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DARE TO CARE: THE COMPLICATED CASE OF WORKING FATHERS ALLEGING SEX AND PARENTAL DISCRIMINATION

*Ifat Matzner-Heruti**

While there has been an increasing amount of comparative legal research into cross-national policies affecting working mothers, an analysis of how these policies affect working fathers is only in its infancy. Accordingly, this article investigates policy variations in the treatment of Israeli and American men as gendered workers and fathers. In particular, this article analyzes employment discrimination cases in which Israeli and American fathers alleged that they were discriminated against due to their sex and parental responsibilities. This article will use masculinities theory to examine these pioneering lawsuits and the precedents they established. Incorporating masculinities literature into the work-family scholarship exposes how gender norms construct identity and shape workplace structures and practices. While most commentary has focused on the effects of these norms on working mothers' ability to integrate work and caregiving, the article shows that these norms also disadvantage fathers, albeit in different ways than mothers.

After analyzing several of the groundbreaking Israeli and American cases in which fathers alleged that they were targets of discrimination, this article suggests a reform for courts in both countries. It proposes incorporating masculinities theory in sex discrimination cases under a gender anti-stereotyping doctrine. According to this doctrine, which Israeli and U.S. courts have already accepted, penalizing women or men due to gender stereotypes might be considered as unlawful sex discrimination. The article then suggests pragmatic applications of masculinities theory as part of the stereotyping doctrine to be used by plaintiffs and courts adjudicating employment sex discrimination cases of male caregivers.

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INTRODUCTION

In May 2013, the Israeli newspaper *Haaretz* published an article titled *Israeli Fathers Who Want it All: But Can They Get a Job After Being Stay-at-Home Dads?*¹ The article discusses the obstacles Israeli fathers face when they balance family needs and paid employment.² According to the article, fathers who decide to be primary caregivers feel that society regards them as less manly, which then affects the ways they view themselves.³ As one of the interviewed fathers memorably stated, “Your testosterone is at zero, as is your self-esteem.”⁴ The article further notes that the current office norm of working long hours—a norm which I will call “the long working hour norm”—does not enable Israeli working fathers to take significant part in raising their children,⁵ a similar problem facing their American counterparts.⁶

The *Haaretz* article carries an important message not only

¹ Naomi Darom, *Israeli Fathers Who Want it All: But Can They Get a Job After Being Stay-at-Home Dads?*, HAARETZ (May 18, 2013, 1:50 PM), <http://www.haaretz.com/weekend/magazine/israeli-fathers-who-want-it-all-but-can-they-get-a-job-after-being-stay-at-home-dads.premium-1.524313>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 59 (2003) (discussing the “time squeeze” of American families); see also JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 90 (2010) [hereinafter WILLIAMS, RESHAPING]; Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 458 (1998); Darren Rosenblum, *Unsexing Mothering*, 35 HARV. J.L. & GENDER 57, 107 (2012) (arguing that American citizens work a relatively high number of hours per week); Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 271 (2002); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 114 (2003) (arguing that in the current economy, “‘full-time’ frequently means overtime,” and “the ideal worker often will leave home at 8 A.M. and not return until 6, 7, or even 8 P.M.”); Joan Williams & H.C. Cooper, *The Public Policy of Motherhood*, 60 J. SOC. ISSUES 849, 852 (2004).

because of its contents, but because it was published in a well-known national newspaper. Further, the article shifts the discourse on the work-family conflict in Israel from a “women’s only” problem to an issue that also has a strong impact on men.

Israeli and American scholars from various disciplines typically examine the work-family dilemma by focusing primarily on the difficulties working mothers face when trying to balance the two spheres.⁷ The prevailing view has been that women—especially mothers—suffer when combining family responsibilities and market work.⁸ Accordingly, there have been many important legislative and policy efforts in Israel and the U.S. in the last several decades to enable women to invest their time and talents in spheres other than the domestic one.⁹ These initiatives have

⁷ See Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 115–16 (2000); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 79 (“Talk about work and family is assumed to be women’s talk. It is talk about women’s lives, our experiences, our feelings.”); see also MAKING MEN INTO FATHERS: MEN, MASCULINITIES AND SOCIAL POLITICS OF FATHERHOOD 25–26 (Barbara Hobson ed., 2002) [hereinafter MAKING MEN INTO FATHERS] (arguing that “the focus of most theorizing about recent changes in the family has been on women, their increased independence, their increased aspirations and their presumed reduced dependence on men”); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC’Y 201, 241 (2008) [hereinafter Dowd, *Masculinities and Feminist Legal Theory*] (“Typically, feminist evaluation of work/family issues and fatherhood has come from the perspective of women or predominantly of women.”). An impressive amount of scholarship has been written about women’s work-family conflicts.

⁸ See Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 429 (“[T]here has been a great deal of discussion in America about work-family conflict or work-life balance. These discussions have typically focused on the plight of women, mothers in particular, and the inhospitable labor market); see also Haya Stier, *The Inter-Relations Between Work for Pay and Family Work*, 7 SOTSIOLOGIA YISRAELIT [ISRAELI SOCIOLOGY] 143, 155 (2005) [Hebrew] (contending that the academic research dealing with integrating work and family has emphasized the fact that women have been those to make sacrifices when combining the two spheres).

⁹ For examples of statutes in Israel, see Employment (Equal Opportunities) Law, 5748-1988, SH No. 38 (1998) (Isr.); Male and Female Workers Equal Pay

typically emphasized women's discrimination in the workplace, which in many respects remains the focus.¹⁰ While women's difficulty juggling work and caregiving responsibilities is worthy of such attention and should be resolved, this is only one side of the issue: fathers also face significant work-family dilemmas—which have been under-researched and widely ignored—particularly in Israel.¹¹

The primary focus on women's work-family conflicts hinders efforts to promote gender equality in the workplace in both Israel and the United States.¹² Only when society confronts fathers'

Law, 5756-1996, SH No. 230 (1996) (Isr.), Male and Female Workers (Equal Retirement Age) Law, 5747-1998 (1998) (Isr.). For examples in the United States, see Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993); Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978); Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (1963).

¹⁰ See, e.g., MAKING MEN INTO FATHERS, *supra* note 7, at 25–26.

¹¹ See Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 10 (2005) (contending that men were partially erased “from the discourse of family care work within legal feminism”); see also BRAD HARRINGTON ET AL., THE NEW DAD: CARING, COMMITTED AND CONFLICTED 36 (2011), available at <http://www.bc.edu/content/dam/files/centers/cwf/pdf/FH-Study-Web-2.pdf> (last modified Wednesday, June 15, 2011) (“Over the past ten years, we have been very aware of the serious lack of research that has been done on the experiences of working fathers. . . . Precious little time or attention has been invested in understanding how men deal with these often competing forces in their lives.”); MAKING MEN INTO FATHERS, *supra* note 7, at 26 (“...the focus of most research and theories has been on the ways that women have become more nearly equal with men in the sphere of work, with almost no attention to the implications of this complexity in men's parental roles for men's equality or inequality in the sphere of the family”); Kelli K. Garcia, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL'Y 1, 1–2 (2012) (contending that “the work-family conflict has been seen through the lens of women's responsibilities” with “almost no discussion of men's role in family caregiving or the conflicts that male caregivers face”). In Israel, see Stier, *supra* note 8, at 146 (arguing that while there is a vast amount of literature dealing with the implications of family responsibilities on women's work patterns, a comparable discussion with regard to men is almost non-existent).

¹² For example, Catherine Fisk considers the reasons for the persistence of the struggle to change the social norms that reinforce gender inequality at the workplace. See Catherine Fisk, *Foreword: Looking for a Miracle? Women, Work, and Effective Legal Change*, 13 DUKE J. GENDER L. & POL'Y 1, 5 (2006). Fisk asks whether the law will be able to “change the institutional cultures that

difficulties in reconciling work and family can we expect workplace norms to be rewritten.

This article uses masculinities¹³ theory—a body of theoretical and empirical work by feminist theorists, psychologists and sociologists—in order to expose stereotypes and gendered biases in statutes and court decisions in Israel and in the U.S. Furthermore, this article provides the first comparative legal analysis of antidiscrimination statutes and case law pertaining to paternal work-family integration.

Only a relatively small number of Israeli and American fathers have brought lawsuits alleging they were discriminated against at work. This article examines some of these pioneering cases. More specifically, it investigates whether Israeli and American working fathers faced similar challenges when they went to court. Additionally, it examines how judges in both countries have perceived male caregivers, workplace norms, and the compatibility

perpetuate women's subordination." *Id.* I argue that by framing the question as focusing solely on women, institutional cultures and norms will not change. See also Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM, 429 (2001) (arguing that "the transformation of the male-centered norms that structure the workplace beyond a minimal concession to women's experiences of pregnancy and childbirth has yet to be achieved"). I contend that norms of the workplace will change when the focus ceases to be merely on women's issues.

¹³ The term "masculinities" is used in the plural form to emphasize that masculinity has numerous impressions and multiple meanings. See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 208; see also MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 28 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) [hereinafter MASCULINITIES AND THE LAW]; NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE, 26–27 (2010) [hereinafter DOWD, THE MAN QUESTION]; Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 684 (2009) (quoting Paul Smith, *Introduction to BOYS: MASCULINITIES IN CONTEMPORARY CULTURE* 1, 3 (Paul Smith ed., 1996)). Yet, I am also aware of the criticism against using that term. See, e.g., Douglas P. Schrock and Michael Schwalbe, *Men, Masculinity, and Manhood Acts*, 35 ANN. REV. OF SOC. 277, 280–81 (2009) (criticizing the multiple masculinities concept and contending that while such concept encourages us to view the differences among men, it also, ironically, promotes a categorical essentialism of men).

of work and family responsibilities.

This article asserts that these pioneering cases can play a central role in both enhancing gender equality and in undermining the long-working-hour norm that dominates many workplaces. It also emphasizes the importance of framing male caregivers' lawsuits because this framing can either facilitate or impede social change for working parents. It argues that, by incorporating masculinities theory into their lawsuits, male caregivers will be able to bring legal coherence to their claims and shed light on the various ways many men are gendered and disadvantaged.

The article proceeds as follows. Part I briefly reviews the main principles of masculinities theory. Part II examines Israeli employment discrimination law and focuses mainly on its "parents' benefits" provision, according to which both women and men should be equally permitted to use workplace parental benefits (when they are provided). Moreover, the section analyzes several cases brought to Israeli labor courts by working fathers arguing that they have been illegally denied benefits on the basis of sex discrimination. An analysis of the judicial decisions reveals common themes pertaining to gender and parental social expectations, and employment norms. Part III analyzes four cases brought by American caregivers who alleged sex discrimination with regard to caregiving responsibilities. An examination of the cases, which challenged federal and state statutes and were litigated at different time periods, reveals gender stereotypes of women and men as caregivers and workers. Part IV elaborates on the similarities and differences between masculinity norms in Israel and in the U.S. as reflected in the analyzed cases. The comparison indicates that gender norms operate in a similar manner in both countries, supporting the data that demonstrate common conceptions of masculinity in Western societies.

Finally, Part V proposes pragmatic applications of masculinities theory to both litigation and court decisions dealing with work-family issues. It attests that masculinities theory can be used in sex discrimination cases under the gender anti-stereotyping doctrine, which has been adopted by U.S. and Israeli courts for several decades. According to this doctrine, penalizing women or men at work for deviating from their traditional gender role is illegal sex discrimination. Hence, masculinities theory could

illuminate the nuances of cultural gender norms and expectations and shed light on the penalties that workers face when they fail to conform to gender stereotypes. Part VI concludes that masculinities theory can further Israeli and American lawyers' and judges' understanding of the various ways workplace practices generate inequality, and hinder men's ability to be both workers and parents.

I. A SHORT INTRODUCTION TO MASCULINITY THEORY

Masculinities scholarship is a cross-disciplinary field of research that emerged in the social sciences during the 1970s and 1980s.¹⁴ The theory's basic premise is that it is not solely women but also men who suffer from gender norms and social expectations. This body of scholarship evaluates the ways masculinity produces power, but also uncovers the disadvantages that men experience within patriarchal societies.¹⁵

Masculinities theory consists of several key concepts. The term "masculinities" is used in the plural form to emphasize that masculinity has various forms and impressions.¹⁶ Thus,

¹⁴ See MASCULINITIES AND THE LAW, *supra* note 13, at 1. Masculinities research draws mainly from sociology and social psychology, but also from psychology, criminology, feminist theory, queer theory, anthropology, and geography. See Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703, 706 (2011) [hereinafter McGinley, *Work, Caregiving, and Masculinities*]; see also Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 HARV. J. L. & GENDER 581, 585 (2010). For an overview of the research of major sociologists, see DOWD, THE MAN QUESTION, *supra* note 13, at 28. Note, however, that "scholars in the field regularly cross disciplinary lines and include other disciplines as well." *Id.*

¹⁵ See MASCULINITIES AND THE LAW, *supra* note 13, at 4. Masculinities studies, thus, expose the assumptions pertaining to manhood and the various ways in which such assumptions justify ideas and institutions. See Cooper, *supra* note 13, at 684–85.

¹⁶ See Cooper, *supra* note 13, at 685 (emphasizing the multiple expressions of a masculine behavior by stating that "I personally might emphasize my blackness, my heterosexuality, or my being a professor in different contexts in order to enact different forms of masculinities."); see also Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 208; see also DOWD, THE MAN QUESTION, *supra* note 13, at 26–27; MASCULINITIES AND THE LAW, *supra* note

masculinities identities are neither fixed nor natural.¹⁷ Rather, they are a socially constructed set of ideas, manifested through performance.¹⁸ Since masculinity is a set of practices, it can change, and indeed, has changed over time.¹⁹ Nevertheless, even though there are many ways to express masculinity, not all masculinities are equal, and the form of masculinity that is socially preferred in any particular culture is called “hegemonic masculinity.”²⁰ In the U.S. and Israel, this man should be white, upper-middle class, and heterosexual.²¹ However, “[h]egemonic masculinity was not assumed to be normal in the statistical sense; only a minority of men might enact it. But it was certainly normative.”²² As a result, men are always anxious and insecure regarding their manhood,²³ which reveals the instability of manhood and a constant struggle within men to achieve and maintain their manliness.²⁴ As the sociologist Michael Kimmel observed, “[w]e are under the constant careful scrutiny of other

13, at 28. *But cf.* with Schrock and Schwalbe, *supra* note 13, at 280–81 (criticizing the multiple masculinities concept and contending that while such concept encourages us to view the differences among men, it also, ironically, promotes a categorical essentialism of men).

¹⁷ See Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 471–72 (2010).

¹⁸ DOWD, THE MAN QUESTION, *supra* note 13, at 26; McGinley, *Work, Caregiving, and Masculinities*, *supra* note 14, at 706–07.

¹⁹ See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 23.

²⁰ This concept was coined by R.W. Connell, a leading theorist of masculinities. See R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 829, 830–33 (2005).

²¹ In Israel, see Einat Hollander, *The “New Israeli Man”? Changes in Constructions of Masculinity in an Inter-Generational Perspective* 65 (2007) (unpublished Ph.D Dissertation, Dep’t of Soc. & Anthro., Bar-Ilan University) (on file with the Bar-Ilan University Library) [Hebrew]. In the United States, see McGinley, *Work, Caregiving, and Masculinities*, *supra* note 14, at 586.

²² See Connell & Messerschmidt, *supra* note 20 at 832–33.

²³ See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in TOWARD A NEW PSYCHOLOGY OF GENDER: A READER 223, 235 (Mary M. Gergen & Sara N. Davis eds., 1997) (“Our efforts to maintain a manly front cover everything we do.”).

²⁴ See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 229; DOWD, THE MAN QUESTION, *supra* note 13, at 28.

men. Other men watch us, rank us, grant our acceptance into the realm of manhood. Manhood is demonstrated for other men's approval."²⁵ Consequently, men compete with each other in order to prove their masculinity.²⁶ This feature of male insecurity is strongly manifested in the realm of paid work, as will be discussed in further details below. Men in Western countries gain their status by being breadwinners, a status conferred by their working condition and therefore, inherently unstable.²⁷ Masculinities theory has also exposed the existence and operation of hierarchies among men themselves, especially at the intersections of manhood with race, class, and sexual orientation.²⁸ Thus, although men feel powerful as a group, they often feel powerless as individuals.²⁹ According to the legal scholar Nancy Dowd, "[i]t is just as important in terms of dismantling male privilege to recognize that not all men are similarly situated and that gender privilege may even be trumped by another characteristic or by nonconformity to gender norms."³⁰ Therefore, masculinity is about the relationships among men, as well as between men and women.³¹

Masculinity is defined in opposition to other identity categories, specifically femininity and male homosexuality.³² For example, acting like "a girl" is regarded as an insult: "To throw like a girl, to cry like a girl, to be emotional like a girl, to dress like a girl—all of these things are insults, instantly recognizable as

²⁵ See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY* 25, 33 (2005) (explaining masculinity as a homosocial enactment); see also MICHAEL S. KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* (1996) (providing a history of U.S. masculinity).

