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ARTICLE

**THE WORK-FAMILY CONFLICT: AN ESSAY
ON EMPLOYERS, MEN AND RESPONSIBILITY**

MICHAEL SELMI*

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I. INTRODUCTION

The last decade has seen a lively debate emerge over what is now typically called the work-family conflict. The debate has primarily centered on the difficulties women encounter in balancing the demands of work and family life, with some related attention paid to how society devalues work in the home. Although the debate has been lively, its progress has stalled, in large part due to the varying assumptions and values that inform the work-family debate.

Within that debate, three different perspectives have emerged. The two most prominent perspectives—which in many ways mirror the equality versus accommodation debate from an earlier era—differ primarily with respect to women's attachment to the labor market. A perspective arising out of equality tends to focus on finding ways to allow women to spend more time in the workforce through proposals such as equal parenting, longer school days, and greater public support for child care. Within this perspec-

* Professor of Law, George Washington University Law School. An earlier version of this paper was presented at the University of St. Thomas Law Journal symposium on Workplace Restructuring to Accommodate Family Life (Mar. 16, 2007). I benefited by questions and comments I received at that time, as well as by conversations with Naomi Cahn, Joan Williams and Kathy Baker, and the research assistance of Kate Moore.

tive, which I have advocated, the primary goal is to allow women greater workplace equality.¹ The second perspective focuses on allowing women to spend more time out of the workplace, at least while their children are young. The idea here is that women should be able to balance their demands from inside and outside of the workplace by splitting their time between the two. Those who operate within this perspective tend to emphasize more and better part-time jobs, often with proportional benefits, and likewise focus primarily on employers as responsible for the difficulties that many women face.² More recently, there has been an emphasis on the benefits flexible workplaces provide to employers, what is sometimes referred to as the business case for work-life benefits.³

The third perspective is quite different, and not typically associated with the academic literature, though a variant is present in this symposium issue.⁴ This perspective is far more ambivalent about the role of women in the workplace, and seems to yearn for a lost era when women tended the home and men the work. Conservative commentators are most apt to align themselves with this traditional view, though when it comes to low-income women, conservatives insist on work rather than public support. Yet, for middle-class and elite women, these commentators identify a preferred role for women as caregivers. While this view is perhaps most closely associated with conservatives, it is also a view that pervades the popular media, particularly in all too frequent articles published in *The New York Times*.⁵

1. For some of those prior contributions, see Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7 (2006) [hereinafter *Women in the Workplace*]; Naomi Cahn & Michael Selmi, *The Class Ceiling*, 65 MD. L. REV. 435 (2006); Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289 (2003); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000) [hereinafter *Family Leave*]. See also Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (emphasizing importance of work to women's lives).

2. See, e.g., SYLVIA ANN HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* (2002) (advocating restructuring the workplace to accommodate women's needs outside of the workplace); ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 258-67 (2001) (advocating creation of part-time jobs and proportional benefits); PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2007) (emphasizing the need for flexible workplaces and better part-time options). Within the legal literature, Professor Joan Williams has been the most prominent and influential commentator, and she has straddled the lines between the two perspectives. Professor Williams advocates the creation of more and better part-time jobs that would have proportional benefits and she decries the penalties attached to motherhood. At the same time, she has also suggested that the demands placed on women outside the workplace are excessive, and she is attentive to the persistence of discrimination that deeply affects women's lives. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

3. See discussion *infra* Part II.

4. Allan Carlson, *Rise and Fall of the American Family Wage*, 4 U. ST. THOMAS L.J. 343, 556 (2007).

5. See, e.g., Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42, available at 2003 WLNR 5673781; Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1. Joan Williams has documented the persistent

These articles emphasize how women, almost always extremely high-income professional women, are dropping out of the workforce to spend time with their children and are choosing to do so, rather than being forced out for reasons of discrimination or some other factor that complicates their choice.

Although there is limited support for the notion that substantial numbers of women are dropping out of the workforce,⁶ there is no question that this perspective has strongly influenced the debate over how best to mediate work-family conflict. This is true not only for those who identify women as mothers but also for a much broader group, given that the media attention has created the perception that women are choosing to opt out, in part because of the high demands of the workplace as well as the rewards of life outside of the workplace. This highlights two recurring problems with moving the debate forward. First, normative considerations undeniably influence the various perspectives—normative considerations that are not easily influenced by data, even though there is no shortage of empirical explorations in the field. This is one area where writers are frequently discussing their own lives, often implicitly, and there is likely a desire to justify personal decisions in a way that may not be present in other areas of scholarship or journalism. Second, and equally important, there remains a substantial ambivalence over what ought to be the end state, namely what it would mean to balance the demands of work and family life. Some writers seem to believe that women should be able to take a significant amount of time out of the workplace when their children are young without suffering any labor market penalty—indeed, occasionally these authors sound like they are advocating that women ought to be able to do whatever they want without penalty. Women who want to work a little should be able to do so; women who want to move in and out of the workforce should likewise be able to without compromising their chances for promotion or prestige; and

media emphasis on the lives of upper-class women, and the ways in which these stories distort reality. See JOAN C. WILLIAMS ET AL., *WORKLIFE LAW, "OPT OUT" OR PUSHED OUT? HOW THE PRESS COVERS WORK/FAMILY CONFLICT* (2006), available at http://www.uchastings.edu/site_files/WLL/OptOutPushedOut.pdf. For a discussion of the media coverage, see E.J. Graff, *The Opt-Out Myth*, *COLUM. JOURNALISM REV.*, Mar.-Apr. 2007, at 51, available at http://www.cjr.org/essay/the_optout_myth.php. For the latest New York Times piece, see Judith Warner, *The Full-Time Blues*, *N.Y. TIMES*, July 24, 2007, at A23 (advocating the creation of a greater part-time sector).

6. As noted above, the data received extensive media hype, but the reality is quite different. A recent analysis from the Department of Labor demonstrated a decline in the participation rate of married mothers of about four percent between its peak in 1997 and 2005. Some of this decline is recession driven, but the authors found a decrease among all income levels. See Sharon R. Cohany & Emy Sok, *Trends in Labor Force Participation of Married Mothers of Infants*, *MONTHLY LAB. REV.*, Feb. 2007, at 9. For an analysis that emphasizes the effects of a slumping economy on women's participation, see Heather Boushey, *Are Women Opting Out? Debunking the Myth*, *CTR. ECON. & POL'Y RESEARCH BRIEFING PAPER*, Nov. 2005, at 4.

women who want to work a lot, or not at all, should also be able to do so.⁷ There is no reason why all of these alternatives ought to be available, or why women should expect to leave the workplace for significant periods of time without suffering any financial penalty.

From the equality perspective, the primary question is whether women are afforded the same, or equivalent, choices as men. For example, if men were permitted to exit the workforce for significant periods without suffering a penalty, then that choice ought to be open to women. If good part-time jobs, with high pay, prestige and proportional benefits, are available to men, then they ought to also be available to women. If those options are not available to men, then there is a significant question why they ought to be available to women, at least as a matter of workplace equality. One of the many ironies embedded in the work-family debate is that those who advocate finding ways to allow women to spend less time in the workplace do so, in part, because of the perception that men suffer high penalties when they participate in the demands of childrearing and home life. It makes little sense to have women engage in housework so that the labor market does not penalize men, when, in fact, women suffer substantial penalties for their weaker labor force attachment.

It is my sense that the debate has stalemated because of a desire to support all choices for women. We cannot, however, have it both—or all—ways, but instead we need to confront the choices that are available. To be sure, we can, and should, work to change or expand those choices, but we need to keep in mind that there are choices to be made. Importantly, we should not treat all choices as equally valid or valuable. Some choices may be better than others, depending on one's perspective. If we are concerned about women's equality and breaking down stereotypes that create barriers to women's advancement in the workplace, we should not focus on policies that allow more women to stay at home, or spend more time out of the workplace.

