more natural inclination to kids. I enjoy spending time with the kids, especially now because I spend less . . . From the time our first child came home, she realized she really wasn't cut out for motherhood. Nancy is more to the point when they're driving her nuts. She has made the ultimate sacrifice in doing it, but it's taken a toll on her.<sup>256</sup>

The ideal worker norm helped police this couple into traditional gender roles, despite a desire for a different, less traditional arrangement. The husband would have preferred to be the one staying home but felt he could not because he made more money than his wife. His wife, on the other hand, was forced into the role of stay-at-home parent despite feeling that she was not "cut out for motherhood."<sup>257</sup>

As long as men are treated as secondary caregivers, they may not feel they have the freedom to participate fully in family life and act as primary caregivers to their own children. Tied as they are to the provider role, the only option they may have when faced with overwork is to "let" their female partners reduce their work-hours or quit work altogether for a period of time.<sup>258</sup>

Unfortunately, this solution will likely further exacerbate gender inequity and gendered caregiving. Sole breadwinners may commit more to work because they can no longer rely on the other earner for income. They may feel more pressure to agree to attend the last minute meeting, travel frequently, and miss the school play. Even with the best intentions, once they disengage from family

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253. KATHLEEN GERSON, *NO MAN'S LAND: MEN'S CHANGING COMMITMENT TO FAMILY AND WORK* 103 (1993).

254. *Id.*

255. *Id.* at 104.

256. *Id.*

257. *Id.*

258. HEWLETT, *supra* note 9, at 77 (stating that twenty-four percent of women but only two percent of men in extreme jobs have spouses that earn more than them). "Quitting an extreme job is easier—and a whole lot less risky—when you have a partner who earns more than you." *Id.*

life, they may truly become secondary caregivers, unaware of bedtime routines and unable to name their children's teachers. Thus, the overwork creates a cycle of increased household specialization.<sup>259</sup> Having a homemaker spouse makes it easier to respond to unreasonable workplace demands. The more a person responds to these demands and increased working hours, the less feasible it is for the second person to return to work.

Human capital theories posit that gender disparities in income and professional achievement persist because women underinvest in their own human capital.<sup>260</sup> According to this argument, an individual's investment in specific human capital is "positively related to the time spent at that activity."<sup>261</sup> Historically, this relationship was used to explain men's and women's differential earnings.<sup>262</sup> More recently, though, economist Gary S. Becker revised this theory based on the fact that investment in specialized human capital produces increasing returns.<sup>263</sup> According to Becker, women have a comparative advantage in doing housework and child care.<sup>264</sup> Importantly, according to Becker, "a small initial difference can be transformed into large observed differences by the reinforcing effects of specialized investments."<sup>265</sup> According to Becker, this "snowballing" effect explains gender differences in income and professional achievement.<sup>266</sup> Women's underinvestment in work is a rational response to their comparative advantage in housework and childcare.<sup>267</sup>

One can dispute the assumption that women have a comparative advantage in doing housework and childcare and the assumption that women expend less effort than men in paid work. Nonetheless, Becker's theory, that small differences at Time 1 will become large differences at Time X, is informative. If couples negotiate and make decisions regarding who will stay home and care for children within the context of their relationship then one small decision—that the

259. See, e.g. HOCHSCHILD, *supra* note 148, at 59–60 (quoting a male executive at the company she was studying, "We made a bargain. If I was going to be as successful as we both wanted, I was going to have to spend tremendous amounts of time at it. Her end of the bargain was that she wouldn't go out to work.").

260. GARY S. BECKER, *A TREATISE ON THE FAMILY* 54–79 (1991).

261. *Id.* at 57.

262. *Id.*

263. See *id.* at 56–57, 62. Becker argues that women's comparative advantage in housework and childcare is the result of innate ability. However, he also states: "Yet a sexual division of labor according to intrinsic advantage does not deny exploitation. If men have full power both to determine the division of labor and to take all household out but above a 'subsistence' amount given to women (a competitive marriage market would divide output more equally), men would impose an efficient division of labor because that would maximize household output and hence their own 'take.' In particular, they would assign women to child care and other housework *only if* women have a comparative advantage at such activities." *Id.*

264. *Id.* at 61–63.

265. *Id.* at 63.

266. *Id.*

267. See *id.* at 57–64 (Becker's theory also assumes that, even when women work the same number of hours as men, they expend less effort at work. According to Becker, housework and childcare are exhausting. Women simply do not have enough energy left over to put give paid work their full attention and effort. Indeed, Becker makes many problematic discussions that are simply not supported by the empirical evidence). See Schultz, *supra* note 18, at 1893–98, for a more detailed discussion.

mother will take maternity leave—leads to long-term repercussions and an inability to return to a more equitable arrangement.

Many professional jobs require long hours that are largely incompatible with significant family responsibilities. Sylvia Ann Hewlett describes the problem precisely:

Think of what a fifty-five hour workweek translates into in terms of work-life balance. Assuming an hour for lunch and a forty-five minute roundtrip commute (the national average), the workday stretches to almost thirteen hours—7:30 A.M. to 8:15 P.M. . . . [T]his kind of schedule makes it extremely difficult for a professional to jump-start a relationship—or be a “good-enough” parent. A mother of a five- or eight-year-old working a fifty-hour week would not make it home in time to eat dinner with her child and would have only a slight chance of getting home in time to read a bedtime story and kiss her child goodnight.<sup>268</sup>

Although Hewlett references mothers, the same is true of fathers. If men are working a fifty-five hour week, they are unlikely to have any significant time to spend with their children on a daily basis.

