The Gender Bind: Men as Inauthentic Caregivers

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March 2, 2012

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Abstract

Almost 20 years after the enactment of the Family and Medical Leave Act, 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 paper seeks to make 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 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. The article further proposes policies, including paid family leave, which will 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. One analysis of articles on the “opt-out” revolution found that there were 315 mentions of mothers but only 25 of fathers. In 64% of the articles surveyed, the husband was described as a breadwinner who made it possible for his wife to stay home.¹ There was almost no discussion of men’s role in family caregiving or the conflicts that male caregivers face.² Instead, the work-family conflict has continued to be seen through the lens of women’s responsibilities.³ With few exceptions, there has been little analysis of men as caretakers of their own children.⁴ Further, when men’s work-family conflict is discussed, it is rarely placed within the context of the couple. That is, there is little substantive discussion of how men’s and women’s work-life decisions interact to produce gendered outcomes.⁶ Yet, as Professor and Director of the Center for Work Life Law, Joan Williams, among others, notes husbands, in what she terms the “dominant family ecology,” could not perform as ideal workers without the flow of care work

⁴ 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 and society. Instead, I envision a world in which men and women are co-equal caregivers of their children.
⁵ A Lexis-Nexis 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.
⁶ There are exceptions, of course. See, e.g., SYLIVIA ANN HEWLITT, OFF-RAMPS & ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD SUCCESS (2007); PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUITE CAREERS AND HEAD HOME (2007).
from their wives.\textsuperscript{7} Today, most families need two wage-earners in order to make ends meet, making a couple level analysis especially important. The continued assumption that men operate within the confines of this dominant family ecology disadvantages both men and women. As has been described in numerous articles and books, women who do not have a “wife” at home are disadvantaged in a workplace that increasingly requires constant availability.\textsuperscript{8} 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.\textsuperscript{9} 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.\textsuperscript{10}

Men who want to participate fully in family life face discrimination, including the denial of leave and potentially greater harm to their careers than women.\textsuperscript{11} According to Prof. 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

\textsuperscript{7} Joan Williams, \textit{Response Essay, “It’s Snowing Down South”: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate}, 102 \textit{COLUM. L. REV.} 812, 821 (2002) [Hereinafter Williams, “It’s Snowing Down South”].

\textsuperscript{8} This is true in both blue and white-collar jobs. Mandatory overtime and work schedules that are provided a few day in advance and that may have only start and not stopping times, mean the blue-collar workers may have little control over their own schedules and no way of predicting even from day to day what their hours will be. 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 on vacation and even out of the country as mobile phones and Blackberry’s have international access.

\textsuperscript{9} ANDREA DOUCET, \textit{DO MEN MOTHER?} 5 (2004).

\textsuperscript{10} DOUCET, \textit{supra} note 9, at 5.

at work— for example, retaliated against for taking family and medical leave—they too experience unlawful gender discrimination.\textsuperscript{12}

Even when company policies offer equitable family leave benefits for men and women, the workplace culture often discourages men from using those benefits.\textsuperscript{13}

Women’s greater responsibility to family caregiving has lead to a view that they are “inauthentic workers”, inhabiting jobs and careers only partially, while their true interests lie with home and hearth.\textsuperscript{14} 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.\textsuperscript{15} The belief that women were caregivers first and workers second helped justify paying men, but not women, a family-wage.\textsuperscript{16} The ideology of the family wage, that men’s primary role in the family is to be a wage-earner, has continued to be prevalent\textsuperscript{17} and has helped reinforce a definition of the father as a provider and not a caregiver.

Women have traditionally faced discrimination in the workplace because they are viewed as inauthentic workers—not fully committed to paid employment. Men, though, face the corresponding problem—they are viewed as inauthentic caregivers. As fathers, their role has been to provide financially for the family. Just as a good mother must be a caregiver first, a good father must be a provider first. Most caregiving done by fathers is taken to be extra, something he is doing to help out and not his primary concern. In fact, the United States Census Bureau

\begin{itemize}
\item \textsuperscript{13} See, e.g., Mindy Fried, \textit{Taking Time: Parental Leave Policy \& Corporate Culture} 91-93 (1998).
\item \textsuperscript{14} See Vicki Schultz, \textit{Life’s Work}, 100 COLUM. L. REV. 1881 (2000), for a discussion of how the courts have treated women as inauthentic workers. See also Joan C. Williams, \textit{Unbending Gender: Why Family \& Work Conflict and What to Do About It} 64-113 (2000) [hereinafter Williams, Unbending Gender] (discussing the problems women face in living up to the ideal worker norm).
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Shawn L. Christiansen \& Rob Palkovitz, \textit{Why the “Good Provider” Role Still Matters: Providing as a Form of Paternal Involvement}, 22 J. OF FAM. ISSUES 84 (2001).
\end{itemize}
considers caregiving by fathers while a child’s mother is at work to be a “child care arrangement.”

Men who do treat caregiving as a primary concern in their lives may face discrimination and hostility in the workplace. Despite the enactment of the Family and Medical Leave Act (FMLA) in 1993, which provided eligible employees with 12 weeks of job-protected unpaid leave, companies are less likely to offer paternity leave than they are to offer maternity leave. Further, maternity leaves are longer and more likely to be paid than paternity leaves. Men who take advantage of paternity leave policies are likely to be viewed negatively and thought to be taking “vacation” rather than actually caring for their own child.

According to Prof. Williams, “[T]he 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 produce widgets. They also produce gender.” The law similarly shapes workplaces and workplace policies. How the law, in turn, shapes family life depends on the cultural and social context of the law. Thus, a “gender neutral” law, such as the FMLA may produce anything but gender neutral results. Therefore, if a law is to promote gender equity, it must be designed to account for and even counteract prevailing social and cultural norms.

This paper seeks to make explicit how the social context in which the FMLA is applied interacts with the law to maintain the status quo and produce gendered outcomes. The FMLA

20 29 U.S.C. § 2601 (Westlaw 2011)
was expected 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 more leave. Although Congress recognized that women are more likely than men to have caregiving responsibilities, Congress also sought to encourage caregiving by men. Unfortunately, the FMLA has 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 in order to care for a newborn child or sick family member. In the first section of this paper, I discuss the FMLA and the reasons behind its failure 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 reinforces the view of men as inauthentic caregivers. The fourth section contends that a new focus on men as caregivers in necessary in order 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. This section suggests policy proposals that will promote co-equal caregiving and breadwinning between men and women.

II. The FMLA and Gender Inequality

The Family and Medical Leave Act was enacted in 1993 as the first major piece of legislation signed by Bill Clinton. The FMLA had passed in Congress twice before but had been vetoed by then president George H. W. Bush. At the time, the FMLA was thought to be, in part, an anti-discrimination measure that would promote gender equality in the workplace by providing women and men with the ability to take job-protected leave to care for sick family

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24 See discussion infra Part II.
members or at the birth of a child. Congress recognized that the increase in single-parent and dual-earner households necessitated some form job-protected leave. The goals of the FMLA were thus quite lofty. The FMLA was supposed to give women the ability to combine work and family responsibilities. “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 loves of men.” Yet, in choosing gender neutral benefits, the FMLA was also intended to encourage gender equity in caregiving and remove any incentive created by the leave benefit for employers to favor men over women in hiring and promotion. In the first significant case involving the FMLA, Justice Reinhquist 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 workplaces 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.