This essay will address one particular issue that has generally been at the margins in the work-family debate: why should the public expect employers to change their practices to accommodate the demands of family life when men fail to do so? Should the onus be on employers, or should we expect men to change their behavior, or perhaps some combination of the two? The essay will proceed in three parts. First, I will explore the various rationales for concentrating policy options on employers, and second I will

7. Although this extreme position is not often articulated, toward the end of her book, Susan Chira states,

Parents need more time with their children. Those who work need high-quality, affordable child care. Those who want to stay home should be able to do so. Those who are poor need enough social supports to keep them in the workforce. Help must come from individuals, from communities, from business, and from the government.

SUSAN CHIRA, *A MOTHER'S PLACE: TAKING THE DEBATE ABOUT WORKING MOTHERS BEYOND GUILT AND BLAME* 279 (1998).

discuss the role of men in the work-family debate. In particular, I will dissect the various excuses that are made for why men do not share a greater responsibility for easing the burdens that come with balancing the demands of work and family. Finally, in a short third section, I will discuss ways we might consider moving the debate forward, by in some ways, moving backwards.

II. EMPLOYERS VS. MEN: WHO IS RESPONSIBLE?

A. *The Employer's Domain*

Within the work-family literature, firms typically receive most of the blame for the problems that arise in balancing the demands of work and family, and as a result, most of the policy prescriptions focus on restructuring the workplace or imposing some additional burdens on employers. This is true of virtually all of the common policy suggestions: more and better part-time jobs, more flexibility for workers, including the ability to work at home, proportional benefits, more leave and paid leave.⁸ However much of this blame seems misplaced, and our excessive focus on employers may obscure some of the deeper issues that are in play.

1. *The Responsibility of Employers*

It would certainly be appropriate to direct policy interventions at employers if they were responsible for the conditions that women encounter, but much of the blame lies elsewhere. In the simplest terms, employers are not generally responsible for the failure of men to share the work burdens in the home, nor are employers the ones who decree that schools should end in the middle of the day. To the extent that it is these issues that are creating the stressful demands on women, it is not at all clear that employers should be the ones to absorb the costs of accommodating the non-market demands of women. Rather, men could change their behavior, an issue discussed in detail in the next section, and we could seek to align the school day with the work day, either by extending school hours or by providing more high-quality, publicly-financed after care programs.

Employers might be responsible for the persistent difficulties women face in balancing work and family life in a variety of ways. Most clearly, employers might be requiring their employees to work excessively long hours—hours that would preclude attention to non-work issues. It is com-

8. See *supra* note 2 and accompanying text. A recent special issue of the liberal magazine, *The American Prospect*, featured a number of articles about the need for restructuring the workplace. See, e.g., Ellen Bravo, *The Architecture of Work and Family: To Have a Job and a Life, We Need to Redesign the National Household*, AMER. PROSPECT, Feb. 19, 2007, at A5 (emphasizing need for paid leave and flexible workplaces); Jodie Levin-Epstein, *Responsive Workplaces: The Business Case for Employment that Values Fairness and Families*, AMER. PROSPECT, Feb. 19, 2007, at A16 (arguing that employers benefit by flexible practices including part-time equity).

monplace today to talk about the 24/7 economy, but the reality is that most employees are not working exceedingly long hours when measured against historical trends. In their excellent recent book, *The Time Divide*, Jerry Jacobs and Kathleen Gerson extensively analyze the most recent data on working hours and conclude that “the average length of the workweek does not appear to have changed appreciably in recent decades.”⁹ The authors note further that virtually all of the increase in working hours that has occurred over the last several decades is attributable to women entering the workforce: “In percentage terms, over three quarters (77.7 %) of the growth in working time among married couples is due to the growth of dual-earner households.”¹⁰ The added work that comes from dual-earner incomes unquestionably adds stress to families because there is less time available to devote to non-work issues, but it is hard to see how that is an employer’s fault or their responsibility to correct.

Employers might be faulted for failing to adapt the workplace to meet the needs of dual-earner families by not, for example, creating more flexible work arrangements. Indeed, one of the mysteries of the workplace is just how uniform employment practices remain and how rigid the labor market has proven. At this point, one might have expected the labor market to create more varied options so that workers would have more choices about when to perform their work, and even how much to work. Yet, as anyone who travels during rush hour can attest, most workplaces still operate on a basic nine-to-five schedule with some modest variation: eight to four or five, and sometimes ten to six.¹¹ The labor market rigidity is surprising in that many jobs could be performed at different hours, and there also seems to be sufficient employee demand to make varied hours more desirable.

There are, however, significant advantages to having uniform schedules, indeed, even, or especially, for family life. If more work schedules were staggered, dual-earner couples would likely spend even less time together, as often happens when a couple engages in shift-work as a way to juggle child care needs.¹² Employers may achieve significant cost-savings by having their employees, or the bulk of them, working at the same time,

9. JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 19 (2004).

10. *Id.* at 46. Naomi Cahn and I have recently explored some of the other findings in this book. See *Women in the Workplace*, *supra* note 1, at 9–13.

11. Just under fifteen percent (14.8 percent) of full-time workers work non-standard hours. Press Release, Bureau of Labor Statistics, *Workers on Flexible and Shift Schedules in 2004 Summary*, Table A (July 1, 2005), available at <http://www.bls.gov/news.release/flex.nr0.htm>. Men were more likely than women to work an alternative shift, and those figures have declined since the mid-1980s. *Id.* Most of those who engaged in shift work did so because it was the nature of the job, and only 8.2 percent indicated they were doing so to balance work and family obligations. *Id.*

12. Cf. Harriet B. Presser, *Embracing Complexity: Work Schedules and Family Life in a 24/7 Economy*, in *WORK, FAMILY, HEALTH & WELL-BEING* 47 (S. Bianchi et al. eds., 2005) (researchers find individuals working during non-standard hours have higher health risks and greater marital discord).

as this can facilitate teamwork and meetings, and is typically a better use of support staff, utilities, and security. Within the service industry, businesses need to be available to their clients, and the clients' needs will often dictate the necessary schedules. Some of this has changed with the availability of internet communications, but as the failure of teleconferencing to displace personal visits suggests, there remains a significant demand for in-person communication which has likely contributed to the persistence of uniform scheduling.

Within an economics framework, employers would be expected to adapt to the changing labor market if there were greater demand from employees. Most employers, or most of those employers that want to be seen as offering a desirable place to work, compete for the best workers, and if those workers were demanding more flexible workplaces, we would expect employers to meet that demand. Greater workplace flexibility might come with some costs to employees, and those costs, in turn, might further temper the demand for changes. Indeed, this is one of the unresolved questions in the work-family debate. It is frequently noted that workers, including men, express a desire to work less and to spend more time with their family.¹³ Those polls, however, rarely ask the more critical question: are workers willing to work less if that means earning less? Generally, what the polls indicate is that workers would like to work less for the same salary. This is kind of like asking children if they would like to have more ice cream—who wouldn't, one might wonder, want to work less for the same salary?¹⁴ One recent study conducted by the Bureau of Labor Statistics found that only 7 percent of those surveyed were willing to trade income for reduced hours, virtually the same percentage as in 1985.¹⁵ We also know that even when employees, especially men, express an interest in trading salary for more leisure time, they rarely do so. After studying dual-earner couples where most expressed a desire to change work and family patterns, Professor Jean Potuchek noted, "[T]his study has not supported the widespread assumption that changed attitudes are precursors of changed behaviors."¹⁶

13. See, e.g., ELLEN BRAVO, TAKING ON THE BIG BOYS: OR WHY FEMINISM IS GOOD FOR FAMILIES, BUSINESS AND THE NATION 218 (2007) (citing 2005 survey of male executives indicating that eighty-four percent would like to spend less time working and more time with their families).

14. Surprisingly, one answer might be the French. A recent study exploring the ramifications of the mandatory thirty-five hour workweek established in France found that workers were generally dissatisfied with the arrangement. When initially implemented, the mandate did not apply to smaller employers, thus the study found a shift of employees from large to smaller employers. Further, the study found a significant number of individuals felt pressure to obtain another job, even though the lower-hour mandate was not accompanied by a loss of wages. See Marcello Estevo & Filipa Sa, *Are the French Happy With the 35-Hour Workweek?* INTERNATIONAL MONETARY FUND WORKING PAPER No. 06/251 (2006), available at www.ssrn.com/abstract=944089.