However, traditional gender arrangements are not as viable or valued as they once were. On average, men want to spend more time with their families than they currently spend.<sup>269</sup> One man in a study on men’s work-life expectations notes how he wanted his experiences to be different from that of his father’s experience: “I look at the grief and anxiety my father had by being the sole provider, and I would like to change that definition of being a man.”<sup>270</sup> Despite the traditional view of father as provider, providing economic support for families is no longer considered sufficient to fulfill the father role. Husbands are expected to participate in some housework and fathers are expected to be actively engaged in their children’s lives, even as mothers continue to be the primary caregivers.<sup>271</sup>

Despite changing attitudes and expectations about men’s family roles,<sup>272</sup> fathers with children under the age of eighteen work more than other men.<sup>273</sup> Perhaps fatherhood ties men more tightly to paid labor, instead of drawing their attention from work.<sup>274</sup> “[F]athers are significantly constrained in their choices by the economic realities produced by this skewed structure” that encourages women to decrease their participation in paid labor when they have children.<sup>275</sup>

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268. Hewlett, *supra* note 221, at 164.

269. JACOBS & GERSON, *supra* note 88, at 88.

270. GERSON, *supra* note 253, at 44.

271. See Christiansen & Palkovitz, *supra* note 21, at 86 (“Parental involvement is generally defined as things fathers can do at home, such as participation during pregnancy, preparing meals, helping with schoolwork, and daily child care.”).

272. GERSON, *supra* note 253, at 65–66.

273. DOWD, *supra* note 85, at 31.

274. *Id.* at 207.

275. *Id.*

Having a family “triggers a stronger male tie to work with fewer options.”<sup>276</sup> Becoming a father increases the importance of the extrinsic (such as salary and insurance) benefits of work.<sup>277</sup>

Nevertheless, men are not satisfied with their work-life balance. Again, a majority of men report work-life conflicts.<sup>278</sup> Men who work long hours want to work less and spend more time with their families.<sup>279</sup> Clearly, professional men are not happy with the status quo. Yet they remain more tightly tied to the labor market than similarly educated women.

Faced with the reality of long hours, a couple may choose to have one parent reduce work hours or stay at home full time. More likely than not, the parent staying home will be the mother.<sup>280</sup> This initial division of labor may reinforce the centrality of the good provider role to fatherhood and encourage fathers to deemphasize the importance of nurturing and family time.<sup>281</sup> When an individual continually fails at a task, he will start viewing that task as less important or valuable and will eventually cease to try succeeding at the task.<sup>282</sup> He will also overemphasize the importance of tasks at which he succeeds.<sup>283</sup> This is a rational strategy for maintaining a sense of self-worth.<sup>284</sup> If an individual continued to value things at which he failed as important to his identity, he would be forced to view himself as a failure.<sup>285</sup> Men who find that they cannot balance work and family may begin to dis-identify with caregiving and seek self-validation in work alone. They may remain unsatisfied with the balance in their lives, but because work is rewarding, they will continue to place an emphasis on work at the expense of family life. Arlie Hochschild found that this pattern emerged for both the men and women in her study, although women were more likely than men to be the ones to reduce work hours in response to family needs.<sup>286</sup>

Families in which fathers are away from home for significant periods of time tend to be more traditional.<sup>287</sup> In one study, when men returned home from

276. *Id.* at 209.

277. See Monica Kirkpatrick Johnson, *Family Roles and Work Values: Processes of Selection and Change*, 67 J. MARRIAGE & FAM. 352, 366 (2005) (“Parenthood by [age 26–27] led to a greater maintenance in the importance attached to extrinsic rewards except among married women.”).

278. JACOBS & GERSON, *supra* note 88, at 84.

279. *Id.* at 65–66.

280. Table 68: *Parents and Children in Stay-At-Home Parent Family Groups*, U.S. CENSUS BUREAU, available at [www.census.gov/compendia/statab/2012/tables/12s0068.xls](http://www.census.gov/compendia/statab/2012/tables/12s0068.xls) (last visited Nov. 14, 2012).

281. DOWD, *supra* note 85, at 207.

282. See Claude Steele, *A Threat in the Air*, 52 AM. PSYCHOLOGIST 613, 616 (1997) (“[I]dentifications follow these assessments: increasing when [prospects] are favorable and decreasing when they are unfavorable.”).

283. See *id.*

284. See Claude Steele, *Thin Ice: Stereotype Threat and Black College Students*, ATLANTIC (1999), <http://www.theatlantic.com/magazine/archive/1999/08/thin-ice-stereotype-threat-and-black-college-students/304663/> (“That is the whole idea of disidentification—protecting against stereotype threat by ceasing to care about the domain in which the stereotype applies.”).

285. *Id.* (“Pain is lessened by ceasing to identify with the part of life in which the pain occurs.”).

286. HOCHSCHILD, *supra* note 148.

287. Anisa M. Zvonkovic et. al, *Family Work and Relationships: Lessons from Families of Men Whose Jobs Require Travel*, 54 FAM. RELATIONS 412, 418–19 (2005).

extended travel they expected to relax and increase their leisure time, rather than take over caretaking duties.<sup>288</sup> In fact, a husband's presence in the household often increased the demands on the wife's household labor. One woman explained that when her fisherman husband is away, "I have more time because I am not tending to his laundry needs and his food needs and his quiet needs."<sup>289</sup> A study of "job-to-home" spillover found that, for women but not for men, having a domestic partner (spouse, opposite or same-sex partner) increased work-life conflict.<sup>290</sup> For women, having a partner may actually increase rather than decrease their workload.