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27 Of course, gender specific leave would very likely have been found to be unconstitutional.
Despite the stated goals and expectations that the FMLA would be revolutionary, its effect has been relatively small.\textsuperscript{29}

The FMLA covers employees in companies with fifty or more workers. Covered employees can take twelve weeks of job protected unpaid leave to care for a newborn child, an ailing parent, older child or spouse, and for their own illnesses.\textsuperscript{30} During the leave period employers must continue healthcare benefits. Notably, federal employees are not covered by the FMLA. 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 12 months and have worked at least 1,250 hours over the previous 12 month. Unsurprisingly, given these restraints, only 46\% of employees in the United States are actually covered by the Act.\textsuperscript{31}

Almost two-thirds of firms covered by the FMLA had to change their policies in order to comply with the Act. The most common change, cited by 69\% of the firms, was to allow fathers to take time to care for a sick or newborn child.\textsuperscript{32} Because more of the covered firms offered some form of maternity leave than paternity leave, the Act had a greater affect on the availability of paternity leave.\textsuperscript{33} 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.\textsuperscript{34} As critics of the FMLA note, the Act’s actual effect on leave taking has been fairly small, in part, because less than half of workers are actually covered.\textsuperscript{35} Second, the lack of paid leave discourages many who need leave from taking it.\textsuperscript{36} Only those who can either afford to go without pay or who are eligible for paid leave are in a

\textsuperscript{29} WILL AITCHISON, THE FMLA: UNDERSTANDING THE FAMILY AND MEDICAL LEAVE ACT 3 (2003).
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
position to take FMLA covered leave. Third, the limitation of 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. 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. They cannot take leave to attend a parent-teacher conference or other school function. Thus, despite grand pronouncements that the FMLA would keep parents from having to choose between caring for a child and going to work, the FMLA provides little relief for families trying to balance work and family. Even with the FMLA, many parents remain, in the words of Prof. Williams, “one sick child away from being fired.”

In upholding the FMLA and abrogating the stats’ Eleventh Amendment immunity in *Nevada Department of Human Resources v. Hibb*, the Supreme Court acknowledged the FMLA as a statute that sought to promote equality, at least in part, by providing men equal access to (and responsibility for) caregiving. According to Justice Rehnquist in the 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.” Employers may be reluctant to hire women or 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 demonstrated a historical commitment on the part of the states to tying women to the caregiving role and men to the provider role. According to

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38 *Hibbs*, 538 U.S. at 725.
data presented to Congress, several states offered leave for women that far exceed any pregnancy related disability.\textsuperscript{39} As many as fifteen states gave women up to one year of maternity leave without providing a corresponding leave benefit for men.\textsuperscript{40} According to the Court in Hibbs leave beyond the first six weeks is for parenting and not disability.\textsuperscript{41} The Court also found that while 37\% of private-sector employees had access to maternity leave, only 18\% had access to paternity leave.\textsuperscript{42} According the court, “stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers’ reliance on them in establishing discriminatory leave policies remained widespread.”\textsuperscript{43} In Hibbs, the Court put forth of vision of the FMLA that recognizes the need to redistribute caregiving responsibilities in order to achieve gender equality in the workplace.\textsuperscript{44} Unfortunately, that goal has yet to be realized.

The view of men as 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 theses cases.\textsuperscript{45} However, after using a variety of methods to find cases and reviewing over 400 published cases, I found only fifteen cases in which a male plaintiff was seeking FMLA protected leave to care for a sick family member or newborn or adopted child. In contrast, there were at least 100 cases in which the female plaintiff sought FMLA protected leave to care for a sick family member or newborn

\begin{itemize}
\item[\textsuperscript{39}] Hibbs, 538 U.S. at 730.
\item[\textsuperscript{40}] Hibbs, 538 U.S. at 730.
\item[\textsuperscript{41}] Hibbs, 538 U.S. at 730.
\item[\textsuperscript{42}] Hibbs, 538 U.S. at 730.
\item[\textsuperscript{43}] Hibbs, 538 U.S. at 725.
\item[\textsuperscript{45}] According to Catherine Albiston in The Rule of Law and the Litigation Process: The Paradox of Losing by Winning, 33 LAW & SOCIETY REVIEW 869, 889 (1999), between 1993 and 1997 there were 288 published trial-level opinions and 58 appellate opinions in which the FMLA was being interpreted. A Lexis-Nexis search of all federal cases in which the FMLA appears yields over 3000 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 10 words of father yields 48 cases, within 20 words of father yields 74 cases, within 20 words of mother 116 cases, within 20 words of spouse 101 cases, within 20 words of daughter 142 cases, and within 20 words of son 171 cases.
\end{itemize}
or adopted child. Similarly, a comprehensive survey of 556 published and unpublished family responsibility discrimination cases from 1971 – 2004 found that only 43 or 7.73% had a male plaintiff.46

The lack of male plaintiffs is informative. First, men simply do not take family leave at the same rate as women. Despite the gender neutral language of the FMLA, the FMLA has done little to encourage men to take significant time off from work to care for a newborn child or a sick family member. Unfortunately, the exact number of men taking family leave and the duration of the leave is surprisingly hard to find. However, it is possible to extrapolate from the data that are available. Women make up 58% of the FMLA protected leave takers and men make up 42%.47 Of the men who take leave, 58% take leave to care for their own serious health condition, but only 49% of the women leave takers take leave to care for their own serious health condition.48 Given these statistics it is clear that a greater percentage of women than men take leave to care for a newborn child or sick family member. Second, when men do take leave to care for a newborn, they take shorter leave than women. This is indirectly supported by the fact that women taking FMLA protected maternity leave take the longest duration of leave compared to leave taking for other reasons and leave takers who take leave to care for a sick family member take the shortest duration of leave compared to leave taking for other reasons.49 Thus, on average, women’s maternity leave is longer than men’s leave to care for a newborn child or sick family member.

For the most part, the cases in which men are the plaintiffs look very much like the cases in which women are the plaintiffs. That is, they primarily involve questions of procedure, such as

47 WESTAT, supra note 31, at 2-5 to -8.
48 Id.
49 Id.
whether the employee provided appropriate notice, questions of timing, such as whether the employee had worked the requisite number of days in order to be eligible for FMLA leave, an questions of whether an illness met the requirements of a “serious health condition.” Some case, which are discussed in greater detail below, rest upon the issue of whether or not a person was taking leave to “care for” a family member and the definition of “to care for.” Although female plaintiffs certainly encountered the question of whether or not their activities during leave qualified as caring for a sick family member, the way in which the courts discuss men’s caregiving provides examples of how men are viewed as inauthentic caregivers. Although only one of the cases discussed below is explicitly a sex discrimination case, the other cases do illustrate the hostility male caregivers face in the workplace.

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. The role of the father is to provide financially and caregiving is treated as something extra fathers do to “help out” mothers. The centrality of the provider role to fatherhood undermines a view of fathers as caregivers.

Author and pundit Kate O’Bierne aptly sums up traditional gender role beliefs. “[M]en show devotion to the family by working really hard. Women show devotion to the family by showing devotion to the family.” 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. Since the Industrial Revolution, fatherhood has been defined largely in terms

50 Christiansen & Palkovitz, supra note 17, at 85.
52 Christiansen & Palkovitz, supra note 17, at 96.
of breadwinning.\textsuperscript{53} Good fathers are those who provide materially for their children. Although expectations of how involved fathers will be with their children have changed over time, the provider role has remained central to the definition of fatherhood.\textsuperscript{54}

Fathers who do not provide economically for their children may feel that they are not “good fathers.” For some fathers, the failure to provide financially leads them to withdraw from family life.\textsuperscript{55} One unemployed father described 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 with they’re young . . . I just feel empty. I’m ashamed I can’t provide them with everything they need.”\textsuperscript{56} The definition of provider varies by socio-economic status. What is considered necessary for children increases as baseline income increases.\textsuperscript{57} Therefore, a professional man may feel that he is not “providing” for his children if his family is unable to afford private schools or summer camps.