²⁶ See *MASCULINITIES AND THE LAW*, *supra* note 13, at 3.

²⁷ See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 25 (2000).

²⁸ Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 13, at 229.

²⁹ See DOWD, *THE MAN QUESTION*, *supra* note 13, at 28; *MASCULINITIES AND THE LAW*, *supra* note 13, at 28–29; Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 233.

³⁰ See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 229.

³¹ DOWD, *THE MAN QUESTION*, *supra* note 13, at 26–28. See also Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 209.

³² See DOWD, *THE MAN QUESTION*, *supra* note 13, at 26–28.

transgressing what constitutes manhood.”³³ Obviously, this demand to avoid anything feminine has a strong impact on men as caregivers, as being nurturing is socially associated as a women’s role.

One of masculinities studies’ goals is to bring a richer and more complex picture of privilege,³⁴ and to show that boys and men not only benefit from their gender advantages, but also suffer gender harms.³⁵ These harms are evident in several ways. For example, male violence is targeted mainly at men;³⁶ boys are socialized to deny emotions which negatively affects their relationships throughout their lives;³⁷ and the pressure to be breadwinner causes stress, leading to potential damage of men’s health, which might deteriorate since many refuse to seek care.³⁸ Furthermore, fathers pay a high price for attaining the breadwinner role in the family, since they need to subordinate their relationship with their children to wage work.³⁹

³³ Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1063 (2012) [hereinafter, Dowd, *Fatherhood and Equality*].

³⁴ See MASCULINITIES AND THE LAW, *supra* note 13, at 30; see also Schrock and Schwalbe, *supra* note 13, at 288–89 (claiming that while men as a group can benefit from sexist ideology, some “manhood acts can sometimes reproduce inequalities in ways that disadvantage subgroups of men”).

³⁵ See Dowd, *Fatherhood and Equality*, *supra* note 33, at 1060; Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 204–05; DOWD, THE MAN QUESTION, *supra* note 13, at 70; MASCULINITIES AND THE LAW, *supra* note 13, at 4 (asserting that much of masculinities theory “describes the harm that our gendered culture does to men”).

³⁶ MASCULINITIES AND THE LAW, *supra* note 13, at 29–30.

³⁷ See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 230; Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1062–63 (1996) (claiming that “[f]rom infancy, men learn to endure suffering silently and in private. Emotional stoicism is ingrained in many and varied ways”); see also MASCULINITIES AND THE LAW, *supra* note 13, at 29.

³⁸ See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 230; see also CHEN NARDI & RIVKA NARDI, MEN IN CHANGE 155–65 (1992) [hereinafter NARDI & NARDI] (describing the price paid by modern men and suggesting several explanations for the significant differences between men and women in terms of health and life expectancy).

³⁹ See *infra* Part III.

While scholars have increasingly discussed masculinities theory, only a few Israeli and American men have attempted to litigate discrimination based on caregiving responsibilities. Israeli fathers have brought only a handful of cases in which they alleged discrimination on the basis of caregiving responsibilities. Similarly, the number of lawsuits that American working fathers have brought, although growing, remains low.⁴⁰ There are a number of reasons why Israeli and American working fathers refrain from litigating their claims: a fear of losing their jobs, insufficient evidence, a lack of resources, and so forth.⁴¹ Yet, it is masculinity norms that greatly undermine working fathers' ability to both acknowledge workplace discrimination and sue their employers.

Israeli and American fathers are normatively expected to be primary providers, and they consequently perceive breadwinning as their main role as husbands and parents.⁴² In that sense,

⁴⁰ Male family responsibility discrimination comprised around fifteen to twenty percent of the Center for WorkLife Law's database. See Joan C. Williams & Allison Tait, *ManceSSION or "Momcession"?: Good Providers, a Bad Economy, and Gender Discrimination*, 86 CHI.-KENT. L. REV. 857, 866 (2011). Note, however, that this database does not differentiate between discrimination against fathers and discrimination against men performing other kinds of caregiving, not necessarily for children (care for sick spouses, sick parents, etc). See *id.* Therefore, the number of cases that deal specifically with discrimination against working fathers is lower.

⁴¹ See Guy Mundlak, *The Law of Equal Opportunities in Employment: Between Equality and Polarization*, 30 COMP. LAB. L. & POL'Y J. 213 (2009).

⁴² See DOWD, *THE MAN QUESTION*, *supra* note 13, at 120; see also Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 759–60 (2000) (book review) (arguing that the social expectation of men to perform as "ideal workers" without family responsibilities arises from pervasive gender norms. These norms "link masculinity with the ability to perform as the family provider"); MAKING MEN INTO FATHERS, *supra* note 7, at 62 (arguing that "indeed, part of the very definition of proper masculinity, and good fatherhood, in the United States has been economic self-support"). With regard to the Israeli contexts, see Dror Gershoni, *New Fatherhood in Israel—A Gender Perspective on Masculinity and Fatherhood in the Institutional and Marital Context* 60 (2004) (unpublished M.A. Thesis, Dep't of Soc. & Anthro., Bar-Ilan University) (on file with the Bar-Ilan University Library) [Hebrew]. Gershoni has empirically examined Israeli men's and women's assumptions and practices regarding fatherhood. *Id.* at 40. He found that work is an important part of men's

contemporary Israeli and American fathers face similar cultural expectations with respect to their paternal duties. Moreover, as discussed above, one of the keystone concepts of masculinities theory is that manhood is defined through negation—of not being a woman or feminine.⁴³ Men, therefore, might reject caregiving because “care is perceived as soft, vulnerable, weak—all characteristics associated with women, and again, to be rejected, at whatever cost by men.”⁴⁴ As Nancy Dowd aptly contends, “[A]t the core of fatherhood, however, is a tension that resonates in the contemporary practice of fatherhood. Fatherhood is one of the critical life roles for men, but care of children is significantly at odds with the concept of masculinity.”⁴⁵

Moreover, masculinity norms are constructed by and within institutional settings. The workplace, as a major institution of modern society, shapes and is shaped by masculinity norms.⁴⁶ As Joan Williams argues, “workplaces are gender factories where men forge and enact their masculinity.”⁴⁷ In particular, the workplace is constructed to support the breadwinner norm.⁴⁸ For example, many Israeli and American workplaces compel employees to work an exceptional number of hours in comparison with their European

self-definition and their social and self-image. *Id.* Consequently, he has demonstrated that the very definition of fatherhood is done in the context of work. *Id.*

⁴³ See *supra* notes 32–33 and accompanying text.

⁴⁴ Dowd, *Fatherhood and Equality*, *supra* note 33, at 1063.

⁴⁵ DOWD, THE MAN QUESTION, *supra* note 13, at 105.

⁴⁶ See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (1989); Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC’Y 139 (1990); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093 [hereinafter Albiston, *Institutional Inequality*]; McGinley, *Work, Caregiving, and Masculinities*, *supra* note 14, at 708; Williams and Tait, *supra* note 40, at 875 (contending that “the workplace culture is male-dominated and defined by norms of extreme masculinity”); WILLIAMS, RESHAPING, *supra* note 6, at 88.

⁴⁷ WILLIAMS, RESHAPING, *supra* note 6, at 88.

⁴⁸ See Dowd, *Fatherhood and Equality*, *supra* note 33, at 1061–63 (contending that “[t]here is no doubt that the breadwinner norm powerfully infuses the structure and culture of the workplace”).

counterparts.⁴⁹ The long working hour norm is especially prevalent in professional and managerial positions,⁵⁰ yet more and more workplaces have come to adopt that norm.⁵¹

The long working hour norm forces workers to devote most of their time and energy to work and thus perpetuates gendered patterns of care. Since men usually earn more than women in Israel and in the U.S.,⁵² couples in both countries might decide that it is

⁴⁹ See GORNICK & MEYERS, *supra* note 6, at 59 (discussing the “time squeeze” of American families). In comparison, the law in Israel defines that a working week is approximately 40 hours a week. Hours of Work and Rest Law, 5711-1951 (1951) (providing that “[a] working week shall not exceed forty-five working hours”). Despite this law, many Israelis work 60 hours a week or more. Nir Hasson, *Experts: Israelis Among Most Overworked People in World*, HAARETZ (Feb. 24, 2009 3:18 AM), <http://www.haaretz.com/print-edition/news/experts-israelis-among-most-overworked-people-in-world-1.270790>. This, of course, puts pressure on Israeli families. See, e.g., Darom, *supra* note 1 (“For many workers, though, there simply aren’t enough hours in the day to successfully combine a high-pressure job with family duties – a quandary with deep roots in the Israeli labor market.”).

⁵⁰ See Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 277 (2002) (asserting that “[l]ong weeks, however, are still most common among professional workers and managers”); see also WILLIAMS, *supra* note 6, at 90 (contending that “Americans now work longer hours than workers in most other developed countries” and that “American elites work longer hours than other Americans.”). In Israel, see Arianne Renan-Barzilay, *Working Parents: Multidimensionalism and Working-Class Social Feminism – A New Theoretical Framework for Reconciling Work and Family in Israel*, 35 TEL AVIV UNIV. L. REV. 310, 327 (2012) (arguing that many of the available positions in the Israeli job market – certainly the most rewarding of these jobs – are irrelevant to those who have other responsibilities).

⁵¹ See Erin L. Kelly, *Discrimination Against Caregivers? Gendered Family Responsibilities, Employer Practices, and Work Rewards*, in *Handbook Of Employment Discrimination Research: Rights And Realities* 341, 350 (Laura Beth Nielsen & Robert Nelson eds., 2005); see also Smith, *supra* note 50, at 277 (asserting that “[s]uch long employment weeks are no longer restricted to a few occupations, but are filtering across a range of occupations and extending down the corporate hierarchy”). In Israel, see Renan Barzilay, *supra* note 50, at 327 (arguing that more and more employment/labor sectors in Israel adopt the long hour norms and view the “ideal worker” as one who works long hours).

⁵² See Dowd, *Fatherhood and Equality*, *supra* note 33, at 1069. In Israel, see Darom, *supra* note 1 (“[W]omen make up some 50 percent of all employees in the workplace here, and the percentage of working women in Israel is among

economically justified for the woman to take care of the domestic responsibilities and thus take family leave when needed, work part time, or leave the workforce altogether. Consequently, the breadwinner model is reinforced, as fathers are required to fulfill their economic responsibilities, and are thus dissuaded from providing care.

II. CARE TO SUE: ISRAELI WORKING FATHERS STRUGGLE TO COMBINE WORK AND CAREGIVING

This Part analyzes the “Parents’ Benefits” provision in the Israeli employment antidiscrimination law and the lawsuits brought by working fathers alleging they were illegally denied these benefits. These cases were unusual in the sense that men were the ones who brought suits claiming they had been discriminated against at work due to their sex and parental responsibilities, and asked to secure parental rights in order to integrate work and family. Therefore, analyzing the national and regional labor court decisions allows for a unique opportunity to examine courts’ views about gender stereotypes as well as social norms pertaining to work, family, and working parents’ ability to integrate the two.

A. The Legal Basis - Employment Antidiscrimination Law

The Employment Equal Opportunities Law (hereinafter: EEO law) was enacted in 1988 to fight discrimination in the Israeli workplace. The law provides that an employer is prohibited from discriminating against workers based on the following characteristics: gender, sexual orientation, marital status, pregnancy, fertility treatments, IVF treatments, parenthood, race, age, religion, nationality, country of birth, political or other orientation, or army service.⁵³ The prohibition—which covers both

the world’s highest. Women also receive more higher education than men. And yet, the wage gap between men and women has remained steady (at about 30 percent) for decades.”)

⁵³ Employment (Equal Opportunities) Law, 5748-1988, SH No. 38, § 2(a) [hereinafter EEO Law].

private and public employers—applies to hiring, work conditions, promotion, training, termination, and retirement.⁵⁴ A violation of the law is considered a criminal offense with a high monetary penalty, and also awards civil remedies.⁵⁵ Labor courts have the sole authority to deal with disputes arising from this law.⁵⁶

Aside from prohibiting discrimination against parents, the law also includes an affirmative provision entitled “Parents’ Benefits.”⁵⁷ At first the law only applied to working mothers, but it was amended in 1995 to include fathers as well.⁵⁸ The EEO law does not create additional benefits, but rather requires that if one or more benefits have been customary for mothers at a workplace, it should also be equally available to fathers at that workplace. The closed list of parental benefits includes:

- (1) absence from work due to child’s illness;
- (2) a shortened working day because a female employee is the mother of a child;
- (3) the right to use the services of an on-site employer-provided day care center;
- (4) the employer’s contribution to the cost of keeping a child in a daycare center.⁵⁹

The law, however, differentiates between working mothers’ and working fathers’ eligibility for the benefits that are customary at their workplaces. While a working mother is eligible for the benefits without further conditions, a working father must prove

⁵⁴ *Id.* § 2(a)(1)–(6).

⁵⁵ *Id.* §§ 10, 15.

⁵⁶ *Id.* § 10. Appeals go to the National Labor Court. Under special circumstances it is possible to file a petition to the Supreme Court, and the Court will agree to hear the case only if (1) there is a legal mistake in the decision of the National Labor Court, and (2) if deciding the case serves justice. *See Nabil Hatib v. The National Labor Court*, 40(1) PD 673 (1986) (Supreme Court of Israel).

⁵⁷ EEO Law § 4.

⁵⁸ *Id.* § 4(a). Section 4(a) states that “[w]here, in accordance with the terms of employment customary at her place of work, a woman employee has any entitlement by virtue of her being a parent, such entitlement shall also be accorded to a male employee at the workplace where the aforesaid term of employment is customary” *Id.*

⁵⁹ *Id.* § 4(b)(1)–(4).

that (1) his spouse is gainfully employed rather than working as a housewife; and (2) his spouse has not already used the benefit herself.⁶⁰ Therefore fathers—but not mothers—must prove that their spouses work in order to be eligible for the abovementioned benefits. Thus, in cases where the mother is unemployed, her spouse will not be entitled to the abovementioned benefits. However, in the opposite scenario, when the mother works and the father is unemployed, the mother would still be entitled to benefits. Hinging the father's ability to use parental benefits upon the mother's work status but not the other way around reflects the legislature's presumption that fathers work (or should work), and that there is therefore no need for a mother to prove that her husband works. This criterion demonstrates the social demand of men to be breadwinners. Furthermore, not hinging the mother's ability to use parental benefits upon the father's work status demonstrates the legislature's assumption that regardless of her husband's work status, it is the mother's responsibility to take care of the children.

The provision imposes another eligibility criterion upon fathers who want to use the benefit. Besides showing that his spouse works, the father will have to prove that his spouse is formally entitled to the benefit at *her* workplace (and has not used it).⁶¹ This requirement does not exist for mothers, and a mother can use the entitlement if it is customary in her own workplace alone. The labor courts were required to deliberate this problematic and rather odd demand.⁶²

The following section will focus on the Israeli labor court decisions regarding a father's ability to work a shortened day when he has young children. An analysis of these cases will show that

⁶⁰ Section 4(a)(1) of the EEO Law states that in order to be eligible for benefits, a father must prove: "(1) his spouse is an employee and she has not been absent from her work by virtue of her said right in subsection (b)(1) or (2) and has not claimed the right to such entitlement as provided in subsection (b)(3) or (4)." *Id.* § 4(a)(1). Fathers who have sole custody of their children are eligible for the right if it exists in their own workplace. *See id.* § 4(a)(2).

⁶¹ Section 4(a)(1) states that "his spouse is an employee and she has not been absent from her work *by virtue of her said right . . . and has not claimed the right to such entitlement . . .*" *Id.* (emphasis added).

⁶² *See* discussion *infra* Part II.B.

while the courts have interpreted the law in an expansive way to afford fathers the benefit, the judges' rationales actually undermined significant father care.

