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### The Parent Trap: Equality, Sex, and Partnership in the Modern Law Firm

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# THE PARENT TRAP: EQUALITY, SEX, AND PARTNERSHIP IN THE MODERN LAW FIRM

MIRANDA MCGOWAN\*

*The fight for women's equality in law has achieved a lot. Women have made up nearly half of law students and law firm associates for the last two decades. Despite this progress, the partnership ranks of law firms are profoundly and intolerably sex segregated and will remain so for the foreseeable future. Our profession, which has fought for and helped to achieve legal equality on behalf of so many, is itself dogged by intractable inequality. A standard set of solutions, which address structural barriers within law firms and the effects of cognitive biases, have been urged for decades and yet have failed to deliver any significant improvement.*

*A persistent feedback loop lies at the heart of this intractable gender inequality in law firm leadership and impedes women's progress to partnership. Gender stereotypical expectations and senses of obligation lead to differences between men and women with respect to their work experience and income, which, in turn, lead to couples making rational, income maximizing (and gender stereotyped) decisions about parenting and managing the home, which reinforce gender stereotypes. Both men and women are caught in this feedback loop. Continuing to focus on fixing law firms so that they are more equal for women cannot disrupt this feedback loop because it ignores the other half of the population—men—who are stuck in the loop.*

*The breadwinner stereotype is the culprit behind men's part of the feedback loop. Women's equality requires it to be dismantled. Persuading men to take paternity leaves of a month or two by themselves with their new babies has eroded the breadwinner stereotype in countries as hard working as, and even more socially conservative than, ours. Many law firms already offer fully paid paternity leaves of over a month, but few men take enough of it to make a real difference. Paternity leaves need to be carefully designed to exploit rather than buck the breadwinner stereotype. The tweaks to existing paternity leave policies are relatively small but will require the commitment of leaders in law firms to make such policies successful. The proposal offered here is not a silver*

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\* Professor of Law, University of San Diego Law School. Thanks to Daralyn Durie, Dov Fox, David McGowan, and Mila Sohoni for helpful comments and conversation; thanks also to my deans, Dean Stephen Ferruolo and Associate Dean Margaret Dalton for support and to the University of San Diego law librarians for their invaluable assistance.

*bullet that will bring down gender inequality. It is, however, likely to help a lot, improve the lives of men, their children, and their spouses, and hurt no one.*

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I. INTRODUCTION

“I’m glad we’ve begun to raise our daughters more like our sons, but it will never work until we raise our sons more like our daughters.” – Gloria Steinem<sup>1</sup>

Women’s equality in law firms presents a classic good news/bad news situation. First, the good news: in 2017, a larger proportion of women were partners of law firms than ever before. Women comprised 23% of law partners,<sup>2</sup> up from 19% in 2009.<sup>3</sup> Now, the bad news—23% of law firm

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1. Claire Cain Miller, *How to Raise a Feminist Son*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/upshot/how-to-raise-a-feminist-son.html?mcubz=0> [<https://perma.cc/SZ9B-FQNK>] (quoting Gloria Steinem).

2. *Women and Minorities at Law Firms—What Has Changed and What Has Not in the Past 25 Years*, NALP BULL. tbl.1 (2018) [hereinafter 2018 NALP BULLETIN], <https://www.nalp.org/0218research> [<https://perma.cc/DCK3-TYS9>] (reporting 2017 figures). In 2016, 29% of non-equity partners were women, up from 26% in 2006, and 18% of equity partners were women, up from 16% in 2006. *Representation of Women and Minorities Among Equity Partners Has Increased Only Slightly*, 2017 NALP BULL. tbl.2 (2017) [hereinafter 2017 NALP BULLETIN], <https://www.nalp.org/0417research> [<https://perma.cc/Z5SA-AEJB>] (reporting 2016 figures); LAUREN STILLER RIKLEEN, WOMEN LAWYERS CONTINUE TO LAG BEHIND MALE COLLEAGUES: REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 1, 2 (2015), <https://ms-jd.org/library/abstract/ninth-annual-nawl-national-survey-on-retention-and-promotion-of-women-in-la> [<https://perma.cc/QK2A-77Z4>] (reporting 2006 figures). The gender makeup of all partners is unavailable from this source.