Long work hours and the expectation that employees perform as ideal workers contribute to the perception of men as inauthentic caregivers. In order for one parent to work long hours, the other parent must be able to take on additional caregiving responsibilities. Because women are more likely than men to be the ones taking on the extra caregiving responsibilities,<sup>291</sup> it is women's career trajectories that suffer.<sup>292</sup> At the same time, men who work those long hours are unable to be primary caregivers, creating a cycle in which their caregiving becomes secondary, and making it harder for them to claim the status of authentic caregiver.

#### B. Lack of Flexibility

In blue-collar jobs, lack of flexibility rather than overwork is the primary problem. According to one study, one-third of working class men and women did not have the choice of when to take breaks, and sixty-two percent could not choose their starting and quitting times. Among those who could choose starting and quitting times, half could not change those times and fifty-three percent could not take time off to care for a sick child.<sup>293</sup> According to Professor Williams,

Scheduling instability works in poisonous combination with American's' unusually high reliance on families for child care. Many Americans in nonprofessional jobs have crazy quilts of child care, with sometimes as many as five different child care arrangements—one for each day of the week. Or else they "tag team," where mom works one shift while dad works a different shift, with each parent caring for the kids while the other is at work. This is not an easy way to live: everyone ends up exhausted, and many parents rarely see each other awake.

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288. *Id.* at 416.

289. *Id.* at 417.

290. Sue Falter Mennino et al., *Home-to-Job and Job-to-Home Spillover: The Impact of Company Policies and Workplace Culture*, SOC. Q. 107, 123–24 (2005).

291. See, e.g. RHONA MAHONY, KIDDING OURSELVES: BREADWINNING, BABIES AND BARGAINING POWER 14 (1995); ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 24–25 (2001).

292. See CRITTENDEN, *supra* note 291, at 25 ("Working mothers are more likely than working fathers to take time off to care for a sick child, resulting in far higher absentee rates.").

293. JODY HEYMANN, THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 115, Figure 6.1 (2000).

Moreover, if one parent is ordered to work mandatory overtime, the family has to choose between mom's job and dad's job, in a situation where they need both jobs to survive.<sup>294</sup>

When these families are forced to choose whose job will be sacrificed, they will likely choose the one that pays the least—typically the mother's.<sup>295</sup> This places her at an even greater disadvantage because every change in job means loss of seniority, loss of sick days or vacation days, a spotty work history, and potentially, a decrease in salary, assuming that a new job can actually be found once the crisis is over.

Yet, most working-class men today do, in fact, provide care, but they hide that caregiving from the public.<sup>296</sup> Men in blue-collar jobs are far less likely than women to tell their employers that they need to take time off or to refuse mandatory overtime for caregiving reasons, even when the caregiving reason provides a valid excuse.<sup>297</sup> A study of union arbitrations found that men “were willing to risk discipline or even discharge rather than tell their employers that they needed to leave work to care for children,” even though many employers allow workers to refuse overtime for legitimate reasons.<sup>298</sup> In contrast there were no cases in which a woman refused to discuss work-family conflicts.<sup>299</sup> In unionized jobs, more men than women are fired, in part because men are very reluctant to discuss work-family conflicts or admit that they have childcare responsibilities.<sup>300</sup> Both blue-collar and white-collar men view childcare and caregiving as a threat to their masculinity, but this viewpoint has greater repercussions for blue-collar men because they have less flexibility in the first place. A white-collar worker may be able to come in late, leave early, or take time off in the middle of the day without being questioned or forced to provide a reason.<sup>301</sup> By contrast, blue-collar workers frequently must provide a justification for a requested change in schedule or refusal to work overtime, and supervisors are free to deny the request.<sup>302</sup> The reluctance to let their employers know that they need flexibility because they have caregiving responsibilities illustrates the way in which caregiving is considered to be transgressive for men.

“High access” to workplace flexibility decreases the amount of work-family conflict for men who work long hours, have high job demands, or are part of a dual earner couple experience.<sup>303</sup> Men experience less work-family conflict when they have control over work schedules, a flexible schedule, the ability to make short-notice schedule changes, and at least five paid days off to care for a sick

294. WILLIAMS, *supra* note 4, at 4.

295. *Id.* at 33.

296. *Id.* at 45.

297. *See id.* at 56–57 (“Roughly 55% of the arbitrations that WorkLife Law studied involved men. While we found no case involving a woman who flatly refused to discuss work-family conflicts, some men were willing to risk discipline or even discharge rather than tell their employers that they needed to leave work to care for children.”).

298. *Id.*

299. *Id.* at 56.

300. *Id.* at 89.

301. *Id.* at 44.

302. *Id.* at 44–45.

303. AUMANN, GALINSKY & MATOS, *supra* note 247, at 13.

child.<sup>304</sup> Thus, changes to family leave policies may be particularly beneficial to men. Fathers in dual-earner couples are also more likely than other fathers to experience work-family conflict,<sup>305</sup> which highlights the importance of thinking about work-family conflict in the context of the couple dyad. Presumably, the mothers in the couple also experience less work-family conflict if the father has workplace flexibility, because she is not solely responsible for any caretaking necessary during normal work hours.