15. See Lonnie Golden & Tesfayi Gebreselassie, *Overemployment Mismatches: The Preference for Few Work Hours*, MONTHLY LAB. REV., Apr. 2007, at 18, 21.

16. JEAN L. POTUCHEK, WHO SUPPORTS THE FAMILY? GENDER AND BREADWINNING IN DUAL-EARNER MARRIAGES 194 (1997).

Rather, traditional behavior patterns continue despite the claims of a desire for change.

One reason employees may not be willing to make the tradeoff between work and salary is because they cannot afford to do so, and employers can clearly be faulted for keeping employee wages too low. As is well known, real wages have largely stagnated over the last decade, although the wage growth for women has been higher than for men.¹⁷ The fact that employers are paying too little, however, is different from requiring their workers to work too much,¹⁸ and it is less clear how the inadequate wages are contributing to the work-family dilemma, other than by adding real and substantial financial stress. Overtime, particularly when it is mandatory, can cause further conflicts but mandatory overtime remains a problem in only a few industries where a shortage of employees exists, such as nursing.¹⁹

There are, however, at least two areas in which employers deserve blame for their practices, particularly in terms of how those practices affect women. Until recently, perhaps the most overlooked employment issue was the lack of paid sick leave for many workers. It is estimated that nearly one-half of the workforce has no paid sick leave, forcing many employees to lose pay if they, or a family member, are sick.²⁰ The lack of sick leave breaches an essential component of the social welfare contract for workers, and implicates a basic level of decency that ought to be provided uniformly to all workers. In the last two years, there has been growing awareness of this problem and legislation has been introduced in Congress to mandate a limited level of paid sick leave.²¹

17. See LAWRENCE MISHLE ET AL., ECON. POL'Y INST., *THE STATE OF WORKING AMERICA 2006/2007*, at 122–24 (2007). Between 1989–2000, female workers' wages increased 20.9 percent, while male workers experienced an increase of 15.0 percent. For the period 2000–2005, the increase for women was 8.3 percent and for men 5.9 percent. *Id.*

18. Obviously, the two can be related if employees worked additional hours to compensate for inadequate wages. Many workers end up doing just that, but as the average hour data indicates, most workers have not added significant hours even though wages have stagnated.

19. It is difficult to obtain data on mandatory overtime since overtime statistics are not typically broken down into mandatory and voluntary categories. For a discussion of mandatory overtime and the various measurement difficulties, see Lonnie Golden & Helene Jorgensen, *Time After Time: Mandatory Overtime in the U.S. Economy*, ECON. POL'Y INST. BRIEFING PAPER NO. 120, Jan. 2002. Nursing is one area that has been widely acknowledged as having excessive and mandatory overtime due to a shortage of qualified nurses, although that shortage is often attributed to poor working conditions including high overtime rates. *Id.* at 9. See also Gordon Lafer, *Hospital Speedups and the Fiction of a Nursing Shortage*, 30 LAB. STUD. J. 27 (2005).

20. See VICKY LOVELL, INST. WOMEN'S POL'Y RES., *NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON'T HAVE PAID SICK LEAVE* 6–7 (2004).

21. Legislation has been introduced in Congress to mandate seven paid sick days annually for all employers with fifteen or more employees. See Molly Selvin, *Sick-Pay Bill Rises Again*, L.A. TIMES, Mar. 26, 2007, at C1 (discussing Healthy Families Act). Voters in San Francisco recently approved a proposal requiring employers to offer one hour of paid leave for every thirty hours worked. See Ilana DeBare, *Law Now Entitles All Workers in S.F. to Paid Sick Leave*, S.F. CHRON., Feb. 6, 2007, at A1.

The other area in which employers should be faulted is also too commonly discounted today: workplace discrimination. Some of this discrimination has been documented through a surge of class action lawsuits filed over the last decade, the most recent of which is the largest involving Wal-Mart.²² I have previously argued that these lawsuits suggest a persistence of discrimination that extends well beyond common perceptions, and also indicates continued hostility to the presence of women in traditionally male jobs.²³ Joan Williams has also documented a sharp rise in lawsuits involving discrimination against mothers.²⁴ Additional empirical studies indicate that working mothers typically suffer a significant wage penalty that cannot be fully explained by their workforce characteristics.²⁵ A recent audit study that varied resumes solely based on motherhood found that employers offered significantly more call-back interviews to women who did not have children, suggesting that the employers were considering motherhood as a negative factor in their hiring decisions.²⁶ In short, there remains widespread evidence that employers discriminate against women in pay and promotion, and do so for reasons that cannot be explained by various human capital factors. In a recent exhaustive review of the literature, Professor Joni

22. *Dukes v. Wal-Mart*, 474 F.3d 1214 (9th Cir. 2007) (granting class certification in sex discrimination case).

23. See Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1 (2005). See also Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict*, 34 PEPP. L. REV. 313 (2007).

24. See Joan C. Williams & Elizabeth Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Carers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31 (2006); Joan C. Williams et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393 (2007); Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171 (2006).

25. A motherhood wage penalty of approximately five percent for one child and up to ten percent for two children has been consistently documented. See Michelle Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001); Deborah Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273 (2003); Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209 (1997); Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137 (1998). Efforts to refine the analysis have shown that some of the motherhood penalty is attributable to time mothers take out of the workforce. The study by Deborah Anderson and her colleagues indicated that college-educated women suffered little penalty, whereas high-school educated women experienced a substantial wage penalty. See Shelly Lundberg & Elaina Rose, *Parenthood and the Earnings of Married Men and Women*, 7 LAB. ECON. 689 (2000) (finding that continuously employed mothers suffered no wage penalty); Anderson et al., *supra*, at 287 (finding that high school graduates suffered the highest penalty and that "highly skilled mothers appear to experience a wage penalty only for their middle-school children").

26. Shelley J. Correll, Stephen Benard, & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1330 (2007) ("[C]hildless women received 2.1 times as many callbacks as equally qualified mothers . . ."). The authors also conducted a laboratory experiment with college students that produced similar results, including significantly lower starting salaries for mothers. *Id.* at 1316–19.

Hersch concluded, "Women earn less than men, and no matter how extensively regressions control for market characteristics, working conditions, individual characteristics, children, housework time, and observed productivity, an unexplained gender pay gap remains for all but the most inexperienced of workers."²⁷ She added,

If the unexplained pay disparity sometimes favored women and sometimes favored men, there would be no reason for concern. . . . But systematically and without exception finding that women earn less than men raises some questions. . . . [I]t is hard to continue to attribute the remaining disparity to unmeasurables and intangibles like effort and motivation and to ignore the possibility that discrimination remains a factor in the gender pay disparity.²⁸

2. *Flexibility is Good for Employers*

Recently, the argument focused on employers has shifted. Rather than concentrating on how employers have impeded women from balancing their competing demands, the argument has turned to emphasize the benefits flexible work practices offer employers. Commentators say that allowing employees more leave time or flexible work schedules reduces employee absenteeism and increases retention, and thus, can be seen as a potentially efficient employment practice that might lower employer costs.²⁹

There is certainly some logic to this argument, and in fact, it is a variant of management philosophies extending back to the turn of the century that emphasize the benefits of providing a humane workplace for attracting and retaining quality employees.³⁰ Surveys indicate that more than forty percent of employers have adopted some form of flexible workplace practice,³¹ and these practices often prove a strong inducement for some employees to continue with their employment or to gravitate toward employers with desirable practices. For many employers, this latter issue potentially raises adverse selection issues because offering the most generous child-leave policies might attract employees who expect to spend a significant amount of time out of the workforce. This might be a worthy trade-off to

27. Joni Hersch, *Sex Discrimination in the Labor Market*, 2(4) FOUND. & TRENDS IN MICROECON. 1, 80 (2006).

28. *Id.*

29. See, e.g., Levin-Epstein, *supra* note 8.

30. Such philosophies have a lengthy pedigree and have gained prominence at different times in our history. For an interesting discussion of welfare capitalism as practiced by various firms, see SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* (1997).