3. *Law Firm Diversity Demographics Show Little Change, Despite Economic Downturn*, NAT’L ASS’N FOR L. PLACEMENT tbl.1 (Oct. 21, 2009), <https://www.nalp.org/oct09lawfirmdiversity> [<https://perma.cc/4X7U-BECR>].

partners are women, and the proportion has increased by 4% in eight years<sup>4</sup> and by 6% in fifteen years.<sup>5</sup> Extrapolating from this rate of increase, women will reach parity sometime around 2075.<sup>6</sup> These stark gender imbalances in partnership ranks persist despite the fact that for two decades, women have consistently made up about 45% of all law firm associates<sup>7</sup> and nearly 50% of law school graduates.<sup>8</sup> Partnership is a male bastion even though women are no more likely than men to leave law firms before becoming eligible to make partner.<sup>9</sup> Inequality also reigns within law partner ranks. Men hold the power<sup>10</sup>

4. 2018 NALP BULLETIN, *supra* note 2, at tbl.1.

5. *Id.*

6. The familiar “opt out” story—where women voluntarily step off the fast track—does not cause this gap. Women are not leaving law firms in droves while they are associates, while men slog away until partnership: The National Association of Women Lawyers reports that 44% of 7th year associates are women. BARBARA M. FLOM & STEPHANIE A. SCHARF, REPORT OF THE SIXTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 4 (2011), <https://ms-jd.org/library/abstract/nawl-report-sixth-annual-national-survey-retention-and-promotion-women-law-> [<https://perma.cc/9EQ9-DJSF>]. When it comes time to make partnership decisions, in other words, 44% of associates are women. Men disproportionately make partner; women disproportionately do not.

7. In 2016, 45% of associates were women. NAT’L ASS’N FOR LAW PLACEMENT, 2016 REPORT ON DIVERSITY IN U.S. LAW FIRMS 5, 8 tbl.1 (2017), <https://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf> [<https://perma.cc/9MYN-F3YU>]. In 2002, 42.4% of associates were women; in 2005, 44% were; in 2009, 45.7% were; by 2013, the percentage had slipped slightly to 44.8%. This comparison is derived from the following NALP publication: *Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly but Steadily*, NAT’L ASS’N FOR LAW PLACEMENT (Oct. 3, 2002), <http://www.nalp.org/2002presenceofwomenandattorneysofcolor> [<https://perma.cc/R67B-P2YB>] [hereinafter NALP 2002]; *Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms*, NAT’L ASS’N FOR L. PLACEMENT (Nov. 17, 2005), <http://www.nalp.org/2005womenandattorneysofcolor> [<https://perma.cc/C8P2-N23C>]; *Law Firm Diversity Demographics*, *supra* note 3; *Representation of Women Associates Falls for Fourth Straight Year as Minority Associates Continue to Make Gains—Women and Minority Partners Continue to Make Small Gains*, NAT’L ASS’N FOR L. PLACEMENT (Dec. 11, 2013), [http://www.nalp.org/lawfirmdiversity\\_2013](http://www.nalp.org/lawfirmdiversity_2013) [<https://perma.cc/LE34-A7B5>].

8. NAT’L ASS’N FOR LAW PLACEMENT, 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS 6 (2017), <https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf> [<https://perma.cc/LMB9-QTCW>] (reporting gender composition of law school graduates ranging from 46% to 49%).

9. MARC BRODHERSON ET AL., WOMEN IN LAW FIRMS 4 (2017), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/gender%20equality/women%20in%20law%20firms/women-in-law-firms-final-103017.ashx> [<https://perma.cc/XY2F-RJPJ>]. At that point, women are “43 percent more likely than men to leave” law firms. *Id.*

10. According to the National Association of Women Lawyers, women are underrepresented on compensation committees, which in turn drives a pay gap between men and women partners. RIKLEEN, *supra* note 2, at 3, 10. Women are also underrepresented on governance committees. *Id.* at 10 (reporting that among AmLaw 200 firms, “35 percent of the respondents had zero or one woman

and prestige, and men get the credit for business.<sup>11</sup> Not all partners are equity partners, and among equity partners, the gender imbalance is even worse. Eighty-two percent of equity partners are men; 18% are women,<sup>12</sup> and this has not changed much over the last fifteen years.<sup>13</sup>

Women partners also get credit for relatively little business—in 2011, four out of five women partners at large firms “received credit” for less than “\$500,000 of business”;<sup>14</sup> consequently, “the majority of women partners” were not credited with enough “business to cover their compensation and overhead” or to make “advantageous” “lateral move[s].”<sup>15</sup> Fewer than 40% of male partners in large firms were in this same boat.<sup>16</sup> At this rate, the twenty-second century will dawn before women in law firms reach parity with men.