**Table 3: Percentage of men reporting little or no work-family conflict as a function of whether they have high or low access to workplace flexibility<sup>306</sup>**

	Work 50+ hours per week	High job demands	Dual-earner	Work-centric
High access	57%	47%	51%	64%
Low access	20%	27%	37%	21%

Treating men as secondary caregivers perpetuates sex disparities in the workplace by making it harder for men to combine work and caregiving. Men face more resistance than women when they use family-friendly policies. They may feel more psychologically tied to the provider role. The structural barriers to engagement in family care may reinforce this commitment, creating a cycle that reinforces men's overwork. Overwork itself reinforces household specialization by making it harder for dual-earner couples to truly share breadwinning and caregiving. Once a couple decides that one person, usually the woman, must cut back on work hours or otherwise step off the career track for a period of time, it becomes harder for the couple to return to shared caregiving. Workplace policies that assume men are secondary caregivers further exacerbate the problem by treating traditional household arrangements as normative and providing extra barriers for men, but not women, to overcome if they want to take family leave.

All of these factors perpetuate gender inequity in the workplace and at home. If men are treated as inauthentic caregivers, they may find themselves unable to take on equal caregiving responsibilities. As a result, women continue to provide more childcare and take on more of the household duties.<sup>307</sup> This self-perpetuating cycle makes it hard for men and women who want to share breadwinning and caregiving to do so.

#### IV. IT'S NOT BABYSITTING IF DADDY DOES IT: PUTTING MEN FRONT AND CENTER IN THE WORK-FAMILY DISCUSSION

Men and women should both be able to participate fully in paid employment and family caregiving. Treating men as inauthentic caregivers who

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304. *Id.*

305. *Id.*

306. *Id.*

307. CRITTENDEN, *supra* note 291, at 24–25.

“babysit” their own children and are financial providers first and foremost disadvantages both men and women; men cannot participate fully in family life and the burden of caregiving falls primarily on women.<sup>308</sup> In order to achieve gender equality in the workplace, there must be a shift towards gender equity in the home. Men must be able combine work and family life. The cult of motherhood predominates discussions of work-life balance, which has led to a neglect of men’s caregiving roles.<sup>309</sup> True change, though, will only occur when men openly embrace the caregiving role.

Leave policies shape behavior *within a specific cultural and economic context*. According to Professor Williams, “Inflexible workplaces have proved so hard to change, in significant part, because of the intertwining of masculinity with work schedules and current understandings of work commitment.”<sup>310</sup> If leave policies are to actually foster gender equality at home and at work, then the policies must be designed with this cultural and economic context in mind. Family caregiving leave policies must work against current norms that treat fathers as primary breadwinners and as involved but secondary caregivers. Family caregiving leave policies must also recognize that mothers’ and fathers’ choices are constrained by the economic realities in which they live and by cultural attitudes that promote *mothering over fathering*. Families already primed to treat mothers as inherently better caregivers may easily acquiesce to employers who provide paid maternity but not paid paternity leave. Certainly, it is no surprise that people identify lack of paid leave as a primary reason for not taking leave.<sup>311</sup> The ideology of “choice” must not be fetishized at the expense of implementing policies that promote equality.<sup>312</sup> Choices are always constrained by, among other pressures, social and cultural context and economic realities.<sup>313</sup> Those individuals and policymakers that seek to promote gender equality must recognize the ways in which choices are constrained and design policies that counterbalance those constraints that inhibit equality.

In *Surrendering to Motherhood*, Iris Krasnow describes her joy at being a “stay-at-home mother”<sup>314</sup>— “[t]here are no shackles in this house, this is no jail.

308. WILLIAMS, *supra* note 4, at 3.

309. See discussion *supra* pp. 1–2.

310. WILLIAMS, *supra* note 4, at 33.

311. Jane Waldfoegel, *Family and Medical Leave; Evidence from the 200 Surveys*, 124 MONTHLY LAB. REV. 19, 19–20 (2011).

312. See WILLIAMS, *supra* note 4, at 33 (“One reason for this policy failure lies in the perception that women’s labor participation is a personal matter rather than a major economic issue, as reflected by the fact that newspapers tend to report many of the stories surveyed in the lifestyles section.”).

313. See, e.g., *id.* at 4 (discussing how separate spheres ideology “shapes what jobs are seen as appropriate for men and women”).

314. I think it is important to note that although Krasnow describes herself as a stay-at-home mother and wrote a book celebrating the virtues of motherhood, she nevertheless wrote a book while she was a “stay-at-home” mother. In an essay in *Mommy Wars: Stay-at-Home and Career Moms Face Off on Their Choices, Their Lives, Their Families*, Krasnow does note that, “I’m happy I left a job in daily journalism at United Press International to hang out with Theo, Isaac, Jack, and Zane . . . But I’m also happy that I kept a finger in the artery of my old life, launching a freelance writing career and becoming a journalism professor.” Iris Krasnow, *My Baby’s Feet are Size 13*, in *MOMMY WARS: STAY-AT-HOME AND CAREER MOMS FACE OFF ON THEIR CHOICES, THEIR LIVES, THEIR FAMILIES* 315, 317 (Leslie Morgan Steiner ed., 2006).