The centrality of breadwinning and masculinity to individual men combined with societal expectations about men’s roles, may lead men to become overcommitted to work. Men are often more reluctant than women to leave work early to care for children or to refuse assignments for personal reasons.\textsuperscript{58} Research on attitudes towards male caregivers suggests that men correctly perceive that they will be judged more harshly than women for using family leave policies.\textsuperscript{59} In fact, men’s beliefs about the provider role influence their decision making even before they are

\textsuperscript{53} NANCY E. DOWD, REDEFINING FATHERHOOD 37 (2000).
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 90.
\textsuperscript{56} Christiansen & Palkovitz, supra note 17, at 97.
\textsuperscript{57} Id. at 91-93.
\textsuperscript{59} See Julie Holliday Wanye & Bryanne L. Cordiero, Who is a Good Organizational Citizen? Social Perception of Male and Female Employees Who Use Family Leave, 49 SEX ROLES 233 (2003).
married or contemplating children. Men who expect to be the primary provider for their family will delay marriage until they believe that their income is adequate so support a family.  

Research on men and women’s gender roles has found that, in general women’s gender identity is more elastic than men’s. 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. Thus, in the realm of the mundane, women may wear pants or skirts, but a man in a dress is likely a man in drag. Women wore their hair short well before long hair was acceptable for men.

Masculinity is part of men’s identity but it is also connected to family and workplace practices. According to psychologist Joseph Pleck, traditional definitions of masculinity require that men conform to culturally prescribed gender roles and that violating gender roles has greater consequences for men than for women. For men, more than for women, work is definitional. What they do is part of who they are. Masculinity may also be defined in opposition to femininity. Thus, caregiving, because it is usually done by women, may be seen as unmasculine. Because men’s gender roles are more rigid than women’s, men may have a harder time redefining traditionally feminine tasks as consistent with masculine identities.

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63 *REDEFINING FATHERHOOD*, supra note 61, at 209.


65 This is not to say the 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.
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.\textsuperscript{66} Since the Industrial Revolution, masculinity has been defined, in part, by paid labor force participation and the ability of a man to provide and care for a family. The provider role is an important part of definitions of fatherhood. Although women will define paid employment as being consistent with femininity, femininity has never been defined by participation in paid work.\textsuperscript{67} Pressure to conform to the provider role and traditional masculinity may also be exerted from the outside. Men are judged more harshly when they use family leave policies. As a result, men may find it harder than women to respond to non-economic family responsibilities. Nevertheless, in today’s world, men are expected to participate in caregiving. Men increasingly cite care children as an important source of satisfaction.

III. Male Caregivers in the Workplace

Men who want to participate fully in family caregiving and work are confronted with many of the same problems with which women have dealt for years. Most workplaces presume and “ideal worker” who is available at the employers’ discretion, often outside of the previously standard nine-to-five day, and benefits from the caregiving work of a stay-at-home spouse. Even when that ideal is no longer explicitly articulated, the standard structure of work requires that employees act like “ideal workers” even when they do not have the stay-at-home spouse. Men, like women, who try to take leave to care for children or other family members may be considered less dedicated to their work. If they choose to work part-time or take advantage of

\textsuperscript{66} 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.

\textsuperscript{67} See Rosie Melendez, \textit{Police Officer, in HARD-HATTED WOMEN: STORIES OF STRUGGLE AND SUCCESS IN THE TRADES} 71-80 (Molly Martin ed., 1988) for an example of how women may incorporate non-traditional jobs into their conceptualization of themselves as women.
other family-friendly policies, they may find themselves segregated into the “mommy track.” Male caregivers, though, often have an extra hurdle to overcome when trying to take leave. The “mommy track” may not be available to them, as many workplace cultures assume that caregiving is women’s work. Indeed, as in the case of Knussman v. Maryland, employers may assume that men cannot be the primary caregiver of their own children.\(^{68}\) Men who take family leave are often thought to be on vacation because employers and co-workers cannot conceive of men as real caregivers to their children. The courts may also treat men’s caregiving as secondary or supplemental, even when they recognize that men have the right to take leave.

\textit{A. Male Caregivers: Discrimination and Hostility in the Workplace}

Male caregivers face surprisingly overt discrimination in the workplace, including less leave benefits than women. As Prof. Martin Malin wrote in a 1994, “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.”\(^{69}\) Despite the intervening years and rulings, such as in Knussman v. Maryland, discussed in more detail below, which plainly hold that family and parental leave must be offered to men and women alike, workplaces regularly provide different paternity and maternity benefits. According to a 2008, study by the Families and Work Institute only 52% of employers offer some pay replacement during


maternity leave while a mere 16% of employers offer pay replacement for paternity leave.\textsuperscript{70} (See Tables 1 & 2). 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.\textsuperscript{71}

Table 1: Caregiving Leave in 2008\textsuperscript{72}

<table>
<thead>
<tr>
<th>Leave Policies</th>
<th>Fewer than 12 weeks</th>
<th>12 Weeks</th>
<th>More than 12 Weeks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maternity Leave</td>
<td>15%</td>
<td>63%</td>
<td>22%</td>
</tr>
<tr>
<td>Paternity Leave</td>
<td>24%</td>
<td>63%</td>
<td>13%</td>
</tr>
<tr>
<td>Adoption or foster care leave</td>
<td>19%</td>
<td>67%</td>
<td>14%</td>
</tr>
<tr>
<td>Care of seriously ill family members</td>
<td>16%</td>
<td>69%</td>
<td>15%</td>
</tr>
</tbody>
</table>

Table 2: Replacement Pay During Leave in 2008\textsuperscript{73}

<table>
<thead>
<tr>
<th>Some Replacement Pay During Leaves</th>
<th>At Least Some Replacement Pay</th>
<th>“Some Pay” By Employer Size</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Small (50 to 99 employees)</td>
</tr>
<tr>
<td>Maternity Leave</td>
<td>52%</td>
<td>48%***</td>
</tr>
<tr>
<td>Paternity Leave</td>
<td>16%</td>
<td>17%</td>
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\textsuperscript{70} FAMILIES AND WORK INST., 2008 NAT’L STUDY OF EMPLOYERS available at http://familiesandwork.org/site/research/reports/2008nse.pdf. See also DEBORAH L. RHODE, ABA COMMISSION OF WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 18 (2001) [HEREINAFTER THE UNFINISHED AGENDA], finding that only 10% to 15% 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. As will be seen infra, though, the policies are often opaque in the wording.


\textsuperscript{72} FAMILIES AND WORK INST., supra note 70, at 19.

\textsuperscript{73} Id.
Companies also state benefits in gendered terms. For example, according the recruiting website for one law firm, “Under certain circumstances, however, we do allow associates to work part-time, for example, in connection with our maternity leave policy.”

Even if part-time work is technically available for paternity leave, the information certainly suggests that it 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, and FMLA are administered concurrently.

Paternity Leave Policy

McDermott offers 4 weeks paid paternity leave at 100% compensation for all male associates and income partners for natural birth and adoption. This benefit is effective immediately upon joining the Firm.

Law schools also provide different paternity and maternity leave policies. A 2006 study of law schools found that 73% offered at least six to eight weeks of paid family leave to women but only 58% provided the same amount of leave to men. Further, even when companies do not make explicit gender distinctions in their leave policies, policies that provide different benefits

75 http://careers.mwe.com/index.cfm/fa/page.view/school_id/9ebf86e8-83c8-4507-9d82-1cf886d1bea8/page_id/7640b739-9681-4e59-be8a-03dd338bc0ae/Benefits.cfm. Although the 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 12 weeks paid leave.
76 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 31% of third and fourth tier law schools offered some form of family leave. Id. at 706.
for primary and secondary caregivers, similarly discourage men from taking as much leave as women. The fact that women give birth and breast-feed makes it hard for men to claim primary caregiver status immediately after the birth of a child.