31. See Maury Gittleman, Michael Horrigan & Mary Joyce, "Flexible" Workplace Practices: Evidence from a Nationally Representative Survey, 52 INDUS. & LAB. REL. REV. 99 (1998) (based on 1993 survey data, forty-two percent of all establishments had at least one practice identified as flexible). According to the Bureau of Labor Statistics, 27.5 percent of workers have access to some form of a flexible schedule, though only one in ten have a formal flexible program. Press Release, Bureau of Labor Statistics, *supra* note 11.

the extent those individuals offer some higher productivity so that the costs of the leave are balanced against higher work output or lower turnover. Employers might also be able to trade salary for more generous benefits, although studies indicate that employees currently pay little for flexible workplace practices and may even receive higher wages.³² On a related note, if employers were to offer lower wages for family-friendly practices, it might compound the adverse selection problem by deterring employees who do not plan to take extended leaves.

In any event, the primary difficulty with the argument that flexibility provides benefits to employers is that there are very little reliable data to support the productivity benefits of flexible workplaces.³³ Most of the studies to date are surveys conducted by advocacy groups, such as Catalyst or the Families and Work Institute.³⁴ While these studies tend to show significant benefits to workplace flexibility, one should be skeptical of relying on the work of advocates, just as one would likely be hesitant to look to the ACLU to document the benefits of workplace privacy or speech protections. This does not mean there are no such benefits, only that better data are needed before concluding that flexibility offers significant advantages common to a wide range of workplaces.³⁵

The arguments for a flexible workplace echo those that have been made regarding the benefits of diversity, and indeed, the notion that diversity is good for business has become a mantra for many workplace advocates. A number of recent studies have sought to measure the benefits of diversity, and, to date, the evidence is mixed. The best known study conducted by MIT Business School Professor Thomas Kochan, along with others, concluded that there were no demonstrated benefits to having a di-

32. One study has documented higher wages associated with flextime. See Bonnie Sue Gariety & Sherrill Shaffer, *Wage Differentials Associated with Flextime*, MONTHLY LAB. REV., Mar. 2001, at 68. ("Results of the study indicate that flextime is associated with significantly higher wages overall."). This is likely attributable to the nature of the workplaces that offer flex-time, which tend to be found in high commitment workplaces. See Paul Osterman, *Work/Family Programs and the Employment Relationship*, 40 ADMIN. SCI. Q. 681 (1995). Of course, simply providing benefits is not enough, as employers also must encourage their use. Many flexible benefits go unused because employees fear they will be penalized if they do use them.

33. The wage differential study just cited, Gariety & Shaffer, *supra* note 32, can be seen as offering evidence in support of the thesis that flexibility offers productivity benefits to employers, though because the study focuses on employers already offering flex-time, it is not clear that the results would be replicated in different workplaces.

34. For examples, see CATALYST, *THE BOTTOM LINE: CONNECTING CORPORATE PERFORMANCE AND GENDER DIVERSITY* (2004); CORPORATE VOICES FOR WORKING FAMILIES, *BUSINESS IMPACTS OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION* (2005); ELLEN GALINSKY & ARLENE A. JOHNSON, *FAMILIES AND WORK INST., REFRAMING THE BUSINESS CASE FOR WORK-LIFE INITIATIVES* (1998). For an academic review of the literature, see Ellen Ernst Kossek & Alyssa Friede, *The Business Case: Managerial Perspectives on Work and the Family*, in *THE WORK & FAMILY HANDBOOK: MULTI-DISCIPLINARY PERSPECTIVES, METHODS, AND APPROACHES* 611 (2006).

35. See Ellen Ernst Kossek, *Workplace Policies and Practices to Support Work and Families*, in *WORK, FAMILY, HEALTH & WELL-BEING*, *supra* note 12, at 97, 104–05 (reviewing the literature and finding as many negative as positive findings and many that found no effect).

verse workforce that could be universally applied.³⁶ Equally important, the study also determined that there were no clear costs to a diversified workforce. In other words, diversity appeared to be a neutral factor, and in some workplaces it might be valuable while in others perhaps not. The fact that diversity appears to be neutral is potentially significant insofar as employers perceive diversity to include negative effects; this is, after all, one of the arguments that people offer in opposition to affirmative action policies, namely that they will bring in less qualified employees. So far those who have studied the issue have not found any loss of productivity associated with affirmative action or diversity programs,³⁷ and it is quite likely that the same will prove true for flexible workplace practices. Although the practices may not prove to be productivity enhancing, they are likely not detrimental either, or at least not as detrimental as employers might fear. Moreover, there is little question that work practices designed to ameliorate work-family conflicts can enhance retention—employers who allow significant leave time or flexible leave policies to care for ill children are almost certain to retain employees who place a priority on these issues.³⁸ Reducing employee turnover can lead to significant cost savings, but simply arguing that the practices will increase retention is not the same as proving that the practices are efficient. The practices would only be efficient if the cost reduction associated with higher retention exceeded the costs imposed by the practices, and this will depend on who is retained and the general costs of turnover, since many companies expect and tolerate a high level of turnover.

Again, this does not mean there are no benefits to flexibility or diversity, only that those benefits have yet to be demonstrated with convincing

36. Thomas Kochan et al., *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUM. RESOURCE MGMT. 3 (2003). For two law-related discussions of the benefits of diversity, see David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L.J. 1757 (2003).

37. See Harry Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. ECON. LITERATURE 483 (2000) (finding little evidence of efficiency loss from affirmative action programs).

38. See, e.g., Jennifer L. Glass & Lisa Riley, *Family Responsive Policies and Employee Retention Following Childbirth*, 76 SOC. FORCES 1401, 1405 (1998) (survey found that employer policies, particularly long leaves, reduced employee attrition). An earlier study found that flexible policies decreased absenteeism but did not reduce turnover. Dan R. Dalton & Debra J. Mesch, *The Impact of Flexible Scheduling on Employee Attendance and Turnover*, 35 ADMIN. SCI. Q. 370 (1990). Most of the studies I have seen do not define absenteeism, and it is not clear how flexible policies reduce absenteeism, other than as a matter of unexcused absences. *Id.* at 377 (focusing on decrease in unexcused absence). The whole point of flexible policies is to allow the employee to miss work when a child is sick or when some other family-related issue needs attending. Almost by definition, these practices are designed to increase time away from work, and thus, by at least one definition, the policies should increase absenteeism. The programs might reduce absenteeism if employees work at different hours, or if they show up at work more frequently because the employer offers flexible scheduling.

evidence. There is, to be sure, abundant anecdotal evidence that the practices produce efficient results, but such evidence is often of limited utility because it is based on recollection or informal surveys and there is no clear indication that the documented benefits will extend to other employers. I also do not mean to suggest that the practices are undesirable; in fact, I strongly believe that they are desirable for reasons other than the benefits employers can reap. Rather these practices are important to overcome past and present discrimination, and to further the aims of equality we have long espoused.

The argument regarding the benefits of flexibility would also have more power if the advocates grappled with the various economic arguments. In its most basic form, neoclassical economics suggest that to the extent the practices are efficient, employers will adopt them. If flexible workplace practices are, in fact, efficient, it would be useful for advocates to develop arguments that explain why more employers have not adopted flexible workplace practices. Arguments along these lines have been made to show why employers have adopted affirmative action policies. Professor Michael Yelnosky, for example, has demonstrated that affirmative action can have the salutary effect of preventing unconscious bias from creeping into an employer's judgments.³⁹ While the context is different, it might be that employers have failed to adopt more flexible practices because of their perceptions that they are costly, or perhaps due to some ambivalence about having more women in the workplace, or even a less subtle form of bias that prefers perpetuating gender roles outside the workplace. A simple resistance to change—again likely fostered by a perception that the practices are costly—may also explain employers' reluctance to adopt the practices.⁴⁰ The only point I wish to make here is that, even if one believes flexible work practices are efficient, it is important to explain why more employers have not adopted them and to offer better data to support the benefits.

In the end, it is unlikely that a substantial claim can be made based on the benefits the practices offer to employers. Rather more flexible workplaces are necessary for the benefit of employees. Whether we should expect employers to voluntarily adopt such practices is a different matter entirely.

B. *The Responsibility of Men*

While employers have received a tremendous amount of analysis and criticism, men have been surprisingly neglected in the debate. As I have

39. Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385 (2003). I made a similar argument, focusing on how affirmative action can be used to address unconscious discrimination in the workplace. See Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995).