B. The Earliest Cases – Interpreting Fathers' Benefit to a Shortened Working Day

The first two employment discrimination suits that fathers brought dealt with the interpretation of EEO law § 4(a)(2), which addresses parents' eligibility to work a shortened day.⁶³ Both cases involved fathers who worked for the civil service sector, where mothers are entitled to work an hour less if they have children younger than thirteen years old. The plaintiffs' spouses, however, who worked in different workplaces, were not eligible for the benefit. The first case, *Yahav v. State of Israel*,⁶⁴ which the Regional Labor Court of Tel-Aviv decided in 1999, involved a father whose wife was self-employed. The plaintiff argued that since his wife finished work around 7 PM, he needed to be home earlier to take care of his children, who were younger than thirteen.⁶⁵ The second case, *Moscolenco v. State of Israel*,⁶⁶ which the Regional Labor Court of Be'er-Sheva decided in 2002, involved a father whose wife was ineligible for the shortened workday benefit in her own workplace. In both cases, the state alleged that the fathers were not entitled to the right since their spouses were not entitled to it—the first wife was self-employed, and the second did not have the benefit in her workplace. The employer's refusal to allow fathers to use parental benefits demonstrates the obstacles men encounter at work when they "deviate" from their stereotypical masculine role of providers.

Interestingly, although the plaintiffs were fathers who sought parental benefits, their arguments were not about their obligation to

⁶³ EEO law § 4(a)(2).

⁶⁴ File No. 031993/96 Labor Court (Tel Aviv-Jaffa [TA]), *Yahav v. Medinat Israel* [*Yahav v. State of Israel*] (Nov. 25, 1999), Nevo Legal Database (by subscription).

⁶⁵ *Id.* §§ 2–3.

⁶⁶ File No. 001277/01 Labor Court (Be'er-Sheva [BS]), *Moscolenco v. Mishteret Israel* [*Moskolenko v. Israel Police*] (Mar. 24, 2002), Nevo Legal Database (by subscription).

raise their children but about discrimination against working mothers. This strategy is not surprising given the lack of social support for fathers as nurturers and caregivers. Therefore, the plaintiffs' lawyers had surmised that the courts would be more receptive to the argument that mothers had been discriminated against at work than the argument that fathers wanted to be involved as caregivers. For example, in *Yahav*, the plaintiff contended that denying fathers the ability to a shortened workday was a forbidden discrimination since "it [wa]s based upon the stereotype according to which a woman's primary role is housekeeping and caregiving, and her work outside the house has minor importance."⁶⁷ Likewise, the *Moscolenco* plaintiff argued that the defendant's refusal to allow him to use his parental benefit "perpetuate[d] traditional feminine stereotypes."⁶⁸

In both cases, the regional labor courts decided in favor of the plaintiffs. In *Yahav*, the court stated that in order to fulfill the law's goal of creating substantive gender equality, fathers would be entitled to the benefit even if their partners were self-employed.⁶⁹ Similarly, in *Moscolenco*, the court decided that a father would be eligible for the benefit even if his partner was not entitled to it in her own workplace.⁷⁰

In both cases the state appealed to the National Labor Court, and in both appeals the court affirmed the regional courts' holdings. According to the National Court in *Yahav*, the EEO law is "a law aiming at fulfilling one of the fundamental principles of any legal system in a developed state, which is the equality principle."⁷¹ Consequently, the court stated that the law should be interpreted in an expansive way that allows fathers with self-

⁶⁷ *Yahav v. State of Israel*, Labor Court TA § 8(h); see also *id.* §8(o) (arguing that denying fathers whose wives are self-employed "hurts the equal opportunities of women in the workplace, especially in senior positions, and reinforces the stereotype according to which a woman's main role is taking care of the house and children while her work outside the home is secondary to her 'domestic roles'").

⁶⁸ *Moscolenco v. State of Israel*, Labor Court BS, § 15.

⁶⁹ *Yahav v. State of Israel*, Labor Court TA § 14.

⁷⁰ *Moscolenco v. State of Israel*, Labor Court BS, § 37.

⁷¹ NLC 1039/00 *Medinat Israel v. Yahav* [State of Israel v. Yahav] 38 Piske Din Avoda [PDA] 26, 34 [2002].

employed spouses to receive the benefit.⁷² Similarly, in *Moscolenco*, the court ruled that as long as the mother works and has not used the benefit, the father would be eligible to it, regardless of whether or not the mother is entitled to the benefit herself.⁷³ In conclusion, the court determined that fathers can receive the benefit if they fulfill two conditions: first, their female colleagues who have children are eligible for the benefit; and second, their spouse works (either as an employee or self-contractor) and has not used the benefit herself.⁷⁴

The dissent in both cases would have overturned the lower courts based on a literal interpretation of the EEO law § 4(a)(2) provision. According to their interpretation, the legislature intended for the father to be eligible for the benefit *only* if his spouse was an employee and not self-employed,⁷⁵ and only if the employed mother was entitled to the benefit in her own workplace.⁷⁶ The majority judges addressed this issue, and stated that the law is not unequivocal but rather bears a broad meaning and could also be applied in cases where the spouse is self-employed,⁷⁷ or herself ineligible for the benefit.⁷⁸ According to the dissenting opinions, the majorities interpreted the law according to its desire to promote employment equality.⁷⁹

The National Labor Court expanded the law to create a society in which the husband of a self-employed mother is still entitled to parenthood benefits.⁸⁰ Moreover, even if his spouse is not entitled to the benefit at her workplace, the father will nevertheless receive the benefit, as long as it is given to mothers at *his* workplace.⁸¹

⁷² *Id.* at 36.

⁷³ NLC 1155/02 *Medinat Israel v. Moscolenco* [State of Israel v. Moscolenco] 39 PDA 337 [2003].

⁷⁴ *State of Israel v. Moskolenko*, 39 PDA at 347; *State of Israel v. Yahav* 38 PDA at 36.

⁷⁵ *State of Israel v. Yahav*, 38 PDA at 33–34 (Tenenboim, J. dissenting).

⁷⁶ *State of Israel v. Moscolenco*, 39 PDA at 347 (Tzur, J. dissenting).

⁷⁷ *Yahav*, 38 PDA at 32.

⁷⁸ *Moscolenco*, 39 PDA at 346–47.

⁷⁹ *Yahav*, 38 PDA at 33; *Moscolenco*, 39 PDA at 346.

⁸⁰ *Yahav*, 38 PDA at 26.

⁸¹ *Moscolenco*, 39 PDA 337. Following these decisions, the *Takshir*, which is the collection of regulations and orders applicable to the Civil Service, was

Although the courts expansively interpreted the law in a way that allows more fathers to use parental benefits, strengthening father care was not the courts' purpose. An examination of the decisions reveals that their reasoning focused on neither fathers nor children but rather on mothers and their ability to attain gender equality in the workplace.

An analysis of the main themes of the decisions sheds light on the judges' (rather problematic) views of gender, parental responsibilities, and work-family balance. First, the courts favor a narrow view of gender equality, according to which equality is achieved when mothers get the ability to work long hours, and not when both genders have the equal ability to integrate work and family effectively. Second, the courts ignore that men have responsibilities to their families and instead regard fathers' involvement in raising children as voluntary. Third, the courts' reasoning reinforces the prevailing workplace norm that more work is better work. Combined, these three flaws in reasoning do not serve to question gendered notions of breadwinning or caregiving responsibilities. In fact, the courts' flawed reasoning does nothing but make it more difficult for workers of both genders to achieve a balance between work and family life.

1. Substantive Equality vs. Formal Equality

Significant parts of the decisions were devoted to the courts' interpretations of gender equality, and the courts were faced with the option of promoting formal equality—where both genders are entitled to equal access to work, meaning long working hours—and substantive equality—where both genders have equal ability to

amended. See Shmuel Holland, *Notice No. 64/17, Parental Rights – Amendment*, CIVIL SERVICE COMMISSION (Feb. 2, 2004), <http://csc.gov.il/DataBases/NashamPosts/Documents/tashad17.rtf>. The new provision explicitly states that a working father will be entitled to a parental right, regardless of whether his spouse is an employee or self-employed, and regardless of whether her workplace provides parental rights or not. Civil Service Regulations, 2004, §35.112, available at <http://www.csc.gov.il/Takshir/terms/Documents/takshir30-6-2014.pdf>. In addition, the EEO law was changed in 2011 to provide that a father with a self-employed wife would be entitled to the right (if his wife had not used the right herself). EEO Law, § 4(a)(1), amend. 17.

balance work and family.⁸² The courts chose the former. According to the judges, fathers should be entitled to shorten their workdays so that mothers can extend theirs. In the court's language: "We chose an expansive interpretation [of the law] in order to enable as many working women as possible to extend their working hours without hurting their children."⁸³ The courts emphasized the importance of the law vis-a-vis women's ability to work more,⁸⁴ not men's ability to provide care more:

The purpose of the law is to promote the working woman, whether she works as an employee or self-employed, in order to put her on the same starting line with working men. The purpose of the law is to give equal opportunity for a woman and a man to obtain the same work and to carry out that work successfully even if it involves working long hours.⁸⁵

Thus, in order to promote gender equality, the judges encourage women to work as many hours as men. This kind of logic has been at the center of many policies aimed at enhancing women's equality at the workplace.⁸⁶ According to this formalistic logic, gender employment inequality will be resolved when women adapt to men's working patterns, and consequently gain economic parity with men.⁸⁷

By encouraging women to work men's longer hours, however, the courts did not promote substantive gender equality. Instead, the

⁸² See File No. 031993/96 Labor Court (TA), *Yahav v. State of Israel* (Nov. 25, 1999), Nevo Legal Database (by subscription) § 13(B) ("Our ambition is to interpret the law in a way which will accomplish its goals of creating substantive equality between a man and a woman . . .").

⁸³ *Yahav v. Israel*, Labor Court (TA), § 13(c) (translation by author).

⁸⁴ See Mordehai (Moti) Mironi, *Work, Family, and the Law in Israel*, 27 COMP. LAB. L. & POL'Y J. 487, 506 (2006) (arguing that in the *Yahav* and *Moscolenco* cases the National Labor Court "emphasized that the purpose of the amendment was to ease the stress working mothers experience due to family obligations and to enhance their chance for development and self-actualization at work").

⁸⁵ *Yahav v. Israel*, Labor Court (TA), § 13(d).

⁸⁶ See Stier, *supra* note 8, at 23.

⁸⁷ *Id.*

courts made it more difficult for parents—mothers as well as fathers—to be both workers and parents. By emphasizing the need for women to adhere to the long-working-hour norm in order to achieve workplace success, the courts encouraged role switching only in certain cases—where women work long hours and men return home early to care for children. The courts’ formalist approach to equality did nothing to deconstruct the separate spheres. Furthermore, in strengthening women’s ability to work longer hours at the expense of spending time with their families, the courts implicitly prioritized work over family.⁸⁸ The courts’ deference to the “work” side of the “work/family” equation reflects an ideological hierarchy between the public and the private—one where the public sphere is more appreciated and respected than the private one.⁸⁹

2. *The Role of Fathers and Their (In)Ability to Integrate Work and Family*

While the two cases dealt with fathers’ ability to combine work and caregiving, there was no reference to either the importance of paternal care or to men’s obligations as fathers. According to the *Yahav* court, actively raising children is less a paternal obligation than a matter of fathers’ good will: “This woman, whose husband is willing to return home early and care for the children, can invest time and resources in her work and career, without feeling that she is neglecting her children.”⁹⁰ Further, the *Moscalenco* court stated that “There are men who are willing to carry the burden of the family in an equal or different way than their partners and are willing to allow them to launch a career”⁹¹ Mothers and fathers were thus “gender-policed” by the courts: it is a mother’s duty to raise her children, but if she is “lucky” enough, her

⁸⁸ Some courts referred to family responsibilities and child rearing as “a burden.” See, e.g., *State of Israel v. Yahav* 38 PDA 26, 35 (2002); *Moscolenco v. Israel Police*, Nevo Legal Database (by subscription) § 36.

⁸⁹ See Stier, *supra* note 8, at 24.

⁹⁰ *Yahav v. Israel*, Labor Court (TA), § 13(c).

⁹¹ *Moscolenco v. Israel Police*, ¶ 35.

husband will “carry the burden of the family”⁹² with her. Moreover, she can launch a career if he is “willing” to allow her to do so. The courts’ view is typical, as fathers’ involvement in raising their children is usually constructed as voluntary rather than as part of their identity as men.⁹³ Furthermore, as masculinities theory has shown, caregiving is in conflict with the concept of masculinity,⁹⁴ which means that fathers who want to be involved in raising their children might impugn their masculine façade.

Along these lines, the courts characterized fathers who worked fewer hours in order to raise their children as rare men who gave up their careers: “In our society, a man who returns home early and cares for his children, a man who is willing to give up his career while his wife succeeds in her work, is not common.”⁹⁵ Let us recall that the plaintiffs asked that their working day be reduced by merely one hour so they could rush home to be with their children—and for the courts, even such a minor reduction was regarded as giving up a career. (Is it only incidental that men have “a career” while women have “work”?). This view emphasizes the overlap between masculinities and work,⁹⁶ or, more accurately, between masculinities and a total commitment to work.⁹⁷ The courts reinforce the breadwinner norm—the notion that the main paternal responsibility is providing economically for their families. Moreover, the courts could not have imagined that the plaintiffs’ motive for reducing their working day was their desire to be more involved parents.

The courts’ underlying perception is that being a breadwinner

⁹² *Id.*

⁹³ See Dowd, *Fatherhood and Equality*, *supra* note 33, at 1061–62.

⁹⁴ DOWD, THE MAN QUESTION, *supra* note 13, at 105.

⁹⁵ *Yahav v. Israel*, Labor Court (TA), § 13(d).

⁹⁶ See Dowd, *Fatherhood and Equality*, *supra* note 33, at 1060–62. Dowd argued that “those men who would choose to care more, to engage more with their families, may worry about the perception that they are not serious or devoted to work, or that their interest in care makes them less manly (and by definition, less of an ideal worker).” *Id.*

⁹⁷ I would like to thank Professor Kathryn Abrams for this observation. See also Abrams, *supra* note 42, at 760 (contending that “a growing body of scholarship suggests a far more complicated relationship between masculinity and the provider status associated with primary commitment to market work”).

is a privilege while adhering to family responsibilities is a burden. Therefore, fathers who work less are seen as sacrificing their careers for their wives. On the other hand, men who work many hours are not seen as fathers who are sacrificing their families.

3. Reinforcement of Workplace Norms

Another theme that arises in both *Yahav* and *Moscolenco* pertains to work practices, particularly many employers' requirements to work long hours. According to the courts, working extra hours, attending meetings at late hours, and staying at the office "as much as the position demands"⁹⁸ are all legitimate employer requirements.⁹⁹ By calling these requirements "the position's demands" and "the position and its constraints,"¹⁰⁰ the courts reaffirmed restrictive work practices and insulated them from challenge. Moreover, by implicitly approving the demand to work long hours, the courts reinforced the view that work quality is correlated with the number of hours worked. However, studies have shown that such an assumption is mistaken, and there is not a correlation between hours worked and productivity.¹⁰¹ Furthermore, linking long work hours and success at work ignores the reality of many workers who are required to work long hours not in order to succeed at work, but merely to keep it.¹⁰² Such a survival mode becomes the operating norm at their workplaces.

In conclusion, these cases had the potential to challenge workplace norms while emphasizing that both working fathers and working mothers need to fulfill family responsibilities. The courts

⁹⁸ *Yahav v. Israel*, Labor Court (TA), § 13(d).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See Catherine Albiston & Shelley Correll, Op-Ed., *Benefit of Office Face Time a Myth*, CNN (March 13, 2013, 10:51 PM), <http://www.cnn.com/2013/03/13/opinion/albiston-correll-women-face-time/index.html?iref=allsearch>.

¹⁰² See generally Jodi Kantor, *Working Anything but 9 to 5: Scheduling Technology Leaves Low-Income Parents With Hours of Chaos*, N.Y. TIMES (August 13, 2014), <http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html> (discussing employment hardships low-income parents face, including unwillingness to request stabilized hours out of fear of losing employment).

squandered this opportunity to encourage social change when they accepted the aforementioned workplace requirements as inevitable and justified. The courts could have encouraged the rare fathers who had fought for the ability to work without sacrificing family involvement. Instead, workplace norms that reinforce the inability of parents to integrate work and caregiving pervade these opinions. The decisions, in effect, proclaim that in order to succeed at work one has to give up family life. While it has been common for men to work longer hours and practically sacrifice their family lives, the courts now encourage women to do the same and, in that sense, emulate men.