Second, policies that require men, but not women, to prove that they are the primary caregiver further reinforces 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 has clearly termed “women’s work.” This 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. According to the complaint, a male lawyer was fired as retaliation for taking paternity leave, which was not consistent with the “macho” stereotype that men at the firm were expected to fulfill. A man taking paternity leave thus faces the dual problem of entering the “mommy track” and engaging in gender atypical behavior. Further, by prioritizing family caregiving, he may be seen as abdicating the role of provider and thus a bad father. When fathers enact the breadwinner role, they are held to lower punctuality and performance standards than mothers while men who signal that they are caregivers face harsh workplace penalties. On study found, for example, that men who took even a short work absence because of a family conflict were recommended for fewer rewards and had lower performance ratings.

77 Cunningham, supra note 71, at 977.
The Fourth Circuit case of *Knussman v. Maryland*, provides a surprisingly sharp example of the overt discrimination male caregivers confront when trying to take family leave.

Knussman, a trooper with the Maryland State Police (MSP), requested four to eight weeks of paid family leave to care for his wife and newborn child. Shortly before Knussman’s daughter was born, Knussman was informed 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 newborn.”81 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.’”82 Instead of primary care leave, Knussman applied for and was granted 10 days of paid sick leave under a provision for secondary caregivers.

After the birth of their daughter, Kimberly Knussman experienced continued health problems, and Knussman requested that his leave be extended to 30 days, stating that he was his daughter’s primary caregiver. “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.”83 On the day before Knussman’s 10 day leave was to end, Knussman was told by one of his immediate supervisors that he might be eligible for additional leave to care for his wife under the paid family sick leave. 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.”84

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82 *Knussman*, 272 F.3d at 628-29.
83 *Knussman*, 272 F.3d at 629.
84 *Knussman*, 272 F.3d at 629-30.
Knussman did submit a letter to the MSP Personnel Management Division from Kimberly Knussman’s doctor, but that letter was considered insufficient to justify family sick leave. Complicating the Knussmans’ case was the fact the Kimberly Knussman was also a state employee, and, according the statute only one employee in a family could qualify as a primary caregiver. Knussman continued to pursue 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.85

85 Knussman, 272 F.3d at 630-31.
The court ultimately found in favor of Knussman, stating that MSP’s classification of Knussman as only a secondary caregiver because he was a man was an impermissible sex-based classification rooted in stereotypes and overgeneralizations about men’s and women’s roles. However, as discussed above, companies continue to offer gendered family leave benefits.

The structure of work, with little time for family responsibilities 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.’”86 This observation is supported by Arlie Russell Hoschschild’s sociological study of a large American corporation. The manager’s at the top were largely male and married to women who did not work. One of the senior managers, “Bill Denton” described 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.87

86 DOWD, supra note 53, at 208.
These men, who had stay-at-home wives and who never had to worry about the laundry, were the ones in charge of implementing the new family friendly policies at “Amerco”. Not surprisingly, they had a hard time understanding the time pressures younger workers faced even as they acknowledged that not many women would be willing to make the same choices their wives had made. Although Bill genuinely recognized the importance of work-family balance, he could not empathize with the problem. He lived in a “social bubble” with men who worked very long hours and were married to women who were not engaged in paid labor and who managed all of the household responsibilities.\textsuperscript{88} Bill Denton and the other upper-level male managers at Amerco were able to work the long hours required to achieve success in their professions because they had wives who took care of the family. Similarly, many of the lawyers, male or female, who reach positions of influence in their organizations, did not have significant family obligations and often expect others to make the same personal sacrifices they did if they want to succeed.\textsuperscript{89} According to Deborah Rhode, “I had to give up a lot. You [should] too,” is a frequent refrain among legal managers.\textsuperscript{90} Few male lawyers take a reduced schedule and most feel that it would be harmful to their careers to ask for more than a few weeks leave.\textsuperscript{91} 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.”\textsuperscript{92} The culture of many companies disadvantages family caregiving participation by men. Time spent in family caregiving is seen as indicating a lack of commitment to work.

\textsuperscript{88} HOCHSCHILD, supra note 87, at 68.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
Men who did not participate in caregiving in their own families may be unwilling to believe that other men can actually be the primary caregivers to their children. For example, although many of the senior managers at Amerco reported regretting that they spent so little time with their children, they had a hard time imaging men as actual caregivers. When an engineer, “Sam Hyatt” took a two-week paternity leave after the birth of his first child, most of his male co-workers could not conceive of Sam as the actual primary caregiver to his son during that time. They viewed his paternity leave as a sort of vacation and imagined him sitting around watching television. Others resented Sam because they felt pressure from their own wives to increase their family activities. Often their wives had made career sacrifices to care for children and wanted some additional support from their husbands. Sam did receive support from some male colleagues. A few of the younger men saw Sam as helping ease they way for them to take paternity leave in the future and a few of the older men wished that the had had a similar opportunity.\(^93\) Sam’s experience is consistent with empirical research on paternity leave. Only 10% to 15% of law firms and Fortune 1000 companies offer the men and women the same parental leave.\(^94\) It is generally less acceptable for men to seek reduced work schedules for the purpose of caring for their families.\(^95\)

Despite Sam’s initial involvement and commitment to childrearing the pressures of two careers eventually became too much. His wife, a chemical engineer at Amerco, moved to part-time. Although Sam said that he would have been happy to be the one working part-time, he also felt that he would not have been able to get the support from Amerco. Women could work part-time but not men. He was concerned that his superiors questioned his work commitment and that, although they said family was important to them, expected their employees to treat work as

\(^{93}\) Hochschild, supra note 87, at 118-19.

\(^{94}\) The Unfinished Agenda, supra note 89, at 18.

\(^{95}\) Id.
the top priority in their lives. Other men who requested paternity leave encountered resistance and were encouraged to use their vacation time. Sam’s experiences were 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.

Almost 20 years after the passage of the FMLA, which provided 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 are discouraged from using the leave that is 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 live.

**B. Men as Secondary Caregivers**

When men do provide family care, they are viewed as secondary caregivers, supplementing the care provided by others, usually their wives. Men are seen as “babysitting” their own children and have to prove that they are actually providing care. Even when the courts recognize their claims as legitimate, men are still viewed as supplemental, rather than the primary, caregivers. Primary caregiver fathers do not “father” in the popular parlance, they “mother” and are coded as Mr. Moms, displaying “their feminine side.”

In *Briones v. Genuine Parts Co.*, a father requested FMLA leave in order to care for his children while his wife was at the hospital caring for their hospitalized son. His employer argued that caring for healthy children was not an FMLA qualifying event. Although the court, in this case, ultimately found that the “scope of the protections afforded by the ACT is broad enough to

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97 Hochschild, *supra* note 87, at 120.
99 Williams, *Reshaping the Work Family Debate*, *supra* note 37, at 105.
encompass Briones’ claim” and allowed the case to proceed, 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.”

Even as the court recognized Briones’ need to care for his own children and is critical of Genuine Parts’ dismissive attitude towards Briones’ claim, it nevertheless characterizes Briones as babysitting his own children. There is also no discussion in the case as to why, Briones’ wife, but not Briones himself, was needed at the hospital. 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 assumption from the courts and Briones was that he was helping his wife care for their children. 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. This kind of understanding of men’s caregiving roles, even when recognized as important, nevertheless relegates men to the “helpers” and contributes to the conception of men as inauthentic caregivers.

The court’s findings in Briones v. Genuine Parts contrast with the court’s reasoning in Greenwald v. Tambrands. In this case, 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. Mark Greenwald requested FMLA leave to care for his wife. Although the court allowed the case to proceed, it

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102 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 that it would not be sufficient for Briones to care 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.
was careful to state, “The Court notes 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.’” Mrs. Greenwald’s statement though, makes clear the importance of childcare 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 bought 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.