40. For a discussion along these lines, see Harry J. Holzer, *Work and Family Life: The Perspective of Employers*, in WORK, FAMILY, HEALTH & WELL-BEING, *supra* note 12, at 83, 87.

argued previously, if men were to take more leave—if men were to share more of the responsibilities related to housework and child care—it would likely negate some of the penalty employers currently impose on female leave takers.⁴¹ If all, or most, employees took leave to care for their children, employers would seemingly be reluctant to penalize them all. Alternatively, one might conclude that if employers did penalize them all, it would not really be a penalty but rather a tradeoff that employees were making to care for their children. After all, it makes little sense to define a condition imposed on all employees as a penalty, rather than one of the conditions of employment. Getting men to spend more time outside of the workplace would also allow women more time to devote to the workplace, and might also help challenge existing gender stereotypes.

Whenever the issue of men taking more leave to care for children is raised, one, or more, of three responses is typically triggered. The most common response is to emphasize the penalty men face in the workplace if they take leave. Men are, in other words, excused from sharing the responsibility of leave because of the costs that will be exacted in the workplace. Characteristic of this view, a management consultant has explained, “Men who [take leave] . . . are looked upon as not being very committed or serious about their jobs.”⁴² A related response emphasizes men’s higher incomes, noting that it is more costly for men than women to take leave, and thus, men are often excused from leave taking because of these higher costs. The third reason is just as common in most discussions, and this reason stresses the progress men have made over the last three decades. Men, it is often asserted, now do more housework, spend more time with children, and take more paternity leave than ever.⁴³ Rather than excuse men’s patterns, this rationale applauds the improved conditions. Each of these responses will be explored in turn.

1. *The Workplace Penalties Men Face*

The argument that men face high workplace penalties for taking leave seems to be the most common, and in some ways the most potent response, but it is also the most misdirected. I have encountered this response in virtually every conversation I have had on the issue, and yet, there is very little

41. See *Family Leave*, *supra* note 1.

42. Mary Beth Grover, *Daddy Stress*, FORBES, Sept. 6, 1999, at 202 (quoting Charles Rodgers, chairman of Boston-based consulting firm WFD). See also ROB PALKOVITZ, INVOLVED FATHERING AND MEN’S ADULT DEVELOPMENT: PROVISIONAL BALANCES 228 (2002); Amy Andrews & Lotte Bailyn, *Segmentation and Synergy: Two Models of Linking Work and Family*, in MEN, WORK, AND FAMILY 262, 272 (Jane C. Hood ed., 1993); Ron Lieber, *Green Thumb: The Next Frontier: Paternity Leave*, WALL ST. J., July 8, 2006, at B1 (noting that leaving a job to spend more time with family is often “code for having been fired”).

43. See Scott Coltrane, *What About Fathers?*, AMER. PROSPECT, Feb. 19, 2007, at A21 (“[M]en in two-parent households now spend more time with their children than at any time for which we have comparable data.”).

empirical support for the notion that men are penalized to a greater extent than women when they take leave to care for children, or to spend more time with their children. This is instead a perception about the repercussions men will face, but it is a perception that is based simply on expectations rather than reality.

It is important to place this question in context. The issue is not whether men will be penalized for taking leave but whether they will be penalized to a greater extent than women. The data clearly and consistently reveal that women suffer economic penalties for taking extended leave, although the data are less clear on short-term leaves, which are the most common.⁴⁴ The data also suggest that women are penalized in excess of the productivity loss associated with leave taking, and that even those women who do not take leave may be vulnerable to labor market penalties based on the perception that they will take leave in the future.⁴⁵

So in assessing whether men are penalized, we need to be mindful of the penalties women face, and there is very little data to suggest that men are penalized to a greater extent than women. In general, the perception that men will be penalized heavily arises because men who take leave are typically acting out of stereotype and we assume that such transgressions will lead to significant penalties. The issue is complicated, however, because acting out of stereotype in this instance means adopting a behavior associated with women that employers already penalize, and so the question is whether there is any reason employers will punish men more heavily. The best answer to this question would be data showing the penalties men face, but it is difficult, if not impossible, to find any significant study showing that male leave-takers are penalized more heavily than their female counterparts. A practical reason for the lack of data is that there are generally too few male leave-takers in any workplace to study, and this is also likely true of larger data sets where the number of men who take significant leave—that can be identified as something specific to family leave—are also likely too small to provide reliable results.⁴⁶

Turning from data to theory fails to advance the argument. From an economic perspective, the leaves should be equally costly to employers re-

44. This is one of the most well-documented relationships. See, e.g., Hersch, *supra* note 27; Anderson et al., *supra* note 25, at 282 (noting that “[a]ctual experience and years out of the labor force alone account for 19% to 37% of the observed total motherhood penalties”); Julie L. Hotchkiss & M. Melinda Pitts, *At What Level of Labor-Market Intermittency Are Women Penalized?*, 93 AMER. ECON. REV. PAPERS & PROC. 233, 236 (2003) (noting that women are penalized “at a fairly low level of intermittency”); Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women’s Earnings*, 118 MONTHLY LAB. REV. 14, 18 (1995) (finding significant and persistent wage loss from extended leave, though a penalty, recedes some with time).

45. *Family Leave*, *supra* note 1, at 744–47.

46. See Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents’ Leave Taking*, 40 DEMOGRAPHY 191 (2003) (noting the lack of studies regarding male leave patterns and finding weak evidence that the FMLA failed to increase male leave taking).

ardless of whether men or women take them, and there is no particular economic reason why an employer would prefer women to take leave. It might make sense to penalize men more heavily if they were more productive, but we certainly should not assume that men are more productive, and even if they were, presumably their greater productivity is factored into higher wages.⁴⁷ Under this scenario, men might be penalized more in an absolute sense but not in a more meaningful relative sense. Employers might also choose to punish men more harshly than women as a way of damming a potential flood. Employers might, for example, assume that a certain percentage of women will take leave and factor this likelihood into their labor costs, but they might also assume that men will not and rely on that fact in structuring their costs and schedules. Under this theory, men who break ranks would then be subject to greater penalties as a way of disciplining the workforce. Yet, within the economic framework, the penalties should not, in fact, be any higher for men, since women's lower wages already account for part of the penalty they incur based on the expectation that they will take leave.

Rather than economic theory, we might turn to issues of masculinity to understand why employers might penalize men more than women. Employers might penalize men for taking leave because they are acting out of stereotype, because they are not acting like men. Yet, when examining why employers would seek to penalize men for not being masculine, it is difficult to avoid the economic arguments. Certainly some employers might prefer their employees to be masculine, independent of whether masculinity translates into greater productivity. These employers might prefer to have an all-male workforce and only hire women begrudgingly. By acknowledging this possible motive, we have moved from the economic realm into discrimination—employers, in other words, might seek to discipline men for “acting like women” because they would prefer not to hire women at all, and not because of higher costs but because they prefer male employees. If that is so, then those employers ought to be subject to discrimination suits.

Admittedly, those discrimination suits might be difficult to prove, but that is true of most discrimination lawsuits, and the theory articulated above underlies a number of large class action suits that have recently ended in successful settlements.⁴⁸ Moreover, the notion that employers might discriminate against men who take leave should not be used to justify men's

47. Studies designed to assess productivity differences between men and women generally show no significant difference. See, e.g., Harry J. Holzer, *The Determinants of Employee Productivity and Earnings*, 29 *INDUS. REL.* 403, 415 (1990) (finding that women had “comparable productivity” but “much lower wages” than men based on data from early 1980s); David M. Smith, *Pay and Productivity Differences Between Male and Female Veterinarians*, 55 *INDUS. & LAB. REL. REV.* 493 (2002) (finding pay differences of fifteen percent that were not explained by differences in productivity).