These kids are your ticket to freedom like nothing you have ever tasted . . . . On that gray carpet, with egg under my nails and egg in my hair, I realized that for the first time in my life I was exactly where I was supposed to be.”<sup>315</sup> Of course, being exactly where she was supposed to be was possible because Krasnow’s husband provided economic support.<sup>316</sup>

When society celebrates the joys of motherhood, there is almost no discussion of the cost to men in being excluded from family life in order to provide, or the pressures put upon men who are the sole breadwinner. For example, New York Times columnist David Brooks claims that women, knowing where real fulfillment lies, have correctly chosen to put more effort into their families than into their jobs.<sup>317</sup> Caring for the family, Brooks contends, is more fulfilling and worthwhile than work in the paid labor force.<sup>318</sup> A variety of articles and commentary reflect this sentiment in their descriptions of women who chose or expect to choose to take time off from paid work to spend more time caring for their families.<sup>319</sup> Staying home to care for children is portrayed as not only important, but also as the most special thing a woman can do.<sup>320</sup> For women, working means missing out on all the important parts of their children’s lives. Iris Krasnow pointedly states, “I invite those women with consuming office jobs to think hard about whether it’s worth it . . . . Your kindergartener is going to be fifteen tomorrow, and you cannot go back to that sweet, golden era when he eagerly leapt into your arms.”<sup>321</sup> These descriptions of blissful motherhood beg the question: if mothers should not miss their children’s first step, is it really fair to ask fathers to miss out on the joys of caregiving?

Men do want to spend more time with their families and caring for their children. In one study of 234 married parents, both fathers and mothers favor an egalitarian relationship in which fathers were equally involved in childrearing.<sup>322</sup> Nonetheless, both fathers and mothers report that fathers participate less in childrearing than desired.<sup>323</sup> This reality has a negative effect on well-being. Parents who feel that there is a discrepancy between father’s ideal involvement

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315. *Id.* at 321.

316. *Id.*

317. Brooks, *supra* note 6, at C8; *but see* Becker, *supra* note 260, at 62 (referring to household duties as “unpleasant activities”).

318. *Id.*

319. *See generally* Lisa Belkin, *supra* note 2. *See also* Story, *supra* note 5. Although these articles purport to identify “trends” in women’s behavior, see Reyhan Harmanci, *Next Time You Read About ‘What Women Want’ Check the Research—It’s Likely to be Flimsy*, S.F. CHRON., Jan. 4, 2006, at E1 (discussing the problems with these “trend” studies and actual data that suggests that there is no wide-scale trend towards dropping out of the workforce), even the glum statistics cited above nevertheless show that women’s achievement is increasing. The percentage of women at the top of their fields has been increasing, albeit slowly. For example, the number of female partners at law firms has been steadily increasing.

320. *See, e.g.*, Mary Elizabeth Williams, *Motherhood Is Not a Job*, SALON.COM, (Apr. 27, 2012, 3:30 PM), [http://www.salon.com/2012/04/27/motherhood\\_is\\_not\\_a\\_job/](http://www.salon.com/2012/04/27/motherhood_is_not_a_job/) (describing one example of this narrative in popular culture).

321. Krasnow, *supra* note 314, at 320–21.

322. Melissa A. Milkie et al., *Gendered Division of Childrearing: Ideals, Realities, and the Relationship to Parental Well-Being*, 47 SEX ROLES 21, 28–29 (2002).

323. *Id.* at 32.

and actual involvement report more stress.<sup>324</sup> Interestingly, fathers who report greater than ideal involvement in financial support also report that the division of household labor is unfair to the mother.<sup>325</sup> These fathers feel particularly committed to egalitarian roles and, thus, they are more likely to feel that greater childcare involvement of the mother is unfair.<sup>326</sup> For men to become “authentic caregivers” they must participate early and regularly in the physical care of their children. This participation helps promote equality by creating a strong emotional bond between father and child, leading the father to take greater responsibility for caregiving in the future. According to one father,

A really interesting thing happened when I started staying home. Up until that point, I would . . . do the night feeding and then go to bed. If the baby woke up after that point, Jean would hear it and would get up with Jordan. After two months of me staying home, she no longer heard when he woke up. It was *me* getting up.<sup>327</sup>

When fathers are involved with the physical care of their children and see themselves as a primary caregiver rather than a helper, they are better able to fully inhabit the caregiving role and take responsibility rather than simply “help” with the children. Therefore, the workforce must accommodate the needs of men and women to participate in both paid employment and caregiving, and the law must be designed with an understanding of how the policies will affect mothers and fathers as part of a dyad. A husband’s inflexible work hours are often the “tipping point” that pushes women out of the workforce.<sup>328</sup> A wife’s odds of quitting her job increase by forty-four percent if her husband works fifty or more hours a week and by 112 percent if he works sixty or more hours a week.<sup>329</sup> Thus, most women do not choose to stay home because of the couple’s belief or ideological commitment to having a stay-at-home parent, but rather because of outside forces that make it hard to sustain a dual-career household.<sup>330</sup>

Just as Congress acknowledged when it enacted the FMLA in 1993,<sup>331</sup> real progress in achieving true gender equality in the workplace will only occur when men are free to, and actually do, participate equally in family caregiving. When being a good provider is considered the primary responsibility of fatherhood, both men and women are disadvantaged. As one author notes, “Suddenly, that guy whose career success you found so attractive . . . becomes the guy who’s never home to help with the kids.”<sup>332</sup> When career success comes before family caregiving, someone must be able to take over those responsibilities.

Until men as well as women have workplace flexibility, women will

324. *Id.* at 33–34.

325. *Id.* at 36.

326. *Id.* at 34.

327. DOUCET, *supra* note 13, at 110.

328. STONE, *supra* note 9, at 78.

329. *Id.*

330. See WILLIAMS, *supra* note 4, at 31 (stating that “many women would prefer to work but are pushed out of jobs they want by employer inflexibility”).

331. 29 U.S.C. §2601(a) (2006).