Mark Greenwald 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 him for FMLA protected leave. He had to provide care to his wife, in addition to doing the housework and caring for the children so that she could take care of herself. This understanding of what it meant to care for his wife rendered her daily activities invisible. Taking over traditional caregiving responsibilities in order to let his wife recover was not considered actual care by the court. If Mark Greenwald had fulfilled only the traditional female tasks of housework and childcare, his caretaking would not have been considered valid, even though his wife was incapable of doing those things herself.

104 Greenwald, 366 F. Supp. 2d at n.7.
105 Greenwald, 366 F. Supp. 2d at 195, 204.
*Aubuchon v. Knauf Fiberglass* demonstrates the general hostility men face in taking family leave, particularly when that leave is related to pregnancy or childbirth. In this case, an Indiana district court found that Aubuchon, who took leave when his wife gave birth was not covered by the FMLA because he did not give timely notice.106 Aubuchon told his employer that his wife was going to go into labor and on his FMLA form identified, “Pregnancy – Any period of incapacity due to pregnancy or prenatal care” as the reason he was requesting leave.107 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.”108 Aubuchon’s leave request was denied and he was subsequently fired. The court granted Knauf summary judgment because Aubuchon did not give Knauf 30 days notice of his need for leave. According to the court, even if Stephanie Aubuchon had 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.

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 indeed pregnant and even if Aubuchon had 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 might have made leave necessary, even if those changed circumstances did not rise to the level of an actual complication. Stephanie Aubuchon experienced several weeks of “false labor” of which Aubuchon had informed his employer. In response to Aubuchon’s notice, his direct supervisor wrote in his notes that Aubuchon could not take leave until his wife actually delivered.

107 *Aubuchon*, 240 F. Supp. 2d at 862.
108 *Aubuchon*, 240 F. Supp. 2d at 862.
The court’s reasoning in the case is overly formalistic, relying on the fact that Aubuchon checked only pregnancy and serious health condition on the FMLA form, rather than providing additional information about any complications that would have necessitated leave. The court treats pregnancy, and allows Knauf to treat pregnancy, as something that only includes the pregnant woman. Knauf’s involvement with his wife’s pregnancy is deemed unnecessary.

When children are involved, the courts tend to treat men as secondary caregivers, assisting their wives in providing care. Even when they recognize men’s leave claims as legitimate, 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 requiring additional proof that would not be required of women.

IV. Overwork and Workplace Inflexibility

Treating 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 men and fathers tied to jobs that leave little time for caregiving. Men, more than women, prioritize the financial rewards of jobs over other aspects.\textsuperscript{109} However, men, just like women, find work to be exhausting and long for a more balanced life and desire jobs that provide autonomy and flexibility. Yet, there are no front page stories detailing a mass exodus of men from the paid labor force and the number of hours professional men work continues to increase. At the same time, the pressure to work longer hours and job inflexibility contributes to workplace sex disparities. 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. Men

\textsuperscript{109} SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS 2 (2007).
are less likely than women to provide unpaid family caregiving work and, regardless of whether their wives work outside the home, less likely to perform childcare or housekeeping.\(^{110}\)

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

Sex disparities in the workplace are most acute at the “extreme jobs” that require the longest hours. For example, in academia, women make up 22\% of college presidents, 24\% of full professors, and 38\% of associate professors.\(^{111}\) In 2002, there were a mere 8 women CEO’s of Fortune 500 companies. In 2003, women comprised only 5.2\% of the Fortune 500 top earners, held 7.9\% of the highest titles and were 13.6\% of the members of boards of directors.\(^{112}\) Although women comprise about half of all law school classes and 30\% of the legal profession, they are only 15\% of law firm partners, 5\% of managing partners and 15\% of federal judges.\(^{113}\)

Professional Americans are experiencing a “time famine.”\(^{114}\) In recent years, the number of people who work more than fifty hours a week has greatly increased.\(^{115}\) A study of professional men and women by Sylvia Ann Hewlett found that at the extreme end, 56 percent of workers were

- on the job 70 hours a week or more,
- 25 percent 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.

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\(^{112}\) CATALYST, QUICK TAKES, STATISTICAL OVERVIEW OF WOMEN IN THE WORKPLACE 1 (2011).


\(^{115}\) Id. at 167.
What these hours mean in terms of overload is sobering. Add in a modest 1-hour commute, and a 70 hour workweek translates into leaving the house at 7:00 a.m., and getting home at 8:00 pm seven days a week. Such a schedule leaves little time – and little energy – for anything else.\(^{116}\)

Both men and women alike cite lack of time for family and self as a major source of dissatisfaction and stress in their lives.\(^{117}\) In one study, professional women’s experiences led them to believe that “tinkering around at the margin would no longer do the trick” and allow them to combine work with motherhood.\(^{118}\) Another study found that 55.5\% of women and 59.8\% of men reported experience some conflict in balancing work, personal life and family life.\(^{119}\) Forty-seven percent of men and 42\% of women said that they experienced “a lot” or “some” interference between job and family life.\(^{120}\)

One national study of worker preferences found that 60\% of men and women would like to work less. On average, men wanted to work 9.8 fewer hours per week, while women wanted to work 9.3 fewer hours a week.\(^{121}\) Among those who worked more than 50 hours per week, 80\% percent of men and 90\% of the women wanted to work less. Men working between 50 and 60 hours per week reported wanting to work 13.35 fewer hours per week. Women in that category

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116 SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS 63 (2007).
118 Hewlett, supra note 109, at 164.
119 JACOBS & GERSON, supra note 58, at 84.
120 Id.
121 Id. at 64 (citing The National Study of the Changing Workforce, 1997). 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 114, at 166-67, for additional information on this trend.
wanted to work 17.72 hours less per week. People working over 60 hours per week wanted to work 25 fewer hours.\footnote{JACOBS & GERSON, supra note 58, at 65-66.}

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 and technical positions that require the greatest number of hours.\footnote{Id. at 67.} Indeed, higher paying professions that offer greater opportunities for advancement increase both the pressures to work more and the penalties for working less.\footnote{Id. at 68.} According to Jerry A. Jacobs and Kathleen Gerson in their book, \textit{The Time Divide}, “[E]xceptionally long workweeks are routinely required for career advancement, but not necessarily desired by those who experience them.”\footnote{Id. at 68.}

The experiences of lawyers are particularly illustrative regarding 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.\footnote{Id. at 68.} Law firm associates regularly work between 60 and 70 hours a week. The median number of billable hours has reached 2000 to 2400 hours at large firms.\footnote{Susan Faab Fortney, \textit{Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements}, 69 UMKC L. REV. 239, 270 (2000).} “[T]he single biggest complaint among attorneys is increasingly long workdays with decreasing time for personal and family life.”\footnote{Nancy E. Dowd, \textit{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 126, at 204.} Over 60% of lawyers in general and 74% of lawyers at large firms reported that billable hour pressure had “taken a toll” on their personal lives.\footnote{James J. Alfani & Joseph N. Van Vooren, \textit{Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective}, 10 J.L. & HEALTH 61, 63 (1995-1996).} According to one study, the prevalence of major depressive disorders

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\item \footnote{JACOBS & GERSON, supra note 58, at 65-66.}{JACOBS & GERSON, supra note 58, at 65-66.}
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\item \footnote{Id. at 68.}{Id. at 68.}
\item \footnote{Fortney, supra note 126, at 264-68.}{Fortney, supra note 126, at 264-68.}
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among lawyers exceeds 10% compared to 3% to 5% in the general population. Lawyers were 3.6 times more likely to suffer from major depressive disorder than other groups with similar socio-demographic traits. Overwork appears to be a major predictor of lawyer’s mental illness and unhappiness. Lawyers who work less are happier, experience less stress, and experience few stress related physical complaints.