C. An Expansion of the Shortened Working Day Benefit: Monetary Benefits for Parents

Working fathers have also litigated cases involving how their parental status affects their eligibility for monetary benefits. Some collective bargaining agreements have accorded working mothers monetary benefits under certain conditions. Fathers at the same workplaces have argued that allowing only mothers to receive these benefits constitutes unlawful sex discrimination. However, section 3(b) of the EEO law indicates specifically that if employed women are accorded employment privileges “by any enactment, collective bargaining agreement or contract of employment,” these privileges should not be regarded as discrimination against men.¹⁰³ Therefore, the state claimed that these monetary benefits were a privilege for mothers as part of affirmative action on their behalf and thus should not be considered discrimination against men.

Several fathers working as teachers have challenged a specific provision in their collective bargaining agreement. This provision provided an addendum to the salary of part-time mother-teachers with children under the age of fourteen.¹⁰⁴ Widowers and divorced

¹⁰³ Employment (Equal Opportunities) Law, 5748-1988, SH No. 38 § 3(b) (“This Law shall not derogate from any privilege granted to a female employee by any enactment, collective [bargaining] agreement or contract of employment and such a privilege shall not be regarded as discrimination.”).

¹⁰⁴ See File No. 300301/97 Labor Court (Be’er-Sheva), Sa’adon v. Medinat Israel [Sa’adon v. State of Israel] (Sept. 30, 2001), Nevo Legal Database (by subscription) § 5 (quoting provisions 63a and 62 of the Collective Agreement of

fathers who raised their children were also entitled to the monetary benefit.¹⁰⁵ However, the collective bargaining agreement did not mention married fathers who were teachers, and the courts had to decide whether such fathers were also eligible for the benefits. The regional labor courts decided in favor of several father-plaintiffs who challenged the agreement. Nevertheless, on appeals, the National Labor Court reversed these decisions and established binding precedents for similar future cases.

In *Saadon v. State of Israel*, decided in 2001, a father-teacher with children under the age of five asked to get the same 10% addendum to his salary that mother-teachers get.¹⁰⁶ The Regional Labor Court of Be'er-Sheva decided in favor of the plaintiff. It interpreted the collective bargaining agreement in light of the EEO law, and declared that the benefit to work a shortened day could also encompass receiving monetary benefits.¹⁰⁷ Several years later, in the *Levi* and *Shterenlib* cases, other father-teachers asked to receive the same benefit.¹⁰⁸ Apparently, the state had not abided by the prior court's ruling and failed to give the benefit to father-teachers.¹⁰⁹ The Regional Labor Courts of Haifa and Tel-Aviv decided in favor of the plaintiffs and virtually reaffirmed the *Saadon* ruling.¹¹⁰

In 2008, the Regional Labor Court of Jerusalem decided in favor of another father who argued he was discriminated against at work. In *Dan Bahat v. State of Israel*, the court interpreted a collective bargaining agreement provision involving working

Teachers). According to provision 63a, mothers will receive an addendum of 10% to their salary if they work between 79% and 90%, and an upgrade to full pay if they work between 91% and 100%. According to provision 62, a mother-teacher will be eligible for an extra payment for her childcare expenses if her children are less than 5 years old. If her employer gives a discount for childcare, she can choose between the extra payment and the discount).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 1.

¹⁰⁷ *Id.* § 6.

¹⁰⁸ Haifa Labor Court 570/05 *Levi et. al v. State of Israel* (Unpublished 8.19.08); Tel-Aviv Labor Court 6271/06 *Shterenlib v. State of Israel* (Unpublished 8.5.09).

¹⁰⁹ *Levi et. al v. State of Israel* §§ 53–57; *Shterenlib v. State of Israel* § 28.

¹¹⁰ *Levi et. al v. State of Israel*, § 45; *Shterenlib v. State of Israel*, § 21.

mothers in the civil service.¹¹¹ According to the provision, working mothers were entitled to a shortened workday. Nevertheless, in cases where they were required to stay longer hours at work, they would be “compensated” and get an addendum to their salary.¹¹² The plaintiff, Dan Bahat, a father working as a state attorney, claimed that he was discriminated against. He claimed that although he stayed beyond the shortened day, he did not receive extra payment, whereas his female colleagues were entitled to the addendum in the same situation.¹¹³ The court decided in favor of the plaintiff, stating that not paying fathers for extra hours, while paying them to mothers, constituted prohibited discrimination against fathers.¹¹⁴ The court rejected the affirmative action argument, and stated that since working fathers are similarly situated to working mothers, this affirmative action for working mothers constituted discrimination against the working fathers’ group.¹¹⁵

Yet, the National Labor Court had a different view as it overturned all the above-mentioned regional labor court decisions, as will be discussed below.

D. Discrimination against Men or Affirmative Action for Women: An Analysis of the National and Regional Labor Courts Rulings

The national and regional labor courts were presented with the question: is giving mothers monetary benefits part of affirmative action for mothers, and therefore justified (as the defendant claimed), or a discrimination against fathers (as the plaintiffs asserted)? While the regional labor courts decided in favor of the father-plaintiffs, the National Labor Court later reversed the

¹¹¹ File No. 2456/03 Labor Court (Jerusalem), Bahat v. Medinat Israel Misrad HaMishpatim [Bahat v. State of Israel] (May 5, 2008), Database Name (by subscription) § 23.

¹¹² *Id.* § 10.

¹¹³ *Id.* § 12.

¹¹⁴ *Id.* § 40.

¹¹⁵ *Id.* § 37.

decisions and established binding precedents for similar future cases. According to the National Labor Court, the monetary benefit is part of an affirmative action for women and, therefore, fathers are ineligible for it. However, despite the opposite results, both the national *and* regional labor courts' rationales are quite similar in that they encourage mothers to work as "ideal workers" in order to attain gender equality. For example, in *Saadon*, *Levi*, and *Shterenlib*, which dealt with father-teachers' eligibility for monetary benefits, the regional labor courts decided that both fathers and mothers are entitled to monetary benefits. The courts rejected the state's claims that such a benefit was an affirmative action since the purpose of affirmative action was to change unfair norms in society, such as the idea that only women take care of children.¹¹⁶ However, allowing only mothers to work less and receive full payment in effect reinforced stereotypes of women as primarily caregivers:

The result would be that a teacher-mother will work less that way. In fact, it would be hard for her to compete with her male colleagues who work longer hours and may progress and climb the job ladder, leaving her to take care of the children and the house.¹¹⁷

Similar to the decisions discussed in the previous section,¹¹⁸ the judges in these cases focused on the issue of hours and the importance of mothers working longer if they wanted to be as successful as men. Notice that, according to the courts, even teachers are evaluated by the number of hours they work, and mother-teachers should extend their working hours in order to attain parity with their male colleagues.

On appeal in *Levi*, the National Labor Court rejected the father-teachers' claims, and asserted that withholding monetary benefits

¹¹⁶ File No. 300301/97 Labor Court (Be'er-Sheva), *Sa'adon v. Medinat Israel* [*Sa'adon v. State of Israel*] (Sept. 30, 2001), Nevo Legal Database (by subscription) § 13; National Labor Court [NLC] 547/08 *Medinat Israel v. Levi Shlomo* [*State of Israel v. Levi*] (Feb. 27, 2013), Nevo Legal Database (by subscription) § 45.

¹¹⁷ *Sa'adon v. State of Israel* § 13.

¹¹⁸ See Part B.

from fathers was permissible.¹¹⁹ According to Judge Arad, President of the Court:

[T]he essence of the monetary benefit as “mother’s prerogative” is to encourage working mothers to stay at work for long hours in order to fulfill job demands. In this way of promoting mother-teachers’ status and salary, the goal of establishing substantive equality between mother-teachers and father-teachers is achieved.¹²⁰

Similarly, on appeal in *Dan Bahat*, decided in 2010, the National Labor Court overturned the Regional Labor Court’s ruling and decided that fathers are only eligible for shortened workdays, not to additional pay if they work longer hours during these days.¹²¹ The court differentiated between fathers and mothers regarding the right to receive an extra pay because “[t]he desirable legal policy . . . is to give women additional incentives in order to encourage them to stay and work long hours and equalize their status at work to men’s status.”¹²² The court reasoned that since men usually earn more than women, men do not need the monetary benefit.¹²³ Moreover, according to the court, if fathers receive such a monetary benefit, they will choose to stay longer at work, which will result in their spouses having even greater responsibility to care for their children.¹²⁴ Keeping the benefit “mothers only” thus

¹¹⁹ *State of Israel v. Levi et. al*, Conclusion §§ 1–4.

¹²⁰ *Id.* § 57.

¹²¹ National Labor Court [NLC] 361/08 Medinat Israel v. Bahat [State of Israel v. Bahat] (Apr. 18, 2010) Nevo Legal Database (by subscription) at *32. The dissenting judge, however, stated that the right to receive an extra payment for those hours was indeed a right pertaining to parenthood, and therefore should be given equally to mothers and fathers. *Id.* at *30 (Rabinowitz, J., dissenting).

¹²² *Id.* at *27, cited with approval in *State of Israel v. Levi* § 57 (reaffirming its rational in the *Bahat* case and stating that the essence of the monetary right is to incentivize working mothers to stay at work long hours, which will establish substantive equality between mothers-teachers and fathers-teachers).

¹²³ *State of Israel v. Bahat* at *27; *State of Israel v. Levi* § 57 (quoting *Bahat*).

¹²⁴ *State of Israel v. Bahat* at *27; *State of Israel v. Levi* §§ 50–51.

“does not contradict the equality principle, *but the opposite is true—it helps to fulfill it.*”¹²⁵ Therefore, paying mothers extra when they stay longer at work is not prohibited discrimination against fathers but rather affirmative action for women, “the purpose of paying mothers for the extra hours they work is to enable them to stay at work long hours and thus to promote their status and income.”¹²⁶ Comparable to the analysis of the decisions interpreting fathers’ right to a shortened workday,¹²⁷ the National Labor Court believed that gender equality would be accomplished when mothers emulated men and adhered to the long-working-hour norm.

While the regional labor courts expanded working fathers’ benefits, the National Labor Court stalled that trend. Regardless of the outcome, all the decisions shared the view that mothers of young children need to receive a monetary incentive to encourage them to stay longer at work, so they could be equal to men. The courts’ neglect of factors other than hours—such as productivity and the quality of the work performed—is disturbing, especially because the plaintiffs worked in the public sector.¹²⁸ The court decisions reinforced the hegemony of work and implicitly devalued caregiving as an important social activity, thus undermining the ability of fathers and mothers to effectively combine work and care.

III. CARE TO SUE: AMERICAN WORKING FATHERS FIGHT TO COMBINE WORK AND CAREGIVING

How do American courts—compared to Israeli ones—make sense of fathers’ conflicts over work and family? More

¹²⁵ *State of Israel v. Bahat* at *26–27 (emphasis in original); *State of Israel v. Levi* § 51 (quoting the Bahat court) (emphasis in original).

¹²⁶ *State of Israel v. Bahat* at *26.

¹²⁷ See discussion *supra* Part I.B.3.

¹²⁸ Typically, public employees work fewer hours than their counterparts in the private sector. If the courts emphasize hours when dealing with public employees, such as teachers and state attorneys, parents working in the private sector—where strict time norms usually operate—would probably receive a similar (if not stricter) treatment in court.

specifically, have antidiscrimination claims been successful for American fathers alleging discrimination at work because of their dual roles as workers and caregivers? This Part analyzes several lawsuits in which American caregivers alleged employment discrimination on the basis of their caregiving responsibilities.

American federal law, unlike its Israeli counterpart, does not include “working caregivers” as a protected group. Therefore, American fathers are required to prove that they were discriminated against based on sex, which is prohibited under the law.¹²⁹ The analysis of the male-plaintiffs’ arguments and the judges’ decisions sheds light on gender stereotypes, masculinity imperatives and social norms pertaining to work, family, and working parents’ ability to integrate the two.

This section will discuss and analyze four cases in which working caregivers alleged sex discrimination. These four cases dealt with distinct issues at different time periods: sex discrimination in federal law in the 1970’s; leave rights and discrimination at public workplaces in the beginning of this century; and leave rights and discrimination at a private workplace in 2012. This section will evaluate not only the decisions but the ways in which the plaintiffs framed their arguments.

¹²⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964). Title VII of the Civil Rights Act of 1964 was enacted to prohibit discrimination against employees in the workplace. Title VII provides: “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, [and] national origin.” *Id.* § 2000e-2(a)(1). A few states have specific prohibitions in their employment discrimination protections based on family responsibilities. In Alaska, for example, the statute prohibits discrimination based on “parenthood”, *inter alia*. See Alaska Stat. § 18.80.200 (2006). In the District of Columbia, an employer cannot discriminate against an employee based on ‘family responsibilities’. See D.C. Code Ann. § 2-1402.11 (2001). There are 63 local jurisdictions in 22 states in addition to Alaska and the District of Columbia that prohibit this type of discrimination. See Stephanie Bornstein & Robert J. Rathmell, *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination*, CTR. FOR WORKLIFE LAW, U.C. HASTINGS COLL. OF L. 1, 1 (2009), <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>.

A. *Discrimination Against Fathers in Federal Law:*
Weinberger v. Wiesenfeld (1975)¹³⁰

As a legal adviser for the ACLU, Ruth Bader Ginsburg created a new legal strategy to eliminate sex discrimination using the constitutional doctrine of equal protection,¹³¹ arguing that “[s]ex-based state action violates equal protection when it entrenches the traditional role divisions that confine men and women to separate spheres.”¹³² Ginsburg challenged laws that reinforced strict sex-role stereotypes—“males as breadwinners, females as homemakers.”¹³³ Indeed, within a decade, the Court had incorporated the anti-stereotyping doctrine as part of its equal protection jurisprudence.¹³⁴ Moreover, together with the incorporation of the anti-stereotyping doctrine, the Court applied intermediate scrutiny to sex-based state actions,¹³⁵ and stated that such actions are constitutional only when they “serve important governmental objectives and must be substantially related to achievement of those objectives.”¹³⁶

Weinberger v. Wiesenfeld, which Ginsburg litigated, was the first case in which a father alleged sex discrimination.¹³⁷ When

¹³⁰ *Weinberger*, 420 U.S. 636.

¹³¹ See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) [hereinafter, Franklin, *Anti-Stereotyping Principle*]; see also Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1299 (2012).

¹³² See Franklin, *Anti-Stereotyping Principle*, *supra* note 131, at 124 (describing the new constitutional argument articulated by Ginsburg in the *Moritz* and *Reed* cases).

¹³³ See Barbara Stark, *Anti-Stereotyping and “The End of Men”*, 92 B.U. L. REV. Annex 1, 1 (2012); see also Franklin, *Anti-Stereotyping Principle*, *supra* note 131, at 119–42.

¹³⁴ Franklin, *Anti-Stereotyping Principle*, *supra* note 131, at 155.

¹³⁵ There are three levels of judicial scrutiny, ranging from strict scrutiny (the most stringent standard) to intermediate scrutiny, and rational basis review (the most deferential). For a discussion of these three levels of scrutiny, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 683–807 (4th ed. 2011).

¹³⁶ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹³⁷ A very early case brought by a male caregiver was *Charles E. Moritz v.*

Stephan Wiesenfeld's wife died while giving birth, he became the sole parent of the child, yet he was denied Social Security benefits—at the time, they were only available to widowed mothers and not fathers.¹³⁸ The Supreme Court held that the statute violated the right to equal protection secured by the Due Process Clause of the Fourteenth Amendment and granted Wiesenfeld the benefits.¹³⁹ While the case involved a father-plaintiff alleging sex discrimination, the focus of his claims—and consequently of the Court's decision—was not the importance of fathers as caregivers. Instead, the plaintiff's arguments, and the Court's decision centered on the issue of discrimination against working mothers.