332. Carolyn Hax, *Peace and Carrots*, in *MOMMY WARS: STAY-AT-HOME AND CAREER MOMS FACE OFF ON THEIR CHOICES, THEIR LIVES, THEIR FAMILIES* 277 (Leslie Morgan Steiner ed., 2007).

continue to do a disproportionate share of family caregiving. In order to escape the “Mommy Wars,” there must be a paradigm shift away from focus on the work-life balance of mothers to focus on men’s caregiving. This shift must take into account the fact that most parents make their decisions about caregiving and work within the context of a couple. The majority of people in the United States will marry and have children at some point in their lifetime.<sup>333</sup> Even those who are not married often make decisions based on the expectation that they will marry in the future.<sup>334</sup> Regardless of marital status, in most instances children have two parents; thus, even for couples who are not married or cohabitating, one parent’s work hours and work choices necessarily affect the other parent’s work hours and work choices.

Work and caregiving are important for people’s well-being, so as a society we should work to make it possible for men and women to participate fully in both family and work life. According to Vicki Shultz, in her article *Life’s Work*, the independence associated with good citizenship has been historically linked to the right to work.<sup>335</sup> Paid work is important to building and maintaining communities.<sup>336</sup> Recent sociological studies on the effects of high unemployment levels in some communities further support the importance of paid work to communities.<sup>337</sup> Psychological research also demonstrates that both men and women experience positive mental effects from participating in paid work and negative effects from unemployment.<sup>338</sup>

Both men and women benefit from paid work. In addition, when women work, men become more involved in family care:

Working motherhood offers a surprising and invaluable benefit: It forces my husband to be a more involved father and a better husband. Because I work, my husband orders our groceries online, makes the kids breakfast every day, periodically takes them to doctors’ appointments, and occasionally even makes our bed . . . . He wouldn’t have done any of this if I stayed home all the time. Sure, he’d want to. He’d have the best intentions. But the immediacy of his work pressures as *the only breadwinner*, coupled with my availability as a last-minute substitute, would make it too easy for him to put work first.<sup>339</sup>

When men participate equally in caregiving, men, women and children will

333. DOWD, *supra* note 85, at 42–48.

334. Heather L. Koball, *Crossing the Threshold: Men’s Incomes, Attitudes Toward the Provider Role, and Marriage Timing*, 51 *SEX ROLES* 387, 393–394 (2004).

335. Schultz, *supra* note 18, at 1887–88.

336. *Id.* at 1888.

337. See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 25–86 (1996).

338. See generally Heather Helms-Erikson et al., *Do Women’s Provider-Role Attitudes Moderate the Links Between Work and Family?* 14 *J. FAM. PSYCHOL.* 658 (2000); Arthur H. Goldsmith et al., *The Psychological Impact of Unemployment and Joblessness*, 25 *J. SOCIO-ECON.* 333 (1996); Graham L. Staines, *Wives’ Employment and Husbands’ Attitudes Toward Work and Life*, 71 *J. APPLIED PSYCHOL.* 118 (1986).

339. LESLIE MORGAN STEINER, *MOMMY WARS: STAY-AT-HOME AND CAREER MOMS FACE OFF ON THEIR CHOICES, THEIR LIVES, THEIR FAMILIES*, at xxiv – xxv (2007) (emphasis added).

benefit.<sup>340</sup>

However, it is important that emphasis on increased caregiving by men not be portrayed as something that men are being asked to do solely to help women. Treating caregiving like women's work that men must help with reinforces a view of feminism as an "interest group pleading in the context of a zero-sum contest between genders."<sup>341</sup> Under this view women can only "win" when men take on more responsibilities. If caregiving is a task that women want to shed then it should surprise no one that men are resistant to take on the task, particularly if workplaces continue to operate as if workers all benefit from the flow of caregiving work performed by someone else. Instead, caregiving and paid employment should be treated as co-equal rewarding activities, with neither seen as the primary domain of men or women. According to the authors of a study of home-to-job and job-to-home spillover, "Achieving job-family integration . . . requires a collective ideological shift away from gendered separate spheres."<sup>342</sup> As long as work is predicated on the stereotypical masculine "ideal worker norm" and men are treated as inauthentic caregivers, work-family balance will remain an elusive goal.

Feminist scholars must treat overwork and lack of flexibility as gender issues that affect both men and women, and they must seek interventions that disrupt the cycle of men's work over-commitment and women's greater investment in family caregiving. The problem of work-life balance must not be assumed to be primarily a women's problem. Policy changes must aim to increase men's commitment to caregiving.

People adjust to changed circumstances, so the modification of workplace culture can lead to real changes in attitudes, behavior, and eventually, society. In her study of men and fatherhood, Kathleen Gerson notes that men who desire egalitarian relationships and shared breadwinning responsibilities sometimes change their attitudes when circumstances require that they become the sole breadwinners.<sup>343</sup> When forced to become the sole breadwinner, these men shifted their beliefs to value a more traditional domestic structure.<sup>344</sup> However, beliefs and preferences never caused a change in behavior; "[r]ather, changes in opportunities and options preceded and prompted the ensuing changes in behavior and desire."<sup>345</sup> If workplaces become more accommodating to both male and female caregivers, men and women will be free to prioritize caregiving without giving up paid employment. This change would encourage men to participate more fully in family life and caregiving, and would help couples

340. Equal caregiving should help ameliorate many of the harms discussed throughout this article. It will allow women to participate more fully in paid labor force and will, ideally, help both men and women better manage work-family conflict. If both men and women are actively and obviously engaged in paid labor and caregiving employers will be more likely to accommodate caregiving. This could have the added benefit of leading to more flexible workplaces for all people, not just those with family responsibilities. Children will likely benefit from the care of both of their parents and the decreased household stress that should result from shared, co-equal parenting.