The current diagnosis for the partnership problem is that law firms are a hotbed of cognitive biases that prevent women from getting quality work and making necessary connections to progress toward partnership, judge them and their work more harshly than men’s, and stunt their professional ambitions. The prescription is to change law firm structures to inhibit the pernicious influence of cognitive biases and to permit greater workplace flexibility. Both of these are exactly right as far as they go. The problem is that law firms have been urged to change their ways for decades. A fresh approach is necessary, preferably one that builds on, not bucks, existing social and workplace trends.

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member, 41 percent had 2 or 3 women, and only 24 percent had four or more women on their highest governance committee.”). Finally, few large firms are headed by women managing partners. *Id.* at 10 (reporting that the vast majority of managing partners at AmLaw 200 firms are men).

11. FLOM & SCHARF, *supra* note 6, at 3, 16 (reporting that “women partners are less likely than men to receive credit for even a relatively modest \$500,000 ‘book of business’” and “a much higher percentage of women partners were relatively ‘bookless’ compared to men—56% of women partners compared to 38% of men partners.”); *see also* RIKLEEN, *supra* note 2, at 10 (reporting that at AmLaw 100 firms, “the typical female equity partner bills only 78 percent of what a typical male equity partner bills.”). *But see id.* (stating that at AmLaw Second Hundred firms, women bill 91% of what men bill).

12. 2017 NALP BULLETIN, *supra* note 2, at tbl. 2 (reporting 2016 data).

13. In 2002, 16% of partners were women. NALP 2002, *supra* note 7.

14. FLOM & SCHARF, *supra* note 6, at 16.

15. *Id.* “[T]he typical female equity partner in the 200 largest firms earn 80% of . . . [that] earned by the typical male [equity] partner.” AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW 6 (2017), [https://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_january2017.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf) [<https://perma.cc/52Q8-3897>].

16. FLOM & SCHARF, *supra* note 6, at 17. Somewhat interestingly, the pay gap is less than one might expect. In 2017, the average woman equity partner makes 94% of her male counterpart. NAWL estimates that this gap amounts to about \$46,000 per year. The pay gap among non-equity partners is 90%. DESTINY PEERY, NUMBER OF WOMEN EQUITY PARTNERS IN LAW FIRMS MAINTAINS A SLOW AND STEADY PACE 1, 8 (2017).

To resolve the partnership problem—and the problem that women are not ascending to leadership roles in business more generally—we have to focus on *men's* equality. The fight for women's rights and women's equality has achieved much, but to finish the job, we need to fight for men's equality. To expand women's opportunities at work, we have to expand men's opportunities to be full caregivers at home and to relieve them of the pressure gender stereotypes exert on them to be family breadwinners.

Analyzing the problem as one of men's equality allows us to come to grips with the paradox of parenthood. After becoming fathers, men work as hard or even harder than before having kids.<sup>17</sup> After becoming mothers, women work less.<sup>18</sup> After becoming fathers, men's incomes generally increase;<sup>19</sup> after becoming mothers, women's generally decrease.<sup>20</sup> This is paradoxical because today, more than ever, women are more educated and ambitious, while fathers, more than ever, embrace their role as hands-on parents.<sup>21</sup> There is nothing essentially different about men and women, their dreams, or their desires. Men want to escape the bonds of the breadwinner stereotype so that they can be more connected and involved fathers and partners who equally share the load at home with their spouses.<sup>22</sup>

Several forces combine to cause men to invest comparatively more time in their professional lives and women more time at home, which in turn undermine women's ability to commit themselves to their jobs as fully as their careers demand and undermine men's ability to be available to their children and

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17. Ghazala Azmat & Rosa Ferrer, *Gender Gaps in Performance: Evidence from Young Lawyers*, 125 J. POL. ECON. 1306, 1333 (2017) (men bring in more business after having children).

18. In particular, women attorneys generally appear to bill significantly fewer hours than men with young children, and the billable hours gap increases after men and women have children. *Id.* This is despite the fact that male lawyers are more likely both to have children and to have more children than female lawyers. *See id.* at 1317 tbl.1.

19. Alexandra Killewald & Margaret Gough, *Does Specialization Explain Marriage Penalties and Premiums?*, 78 AM. SOC. REV. 477, 489 (2013) (finding that compared to men who are “married and childless, married fathers of two or more children have wages 4.8 percent higher”).

20. This disparity is not due to women selecting into lower-paying, family friendly jobs before having children. Women's wages tend to rise before childbirth. Paula England et al., *Do Highly Paid, Highly Skilled Women Experience the Largest Motherhood Penalty?*, 81 AM. SOC. REV. 1161, 1170 (2016); *see also* Azmat & Ferrer, *supra* note 17, at 1334 (finding that women do not decrease their billable hours in the year prior to having a child).