1. Who is Discriminated Against Anyway? The Framing of Plaintiff's Arguments and the Supreme Court's Decision

Although *Wiesenfeld* involved a man alleging sex discrimination, the vast majority of Ginsburg's argument focused on discrimination against working women.¹⁴⁰ Ginsburg realized that elaborating on the discrimination against women—especially those who worked “like men”—would be an easier argument for the all-male Supreme Court to digest. Certainly, it would be easier than the argument that men were discriminated against due to their role as caregivers, and therefore were entitled to monetary (and

Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972). Moritz argued that he was discriminated against compared to single women who were entitled to a deduction for the cost of caring for an elderly parent. *Id.* at 467. The Tenth Circuit held that the provision was invalid since it discriminated between unmarried males and unmarried females. *Id.* I will not analyze this case, however, since I intend to focus on cases involving fathers and not male caregivers in general.

¹³⁸ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637–38 (1975).

¹³⁹ *Id.* at 636–37.

¹⁴⁰ Ginsburg's Oral Argument at 23:27, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892), available at http://www.oyez.org/cases/1970-1979/1974/1974_73_1892 (“Steven Wiesenfeld's case concerns the entitlement of a female wage earner, a female wage earner's family to Social Insurance of the same quality as that accorded to the family of a male wage earner”).

other) benefits.¹⁴¹ Thus, she presented the case as discrimination against Paula Wiesenfeld and others like her, female workers who contributed to Social Security just as male workers, but were nevertheless deprived of the insurance because they were women and not men.¹⁴² These women, who worked and paid into Social Security, were unable to get the Social Insurance needed to protect their families just because they were women.¹⁴³ Indeed, Ginsburg's strategy proved successful,¹⁴⁴ and the Supreme Court dedicated most of its decision to discrimination against working women instead of the issue of discrimination against men as caregivers.¹⁴⁵ Justice Brennan, who wrote the majority opinion, stated that the provision differentiated between men and women who worked and paid into Social Security solely on the basis of gender.¹⁴⁶ The majority further stated that gender-based differentiation resulted in less protection for the families of working women than for the families of working men.¹⁴⁷

The Court declared that the assumption that male workers' earnings—but not those of female workers—are vital and significant to family survival was an “archaic and overbroad

¹⁴¹ See Franklin, *Anti-Stereotyping Principle*, *supra* note 131, at 133–39 (elaborating on the lawyers' and judges' traditional views regarding men as caregivers, and describing how the governmental lawyers were suspicious and uncomfortable with Wiesenfeld's request to get “mother's benefits”).

¹⁴² Ginsburg's Oral Argument at 48:57 (“In sum, Appellee respectfully requests that the judgment below be affirmed, thereby establishing that under this nation's fundamental law, the woman worker's National Social Insurance is no less valuable to her family than is the social insurance of the working man.”).

¹⁴³ *Id.* at 24:00.

¹⁴⁴ *Weinberger*, 420 U.S. at 653. See also *Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, April 10, 2009*, 70 OHIO ST. L.J. 805, 815 (2009) (“Most of the Justices thought the law discriminated against the woman as wage earner.”).

¹⁴⁵ *Weinberger*, 420 U.S. at 637.

¹⁴⁶ *Id.* at 645.

¹⁴⁷ See *id.* In her article, Franklin argues that Justice Powell and Justice Burger perceived the case “as a simple equal pay case.” Franklin, *Anti-Stereotyping Principle*, *supra* note 131, at 136–37. According to the justices, “[T]he statute was unconstitutional because it deprived working women of benefits that accrued to working men.” *Id.*

generalization not tolerated under the Constitution.”¹⁴⁸ The Court indicated that even though empirical data showed that in many families men were the main providers for their wives and children, there are also families where women work and whose earnings contribute significantly to the family.¹⁴⁹ These female workers pay Social Security taxes, but their efforts “produc[e] less protection for their families than . . . men’s efforts,” which is gender-based discrimination offensive to the Fourteenth Amendment.¹⁵⁰ Moreover, since Social Security benefits decrease as earnings increase, the provision would help only those men who are similarly socioeconomically positioned to many women—those who do earn only little or no money.¹⁵¹ Therefore, the gender-based classification is not a justified way of helping women. Instead, it is “dissimilar treatment for men and women who are . . . similarly situated” and is therefore unconstitutional.¹⁵²

2. Widowers as Legitimate Caregivers

The judges emphasized that a father should be allowed to care for his children when the mother is absent, stating that even in a family where the father is the main provider and the mother takes care of the children the situation can change when the mother dies: “It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.”¹⁵³ And also: “The fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work *if his wife dies*.”¹⁵⁴ Justice Rehnquist, who filed an opinion concurring in the result, stated that “[i]t is irrational to distinguish between mothers and fathers when the sole question is whether a child of a deceased contributing worker should have the

¹⁴⁸ *Weinberger*, 420 U.S. at 643 (internal citations omitted).

¹⁴⁹ *Id.* at 645.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 653.

¹⁵² *Id.* (citing *Reed v. Reed*, 404 U.S. 71, 77 (1971)).

¹⁵³ *Id.* at 652

¹⁵⁴ *Id.* (emphasis added).

opportunity to receive the fulltime attention of *the only parent remaining to it.*"¹⁵⁵

Implicit in these statements is that when both of the parents are alive, it is still the woman who should be the primary caretaker. I argue that the Court meant to enable fathers to receive "mothers' benefits" only in the exceptional situation of the mother's death and not in the "normal" situation of two living parents. Only in that situation does the child's interest in getting personal care from a parent have nothing to do with the gender of that parent. As Cary Franklin shows in her article on the development of the anti-stereotyping doctrine, the idea that *Wiesenfeld* "might be a victim of sex discrimination was treated as a joke."¹⁵⁶ It was almost impossible for lawyers, judges, and law clerks to believe that *Wiesenfeld* "genuinely desired to stay home and care for his infant son."¹⁵⁷ Franklin writes:

Behind the scenes, Powell admitted that he found the thought of men receiving "mother's benefits" repulsive. He fretted to his law clerk that the Court's decision would induce "a high level of indolence" and swell "the ever increasing welfare rolls" as men quit their jobs in order to laze about at home with their kids.¹⁵⁸

Note Justice Powell's belief that parents who take care of children are "laz[ing] about at home with their kids,"¹⁵⁹ meaning that childrearing was not true work but akin to a vacation.

Wiesenfeld, the Supreme Court's first case involving a father who alleged sex discrimination, revealed multiple social assumptions. First, working women who "worked like men" were worthy of equal rights. Since working men, who were the point of reference, paid into Social Security to protect their family in times of need, working women who also paid into Social Security should be able to protect their families as well. Second, paternal caregiving is worthy of protection only when the mother is absent.

¹⁵⁵ *Id.* at 655 (Rehnquist, J., concurring) (emphasis added).

¹⁵⁶ See Franklin, *Anti-Stereotyping Principle*, *supra* note 131, at 86.

¹⁵⁷ *Id.* at 87.

¹⁵⁸ *Id.* at 137.

¹⁵⁹ *Id.*

In that special case, the child who has lost his mother is entitled his father's care.

*B. Discrimination against Fathers in the Public Sector:
Knussman v. Maryland (2001)*¹⁶⁰

1. Knussman's Arguments and Court Decision

Like Wiesenfeld, Knussman argued that his employer discriminated against him on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁶¹ Knussman was a trooper for the Maryland State Police (MSP).¹⁶² Because his wife's pregnancy was difficult, he asked to "be permitted to take four to eight weeks of paid 'family sick leave' to care for his wife and spend time with his family following the birth of his child."¹⁶³ His supervisor, however, told him that he would not be entitled to more than two weeks.¹⁶⁴ Then, shortly before his wife's delivery, Maryland enacted a new statutory provision that allowed state employees to use paid sick leave to care for a newborn.¹⁶⁵ The new provision permitted a caregiver, which it defined as "an employee who is primarily responsible for the care and nurturing of a child," to use up to thirty days of accrued sick leave to care for a newborn.¹⁶⁶ The statute also provided that a secondary caregiver, which it defined as "an employee who is secondarily responsible for the care and nurturing of a child" would be entitled to take up to ten days of accrued sick leave.¹⁶⁷ Knussman asked for the thirty days of leave but his superior officers in the Aviation Division granted him only ten days of paid sick leave.¹⁶⁸ Moreover, the manager of the medical leave section

¹⁶⁰ Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001).

¹⁶¹ *Id.* at 627.

¹⁶² *Id.*

¹⁶³ *Id.* at 628.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 628.

of the MSP told him that “only birth mothers could qualify as primary care givers; fathers would only be permitted to take leave as secondary care givers since they ‘couldn’t breastfeed a baby.’”¹⁶⁹

Following the birth of his daughter, given his wife’s health problems, Knussman requested to change his status to a primary caregiver since he was functioning as the main caretaker of his newborn child.¹⁷⁰ The manager of the medical leave section of the MSP informed him, however, that “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.”¹⁷¹

The Fourth Circuit held that the employer violated the Equal Protection Clause because the personnel manager based the decision on gender stereotypes.¹⁷² Comparing the case to *Wiesenfeld*, the court concluded that “gender classifications based upon generalizations about typical gender roles in the raising and nurturing of children” would be rejected as unconstitutional.¹⁷³

2. The *Knussman* Case as an Extreme Case

Knussman’s facts were exceptional, and signaled to potential plaintiffs that only under extreme circumstances can working fathers have equal rights at work due to their role as caregivers. Knussman was forced to take leave because his wife was very sick and could not care for their newborn daughter. Judge Lee, who concurred in the judgment but dissented in the decision to remand the case for a trial on damages, strengthened that point:

[T]he events surrounding the emotional distress were significant. . . . During her pregnancy, Mrs. Knussman was diagnosed as having preeclampsia. This condition extended beyond the birth of their

¹⁶⁹ *Id.* at 628–29.

¹⁷⁰ *Id.* at 629.

¹⁷¹ *Id.* at 629–30.

¹⁷² *Id.* at 635.

¹⁷³ *Id.* at 636–37.

child. . . . This process can progress to a point of causing kidney failure, liver failure, or may even become fatal. Preeclampsia crippled Mrs. Knussman's ability to function, and to care for her newborn child.¹⁷⁴

The facts in the case prove, once again, that fathers take a greater role in caring for children when their wives are incapable of doing so. In both *Wiesenfeld* and *Knussman*, the plaintiffs became involved in caregiving because their wives were either dead (*Wiesenfeld*), or sick (*Knussman*). Moreover, they show the harsh attitudes fathers encounter at work when they need to serve as caregivers.

Knussman was also unique in that the explicit stereotyping was extreme. This enabled Knussman to argue the case as one of straightforward sex discrimination prohibited under the Equal Protection Clause.¹⁷⁵ In sex discrimination cases it is often difficult to prove discrimination since the employer supplies other reasons for its seemingly discriminatory conduct, such as business necessity and "objective" standards of performance.¹⁷⁶ In this case, however, the employer denied Mr. Knussman the extra leave solely on the basis of his gender, and blatantly and explicitly stated its reasons.¹⁷⁷

In sum, like *Wiesenfeld*, *Knussman* demonstrates the courts' attitudes that paternal caregiving is worthy of protection only under unusual circumstances: Mr. Knussman prevailed arguably because he had essentially functioned as a single parent. Moreover, he was able to provide strong evidence that enabled him to prove that his employer discriminated against him on the basis of sex. And yet, although he prevailed, he had to go through a long and

¹⁷⁴ *Id.* at 648 (Lee, J., concurring in part and dissenting in part) (internal citations omitted).

¹⁷⁵ See Bornstein, *supra* note 131, at 1337.

¹⁷⁶ See Williams & Tait, *supra* note 40, at 866–69 (citing cases in which employers used such reasons).

¹⁷⁷ See Lindsay Taylor, *Family Care Commitment Discrimination: Bridging the Gap Between Work and Family*, 46 FAM. CT. REV. 558, 563 (2008) (referring to *Knussman* as an extreme case, while stating, "[O]nly stunning cases of sex-based discrimination brought by men under Title VII have been successful.").

exhaustive process to achieve it. His lawyer aptly described Knussman's "winning": "Unfortunately, however, Trooper Knussman spent five years to get the leave and eight years to get the money. . . . Ironically, a case brought under a statute designed to provide timely relief for life's most pressing emergencies has now outlasted the Trojan War's nine-year duration."¹⁷⁸

Knussman's long and daunting struggle well exemplifies the difficulties plaintiffs face when they seek justice by crossing the lines of masculinities norms. And yet, even though he was struggling to get merely twenty more days of leave to care for his wife and baby, the Eleventh Circuit described him as a plaintiff who took "too active a role in child-rearing."¹⁷⁹ This description of a father whose request for leave was relatively modest sheds light on judges' views about men as caregivers.

C. *Discrimination against Male Caregivers in the Public Sector: Nevada Department of Human Resources v. Hibbs* (2003)¹⁸⁰

In 2003, the Supreme Court decided another case brought in which a man alleged discrimination based on his family responsibilities.¹⁸¹ While the facts of this case involved caregiving for a spouse and not children, much of the Court's opinion involved an analysis of the Family and Medical Leave Act (FMLA) as a significant provision for working parents. William Hibbs's wife was hurt in a car accident and he took FMLA leave in

¹⁷⁸ See Robin R. Cockey, *The Family Medical Leave Act: What You See and What You Get*, 12 AM. U.J. GENDER SOC. POL'Y & L. 1, 5 (2003). Cockey was the lead trial counsel at the case, and argued it before the Fourth Circuit in 2001.

¹⁷⁹ See *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011). In this case, the Court had to decide whether an employee was discriminated against after she had notified her employer that she was going through a gender transition. *Id.* at 1312–13. The Court ruled that "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype," and referenced other cases, among them the *Knussman* case. *Id.* at 1318. See also Bornstein, *supra* note 131, at 1337 (citing *Glenn*, 663 F.3d 1312).

¹⁸⁰ 538 U.S. 721 (2003).

¹⁸¹ *Id.* at 725.

order to care for her.¹⁸² His employer, the Welfare Division of the Nevada Human Resources Department, claimed he had exhausted the allowed twelve weeks of unpaid leave and thus was required to return to work.¹⁸³ When he did not, he was fired.¹⁸⁴ When Hibbs sued his employer under the FMLA, Nevada argued for dismissal, alleging it had sovereign immunity under the Eleventh Amendment of the United States Constitution.¹⁸⁵

The Supreme Court held that Nevada did not have sovereign immunity, because Congress had validly exercised its enforcement power under the Fourteenth Amendment when it abrogated the states' sovereign immunity with the enactment of the FMLA.¹⁸⁶ In delivering the decision of the Court, Justice Rehnquist stated that the Act's purpose was "to protect the right to be free from gender-based discrimination in the workplace" as well as from gender stereotypes.¹⁸⁷ The Justice described the legislative history leading to the enactment of the FMLA and the Congressional testimony that preceded its enactment, including that about the meager parental leave offered to fathers.¹⁸⁸ He stated that the extended maternity leave that certain states offered to women proved that such leave was not based on physical needs, but rather on "the pervasive sex-role stereotype that caring for family members is women's work."¹⁸⁹

While one could read *Hibbs* as supporting coequal parenting and fathers as nurturers,¹⁹⁰ this vision is more symbolic than realistic for at least two reasons. First, although the Court acknowledged discrimination against men as caregivers—certainly more than it did in *Wiesenfeld*¹⁹¹—it still focused much more on

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 725–27.

¹⁸⁷ *Id.* at 728.

¹⁸⁸ *Id.* at 730–33.

¹⁸⁹ *Id.* at 731.

¹⁹⁰ See, e.g., Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1291 (2005); Garcia, *supra* note 11, at 7–8.

¹⁹¹ Justice Rehnquist's opinions in these two cases illustrate the change

workplace discrimination against women. For example, when discussing gender stereotypes, the Court emphasized the stereotypes women endure as workers rather than the stereotypes men endure as caregivers. The Court emphasized how stereotypes “forced women to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.”¹⁹² The Court does not elaborate on the harm gender stereotypes cause to men, never considering the complementary stereotypes regarding fathers’ family commitments and their value as caregivers.