341. Richard Michael Fischl, *Essay: A Women's World*, 52 BUFFALO L. REV. 659, 665-66 (2004).

342. Mennino et al., *supra* note 290, at 108.

343. GERSON, *supra* note 253, at 106.

344. *Id.*

345. *Id.* at 105.

avoid the single-earner trap that leaves men bound exclusively to paid employment and women tied to unpaid family caregiving.

#### V. INCREASING MEN'S CAREGIVING: RECOMMENDATIONS FOR CHANGE

The culture of a workplace must be family-friendly, and men and women must feel that they can make use of family-friendly policies without jeopardizing their careers. The existence of overt family-friendly policies is of little use if employees are discouraged from taking advantage of those policies.<sup>346</sup> Workplace solutions must be designed to encourage both men and women to actively engage in family life. Similarly, efforts to increase men's involvement in family life and caregiving work must attempt to decrease the number of hours professionals spend engaged in paid labor and increase workplace flexibility for all workers—and especially for blue-collar workers.<sup>347</sup> Under the current regime, an equitable distribution of work would only shift stressors from one group to the other without really fixing the problems.<sup>348</sup> Policy recommendations should therefore aim to make it easier for men and women to share both the provider role and the caregiving role.

In Sweden, for example, parents are not only able to take up to a year and a half leave after the birth of a child, divided between the mother and father, but one parent may also work eighty percent of the time until the child reaches the age of eight.<sup>349</sup> A whole host of laws and policy choices could be instituted in the United States to support shared caregiving by making it possible for mothers and fathers to remain in the workplace while also caring for their children.

This article's proposals are aimed at encouraging both men and women to take advantage of family leave policies and discourage employers from requiring overwork. National paid leave must be at the top of any list of policies designed to encourage men to take family leave, and in particular, time off to care for a newborn child. Paid leave is necessary, although not sufficient, to encourage shared caregiving. Without paid leave,<sup>350</sup> families are unlikely to choose to forgo the salary of the highest earner, who is usually the father.<sup>351</sup> Additionally, because fatherhood is often defined in terms of the ability to provide financially for one's children,<sup>352</sup> men may be more reluctant than women to give up their salaries. Paid family leave would allow men to fulfill the dual role of caregiver and provider.

However, under the current system, American employers must pay the

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346. Mennino et al., *supra* note 290, at 108.

347. I make the distinction here because many working class and hourly workers would prefer more work. The increase in part-time work has been particularly problematic for blue- and pink-collar workers.

348. DOWD, *supra* note 85, at 207.

349. WILLIAMS, *supra* note 4, at 8.

350. Waldfogel, *supra* note 49, at 14.

351. See WILLIAMS, *supra* note 4, at 33 (explaining that on average, women bring home 28% of the family income); see also Malin, *supra* note 115, at 1049 (“[P]arental leave for men is almost always unpaid; this makes it financially impossible for the father who is saddled with the traditional role of primary breadwinner to use it.”).

352. Christiansen & Palkovitz, *supra* note 21, at 85; see also GRISWOLD, *supra* note 103, at 144.

wages of workers on leave, fueling work-place resentment as others are forced to take on extra work without a corresponding increase in pay.<sup>353</sup> This resentment may contribute to the attitude that mothers are less committed to their work, since they are willing to allow others to take on extra responsibilities while they stay at home. In addition, it contributes to the problem of overwork because employees must take on extra responsibilities when someone goes on leave, making the workplace less flexible for those who do not take leave. The current system, in which employees who are not on leave must take on extra responsibilities, also does nothing to help the wife of a man who must take on extra responsibilities at work because someone else is on maternity leave. In fact, the wife may be at an even greater disadvantage because her husband is even less available than he otherwise would have been.

Paid leave that is financed through unemployment compensation would allow employers to hire replacement workers, encouraging men to take leave by decreasing the work-place fallout. Because employers would contribute to a program that would be responsible for paying the salaries of employees when they are on leave, the employers would be able to hire temporary workers to replace a worker on leave. California's Paid Family Leave Act,<sup>354</sup> which uses the unemployment insurance system to pay individuals while they are on family leave, could serve as a model for the country. In addition, to encourage fathers to take leave, parents should be eligible for more leave time if the leave is split between both parents. For example, if only one parent uses family leave, that parent would be eligible for four months of paid leave but if both parents take leave, then they would get an additional month for a total of nine months leave, split between both parents.<sup>355</sup> This has been successful in Norway, which has instituted "daddy days" that require some portion of leave to care for a newborn be taken by fathers.<sup>356</sup> Since such "daddy days" were instituted, "men's use of leave rose from less than 5% to more than 70%."<sup>357</sup>

Employers should not be allowed to make distinctions between "primary" and "secondary" caregivers for the purposes of allowing family leave. If an employer offers family leave, employees should be able to take the leave, regardless of whether or not the other parent works or also takes time off. Employees should also be allowed to take the leave immediately after the other parent so that both parents will be able to spend some time at home as the primary caregiver. As is currently the case for unpaid leave under the FMLA, parents should be allowed to take leave intermittently.<sup>358</sup> For example, both a mother and father could take the first two weeks after a child is born, then the mother could take her additional ten, and then the father could take his additional ten weeks. This system provides for twenty-two weeks of care.

353. WILLIAMS, *supra* note 4, at 35.

354. CAL. UNEMPLOYMENT INS. CODE § 3301(a)(1) (West 1986).

355. Obviously, some of these recommendations are more politically viable than others. However, using the unemployment compensation system to provide pay replacement may allow for longer periods of leave since the cost of the leave will be spread out across all employers.