Thus, while there is evidence of reduced gender inequality in some dimensions of social life in the form of the sex of breadwinners and caregivers, negative spillover remains in the form of the persistent gendering of market work as male and caregiving as female. This trajectory suggests a sort of perverted gender equality in which women and men experience equivalent levels of negative spillover between their jobs and their homes instead of contentedly sharing market work and caregiving.

Increasing women’s participation in the workplace may lead to some additional sharing of caregiving, but as long as working hours are predicated on the ideal worker norm, increased sharing among caregivers will only increase families’ work burden.

The problem of overwork and gender equity occurs within the context of the family. One study found that the average number of hours men work per week has not changed in 30 years. They found that in 1997 and 2008 men worked an average of 47 hours per week. During that same time period the average number of hours women work increased from 39 per week in 1997

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131 Id. at 1083.
132 Fortney, supra note 126, at 264-68.
to 42 hours in 2008.\textsuperscript{134} Strains on family life occur not only because one person in a couple works long hours but because combined mothers and fathers are working longer hours.

Further, even though men may be working the same number of hours per week as they did 30 years ago, the nature of work has changed significantly. Men report increased pressure to work very fast and very hard. In 2008, 41\% of men reported that that were contacted at least once a week by people from their workplace outside of normal work hours.\textsuperscript{135}

Women, but not men, may “choose” domesticity in order to escape unsatisfying work situations, leaving the role of breadwinner and provider to men.\textsuperscript{136} In her study of men and fatherhood, Kathleen Gerson found that when men were forced into a primary breadwinning role, despite expectations of a more egalitarian arrangement, they justified the change in terms of providing for their children.\textsuperscript{137} 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.\textsuperscript{138} One respondent stated, “There are things 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.”\textsuperscript{139} Other men, though, were anguished 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:

\textsuperscript{135} Id. at 13.
\textsuperscript{136} Kathleen Gerson, No Man’s Land: Men’s Changing Commitment to Family and Work 103 (1993).
\textsuperscript{137} Id. at 102.
\textsuperscript{138} Id. at 103.
\textsuperscript{139} Id. at 104.
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 time . . . From the time our first child came home, she realized she really wasn’t cut out for motherhood. Nancy is more to the point where they’re driving her nuts. She has made the ultimate sacrifice in doing it, but it’s taken a toll on her.\textsuperscript{140}

The ideal worker norm helped police this couple into traditional gender roles, despite a desire for a different less traditional arrangement.

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. Men who are unsatisfied with the long hours that their jobs may require are less likely than women to feel that they have the freedom to cut back on hours. 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 all together, for a period of time. Unfortunately, this solution is likely to further exacerbate the problem. Sole breadwinners may become more committed to work because they no longer have the option of relying on the other earner for income. They may feel more pressure to agree to attend the last minute meeting, travel frequently or miss the school play. Even with the best intentions, once they become disengaged from family life, they may truly become secondary caregivers, unaware of bedtime routines and unable to name their children’s teachers. The overwork creates a cycle of increased household specialization. Having someone at home to rely on to provide caregiving work 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 seems to have the second person return to work.

\textsuperscript{140} Id. at 104.
Human capital theories hold that gender disparities in income and professional achievement persist because women under-invest in their own human capital.\textsuperscript{141} According to this approach, people’s investment in specific human capital is positively related to the time spent in that activity. Historically, this was used to explain men’s and women’s differential earnings. Women were thought to invest less in employment related human capital \textit{because} they spent less time in the workforce. More recently, though, economist Gary S. Becker revised this theory based on the fact that investment in specialized human capital will produce returning results. According to Becker, whether the result of innate ability or discrimination, women have a comparative advantage in doing housework and child care. When women have children or anticipate having children, they invest less in developing skills related to work and more in developing skills related to child care and housework. As they become more specialized in the household arena, the rewards for investment in employment related activities decreases. According to Becker, this “snowballing” effect explains gender differences in income and professional achievement. Women’s underinvestment in work is a rational response to their comparative advantage at housework and childcare.\textsuperscript{142}

Although one can dispute the assumption that women have a comparative advantage in doing housework and child care and the assumption that women expend less effort than men in paid work, Becker’s theory that small differences at Time 1 will become large differences at Time X is informative. If couples negotiate decisions regarding who will stay home and care for children once they are born as a couple, then one small decision—that the mother will take

\textsuperscript{142} Becker, \textit{supra} note 141, at 57-63. 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, \textit{supra} note 14, at 1893-98, for a more detailed discussion.
maternity leave—could lead 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.

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 round-trip commute (the national average), the workday stretches to almost thirteen hours – 7:30 A.M. to 8:15 P.M . . . 

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.143

Although Hewlett references mothers, the same is true of fathers. If they 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 would prefer to spend more time with their families than they currently do.144 One man in a study on men’s work-life expectations noted 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 a sole provider, and I would like to change that definition of being a man,” he said.145 Providing economic support for families is no longer considered sufficient. Husbands are

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143 Hewlett, supra note 114, at 164.
144 JACOBS & GERSON, THE TIME DIVIDE, supra note 58, at 88.
145 GERSON, supra note 136, at 44.
expected to participate in housework and fathers are expected to be actively engaged in their children’s lives.\textsuperscript{146}

Despite changing attitudes and expectations about fatherhood and men’s family roles, most men are engaged in paid labor.\textsuperscript{147} In fact, fathers with children under the age of eighteen work more than other men.\textsuperscript{148} Fatherhood may tie men more tightly to paid labor. “[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.\textsuperscript{149} Having a family “triggers a stronger male tie to work with fewer options.”\textsuperscript{150} Middle-income Black fathers rank being a good provider as the most important thing a father could do for his children.\textsuperscript{151} Becoming a father increases the importance of the extrinsic (salary, insurance etc.) benefits of work.\textsuperscript{152}

Nevertheless, men are not satisfied with their work-life balance. As discussed above, a majority of men report work-life conflicts. Men who work long hours want to work less and want to spend more time with their families.\textsuperscript{153} Men cite overwork as a primary cause of stress and worry.\textsuperscript{154} Professional men are not happy with the status quo. Yet, they remain more tightly tied to the labor market than similarly educated women.

The hours demanded by professional jobs make it nearly impossible for two professional individuals to have children and both achieve high levels of success. Faced with the reality of

\begin{footnotes}
\footnotetext{146}{Christiansen & Palkovitz, supra note 17, at 87-89.}
\footnotetext{147}{GERSON, supra note 136, at 65-66.}
\footnotetext{148}{REDEFINING FATHERHOOD, supra note 53, at 30.}
\footnotetext{149}{Id. at 207.}
\footnotetext{150}{Id. at 209.}
\footnotetext{151}{Id. at 90. Thirty-seven percent of fathers ranked provider first, which role among provider, husband, father, and worker was most important to their children. Similarly, when asked what being a “good father” meant, being a good provider was chosen 30% of the time out of nine categories. Id.}
\footnotetext{152}{Monica Kirpracik Johnson, Family Roles and Work Values: Processes of Selection and Change, 67 J. OF MARRIAGE AND FAM. 352, 366 (2005).}
\footnotetext{153}{GERSON, supra note 136, at 65-66.}
\footnotetext{154}{RHODE, BALANCED LIVES, supra note 117, at 18.}
\end{footnotes}
these 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. This initial division of labor may reinforce the centrality of the good provider role to fatherhood and encourage fathers to de-emphasize the importance of nurturing and family time. When people continually fail at a task, they are likely view that task as less important or valuable and will eventually cease to try to succeed in the task. They will also overemphasize the importance of tasks at which they succeed. This is a rational strategy for maintaining a sense of self-worth. If people continued to value things at which they failed as important to their identity, they would be forced to view themselves as failures. 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, may continue to place emphasis on work at the expense of family life. Arlie Hoschchild found that this was a common pattern 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.