The other reason why the Court’s language was mostly symbolic is because it praised the FMLA’s ability to lessen working parents’ obstacles when trying to combine work and caregiving, despite data showing otherwise. For example, the Court criticized the ability of Title VII and the Pregnancy Non-Discrimination Act (“PDA”) to address the problem of sex-based discrimination.¹⁹³ Thus, it stated, Congress rightly acted in enacting the FMLA, which established “a minimum standard of family leave for *all* eligible employees, irrespective of gender,” that would undermine the stereotype that only women were caregivers.¹⁹⁴ Moreover, the Court viewed the FMLA’s gender neutrality as making huge strides toward gender equality since both women and men were now able to take leave.¹⁹⁵ Therefore, according to the Court, allowing men to take leave without fear of losing their jobs would lead to a growing number of men taking

over time. In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), he concurred in the result but not with the view that the statute in dispute had reinforced sex stereotypes. According to Justice Rehnquist, the case was to be decided solely on the issue that “it is irrational to distinguish between mothers and fathers when the sole question is whether a child of a deceased contributing worker should have the opportunity to receive the fulltime attention of the only parent remaining to it.” *Id.* at 655 (Rehnquist, J., concurring). In *Hibbs*, however, he justified the enactment of the FMLA as an important measure to remedy traditional and harmful sex stereotypes regarding women’s and men’s social roles. *Hibbs*, 538 U.S. at 730.

¹⁹² *Hibbs*, 538 U.S. at 736.

¹⁹³ *Id.* at 737.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 733–35.

responsibility as caregivers. However, in 2003, the year *Hibbs* was heard and decided by the Supreme Court, there was ample data showing that the Act had been unsuccessful in changing gendered patterns of care and in modifying sex-based stereotypes, especially with regard to male caregivers.¹⁹⁶

In conclusion, the Court's decision in *Hibbs*, like its decision in *Wiesenfeld*, focused on the discrimination against women in the workplace due to social stereotypes about their domestic role. A discussion of stereotypical views about male caregiving is almost absent. Although the Court praised the FMLA and critiqued gender stereotypes, it ignored the fact that the FMLA had failed to change gendered patterns of care.

*D. Discrimination against Father-Attorneys at Private Law Firms: Ayanna v. Dechert (2012)*¹⁹⁷

Ariel Ayanna, a male plaintiff, filed this complaint and jury demand in 2010, arguing against his employer's "macho" culture.¹⁹⁸ Ayanna, who was the primary caretaker of his sick wife

¹⁹⁶ According to two surveys conducted in 1995 and in 2000 by the Commission on Family and Medical Leave, the FMLA had a minor effect on employees' leave-taking behavior. See Joanna L. Grossman, *Job Security without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 33, 51-55 (2004) (describing available empirical data on leave-taking patterns by men which show that the majority of leave takers have been women). According to Grossman, in 2003, on the Act's tenth anniversary, there was "only limited cause for celebrating a statute whose contribution to women's true equality has been largely symbolic." *Id.* at 19. See also Chuck Halverson, Note, *From Here to Paternity: Why Men Are Not Taking Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 263 (2003); Marc Mory & Lia Pistilli, *Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689 (2001).

¹⁹⁷ *Ayanna v. Dechert, LLP*, 914 F. Supp. 2d 51 (D. Mass. 2012). This case emphasizes the ways by which male caregivers at private workplaces suffer repercussions at work when they fulfill familial responsibilities. It demonstrates the linkage between masculinities norms and workplace norms, especially with regard to working hours. In addition, it reveals the legal problems plaintiffs encounter when discriminated against due to caregiving responsibilities.

¹⁹⁸ Complaint and Jury Demand, *Ayanna v. Dechert, LLP*, 914 F. Supp. 2d 51 (D. Mass. 2012) No. 110-CV-12155, 2010 WL 5344371.

and their two sons, was a lawyer who worked for Dechert LLP, a global law firm.¹⁹⁹ After the birth of his second son, he used all the paid paternity leave that his firm offered along with the FMLA entitlement, although he returned to work before his FMLA leave was over.²⁰⁰ Following his return from leave, he alleged that his supervisor treated him with hostility, and monitored his work and attendance more closely than that of other associates.²⁰¹ Later, he was given fewer and fewer assignments, and eventually received a “fair” rating in his annual performance evaluation based on the billable hours he had completed.²⁰² Dechert terminated him four months after he returned from the FMLA leave.²⁰³ Ayanna sued Dechert based on sex discrimination and FMLA retaliation.²⁰⁴ Similar to *Wiesenfeld*, *Knussman*, and *Hibbs*, Ayanna argued that Dechert had discriminated against him due to gender stereotypes.²⁰⁵ He claimed that Dechert retaliated against him because he had refused to assume a stereotypically “male” role in connection with his children.²⁰⁶

The court dismissed Ayanna’s claim of disparate treatment sex discrimination in violation of Massachusetts General Law,²⁰⁷ and issued an order in Dechert’s motion for summary judgment.²⁰⁸ Since the law prohibits discrimination against employees based on sex, but not based on family responsibilities,²⁰⁹ the court ruled that

¹⁹⁹ *Ayanna*, 914 F. Supp. 2d at 52.

²⁰⁰ *Id.* at 52–53.

²⁰¹ See Complaint and Jury Demand, *supra* note 198, at paras. 51, 52, 58, 59, 64, 65.

²⁰² *Ayanna*, 914 F. Supp. 2d at 52. See also Complaint and Jury Demand, *supra* note 198, at paras. 52, 58, 69–71.

²⁰³ *Id.* at paras. 69, 71.

²⁰⁴ *Ayanna*, 914 F. Supp. 2d at 53.

²⁰⁵ See Complaint and Jury Demand, *supra* note 198, at Counts I–IV.

²⁰⁶ Ayanna had originally alleged violations of the FMLA, Title VII, and the ADA as well as sex discrimination under Massachusetts law. *Id.* He later dismissed his Title VII and ADA claims. See *Ayanna v. Dechert LLP*, 914 F. Supp. 2d 51, 53 (D. Mass. 2012).

²⁰⁷ *Ayanna*, 914 F. Supp. 2d at 53.

²⁰⁸ *Id.*

²⁰⁹ The statute provides :

[A]n employer, by himself or his agent, because of the race,

Ayanna did not show any facts proving he had been discriminated against and was ultimately fired because of his sex.²¹⁰ However, the court denied the firm's motion for summary judgment regarding Ayanna's claims of retaliation under the FMLA.²¹¹ The court stated that there was a question of fact whether Ayanna was fired solely because of his low billable hours, as Dechert claimed, or—as Ayanna claimed—because his termination was a form of retaliation against him for taking the leave.²¹²

The following sections review and analyze the main issues this case evoked: the connection between masculinities and work norms; the lawyers' decision to frame their arguments against a “macho” workplace; and the problems plaintiffs face when alleging employment discrimination based on caregiving responsibilities.

1. The Operation of Masculinities Norms According to Ayanna's Complaint

The facts of the case strongly manifest how masculinity imperatives operate at work in general, and law firms in particular. According to Ayanna's claims, as soon as he fulfilled his caregiving duties and took care of his wife and sons, his workplace's attitudes toward him changed. Dechert refused to let him use his vacation time to cover his salary while he took FMLA leave,²¹³ retaliated against him by not assigning him enough work

color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

MASS. GEN. LAWS ch. 151B, § 4(1) (2012).

²¹⁰ *Ayanna*, 914 F. Supp. 2d at 57.

²¹¹ *Id.* at 56.

²¹² *Id.*

²¹³ *See* Complaint and Jury Demand, *supra* note 198, para. 49 (Ayanna argued that Dechert advanced vacation time for other associates when they took

after he returned from leave,²¹⁴ and negatively evaluated his performance on the basis that “personal issues” badly affected his work.²¹⁵

Dechert’s treatment of Ayanna is consistent with research in sociology and social psychology which shows that fathers are penalized when they do not behave as their gender role dictates and instead “dare” to be engaged parents.²¹⁶ For instance, employers evaluated caregiving fathers less favorably than other male workers who acted according to gender expectations.²¹⁷ Such

leave for other purposes.).

²¹⁴ *Id.* para. 51.

²¹⁵ *Id.* para. 71.

²¹⁶ See, e.g., Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. SOC. SCI. 397, 410 (2007) [hereinafter Albiston, *Institutional Perspectives*] (reviewing several empirical studies which showed the penalties men suffered at work when they took parental leave, and arguing that “those who violate expected gender roles are penalized”); J.L. Berdahl & S.H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 358 (2013) (showing that working fathers who are involved in caregiving experience more harassment and mistreatment than fathers who are not involved in caregiving, and than men without children); S. Coltrane et al., *Fathers and the Flexibility Stigma*, 69 J. SOC. ISSUES 279, 297–98 (2013) (showing that men who modify their employment due to family reasons earn significantly less than other workers in the future); Kessler, *supra* note 11, at 45–46; Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 758–59 (2000) (discussing the penalties men suffer at work when they take leave because their behavior “violates the prevailing gender norms”); Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 587 (2007) (arguing that men who take leave are acting out of stereotype, which “means adopting a behavior associated with women that employers already penalize”); J.A. Vandello et al., *When Equal Isn’t Really Equal: The Masculine Dilemma of Seeking Work Flexibility*, 69 J. SOC. ISSUES 303, 316 (2013) (showing that men who asked for flexible work arrangements have been perceived as less masculine).

²¹⁷ See, e.g., Bornstein, *supra* note 131, at 1323 (claiming that men who have taken FMLA leave have suffered penalties at work since they have transgressed the gender stereotype that men should be breadwinners); Lori Jablczynski, Note, *Striking a Balance Between the “Parental” Wall and Workplace Equality: The Male Caregiver Perspective*, 31 WOMEN’S RTS. L. REP. 309, 317 (2010) (citing studies which found that fathers had suffered more penalties than mothers when they took parental leave or worked part-time); L.A.

“gender-policing” demonstrates one of masculinities theory’s core principles: that there is a hierarchy among men and not all men benefit from a masculine work culture.²¹⁸ Ayanna certainly did not benefit from his firm’s work culture. Moreover, in order to put Ayanna “in place” and maintain the gendered order, senior associates at Dechert would brag about not spending time with their families, and mocked in front of other senior and junior associates for doing so.²¹⁹ This kind of behavior did not just signal to Ayanna that his “work/life balance” was intolerable to the firm, but intolerable to his colleagues as well. Indeed, according to the lawsuit, “Ayanna’s colleagues, both partners and associates, knew about Ayanna’s role as an equal co-parent and that he did not fulfill the “macho” stereotype.”²²⁰ They also saw how he was criticized and publicly humiliated for trying to integrate work and family—it is therefore unsurprising that male attorneys at Dechert took neither the full twelve weeks of FMLA leave nor the full amount of paid paternity leave the firm’s policy provided.²²¹

As masculinities theory has shown, men operate with the goal of impressing other men, as they feel that they “are under the constant careful scrutiny of other men.”²²² Ayanna’s employer

Rudman & K. Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322, 336–38 (2013) (showing that male workers who asked for family leave were viewed as poor workers); Williams & Tait, *supra* note 40, at 865–66 (“[D]iscrimination against male caregivers takes various forms, including holding men with family responsibilities to higher standards, hyper-scrutinizing their work, interfering with their ability to take leave as guaranteed by the Family and Medical Leave Act (FMLA), or retaliating against men who take FMLA leave (typically via wrongful demotion or termination).”).

²¹⁸ See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 233–34.

²¹⁹ See Complaint and Jury Demand, *supra* note 198, para. 18.

²²⁰ *Id.* para. 17.

²²¹ *Id.* para. 46.

²²² Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY* 25, 33 (2005) (explaining masculinity as a homosocial enactment). See generally MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* (1996) (providing a history of U.S. masculinity).

disproportionately scrutinized him and expressed to the other male attorneys that if they wanted to be regarded as masculine and be securely employed, they should not be involved in caregiving. Furthermore, the fact that male attorneys did not use leave benefits, not even the paid paternal leave that the firm allowed, shows how masculinities and institutional norms are intertwined. Organizations may have a formal policy with progressive arrangements for caregivers for symbolic and legal reasons, yet the workplace atmosphere might be at odds with this formal policy.²²³ This is one of the reasons why many employees, mainly men, do not use work-family arrangements even when their employers formally provide them.²²⁴ The organization's behavior can stem from traditional masculine views of men as breadwinners and women as caregivers. Therefore, institutions have a compelling power to encourage or discourage men from taking leave, and thus support or hinder more equal family caretaking arrangements.²²⁵ Even though Dechert's formal policy provided fathers with four weeks of paid leave, the firm's culture effectively discouraged them from using it.

2. Arguing Against a "Macho" Work Culture: An Analysis of Ayanna's Complaint and the Court's Decision

Ayanna's lawyers had a complex case to litigate: they represented a male lawyer who worked for a private law firm that adhered to the billable hour system.²²⁶ In such a system, employees are measured by the hours they put in: the more hours the better. Evidently, given these demands, lawyers at these firms find it very

²²³ See Albiston, *Institutional Perspectives*, *supra* note 216, at 409–11 (arguing that sometimes "internal organizational cultures discourage workers from making use of [work/family] policies"); see also Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 *LAW & SOC'Y REV.* 11, 12–13 (2005).

²²⁴ See Albiston, *Institutional Perspectives*, *supra* note 216, at 411 (arguing that "studies suggest that institutions, in the form of organizational processes and cultural norms, reduce the likelihood that men will take parental leave").

²²⁵ See *id.*

²²⁶ See Complaint and Jury Demand, *supra* note 198, para. 52.

difficult to be engaged parents since they have to spend most of their time working. Ayanna's lawyers were probably aware of this conflict and chose to frame the case around the argument that the plaintiff's familial obligations had not interfered with his ability to put in the long hours that the firm demanded. However, they evoked another argument, namely that the firm had a "macho" culture "which praises and encourages male associates and partners to fulfill the stereotypical male role of ceding family responsibilities to women."²²⁷ Therefore, on the one hand, the plaintiff argued that the firm had a "macho" culture that praised the male attorneys who had worked for many hours; and on the other hand, he argued that he had been able to adhere to these demands of working very long hours. This combination of arguments was incoherent and illogical as it presented Ayanna as a superhuman being who could work 70-80 hours a week *and* take care of his family. At no point, however, did Ayanna connect the "macho" culture at the firm to its long working hour norm. For instance, Ayanna argued that when he had worked on a project with one of the partners, Ayanna "left work at approximately 9:00 p.m. after completing his portion of a project he was working on with partner Anthony Zacharski."²²⁸ Yet even after leaving at 9:00 p.m., Ayanna felt he had to further explain his leaving at this hour: "[T]here was no reason for Ayanna to stay that night as Zacharski had not directed Ayanna to stay nor was there any other reason."²²⁹ Nevertheless, the complaint continued, when he left at 9:00 p.m., Zacharski "immediately assumed Ayanna had a 'conflicting' family obligation and chastised him the following day for leaving . . . Zacharski was responding to the reputation Ayanna had in the firm as a man who adopted a traditionally 'female' role."²³⁰ (One should wonder how leaving work at 9:00 p.m. can be regarded as adopting a traditionally "female" role). The lawyers continued this line of argument: "[A]s the project continued, Ayanna worked long days, all seven days of the week, and over the

²²⁷ *Id.* para. 11.

²²⁸ *Id.*

²²⁹ *Id.* para. 25.

²³⁰ *Id.*

July 4th weekend.”²³¹ He also worked from home.²³² Moreover, the plaintiff’s lawyers repeatedly emphasized that Ayanna’s family responsibilities did not affect his working hours:

Ayanna’s caregiving responsibilities never detracted from his fulfilling the requirements of his position at Dechert. Ayanna regularly was at the office until 7:00, 8:00, 9:00 p.m. or even later, and he often worked late into the night from home. He never missed a deadline and was never unavailable even if he was not physically in the office.²³³

In addition, as if working daily until late hours was not enough, the lawyers argued that Ayanna was always available for work: “Ayanna always took his laptop and Blackberry home with him, was available to work on assignments from home at any time, at all hours, and was available to come into the office on the weekends.”²³⁴

The framing of a case is the lawyers’ choice, and Ayanna’s lawyers chose to put the focus on the number of hours Ayanna had worked. They presented evidence that, even though he had familial obligations, those obligations “never interfered with the requirements of being an associate at Dechert.”²³⁵ While Ayanna’s lawyers assumed that their client had a better chance of winning the case if he showed that he had conformed to the employer’s demands rather than challenge them,²³⁶ their choice of not

²³¹ *Id.* para. 26.

²³² *Id.* para. 60 (“Ayanna regularly worked late at the office and even worked from home.”).

²³³ *Id.* para. 66.

²³⁴ *Id.* para. 67.

²³⁵ *Id.* at 1–2. The question that comes to mind is: how is it possible, technically and practically, to work daily at the office until late hours, including on weekends and holidays, as well as be available all the time and also fulfill family obligations?