48. I have discussed these cases, many of which have arisen in the securities industry, in Selmi, *supra* note 23, at 6–12.

behavior. It has long been argued that by requiring employers to promote women, or to accommodate the disabled, they may be inclined to discriminate against them in the hiring process.⁴⁹ Yet, the claim that employers might discriminate against some employees to avoid statutory mandates has never been a convincing reason not to advance those mandates, nor should the argument be used to justify men's reluctance to take paternity leave. But beyond that normative argument is the flimsy nature of the case for employer discrimination. As noted above, there is little question that some employers will likely penalize men who act out of stereotype out of a desire to preserve gender stereotypes, but those employers are likely to constitute a small segment of employers, and again, the actions of a small group should not excuse men from sharing in the task of childrearing or housework.

One could devise an economic argument for why employers might want to preserve masculinity in the workplace, and that argument would likely turn on the interests of other employees. In traditionally masculine workplaces like a steel mill, when those existed, or more recently, securities brokerage houses, other employees may thrive on having a distinctly masculine workplace, and to the extent those employees are especially productive, an employer might cater to those tastes as a way of enhancing the productivity of its workforce.⁵⁰ Again, this argument works only if the male employees are more productive than other employees, and sufficiently more productive to compensate for the costs that would be incurred by preserving a masculine workforce. If the employees are simply of average productivity, then employers could presumably replace them with other average employees who do not impose these additional costs of masculinity.

The real question is whether any of these theories can be supported empirically, and as noted above, there is to date no convincing evidence to establish that a higher penalty exists for men. With that in mind, it is important to emphasize how much appears to be invested in believing these theoretical arguments. Even on a purely theoretical basis, the notion that men might be penalized more than women is, at best, quite attenuated. Why then does the argument hold so much appeal? I think the reason for that lies in that for many people, men and women alike, there is a need to explain or rationalize their own lives, their own life choices, and this is true even for those who seek greater workplace equality. It is striking, even if only from personal experience, how frequently women who should know better excuse the actions of men and turn immediately to employers as the source of blame.

49. This is standard fare among conservative commentators. *See, e.g.*, RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 265 (1992).

50. For an example of this kind of workplace, see CLARA BINGHAM & LAURA LEEDY GANSLER, *CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW* (2002).

2. *Men Make More Money*

The second response to men's unwillingness to take leave emphasizes their higher incomes. Because men typically make more money than their female partners, it is rational, according to this view, for them to continue working while their spouse stays home.⁵¹ In other words, if only one parent can stay home, it should be the one making a lower salary. This argument has an air of truth to it, but it also ignores many complexities of income distribution and leave-taking, including the circular nature of the claim. While it is true that most men enjoy higher incomes than their spouses, one reason for that is the fact that they express a greater attachment to the workplace.⁵² Those higher incomes are thus, in part, a product of existing leave-taking patterns. If we were to change those patterns, we would also likely alter some of the wage gap. To accept this excuse is to accept a gendered division of labor, along the lines asserted by Gary Becker many years ago⁵³ but perhaps for slightly different reasons, one now having to do with social norms as opposed to any degree of advantage from specialization.

The flaws in this argument, however, go deeper. If one wants to stay with the data, a significant portion of women now have higher incomes than their husbands. Approximately twenty-five percent of married women have higher incomes, and for those couples,⁵⁴ one would expect the men to be the ones to shoulder responsibility outside of the workplace. No study has ever documented anything near this level of participation by men in childrearing. According to the United States Census Bureau, there are approximately 159,000 stay-at-home dads compared to 5.6 million mothers.⁵⁵ Thus, if the decision regarding who ought to spend time outside of the paid labor market is truly driven by economics, one would expect to find a substantially higher number of men currently doing so. Primary earners should not be treated differently based on their gender; rather, the higher income earner should take less leave regardless of gender.

Not only is the argument circular and flawed as an empirical matter, but it also ignores the realities of leave-taking. For most couples, leave-taking can be done in serial fashion so a couple is not forced to choose

51. For an argument along these lines, although one focused in significant part on the tax system, see Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595 (1993).

52. I discuss this issue in detail in *Family Leave*, *supra* note 1, at 735.

53. His argument is laid out in most detail in GARY S. BECKER, *HUMAN CAPITAL* (2d ed. 1975).

54. According to data reported by the Bureau of Labor Statistics in 2003, 25.2 percent of women earned more than their husbands. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR REPORT 985, *WOMEN IN THE LABOR FORCE: A DATABOOK* 66 tbl.25 (May 2005). Since 1991, that figure has exceeded twenty percent. *Id.*

55. U.S. BUREAU OF THE CENSUS, *CURRENT POPULATION SURVEY, 2006 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT*, at tbl.FG8, (2007) available at <http://www.census.gov/population/socdemo/hh-fam/cps2006/tabFG8-all.xls> (released Mar. 2007).

which income to sacrifice in order to tend to home life. This is particularly true when it comes to leave associated with the birth or adoption of a child—parents would typically not take leave at the same time but would stagger their leaves. It might be the case that many couples feel they cannot sacrifice the male's income even for a short time, but in that situation one would expect there to be significant differences in the male and female incomes, which may sometimes be the case but not always. Most men have access to some form of paid leave—likely vacation or sick leave rather than paternity leave. Many women utilize vacation or sick leave as a means of assuring some income during their leave, and men could do the same.

Even where there might be an income disparity within the household, these decisions are not so easy to rationalize. Assuming a mother has an income of \$30,000, or roughly \$575 a week, and the father has an income twenty-five percent higher as would be consistent with data on the gender gap, the weekly difference is \$144, or approximately \$110 a week after taxes.⁵⁶ This is not a trivial difference to most families, but it is also not a dramatic difference that would obviously justify choosing one income over the other, particularly if the leave is temporary. It is quite likely that a couple's decision on how to structure their leave is made easier by stereotypical assumptions regarding who should be the primary caretaker and who the breadwinner. From this perspective, it may be easier to forego a woman's income, even where it is close to a man's, because one assumes that she should be the one responsible for childrearing and the husband should be the one responsible for providing economically for the family.

A related argument, and one made frequently by advocates of more traditional gender divisions, applies in the cases where one parent drops out of the labor market to care for children. To the extent someone is to forego an income, either temporarily or permanently, it should be the lower-paid person, and that is, more often than not, the woman. Again, that is true so far as the argument goes, but even if true, it will obviously do nothing to advance issues of gender equality—and as noted above, we know that in a substantial number of families, the woman earns the higher income. Moreover, implicit in the argument, and sometimes explicit, is the sense that the high cost of child care will consume most of the second income, providing an additional claim to rationality in having the woman stay home.

The notion that the high cost of child care makes it economically rational for women to drop out of the labor market is a myth perpetrated by a disproportionate focus on high-income families. Many professional women, and academics, are accustomed to child care that costs in excess of \$1,000 a

56. The figures in the text roughly correspond to existing data. In 2005, the median hourly wage for white men was \$17.42 an hour with a gender wage gap of eighteen percent. I have used a higher estimate assuming that men and women are not necessarily working the same job. For the data, see MISHEL ET AL., *supra* note 17, at tbls.3.24, 3.25.

month,⁵⁷ but most child care is far less costly. A recent study based on the 1996 Survey of Income and Program Participation (SIPP) indicated that, on average, families spend 4.9 percent of their after-tax income on daycare.⁵⁸ Sixty-three percent of families incurred no expenses, while only ten percent had expenses that were more than \$600 a month.⁵⁹ For lower-income families, relatives were the most common means of care.⁶⁰ These figures are consistent with most other studies that have sought to document the cost of child care.⁶¹ The figures can be troubling to the extent there is a relationship between quality of care and cost, which many studies have documented. In general, relative care typically offers the lowest quality of care.⁶² But this is a very different kind of objection, one that has little to do with whether the cost of child care can justify foregoing an income, and much more to do with the quality of child care that is available to lower-income families.

I should note that a number of studies have documented a relationship between the labor force supply of married women and the cost of child care. These studies might provide some support for the claim that the costs, and possibly the quality, of child care are driving women out of the labor market.⁶³ These studies, however, do not get at the more difficult question of why child care costs have such an effect on women's but not men's labor force participation, nor do they suggest that most women are affected. Rather, what the studies show is that women's labor force participation is sensitive to the costs of child care.⁶⁴ But as noted earlier, for most women, child care costs are not a significant portion of their income, and certainly do not consume all of their wages, even after factoring taxes into the equation.