356. WILLIAMS, *supra* note 4, at 36.

357. *Id.*

358. 29 U.S.C. §2012(b) (2006).

However, consecutive leave should not be mandated, as is the case when employers make the primary and secondary caregiver distinction. In order to encourage father-child bonding and establish routines in which the father is an equal caregiver, at least some concurrent leave should be encouraged so that fathers have the opportunity to bond with their child and care for postpartum mothers. Parents may also want to use their paid leave in a way that effectively creates a short-term, part-time schedule. For example, the mother may care for a new baby two days a week while the father cares for the baby three days a week and they split caregiving evenly on the weekends. Further, the primary and secondary caregiver distinction is destructive in that it assumes that only one person, usually the mother, can be the primary caregiver.<sup>359</sup> This distinction leaves no room for co-equal parenting and thus, reinforces stereotyped notions of who can be a caregiver. As long as men must prove that they are, in fact, a primary caregiver, culture will treat their caregiving as inauthentic.

Other strategies must address the problem of overwork and attack the ideal worker norm, which presumes the presence of a full-time caregiver to support the worker.<sup>360</sup> The Fair Labor Standards Act<sup>361</sup> should be modified to provide protections for managers and professionals who are currently exempted. Professionals who work over forty hours a week should receive compensation time that can be taken at the employee's discretion. Professionals who work more than forty-five hours in any given seven day period or more than twelve hours in any given twenty-four hour period should receive a mandatory day off that does not count against their vacation or other discretionary time off. And employers should be required to provide three weeks of vacation and should be penalized if more than fifteen percent of their employees do not use their vacation or their accrued compensation time in a given year.<sup>362</sup> Employees should not be forced to take more than one week of their vacation consecutively and should be allowed to use the time, without penalty, to respond to family emergencies. Additionally, employees should also be allowed to use at least five of their vacation days as half-days (for ten half-days).

Mandatory overtime must also be reformed, and workers must be given some predictability in their schedules. People cannot adequately make plans for childcare if they do not know when and for how long they will be working. One possible solution to the problem of mandatory overtime would be for employers

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359. See e.g., *Paid Parental Leave Request: Primary Caregiver Affidavit*, DUKE UNIVERSITY HUMAN RESOURCES, [http://www.hr.duke.edu/forms/parental\\_leave.php](http://www.hr.duke.edu/forms/parental_leave.php) (last visited Nov. 14, 2012). An affidavit must be signed to certify that a person is the primary caregiver and “[a] primary caregiver is defined as someone who has primary responsibility for the care of a child immediately following the birth or the coming of the child into the custody, care and control of the parent for the first time. This definition applies to both births and adoptions. Only one paid leave per child per household will be granted to the primary caregiver of the child. If only one parent is a Duke employee, they must be the primary caregiver to qualify for the paid leave.” *Id.*

360. See WILLIAMS, *supra* note 12, at 5 (stating the ideal worker norm “links the ability to be an ideal worker with the flow of family work and other privileges typically available only to men”).

361. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2006).

362. Mandatory vacation time is easier to implement for professional and managers, as they are more likely than mandatory employees to already receive paid vacation. Nevertheless, vacation time could be paid for through a fund that collects revenue from a payroll tax and the fines imposed when companies violate the required vacation mandates.

to notify their employees in advance when they will be “on-call” for overtime. Notice allows employees to arrange for childcare in case of overtime, and gives employees the confidence that on the days when they are not “on-call,” they will be able to leave at the scheduled time.<sup>363</sup>

Psychology is not easily changed by political fiat, and embedded social patterns are resistant to sociological intervention. Nevertheless, people’s beliefs and actions do change in response to structural modifications. Men want to be more involved with their families. Policies such as those recommended above may help both men and women increase their participation in caregiving and provide some relief for the problems of overwork and lack of workplace flexibility.

## VI. CONCLUSION

Despite the passage of the FMLA, which provided for gender-neutral family leave, men have not greatly increased their family caregiving responsibilities. Men still face a great many obstacles to providing family care. Few companies offer paid leave and companies continue to provide greater maternity leave than paternity leave benefits. Even the courts treat men as inauthentic caregivers. Fathers’ caregiving responsibilities are viewed as supplementary to mothers’ caregiving.

Therefore, men’s caregiving must be placed at the forefront of discussions of work-life balance. To achieve workplace gender equality, policies must be targeted to increase men’s caregiving. Men’s and women’s work-life “choices” must be viewed and analyzed within their social context. Policies aimed at increasing gender equality must account for the dyadic nature of most work and family choices.

Men should not be consigned “to a life of endless work, outsourcing their children’s childhoods to women and abandoning any hope of nonstrategic social connections. Feminists need to return to the early feminist insight that our current gender system impoverishes the lives of men as well as women.”<sup>364</sup> Lack of paternity leave for men or support for men in using family-friendly policies translates directly into decreased opportunities for women. Despite men’s general commitment to work and the provider-role, professional men also express a desire to work less and dissatisfaction with their work-life balance. We must increase opportunities for men to participate in caregiving, and consequently, increase women’s ability to participate full time in paid labor. Work must be re-conceptualized to be more accepting of family responsibilities. A rebellion against the ideal worker model and overwork is a rebellion against the gender oppression that excludes men from caregiving, just as it historically excluded women from the workplace.

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363. Of course, this does not address the other very real problem that forces one parent, typically the mother, out of the work-force—a lack of high-quality, affordable child-care that is open beyond the standard hours.

364. WILLIAMS, *supra* note 4, at 107.