²³⁶ Ayanna’s lawyers’ strategy is probably based on their acquaintance with courts’ interpretation of Title VII and the latter’s reluctance to undermine work practices. *See generally* Albiston, *Institutional Inequality*, *supra* note 46, at 1133 (“[A] close analysis of Title VII doctrine reveals that courts have left little doctrinal room for challenging facially neutral work practices that nevertheless construct the meaning of gender.”).

criticizing the firm's work practices helps to reinforce them. In other words, by showing how Ayanna had conformed to the employer's demand of working very long hours, the lawyers condoned and strengthened the same macho culture they had argued against.

An alternative framing of the case could have been that the long working hour norm is in effect a masculine feature of the workplace,²³⁷ mainly because of its incompatibility with caregiving duties. To prove that point, the lawyers could have argued that while the workplace was historically constructed by and for men,²³⁸ times have changed as more men today suffer from workplaces' masculine culture when they fulfill their caregiving responsibilities.²³⁹ Their choice of not evoking claims against workplace-time norms, but rather showing how their client obeyed these norms, highlights a problematic issue regarding social change through the legal system. Since private lawyers want to win cases and not undermine the system as a whole, and since legal decisions are based on lawyers' claims, courts' decisions do not necessarily have the ability to bring about social change.

Indeed, the court's decision focused on the question of whether or not Ayanna actually worked all the hours required of him, without questioning the long-working-hour norm itself, and its repercussions for Ayanna and other working parents. The court's approach proves how the doctrine of disparate treatment focuses on the individual plaintiff without locating problems within the

²³⁷ See McGinley, *Work, Caregiving, and Masculinities*, *supra* note 14, at 708 (discussing how certain workplace structures—such as mandatory overtime—are gendered structures). *Cf.* Williams & Tait, *supra* note 38, at 875 (discussing the consequences for men who deviate from masculine work structures such as taking a leave of absence under FMLA).

²³⁸ See, e.g., MACKINNON, *supra* note 46, at 224 (arguing that masculine characteristics define everything from insurance coverage to the workplace); Acker, *supra* note 46, at 146–47 (explaining the gendering of social organizations).

²³⁹ See *supra* Parts II and III (examining cases litigated by men alleging discrimination against them due to their parental status). See also *supra* notes 216–17, and accompanying text (referencing studies that demonstrate the ways men have been discriminated against in society and at work due to their parental responsibilities).

structure of the workplace, such as time norms.²⁴⁰

3. *Ayanna v. Dechert* and the Problems of Current Employment Antidiscrimination Law

This case demonstrates the normative difficulties plaintiffs have when alleging employment discrimination based on family responsibilities. Since Title VII lacks a specific protection against caregiver discrimination, plaintiffs such as Ayanna are required to reformulate their claims as discrimination based on sex and not parental status. Therefore, Ayanna argued that he had been discriminated against in comparison to female workers at the firm who “were not required to be disengaged parents.”²⁴¹ This case also shows that evidentiary issues arise when a plaintiff is forced to litigate a caregiving discrimination suit through the sex discrimination rubric: often there is clear evidence of intentional discrimination because of caregiving responsibilities while there is not as clear evidence of discrimination because of sex. For example, the court did not accept the claim that Christian, Ayanna’s supervisor, was hostile to him because he was a male caregiver.²⁴² At most, the court asserted, Christian may have disfavored Ayanna for putting family before work, but that, the court held, was not illegal.²⁴³

Ultimately, Ayanna was unsuccessful in convincing the court that he was discriminated against based on his sex. The court rejected the sex discrimination claim and stated that “female attorneys who took on caregiving roles also experienced negative outcomes at Dechert.”²⁴⁴ A female attorney, for example, was fired because she too could not get sufficient work assignments upon her

²⁴⁰ See Catherine Albiston, *Institutional Inequality*, *supra* note 46, at 1094 (“Discrimination in American employment law is personal . . . the vast majority of employment discrimination claims advance legal theories that require evidence of discriminatory animus. Institutions are, at most, marginal concerns for these statutes.”)

²⁴¹ Complaint and Jury Demand, *supra* note 201, para. 77.

²⁴² *Ayanna v. Dechert LLP*, 914 F. Supp. 2d 51, 56 (D. Mass 2012).

²⁴³ *Id.*

²⁴⁴ *Id.*

return from maternity leave.²⁴⁵ Because both working mothers and fathers at the firm were similarly situated, meaning they were similarly discriminated against, Ayanna was unsuccessful in showing that his sex motivated Dechert's adverse employment action.²⁴⁶

The complexity of claiming sex discrimination when the plaintiffs have actually been discriminated against due to their family responsibilities has brought scholars to advocate amending Title VII to include a specific prohibition on discrimination against workers with family responsibilities.²⁴⁷ Such a change would separate family responsibilities from the gender of the caregiver.²⁴⁸ According to the sociolegal scholar Catherine Albiston, "defining the protected class in terms of caretaking behavior rather than gender does help avoid reifying care as a gendered characteristic."²⁴⁹ The explicit protection of caregiver status would also mean that plaintiffs would not have to make the more subversive and complex gender-conformity arguments. Moreover, such a protection powerfully conveys to both men and employers that family obligations are not solely a female responsibility.²⁵⁰ If Ayanna had been protected as a caregiver, he would have avoided

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See, e.g., Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463, 1465-1466 (2008) ("This convincing set of data makes a strong case for legislation expressly prohibiting FRD. Working in tandem with accommodation laws, laws specifically prohibiting discrimination based on family caregiver status are necessary to right this employment discrimination wrong."); see also McGinley, *Work, Caregiving, and Masculinities*, *supra* note 14, at 722 ("Passage of legislation that would prohibit discrimination based on child care responsibilities and some type of reasonable accommodation would go a long way toward granting working parents the flexibility they need to work and care for their children.").

²⁴⁸ See Albiston, *Institutional Perspectives*, *supra* note 216, at 414.

²⁴⁹ *Id.* at 415.

²⁵⁰ However, according to Albiston, the probable consequence might be that the categories of men and women will become categories of caregivers and non-caregivers, but nothing will change and caregivers will continue to suffer from discrimination. *Id.* at 405-06.

having to compare himself to women with family responsibilities—instead, his legal team could have argued that attorneys, male and female, who met their caregiving duties, were illegally penalized and discriminated against at Dechert.

Nevertheless, it remains an open question whether such an amendment would change judicial interpretations of disparate treatment. Would the courts finally locate the problem not in the individual but in work practices? Would the court in cases like *Ayanna* criticize the firms' long working hour norm and its harmful effect on working parents? As the Israeli experience has demonstrated, even when an antidiscrimination law specifically protects parents, courts are still reluctant to challenge or criticize workplace norms as unfitting to working parents.²⁵¹ Thus, it is unclear whether or not U.S. courts would be inclined to critically examine workplace norms and how they negatively impact working parents, even after a modification of Title VII.

In sum, *Ayanna v. Dechert* was exceptional in several aspects. It was based on a male worker's claim that he was retaliated against and fired due to his role as an active caregiver. Further, this plaintiff worked as an attorney at a private law firm that operates according to the billable hour system. This combination of factors led his lawyers to denounce the "macho" work culture while arguing that *Ayanna* was actually able to adhere to it. They ignored the core problem, which is what prevents workers from being able to integrate work and caregiving—the demand to stay at work for long hours. This problem is especially pervasive in law firms that adhere to the billable hour system where lawyers are evaluated mainly on the basis of the number of hours they work.

This case also shows the legal difficulties plaintiffs face when they are discriminated against at work due to their familial responsibilities. Given Title VII's failure to protect caregiving responsibilities, these plaintiffs are required to prove that they were discriminated against based on sex. This lacuna in the federal law has led to absurd outcomes, as demonstrated in *Ayanna*: the court rejected *Ayanna*'s claim of sex discrimination since the firm showed that it had discriminated against both female and male attorneys. Amending Title VII to include parents and other

²⁵¹ See *supra* Part II.B.

caregivers as a protected class would have helped Ayanna and other parents to fight discrimination at work due to familial responsibilities. Whereas such an amendment might not have dramatically changed judicial interpretations of disparate treatment, it would at least help Ayanna (and other parents) to avoid the pitfalls of arguing he had been discriminated against based on sex.

IV. THE MANIFESTATION OF MASCULINITIES NORMS IN THE ISRAELI AND AMERICAN CASES: SIMILARITIES AND DIFFERENCES

A careful analysis of the cases that Israeli and American fathers have brought indicates that gender norms operate in a similar manner in both countries. This corroborates other studies showing that although masculinities identities are context-dependent, there are common characteristics of masculinity in Western societies.²⁵² As will be elaborated below, four main similarities between Israel and the U.S. are evident when looking at court cases brought by caregiving men. First, men are penalized when they deviate from traditional gender roles. Second, addressing discrimination against working mothers is still easier for the courts than acknowledging fathers' difficulties in combining work and family. Third, men tend to take an active role in raising their children when their wives are incapable of doing so. Fourth, courts still regard workplace structure and demands as inevitable, and reinforce the "ideal worker" norm, thus prioritizing work over family.

While the Israeli and American cases have dealt with somewhat different aspects of male work/family integration, this is mainly because of the differences in the statutory provisions, not the gender norms underling the cultures. For example, the focus of the Israeli cases has been on interpreting several parental benefits, such as parents' ability to work less and receive monetary

²⁵² See Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 272 (2013).

benefits.²⁵³ These provisions do not exist under the American legal system. The U.S. cases, however, have been focused on interpreting certain clauses of the Constitution, such as the Equal Protection Clause.²⁵⁴ Since Israel does not have a Constitution, this kind of analysis is absent in its jurisprudence. Also, the disparate formulations of antidiscrimination laws and family leave entitlements in the two countries have had significant implications for male plaintiffs' legal claims, and consequently the courts' decisions. For instance, while the Israeli employment antidiscrimination law specifically forbids discriminating against parents, its American counterpart does not include parents as a protected group. Consequently, American parents alleging they were discriminated against due to their familial responsibilities need to frame their lawsuits as sex discrimination claims.²⁵⁵

Despite the aforementioned differences, common masculinity norms pervade the Israeli and American cases. First, consistent with social science studies conducted in Israel and the U.S., these cases reaffirmed that men are penalized when they deviate from traditional gender roles.²⁵⁶ For instance, the employer in *Knussman v. Maryland* denied the plaintiff's additional leave requests, and made harsh comments regarding his desire to perform as a primary caregiver.²⁵⁷ In *Nevada Department of Human Resources v. Hibbs*, Hibbs's employer fired him after he took FMLA leave to care for his injured wife.²⁵⁸ In *Ayanna v. Dechert*, Dechert penalized Ayanna for taking time off to care for his newborn and sick wife.²⁵⁹ His supervisor intensely and disproportionately scrutinized his work, retaliated against him for taking leave, and ultimately terminated him due to his involvement in family responsibilities.²⁶⁰

²⁵³ See *supra* Part I.C.

²⁵⁴ See *supra* Part II.

²⁵⁵ See *supra* Part III.D.

²⁵⁶ See *supra* notes 216–17, and accompanying text.

²⁵⁷ *Knussman v. Maryland*, 272 F.3d 625, 629–39 (4th Cir. 2001). See generally *supra* Part III.B.

²⁵⁸ *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 725 (2003). See generally *supra* Part III.C.

²⁵⁹ *Ayanna v. Dechert, LLP*, 914 F. Supp. 2d 51, 53 (D. Mass. 2012). See generally *supra* Part III.D.

²⁶⁰ See Complaint and Jury Demand, *supra* note 198, paras. 51, 52, 58, 59,

These caregiving fathers were punished for transgressing gender norms. Interestingly enough, in the Israeli cases, judges expressed stereotypical assumptions that the male plaintiffs were giving up their careers for their wives.²⁶¹ The hostile attitude towards men who fulfilled familial duties signifies the “gender policing” of men who act in contrast to the masculine imperative to avoid acting in a “feminine” way.²⁶² Since caregiving is socially associated with women, men who nevertheless perform such roles, and dare to deviate from their assigned masculine role, are socially penalized.²⁶³

Second, Israeli and American courts found it easier to address the discrimination working mothers endure rather than the discrimination that working fathers endure, which demonstrates that both societies prioritize paid work over caregiving. In *Wiesenfeld*, for example, the Supreme Court dedicated most of the decision to the discrimination against Wiesenfeld’s wife.²⁶⁴ Moreover, the idea that a father wanted to stay home to care for his child elicited disbelief from some judges and attorneys.²⁶⁵ In *Hibbs*, decided almost 30 years later, the Supreme Court’s emphasis was still more on strengthening women’s ability to work rather than men’s ability to nurture. At no point did the Court refer to the momentous importance of men as caregivers and the positive outcome their involvement confers upon their families.

In the Israeli cases, the judges referred only to the stereotyping of women as caregivers, a limiting cultural definition that impacts women’s ability as workers.²⁶⁶ The courts never considered gendered stereotypes of men as disingenuous or invalid caregivers. In *Yahav* and *Moscolenco*, the courts allowed fathers to work less so that mothers could work more.²⁶⁷ All the cases disregarded the

64, 65. See also *supra* Part III.D.1.

²⁶¹ See *supra* Part II.B.

²⁶² See *supra* Part I.

²⁶³ *Id.*; see also *supra* notes 216–17, and accompanying sources.

²⁶⁴ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637–38 (1975).

²⁶⁵ See *supra* Part III.A.

²⁶⁶ See generally *supra* Part II.

²⁶⁷ See *supra* Part II.B.

importance of fathers caring for their children,²⁶⁸ even though a myriad of data showed that caring and engaged fathers are important to the wellbeing of their children and families.²⁶⁹ Regarding fathers as “the second sex” when it comes to caregiving, and also as secondary and even incompetent parents,²⁷⁰ demonstrates one of masculinities theory’s core principles: gender privilege and power come with a price.²⁷¹ Gender policing of men that forces them to work as if they do not have family responsibilities comes at the expense of fathers’ relationships with their families.²⁷²

²⁶⁸ *Id.*

²⁶⁹ See, e.g., WILLIAM MARSIGLIO & KEVIN ROY, NURTURING DADS: SOCIAL INITIATIVES FOR CONTEMPORARY FATHERHOOD (2012); Dowd, *Fatherhood and Equality*, *supra* note 33, n.22 (referring to relevant studies); Kathleen Sylvester & Kathleen Reich, *Making Fathers Count, Assessing the Progress of Responsible Fatherhood Efforts*, Social Policy Action Network 223 (2002), available at <http://www.aecf.org/upload/publicationfiles/making%20fathers%20count.pdf> (last visited 8.15.13) (providing research showing the importance of fathers’ presence for children); Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 529–30 (1997) (contending that “[t]here is a growing body of evidence suggesting that children in two-parent families do better when their fathers play a more engaged and substantial role in their lives” and referring to relevant data). In Israel, see NARDI & NARDI, *supra* note 38, at 224 (citing studies conducted in Israel showing that an involvement of fathers in raising children has a positive effect on the fathers themselves as well as on their children).

²⁷⁰ See DOWD, THE MAN QUESTION, *supra* note 13, at 120.

²⁷¹ *Id.* at 105. See also Dowd, *Fatherhood and Equality*, *supra* note 33, at 1058 (contending that “[i]ronically, being the breadwinner privileges, but it also subordinates”). With regard to Israeli fathers, see Hollander, *supra* note 21, at 317–22 (arguing that even those who are privileged by work recognize that they pay a price).

²⁷² See Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend in Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 174 (2006) (“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.”); see also Dowd, *Fathers and the Supreme Court*, *supra* note 190, at 1321 (“One of the most enduring fatherhood roles is the father as breadwinner, but that role fails to incorporate nurture, sacrificing nurture for gender-defined

The third similarity between the Israeli and American cases is manifested in the facts of the cases, showing that the plaintiffs took an active role in raising their children when their wives were incapable of doing so. In *Wiesenfeld*, the mother had died, and in *Knussman* and *Ayanna*, the mothers were sick. In the Israeli cases, however, mothers could not be with the children because of work. Indeed, as masculinities theory has demonstrated, fathers' main responsibility is to provide for their families financially,²⁷³ and at best function as "second string caregivers."²⁷⁴ If they are nevertheless required to engage in serious and significant caregiving, it is because they do not have a wife who can perform that role.²⁷⁵ By the same token, being engaged in care is regarded as voluntary and optional for Israeli and American fathers and not part of their identity as men.²⁷⁶

Lastly, and most importantly, the courts in both countries accepted workplace structure and demands as a given, demonstrating how judicial interpretations of antidiscrimination laws reinforce gender inequality. Neither the Israeli nor the American court decisions challenged the current structure and its incompatibility with most working parents' needs. Instead, the courts based their decisions upon cultural meaning of work and caregiving, refraining from challenging work practices and schedules, although the statutory language permits different

economic responsibility"). For a discussion of the prices Israeli men pay for gender norms, see Hollander, *supra* note 21, at 317–22 (her empirical study has shown that Israeli men pay a high price for the social demand to function as breadwinners, which is a constrained and demanding role. As a result, they have to make compromises as fathers and partners).