Families in which fathers are away from home for significant periods of time tend to be more traditional. In one study, when men return home from extended travel, they expected to relax and increase their leisure time, rather than take over caretaking duties. In fact, a husband’s presence in the household often increased the work demands his wife. According to one woman in the study 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.” Another study of “job-to-home”

155 REDEFINING FATHERHOOD, supra note 61, at 207.
157 HOSCHSCHILD, supra note 87.
159 Id.
spillover found that, for women, but not for men, having a domestic partner (spouse, opposite or same-sex partner) increased work-life conflict.\textsuperscript{160}

\textbf{B. Lack of Flexibility}

In blue-collar jobs, lack of flexibility, rather than overwork, is a primary problem. According to one study, one-third of working class men and women could not decide when to take breaks, 62\% could not choose starting and quitting times, among those who could choose starting and quitting times half could not changes those times and 53\% could not take time off to care for a sick child.\textsuperscript{161} According to Prof. Williams,

[S]cheduling 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. 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.

When these families are forced to choose whose job will be sacrificed, they will choose the one which pays the least—typically the mother’s—placing her at an even greater disadvantage because every change in job means loss of seniority, loss of sick days or vacation days, a spotty

\textsuperscript{160}Mennino, \textit{supra} note 133, at 124.

\textsuperscript{161}JOHY HEYMAN, \textsc{The Widening Gap: Why America’s Working Families Are in Jeopardy and What Can Be Done About It} 115, Figure 6.1 (2000).
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, even when they hide that caregiving from the public.162 Men in blue-collar jobs, however, are far less likely than women to tell their employers that they need to take time off or refuse mandatory overtime for caregiving reasons, even when the caregiving reason would be excused. 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.163 In contrast there were no cases in which a woman refused to discuss work-family conflicts.164 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 child care responsibilities.165 Both blue-collar and white-collar men may view childcare and caregiving as a threat to their masculinity, but this may have 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 and without being forced to provide a reason. In 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. Men’s reluctance to let their employers know that they need flexibility because they have caregiving responsibilities illustrates the way in which caregiving is considered transgressive for men.

162 WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE, supra note 37, at 45.
163 Id. at 56.
164 Id.
165 Id. at 89.
Having “high access” to workplace flexibility including having control over work schedules, having a flexible schedule, being able to make short-notice schedule changes and having at least five paid days off to care for a sick child all decrease the amount of work-family conflict men who work long hours, have high job demands or are part of a dual earner couple experience. (See Table 3.) Thus, changes to family leave mandates may be particularly beneficial to men. Fathers in dual-earner couples are also more likely than other fathers to report experiencing work-family conflict, highlighting the importance of thinking about work-family conflict in the context of the dyad. Presumably, the mothers in the couple also experience less work-family conflict if the father has workplace flexibility because she would not be solely responsible for any caretaking that had to take place 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**

<table>
<thead>
<tr>
<th></th>
<th>Work 50+ hours per week</th>
<th>High job demands</th>
<th>Dual-earner</th>
<th>Work-centric</th>
</tr>
</thead>
<tbody>
<tr>
<td>High access</td>
<td>57%</td>
<td>47%</td>
<td>51%</td>
<td>64%</td>
</tr>
<tr>
<td>Low access</td>
<td>20%</td>
<td>27%</td>
<td>37%</td>
<td>215</td>
</tr>
</tbody>
</table>

Treating men as secondary caregivers helps perpetuate sex disparities in the workplace by making it harder for men to combine work and caregiving. Men face more resistance than women in using family-friendly polices. They may feel more psychologically tied to the provider role and this commitment is reinforced by the structural barriers to engagement in family care, 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 the decision is made for one person, usually the woman, to cut back on work

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166 Aumann, Galinsky & Matos, supra note 134, at 13.
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 to be secondary caregivers further exacerbate the problem by treating traditional household arrangements as normative and providing extra barriers for men, by not women, to overcome if they want to take family leave.

V. 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 “baby-sit” their own children and are seen as financial providers, first and foremost, disadvantages both men and women. Men are not allowed to participate fully in family life and the burden of caregiving is placed primarily on women. In order to achieve gender equality in the workplace, there must be a shift towards treating men as primary caregivers. Men must be given the opportunity to provide care for their families and to combine work and family life. The rewards of caregiving must be emphasized. The cult of motherhood has predominated discussions of work-life balance and has led to a neglect of men’s caregiving roles. True change, though, will only happen when men openly embrace the caregiving role.

Leave polices shape behavior within a specific cultural and economic context. According to Prof. 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.”167 If leave policies are going to actually foster gender equality at home and at work, then they 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 leaves must also

167 WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE, supra note 37, at 32.
recognize that mother’s and father’s 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 to care for children may easily acquiesce to employers who provide paid maternity but not paid paternity leave. Certainly, it is no surprise that people are more likely to take leave if they receive some form of pay replacement. The ideology of “choice” must not be fetishized at the expense of implementing policies that promote equality. Choices are always constrained—by social context, economic realities and cultural pressures. Those that seek to promote gender equality must recognize the ways in which choices are constrained and design policies that counterbalance those constraints that work against equality.

**A. Surrendering to Fatherhood: Men as Co-equal Caregivers**

In *Surrendering to Motherhood*, “stay-at-home mother” Iris Krasnow describes her joy at being a stay-at-home mother, “There are not shackles in this house. This is no jail. These kids are your ticket to freedom like nothing you have ever tasted . . . On the 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.” Of course, being exactly where she was supposed to be was possible because her husband provided the economic support. In celebrating 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 in being the sole breadwinner. For example, New York

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168 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).
Time’s 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. Caring for the family, Brooks contends, is a more fulfilling and worthwhile project than work in the paid labor force. This sentiment is reflected in a variety of articles and commentary describing women who have chosen or expect to choose to take time off from paid work to spend more time caring for their families. Staying home to care for children is seen as not only important, but as the most special thing a woman can do. Working, for women, means missing out on all the important parts of their children’s lives. “I invite those women with consuming office jobs to think hard about whether it’s worth it,” Iris Krasnow states, “your kindergartener is going to be 18 tomorrow, and you cannot go back to that sweet, golden era when he eagerly leapt into your arms.” 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? This is not a facetious question. Family caregiving, like paid work, is rewarding.

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 favored an egalitarian ideal in which fathers were equally involved in childrearing. Yet, both fathers and mothers reported that fathers participated less in childrearing than their ideal. This had a negative affect on well-being. Parents who felt that there was a discrepancy between father’s ideal involvement and actual

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170 *See generally* Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAGAZINE, Oct. 26, 2003 (profiling women who left high-powered careers to stay home with their children). *See also* Lisa Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1. Although these articles purport to identify “trends” in women’s behavior, see Rehyan Hamanci, *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.
involvement reported more stress.\textsuperscript{173} Interestingly, fathers who reported greater than ideal involvement in financial support also reported that the division of household labor was unfair to the mother.\textsuperscript{174} Fathers who felt that their involvement in financial support was greater than their ideal felt particularly committed to egalitarian roles and, thus, were more likely to feel that greater childcare involvement of the mother was unfair. This finding further highlights the problem men face in wanting to be more involved in caregiving.