57. The cost of center-related care of all of the universities I have been affiliated with in the last decade have all exceeded \$1,000 a month. For an additional discussion of professionals paying more than \$1,000 a month, see Stephanie Armour, *High Costs of Child Care Can Lead to Lifestyle Changes, Adjustments*, USA TODAY, Apr. 18, 2006.

58. See Dan T. Rosenbaum & Christopher Ruhm, *The Cost of Caring for Young Children*, NAT'L BUREAU OF ECON. RESEARCH WORKING PAPER NO. 11837, 2005, at 11.

59. *Id.*

60. *Id.* at 17.

61. See Kristin Smith, *Who's Minding the Kids? Child Care Arrangements: Spring 1997*, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, 2002, at 14–15 (noting that on average, child care payments were \$67 per week per preschooler, and \$40 per week for children older than five); Linda Giannarelli & James Barsimantov, *Child Care Expenses of America's Families*, THE URBAN INSTITUTE OCCASIONAL PAPER NO. 40, Dec. 2000, at 4 (for those who paid for child care, the average cost for a child under 13 was \$286 per month).

62. Gregory Acs, *A Good Employee or a Good Parent? Challenges Facing Low-Income Working Families*, 4 U. ST. THOMAS L.J. 343, 494 (2007).

63. See, e.g., Wen-Jui Han & Jane Waldfogel, *Child Care Costs and Women's Employment: A Comparison of Single and Married Mothers with Pre-School-Aged Children*, 82 SOC. SCI. Q. 552 (2001).

64. *Id.* See also David M. Blau & Alison P. Hagy, *The Demand for Quality in Child Care*, 106 J. POL. ECON. 104, 107 (1998) (finding that individuals focus more on price than quality of care).

3. *Men Are Much Better Than They Used to Be*

A third and common response emphasizes the improvements that men have made in equalizing the work they do outside of the home. Although there is surely some support for the claim that men have improved in their devotion to non-labor market activity, this response is most clearly a veiled excuse for men's behavior rather than any justification of existing patterns.

The data are fairly clear and consistent on the division of work outside of the labor market, regardless of the particular source of the data. As one might imagine, noncontemporaneous personal recollections are notoriously unreliable. People—men and women alike—tend to overestimate their contributions while underestimating the work of others. The most reliable estimates appear to be those based on time diaries, although these diaries are controversial because they tend to demonstrate more leisure time than is consistent with popular perceptions. Indeed, the time diaries sponsored by the University of Maryland suggest that people have more leisure time today than they did twenty or thirty years ago, again contrary to one of the central claims in the work-family debate.⁶⁵

In any event, studies consistently show that women do approximately twice as much child care and housework than men.⁶⁶ This can be seen as a significant decline from a generation earlier where women typically performed three times as much non-market work.⁶⁷ Even so, looking beyond the bare numbers reveals a substantial persistence of gendered care. Although men are doing more work, the majority of the decline in the housework gap is attributable to women doing less work in an absolute sense.⁶⁸ Many families purchase rather than prepare meals in the home, and cleaning is more frequently outsourced and also performed less often. Men and women, however, continue to perform different tasks. Men still do much of their house-related work outside, or while playing with their children, and the time they spend on more mundane inside work such as cleaning, cooking or doing laundry has not increased appreciably over the last three de-

65. For example, in their most recent analysis, which is based on data from 2000, the authors of the Maryland project concluded, "[E]ven these ultra-busy parents still average about 33 hours of free time per week (with fewer than 10 percent of couples having less than 20 hours per week, which is what most parents estimate they have)." SUZANNE M. BIANCHI, JOHN P. ROBINSON & MELISSA A. MILKIE, *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 124 (2006).

66. Based on 2000 data, married mothers performed 12.9 hours of child care per week, while married fathers performed 6.5 hours. *Id.* at 64, tbl.4.1. In the separate category of primary housework, married fathers performed 9.7 hours per week, and married mothers performed 19.4 hours. *Id.* at 93, tbl.5.1.

67. *Id.* at 64.

68. Men's housework has not increased since 1985, and in fact, has decreased six hours during that time. Married mothers, however, have decreased their primary housework from 34.5 hours in 1965 to 19.4 hours in 2000. *Id.* at 93, tbl.5.1.

cedes.⁶⁹ Similarly, much of their time is shared time rather than alone time with children, and in those cases they may not be providing primary care.⁷⁰

Those who are apt to see progress in the data are likely to stress that change takes time, but when it comes to balancing the equities in the home, one has to wonder how much time is necessary. After all, we are not talking about global changes, or even deep attitudinal changes such as were necessary during the civil rights era. Instead, we are talking about doing laundry, cooking and taking children shoe shopping. Even if we see these activities as reflecting deeply gendered tasks that are part of how we construct gender, at the end of the day we are still talking about laundering, cooking and shoe shopping. From that perspective, neither Michel Foucault nor Judith Butler is likely to be of much assistance.

The strongest argument to excuse the behavior of men would be to suggest that men do not have access to leave, if only it were true. What is true is that more women have access to paid family leave because many of the policies are designed for women, but it is also true that most women do not have access to paid leave. Only eight percent of workers in private industry have access to any paid family leave, and that leave is concentrated among white collar workers making above-average wages.⁷¹ Most women who are able to take some form of paid leave typically do so by cobbling together vacation and sick leave. When the paid leave expires, many women will then take some form of unpaid leave. Men, however, typically have the same, and often better, level of benefits. Many men have a higher level of benefits in the form of greater vacation or sick leave, particularly since these benefits are often tied to seniority or salary—areas in which men generally have significant advantages. Studies also indicate that men are more likely to have flexible work schedules.⁷²

69. The recent time diary data released by the Bureau of Labor Statistics indicate that men perform twice as much lawn and garden care, while women perform three times as much work related to food preparation and cleanup. Women also perform twice as much housework and devote twice as much time purchasing consumer goods. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, AMERICAN TIME USE SURVEY—2006, at 11 tbl.1 (2006), available at <http://www.bls.gov/news.release/pdf/atus.pdf>. For a comprehensive survey on the division of household tasks, see Suzanne M. Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79 SOC. FORCES 191 (2000).

70. In 2000, sixty-one percent of married fathers' child care occurred during a simultaneous free-time activity, nearly one-third of which (thirty-one percent) was watching television. BIANCHI ET AL., *supra* note 65, at 69–70. Married mothers also did a significant amount of their child care (forty-three percent) while engaged in another activity. *Id.* Men also spend more of their time with their wives present. See Liana C. Sayer, Suzanne M. Bianchi & John P. Robinson, *Are Parents Investing Less in Children? Trends in Mothers' and Fathers' Time with Children*, 110 AM. J. SOC 1 (2004).

71. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEES BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, SUMMARY, 2006, at 24 tbl.19 (2006), available at <http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf>.

72. See Hersch, *supra* note 27, at 59–60 tbl.14 (2006) (based on U.S. Department of Labor data, indicating that 28.1 percent of full-time men had flexible schedules while 26.7 percent of women had flexible schedules).

As should be clear, none of the common excuses for why men have not made more changes in their behavior can withstand careful scrutiny. Men have access to leave, are not likely to suffer greater penalties than women for taking that leave, and the various costs of leave—or the costs of child care—cannot explain why women continue to have overwhelming responsibility for life outside of the workplace.