²⁷³ See *supra* Part I.

²⁷⁴ I would like to thank professor Catherine Albiston for suggesting this term.

²⁷⁵ See Dowd, *Fatherhood and Equality*, *supra* note 33, at 1063 ("[W]hile men are equally capable of care work, many men do so not by choice but only when they are forced into becoming a caregiver because of divorce, unemployment, or the death of a spouse.").

²⁷⁶ See *id.* at 1061–62. In Israel, see Daphna Hacker, *Motherhood, Fatherhood and Law: Child Custody and Visitation in Israel*, 14 *Social & Legal Studies* 409, 425 (2005) ("[T]he Israeli legal field reinforces the gendered perceptions of parenthood by turning the question of maternal custody into a non-issue, by constructing fatherhood as an undefined voluntary role. . . .")

interpretations.²⁷⁷ The idea that both parents should be able to integrate work and family, for the sake of themselves and their children, was never considered as an option. For example, the courts never even contemplated alternatives to the measuring of employees' hours at the office, such as focusing on employees' results and incentivizing productivity.²⁷⁸ Moreover, although the cases were brought by men who were penalized only because they deviated from their traditional gender stereotypical role, neither decision criticized the employers' discouraging attitude toward fathers who combine work and caregiving. While one might argue that challenging work practices are not the courts' role, the courts in fact have been prohibiting employers' decisions when they had been based upon gendered stereotypes.²⁷⁹ Therefore, as the next Part will show, the use of masculinities theory as part of the gender anti-stereotype doctrine could further expose the role of culture and norms pervading many work practices.

Note, however, that a main difference between the Israeli and American cases involves the judges' views towards the *role of mothers as workers*. A vast majority of the Israeli decisions was dedicated to the prevalent discrimination against working women, especially working mothers. Therefore, the judges' rationale in allowing fathers to work less was that women could progress at work by working more hours. The National Labor Court's rationale in *Bahat* and *Levi*, which disallowed fathers to receive monetary benefits if they stayed beyond the shortened day, was a sort of an affirmative action for women.²⁸⁰ The Judges perceived the monetary benefit as a financial incentive that encouraged mothers to forego shortened workdays and instead work longer

²⁷⁷ Catherine Albiston, *Institutional Inequality*, *supra* note 46, at 1093 (contending that "courts remain reluctant to enforce changes to employers' established work schedules and leave policies, even when the statutory language is consistent with requiring these changes").

²⁷⁸ See, e.g., Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1957 (2000) ("A reduced workweek should alleviate work-family conflict for everyone and help promote greater sharing of employment and housework among men and women.").

²⁷⁹ See Parts III.B. and III.C.

²⁸⁰ See Part II.C.

hours.²⁸¹ Compared to the Israeli judges, American judges have not taken the same path of strengthening fathers' caregiving role as a means for mothers to spend more hours working. While the American courts did criticize the historical workplace discrimination against women and the gender stereotypes towards them, they did not press women to work longer hours as their Israeli counterparts did.

The comparative analysis of these cases reveals that Israeli and American judges have common views on men's role as caregivers, and work structure. It has also exposed the inability of judges to conceptualize the harms that men, as gendered beings, suffer as caregivers. Therefore, incorporating masculinities theory into future legal claims of working fathers can help to illuminate these harms and combat biases against male caregivers. In order to further that goal, the next section develops a legal framework for plaintiffs and judges in future work-family cases in Israel and the U.S.

V. ESTABLISHING A REFORM IN THE COURTS BY INCORPORATING MASCULINITIES THEORY INTO WORK-FAMILY CASES

As demonstrated earlier, several factors have been accumulatively responsible for creating work-family conflicts for fathers. In this Part, I propose to incorporate masculinities theory into lawsuits and court decisions dealing with work-family issues.²⁸² Doctrinally, masculinities theory can be used in sex discrimination cases under a gender anti-stereotyping principle. This theory could shed light on the nuances of cultural gender norms and expectations while making actionable penalties imposed

²⁸¹ *Id.*

²⁸² Judicial decisions have a crucial role in advancing or hindering social change for working fathers. These decisions are significant beyond simply being "solutions" to the specific cases; the published decisions will be used by future potential claimants, guiding them on the potential merits of their case. *See* CATHERINE R ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 188 (2010); *see also* Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1208 (1991).

on workers for failing to conform to gender stereotypes.

Studies indicate that lawyers and judges base their understanding of a person's behavior on implicit assumptions regarding the activity and the person performing it,²⁸³ and they might incorrectly interpret behavior based on stereotypes and cognitive bias.²⁸⁴ One of the major harms of stereotypes is that they lead to the treatment of an individual based on his or her supposed group trait and not on that individual's capabilities.²⁸⁵ Therefore, being familiar with masculinities theory and taking it into account can help decision-makers view and interpret persons' behaviors differently.²⁸⁶

In practice, plaintiffs in disparate treatment discrimination cases can use social science literature on stereotyping in order to "educate the court about the role of unexamined bias and stereotyping in the decision-making process."²⁸⁷ Actually, incorporating stereotyping evidence in claims of sex discrimination is not new, and courts have been embracing this evidence for decades.²⁸⁸ The novelty, however, is to incorporate masculinities theory and masculinities social psychological evidence as part of the gender stereotyping evidence. Empirical social psychology studies can demonstrate biases against caregivers, especially male caregivers, and help plaintiffs establish their cases using circumstantial evidence that "may reveal a pattern of continuing bias."²⁸⁹ For example, using evidence from social and cognitive psychology could have helped Ayanna persuade the court not to accept Dechert's motion for summary judgment on the issue of disparate treatment sex discrimination. Since the court was required to make inferences against the defendant, Ayanna could have claimed that social cognition research explained Dechert's

²⁸³ See MASCULINITIES AND THE LAW, *supra* note 13, at 8.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ See Williams & Segal, *supra* note 7, at 131–32.

²⁸⁸ American courts have been accepting this evidence since the 70's. See Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 222 (2014).

²⁸⁹ *Id.* at 133.

behavior as part of its cognitive bias against male (and female) caregivers.²⁹⁰ Further, using masculinities theory as part of a gender anti-stereotyping principle saves plaintiffs the need to find comparative evidence.²⁹¹ Thus, male plaintiffs who argue they have been discriminated against due to illegal gender stereotypes of masculinity can focus the claims on caregiving men and *their* hurdles. By exposing the stereotypes that caregiving men encounter at work, masculinities theory can strengthen male plaintiffs' legal claims in work-family cases.

What does it mean for lawyers and judges to incorporate masculinities theory into their lawsuits and decisions, respectively? First, it means encouraging discussions of men's experiences and acknowledging that it is not solely women who suffer from gender norms and social expectations—men also experience gender harms.²⁹² Therefore, men's experiences with disempowerment, bias, and oppression should be explored.²⁹³ Incorporating masculinities theory also means questioning the traditional association between breadwinning and masculinity that, along with masculine workplace structures, has resulted in reduced options for fathers to provide care for their families.²⁹⁴ As a practical tool, judges can ask “the man question,” which examines prevailing cultural assumptions and norms to which men are subject,²⁹⁵ and asks how men—as gendered subjects—are situated in relation to a certain policy. Asking “the man question” will enable courts to

²⁹⁰ See *id.* at 132–33.

²⁹¹ See Catherine Albiston, *supra* note 46, at 1154 (“Stereotype theories are enormously useful because they allow plaintiffs to proceed without difficult-to-obtain comparative evidence . . .”).

²⁹² See Schrock and Schwalbe, *supra* note 13, at 288–89 (claiming that while men as a group can benefit from sexist ideology, some “manhood acts can sometimes reproduce inequalities in ways that disadvantage subgroups of men”); Cunningham-Parmeter, *supra* note 252, at 259–60.

²⁹³ Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1088 (1996).

²⁹⁴ See Abrams, *supra* note 42, at 761 (arguing that “unless the norms that support a link between masculinity and provider status are identified, analyzed, and gradually revised,” we can expect no improvements to fathers' work-family conflict).

²⁹⁵ See Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 422 (2010).

expose masculinity norms—both at the structural and personal level. Courts will then be able to explore how these norms impede men’s ability to take care of their families. Shifting the focus to fathers’ difficulties in balancing work and caregiving will expose the high price men pay for attaining the breadwinner role in the family: the subordination of their relationship with their children for wage work.²⁹⁶

Taking the core principles of masculinities theory into account also means critiquing and undermining the prevailing cultural norm that regards caregiving as feminine, and therefore, as primarily a woman’s responsibility. Judges should value and strengthen the importance of paternal care as essential to the well-being of children and fathers, as well as mothers, and as part of gender equality.²⁹⁷ To be sure, advocating for caregiving work is not new.²⁹⁸ The novelty, however, is in the inclusion of fathers in a debate that has been almost exclusively focused on women. Moreover, acknowledging fathers’ importance as active parents has the potential to transform current workplace norms. However, in order for courts to challenge workplace norms and create social change for caregivers, they first have to accept that caregiving is no less important than paid work.²⁹⁹ For instance, acknowledging and embracing paternal care might not have changed the outcome

²⁹⁶ WILLIAMS, *RESHAPING*, *supra* note 6, at 81 (claiming that “the successful breadwinner may incur personal costs that far outstrip his earnings”). *See also* DOWD, *THE MAN QUESTION*, *supra* note 13, at 105; Dowd, *Fatherhood and Equality*, *supra* note 35, at 1058 (“Ironically, being the breadwinner privileges, but it also subordinates.”). In respect to Israeli fathers, see Einat Hollander, *Images of Masculinity and the perception of its costs among Israeli Male Adolescents 317-322* (2001) (unpublished M.A. thesis, Bar-Ilan University) (on file with Bar-Ilan University Library) (arguing that even those who are privileged by work recognize that they pay a price).

²⁹⁷ *See* Dowd, *Fathers and the Supreme Court*, *supra* note 272, at 1312, 1328. In addition, the household should be viewed as inseparable from childcare. *Id.* at 1314.

²⁹⁸ *See* Kessler, *supra* note 11, at 371.

²⁹⁹ *See* Kessler, *supra* note 11, at 460 (arguing that when “caregiving work valued as fundamental to the functioning of society, and to living a full life, then the assertion that engaging in such work is a ‘fundamental right’ deserving of accommodation or at least nondiscrimination in the workplace would not entail a vast judicial leap.”).

of *Bahat*, in which Bahat asked to receive the same monetary benefits that mothers receive when they work longer hours during shortened workdays. However, it might have changed the *rationale* of the National Labor Court, which denied him these monetary benefits. Viewed through the lens of encouraging fathers' involvement in their children's lives, the Court might have asserted that fathers whose workplaces allow parents to work shortened days should be incentivized to use such an arrangement. Hence, Bahat would not receive monetary benefits if he had decided to work more hours rather than use his shortened workday arrangement.

The third core principle of masculinities theory that judges should consider is that men feel that other men are evaluating them, and thus must constantly prove their manhood.³⁰⁰ This feature of male insecurity is strongly manifested in the realm of paid work, as men in Western countries gain their status from being breadwinners, yet, since jobs are unstable, the status is unstable as well.³⁰¹ Along these lines, research has shown that Israeli and American working fathers are strongly influenced by their fellow male colleagues' behavior.³⁰² Hence, fathers are more likely to be engaged in caregiving and use parental entitlements only if other fathers at their workplaces do the same. Judges should take into account this empirical dynamic when investigating whether caregiving men have been discriminated against at work. One practical way for courts to examine workplace attitudes

³⁰⁰ DOWD, THE MAN QUESTION, *supra* note 13, at 21. See also MASCULINITIES AND THE LAW, *supra* note 13, at 3.

³⁰¹ JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 25 (2000).

³⁰² See Rosenblum, *supra* note 6, at 110 (citing research that has demonstrated that, even in Sweden, where benevolent paid parental leave is available and the state is supportive of fathers' involvement in care, peer pressure remains very powerful: "[M]ale employees are still more likely to take leave only if another father took leave within the previous two years"); see also Gershoni, *supra* note 42, at 63 (In his study of Israeli fathers, Gershoni's interviewees have said that in order for them to be more openly engaged in care, employers need to change their perceptions, and other working fathers need to publicly exhibit their participation in parenting.). Peer behavior has a greater effect on men than the behavior of their own fathers or their partners. DOWD, THE MAN QUESTION, *supra* note 13, at 112.

toward male-caregivers is to look at working fathers' *actual use* of the organization's work-family policies, as well as the attitudes toward those who have used them.³⁰³ In that way, employers' practice of merely disclosing its formal parental policies could not be used to conceal discrimination against fathers. Rather, employers must also disclose the number of workers who have actually used these benefits. If the work environment does not support working fathers, and in effect they refrain from using the parental arrangements (and are penalized at work when they do), the employer might be liable for sex discrimination.³⁰⁴ For instance, in *Ayanna v. Dechert*, while Dechert had a formal paid parental leave policy, the firm's culture in effect discouraged men from using it.³⁰⁵ The fact that male attorneys did not use leave entitlements, not even the paid paternal leave the firm allowed, should have been weighed against the firm.

In conclusion, incorporating masculinities theory in future work-family cases has the ability to shed light on gender stereotypes and gender bias that working fathers face. Furthermore, it will enable the unpacking of the traditional equation between breadwinning and masculinity, which hinders many men from combining work and caregiving effectively. One of the practical ways to incorporate masculinities theory is to ask "the man question" in order to examine how men, as gendered subjects, are situated in relation to a certain policy. Furthermore, looking at the actual number of male workers who have used legal or organizational work-family policies can help judges investigate an organization's actual approach towards these workers.

However, and most importantly, my proposal to take men's hurdles as caregivers into account does not mean ignoring and diminishing the centuries of discrimination and harm that women have experienced. My intent is the opposite: I hope to advance the cause of feminism by drawing attention to the more universal

³⁰³ See Albiston, *Institutional Perspectives*, *supra* note 216, at 402.

³⁰⁴ See Palazzari, *supra* note 8, at 468–69. Palazzari theorizes that fathers can use a "hostile work environment claim" when they are denied leave or being penalized when they return from leave. *Id.* Hostile work environment claims are most often used in sexual harassment cases.

³⁰⁵ See *supra* Part III.D.1.

harms of gender-role “policing” and considering the interconnected aspects of male and female inequality.³⁰⁶ Therefore, taking masculinity imperatives into account will provide a way to look specifically at the challenges that fathers face, which are different from those of mothers yet intertwined.³⁰⁷ In addition, by incorporating a more complex view of men as gendered subjects, we will be able to enhance gender equity for the benefit of women, children, and men.³⁰⁸

VI. CONCLUSION

There is a rarely discussed but pervasive problem in Israel and the U.S.: employment discrimination against fathers based on sex in combination with their family responsibilities. While not great in number, several cases—in both Israel and the U.S.—have attempted to address this problem. These cases had the potential to expose how gender norms, to the detriment of both fathers and mothers, inform workplace norms. However, this potential was squandered, partly due to the ways the plaintiffs’ lawyers chose to frame the claims, which impacted the courts’ reasoning and outcomes.

An incorporation of masculinities theory in future litigation, however, has the potential to expose the gendered performances—and their repercussions—of Israeli and American working fathers. Taking masculinities norms into account also means being highly skeptical of the traditional equation of masculinity and breadwinning. Fortunately, social norms, as well as workplace practices, are neither fixed nor natural. Rather, they are socially constructed and thus have the potential to be reshaped in a way that acknowledges and embraces greater paternal care.

³⁰⁶ See MASCULINITIES AND THE LAW, *supra* note 13, at 38.

³⁰⁷ See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 7, at 244.

³⁰⁸ See Collier, *supra* note 17, at 472.