For men to become “authentic caregivers” they must participate early and regularly in physical caregiving of children. This will help promote equality by creating a strong emotional bond between father and child, leading the father to take greater responsibility for caregiving. 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 \textit{me} getting up.”\textsuperscript{175} When fathers are involved with the physical care of their children and seem 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.” 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 push women out of the workforce rather than a belief or ideological commitment to having a stay-at-home parent.\textsuperscript{176} A wife’s odds of quitting her job

\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} DOUCET, \textit{supra} note 9, at 110.
\textsuperscript{176} STONE, \textit{supra} note 6, at 78.
increase by 44% if her husband works 50 or more hours a week and by 112% if he works 60 or more hours a week.\textsuperscript{177}

Just as was envisioned when the FMLA was enacted in 1993, real progress in achieving true gender equality in the workplace will only be made 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, 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.”\textsuperscript{178} In order to escape the “Mommy Wars,” there must be a paradigm shift to a 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 lifetimes.\textsuperscript{179} Even those who are not married often make decisions based on the expectation that they will marry in the future.\textsuperscript{180} 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’s.

Work and caregiving are important for people’s well-being, and as a society, we should work towards a goal of making it possible for men and women to participate fully in 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.\textsuperscript{181} Paid work has been

\begin{itemize}
\item \textsuperscript{177} Id.
\item \textsuperscript{178} 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).
\item \textsuperscript{179} REDEFINING FATHERHOOD, supra note 61, at 42-48.
\item \textsuperscript{180} Heather L. Koball, Crossing the Threshold: Men’s Incomes, Attitudes Toward the Provider Role, and Marriage Timing, 51 SEX ROLES 387, 393-394 (2004).
\item \textsuperscript{181} Schultz, supra note 14, at 1887-88.
\end{itemize}
important to building and maintaining communities. Recent sociological studies on the effects of high unemployment levels in some communities further support the importance of paid work to communities. Psychological research has also demonstrated that both men and women experience positive mental effects from participating in paid work and negative effects from unemployment. 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.

When men participate equally in caregiving both men and women, as well as their children, benefit.

It is important, though, that emphasis on increased caregiving by men not be viewed as something men are being asked to do in order to help women. Treating caregiving like women’s work that men must help with, reinforces a sense of feminism as “interest group pleading in the

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182 Id. at 1888.
context of a zero-sum contest between genders.”\textsuperscript{186} Instead, caregiving and paid employment should be treated as co-equal, rewarding activities that are the primary domain of neither men nor 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.”\textsuperscript{187} As long as work is predicated on the stereotypical masculine “ideal worker norm” and men are treated as inauthentic caregivers, full time work will continue to intrude upon family life.

Feminist scholars must treat overwork and lack of flexibility as a gender issue that affects both men and women and seek interventions that disrupt the cycle of men’s work overcommitment 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 and policy changes must be targeted to increase men’s commitment to caregiving.

People adjust to changed circumstances and modifying workplace culture can lead to real changes in attitudes and behavior. In her study of men and fatherhood, Kathleen Gerson notes that men who desired egalitarian relationships and shared breadwinning responsibilities sometimes changed their attitudes when circumstances required that they become the sole breadwinners.\textsuperscript{188} However, beliefs and preferences never caused a change in behavior. “Rather, changes in opportunities and options preceded and prompted the ensuing changes in behavior and desire.”\textsuperscript{189} If workplaces were more accommodating to both male and female caregivers, men and women would be free to prioritize caregiving without giving up paid employment. This would encourage men to participate more fully in family life and caregiving and would help

\textsuperscript{187} Mennino, supra note 133, at 108.
\textsuperscript{188} Gerson, No Man’s Land 105 (1993).
\textsuperscript{189} Id.
couples avoid the single-earner trap that leaves men bound to exclusively to paid employment and women tied more closely to unpaid family caregiving.

**B. 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. Having overt family-friendly policies is of little use if people are discouraged from using them. Workplace solutions must be designed so as to encourage both men and women to be actively engaged in family life. Similarly, efforts to increase men’s involvement in family life and caregiving work must include a plan to decrease the number of hours professional people spend engaged in paid labor and increase workplace flexibility for all workers and especially for blue-collar workers. Under the current regime, an equitable distribution of work would only shift stressors from one group to the other without really changing the problem. Policy recommendations should therefore be aimed at making 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 80% time until the child reaches the age of eight. A whole host of laws and policy choices support shared caregiving by making it possible for mothers and fathers to remain in the workplace while also carrying for their children. The following proposals are aimed at encouraging both men and women to take advantage of family leave policies and discourage employers from requiring overwork.

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190 Mennino, *supra* note 133, at 108.
191 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.
192 DOWD, *supra* note 127, at 207.
193 WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 1, at 8.
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, families are unlikely to choose to forgo the salary of the highest earner, who is also usually the father. Because fatherhood is often defined in terms of ability to provide financially for one’s children, men are also 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 our current system, U.S. employers must pay the wages of workers on leave, fueling work-place resentment as others are forced to take on extra work without a corresponding increase in pay.\(^{194}\) This 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 and it contributes to the problem of overwork. In addition, the current system does nothing to help the wife of a man who must take on extra responsibilities at work because someone else is on maternity leave. 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. California’s Paid Family Leave Act\(^ {195}\) could serve as a model. In addition, to encourage fathers to take leave, parents should be eligible for more leave time if it 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.\(^ {196}\) This has been successful in Norway. Since such “daddy

\(^{194}\) *Id.* at 35.  
\(^{195}\) CAL. UNEMP. INS. CODE § 3301(a)(1) (Westlaw 2011).  
\(^{196}\) 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.
days” were instituted, requiring that some portion of leave be taken by fathers, men’s use of leave increased from less than 5% to more than 70%.197

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 also takes leave. They 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 with the FMLA for unpaid leave, parents should be allowed to take leave intermittently. 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 finally the father could take his additional ten weeks. This would provide for twenty-two weeks of care. However, consecutive leave should not be mandated, as is the case when employers make the primary and secondary caregiver distinction. Because early bonding is important with a new child and the patterns of caregiving established in the first weeks of life may be hard to change, 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. 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. This distinction makes no room for co-equal parenting and caregiving and, thus, reinforces stereotyped notions of who can be a caregiver. As long as men must prove that they are, in fact, the primary caregivers, they will be operating in a culture that treats their caregiving as inauthentic.

197 Id. at 36.
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. The Fair Labor Standards Act\footnote{29 U.S.C. ch. 8 (2006).} should be modified to provide protections for managers and professionals who are currently exempted. Professionals who work over forty-hours a week should receive comp 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 12-hours in any given 24 hour period should be provided a mandatory day off that does not count against their vacation or other discretionary time-off. Employers should be required to provide three weeks of vacation and should be penalized if more than 15\% of their employees do not use their vacation or their accrued comp-time in a given year.\footnote{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 fund that collects revenue from a payroll tax and the fines imposed when companies violate the required vacation mandates.} 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. Employees should also be allowed to use at least five of their vacation days as half days (i.e. 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 to notify their employees in advance when they will be “on-call” for overtime. That would allow employees to arrange for childcare in case of overtime and would give them confidence that they days when they are not “on-call” they will be able to leave at the scheduled time.\footnote{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.}
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. Polices, such as those recommended above, may help both men and women increase their participation in caregiving and provide some relief for the problem of overwork and lack of workplace flexibility.

VII. 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 mothers’ caregiving.

Men’s caregiving must be placed at the forefront of discussions of work-life balance and polices must be targeted to increase men’s caregiving, in order for workplace gender equality to be achieved. 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.”201 Lack of paternity leave for men or support for men in using family

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201 WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE, supra note 37, at 106.
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. Both men and women are ready for a change in the structure of the workplace. We must take advantage of this moment to increase opportunities for men to participate in caregiving, and, as a consequence increase professional women’s ability to participate full time in paid labor. Work must be reconceptualized to be more accepting of family responsibilities. “[T]he core principle of resolving work/family conflicts . . . must be that any vision of work and family must fight against essentialism and hierarchy.”

A rebellion against the ideal worker model and overwork is a rebellion against gender oppression, that excludes men from caregiving, just as it historically excluded women from the workplace.

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202 Dowd, supra note 127, at 186.