III. THE NEXT FRONTIER

It has always been a bit of a mystery why men have received such a pass in the work-family debate, although mystery may not be the right word. There is little question that much of the reason men have been neglected in the debate arises out of frustration: the hope of equal parenting and equal housework has not been realized, and it does not look like it will arrive any time soon. It also seems that we have lost the grander aspiration, not just for equal parenting, but for issues of gender equality more broadly. This is true even though polls continue to demonstrate overwhelming support for the concept of equal parenting. Indeed, one recent poll showed that eighty-two percent of the birth cohort 1965–1981 supported the concept of equal care-giving.⁷³ These polls can quickly become self-serving fountains of excuse, however, as the necessary follow-up question is: what have you done to bring about equal care-giving in your relationship? That question focuses on what individuals have done instead of concentrating on what individuals say they would like to do. In the end, what matters is what people have actually done, and on that score, we have made far too little progress, and there is reason to believe we are now backsliding.⁷⁴ As noted previously, most of the progress we made towards gender equity in housework and childwork was made prior to the 1990s with little progress since then, and the same is true for expressions of egalitarianism.⁷⁵ There also remains a stubborn desire for gendered spheres. As the authors of a retrospective on attitudes towards the family noted,

Within [the] widespread acceptance of gender equality, there is also a strong current of continued support of a gendered division of labor. A substantial number of Americans—more men than

73. BIANCHI ET AL., *supra* note 65, at 128.

74. A recent poll showed a significant increase in women who preferred part-time to full-time work. In 1997, thirty-two percent of working mothers indicated that full-time work was the ideal, whereas only twenty-one percent did in 2007. The numbers describing part-time work as the best option increased from forty-eight percent to sixty percent. See PEW RESEARCH CENTER, FEWER MOTHERS PREFER FULL-TIME WORK 1 (2007), available at <http://pewresearch.org/assets/social/pdf/WomenWorking.pdf> (focusing on what would be ideal “considering everything”—mothers were not asked whether they were willing to sacrifice income to work part-time).

75. See Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE AND FAM. 1009, 1014 (2001) (“These data . . . suggest that there may have been not only a leveling off of the egalitarian trend in the late 1990s but a small reversal of a long-term pattern.”).

women—continue to believe in men having primary responsibility outside the home, with women being in charge of the home.⁷⁶

Perhaps the primary explanation why scholars and advocates have focused on employers rather than men is for the very practical reason that it is easier to force change on employers than on private individuals. We can mandate that employers change their policies, but we cannot mandate that men become active parents, do the dishes or work less. This is, however, a strategy of convenience rather than conviction and our efforts to create social policy through the workplace have had a checkered history that should offer caution regarding the prospects of fostering change by focusing exclusively on employers. We can see this most clearly today in the state of our health insurance system. The American employer-based health insurance has produced extremely high costs for many employers—particularly in some of the older industries such as automobiles where health costs add significantly to the cost of an automobile—and uneven results for employees, many of whom are increasingly unable to afford the shared costs of employer-provided insurance.⁷⁷ It has never been clear why employers would be good agents for employees, or why they ought to devote their own time and resources to managing health care plans, other than that we lacked the political will to create a broader governmental solution.

There is no reason to think we will do any better by leaving work-family issues to employers, and there is no reason to believe that employers ought to bear primary responsibility for the necessary changes. At a minimum, we must change social norms outside of the workplace in order to expect significant changes within. That means that we need to alter the gender patterns and expectations in the home; men must become more involved in family life, and we should be careful not to applaud improvements that occur at a glacial pace. Men do not deserve medals for doing the laundry, nor should we become excited when their housework triples if the original baseline was twenty minutes a day. While men need to change their behavior, women must as well—beginning with dropping their excuses for why men don't share more in home life.

The necessary changes run deep. Anyone who spends time with children sees a gendered world—a world where daycare employees are overwhelmingly female (with an occasional male director), where elementary school teachers are female, where boys and girls are quickly divided in their after-school activities, where police and firefighters are male, where doctors are frequently male and nurses almost always female. When children visit the homes of their friends, they are likely to see parents engaged in gendered activities. Everywhere children turn they see gender divisions—of

76. *Id.* at 1032.

77. While this is not the place for an extended discussion, those who are interested in a recent critique of the current system should see MICHAEL E. PORTER & ELIZABETH OLMSTED TEISBERG, *REDEFINING HEALTH CARE: CREATING VALUE-BASED COMPETITION ON RESULTS* (2006).

course, this is not true of all children, and the presence of same-sex couples disrupts the balance in many areas but it is undeniable that the worlds of our children still look all too gendered, even if a tad less than was true for the previous generation.

This gendered world has a profound effect on that next generation of women and men. Studies continually show that children are strongly affected by the roles their parents play—working mothers produce more egalitarian-oriented children, as is also true when children experience non-stereotypical gendered parenting.⁷⁸ This is how norms are changed, and it is the most difficult work because it requires change on virtually everyone's part. This is true for men who need to live up to their stated aspirations, and need to be held accountable when they fail to do so. Women, too, may hold some responsibility for the continued gender patterns. A number of scholars, including my colleague Naomi Cahn, have suggested that women frequently play a gatekeeper role in the house, where they, often unintentionally, reinforce gendered parenting patterns by controlling how the work in the home is done.⁷⁹ This can occur when women hold onto certain tasks, but it can also occur when women enforce particular norms for how housework is performed.⁸⁰

The reigning norms are certainly not easy to change; “the web of gender,” to use the phrase of Professor Potuchek, entraps us in many and subtle ways. But I am confident we will more likely break through the web if we are able to get men to act more like women. Additionally, I am equally confident that we will spin the web tighter by emphasizing the need for women to spend more time out of the workplace. We are simply not going to move closer to any notion of equality by emphasizing the benefits of flexibility for employers, by trying to create better part-time jobs or by mimicking the French, the Dutch or whomever else seems to have policies designed to allow women to be secondary workers while holding onto their primary caretaking roles. The emphasis on part-time work seems particularly misguided. Most European countries have developed more robust part-time sectors than exist in the United States, but in no country are those positions desirable other than as a means of allowing women to spend some time in the workplace. In every country, women dominate the part-time

78. See, e.g., Teresa Ciabattari, *Changes in Men's Conservative Gender Ideologies: Cohort and Period Influences*, 15 *GENDER & SOC'Y* 574, 584 (2001) (“Men whose mothers worked in the paid labor force and men with more educated mothers have less conservative attitudes.”); Mick Cunningham, *Parental Influences on the Gendered Division of Housework*, 66 *AM. SOC. REV.* 184, 198 (2001) (“For both sons and daughters, parental behaviors early in the life course had long-term effects on the allocation of housework.”).

79. See Naomi Cahn, *The Power of Caretaking*, 12 *YALE J.L. & FEMINISM* 177 (2000); Sarah M. Allen & Alan J. Hawkins, *Maternal Gatekeeping: Mothers' Beliefs and Behaviors That Inhibit Greater Father Involvement in Family Work*, 61 *J. MARRIAGE & FAM.* 199 (1999).

80. Allen & Hawkins, *supra* note 79, at 203 (“Mothers also may redo tasks, set unbending standards for family work, or criticize their husbands' work to protect their own authority in the home.”).

sector, and suffer in economic terms as a result of that dominance.⁸¹ There is simply no reason to think we can create better part-time jobs here—better in that they will not offer lower wages or fewer promotional opportunities.

Paid leave, on the other hand, offers significant benefits to women leave takers, particularly if the leave is for a limited period of time, and adopting paid leave would be an important step toward creating a more family-friendly workplace. Aligning the school day with the work day will also reduce one of the most significant conflicts that occur for families with school-age children. Obviously, both of these policies entail significant costs, and at least in the current social framework, it is unlikely that these policies can be enacted on a federal level, though there is some hope on the state and local level where more progressive policies have arisen.

By itself, paid leave, or even lengthening the school day, will be insufficient, especially if men do not take the leave when it is available, or if women continue to have responsibility for home life. Instead, we need to focus on getting men to change their behavior, and to a lesser extent, women to change their behavior. If we do that, it will also be significantly easier to enact beneficial workplace policies because there will be a greater political constituency for such policies.

81. See *Women in the Workplace*, *supra* note 1, at 20 (discussing part-time work in Europe with citations). For an additional recent paper, see Alan Manning & Barbara Petrongolo, *The Part-Time Pay Penalty for Women in Britain*, INST. FOR STUDY LABOR, IZA DISCUSSION PAPER NO. 2419, Nov. 2006, at 17 (“On average women working [part-time] in the UK have hourly earnings that are twenty-two percent less than women working [full-time] . . .”). In the Netherlands, which has the largest part-time sector, the growth of part-time work resulted from a deal struck with unions to preserve existing full-time jobs by allowing an expansion of the non-union part-time sector. See MARTIN CARNOY, SUSTAINING THE NEW ECONOMY: WORK, FAMILY, AND COMMUNITY IN THE INFORMATION AGE 70 (2000).