21. *See infra* Sections II.B. & C.

22. *See* BRAD HARRINGTON ET AL., THE NEW DAD: CARING, COMMITTED AND CONFLICTED 12 chart 5 (2011), [https://www.bc.edu/content/dam/files/centers/cwf/research/publications/researchreports/The%20New%20Dad%202011\\_Caring%20Committed%20and%20Conflicted](https://www.bc.edu/content/dam/files/centers/cwf/research/publications/researchreports/The%20New%20Dad%202011_Caring%20Committed%20and%20Conflicted) [<https://perma.cc/GUJ4-JGZH>].

spouses. Women marry men whose work demands equal or exceed their own.<sup>23</sup> Unspoken gender norms push men to bring home the bacon and women to tend the hearth and wipe little faces. The demands of intensive parenting combine with the demands from professional careers like law to crush women and their ambitions. And gender discrimination at work makes a gendered division of labor at home and work make financial sense.<sup>24</sup>

At the heart of this paradox lies the breadwinner stereotype, which mandates that, above all else, fathers must be good providers for their children. It operates as a background force that affects men's and women's decisions about how to share responsibility for paid work, childcare, and housework. The pressure men feel to be breadwinners shunts the burdens at home firmly onto a woman's shoulders while pushing men to advance their careers and income.

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23. This Article focuses on the choices facing straight couples. I focus on straight couples because the paradox of parenthood that I describe here derives support from, and reinforces, stereotypes that operate most forcefully with respect to straight couples. This is not to say that same-sex spouses and couples have an easy time balancing the demands of work and home responsibilities once they become parents or that they split both paid work and childcare and housework fifty-fifty. Indeed, recent evidence suggests that once same-sex spouses and couples become parents, one spouse often becomes the primary breadwinner and the other the primary caretaker. See Claire Cain Miller, *How Same-Sex Couples Divide Chores, and What it Reveals About Modern Parenting*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/upshot/same-sex-couples-divide-chores-much-more-evenly-until-they-become-parents.html> [<https://perma.cc/R4ZJ-5PTT>] (reporting research finding that “Though [same-sex] couples are still more equitable [than opposite sex ones], one [same-sex] partner often has higher earnings, and one a greater share of household chores and child care.”); see also Abbie E. Goldberg, “Doing” and “Undoing” Gender: The Meaning and Division of Housework in Same-Sex Couples, 5 J. FAM. THEORY & REV. 85, 90–91 (2013) (stating that same-sex couples with children may find that “specialization” is “a more efficient strategy for dividing labor than trying to share both paid and unpaid labor equally.”). However, in a same-sex couple gender stereotypes are less likely to drive the choice of which partner will specialize in either task; to the extent they bear on such a decision they would do so indirectly. Miller, *supra* (stating that the choice to specialize is “not just about gender: Work and much of society are still built for single-earner families.”). Instead, same-sex couples consciously choose who does what, and they generally feel as though their division of labor is equitable. *Id.* Cf. Alyssa Schneebaum, *The Economics of Same-Sex Couple Households* 78 (Sept. 2013) (Ph.D. dissertation, University of Massachusetts-Amherst) [https://scholarworks.umass.edu/open\\_access\\_dissertations/818/](https://scholarworks.umass.edu/open_access_dissertations/818/) [<https://perma.cc/BA86-ZTKS>] (finding that same-sex couples appear to specialize when they become parents, but they “assign specialized roles based on relative (to their partner) income, education, age, and race, but less so than in different-sex couples.”). In addition, when same-sex couples choose to have one spouse or partner specialize in paid work and the other in care work, their choices do not systematically disadvantage women's prospects at work or systematically deprive men's opportunities to assume more nurturing roles at home. Indeed, one recent study has found that the primary breadwinner of a lesbian couple sees her income increase when she becomes a mother, much as men see their incomes increase when they become fathers. *Id.* at 9. As Claire Cain Miller put it, same-sex couples “don't have traditional gender roles to fall back on, and they tend to be more committed to equality” than opposite sex couples. Miller, *supra*.

24. PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 76 (2007).



The breadwinner stereotype means that good fathers must be good providers. The flip side does not hold—good mothers do not have to be good providers (and being one might make you a worse mother). To expand women's opportunities at work, we have to expand men's opportunities to be full caregivers at home and to relieve them of the pressure of having to be a breadwinner.

The result is a destructive feedback loop, in which stereotypical expectations and senses of obligation lead to differences between men and women with respect to their work experience and income, which, in turn, lead to income-maximizing decisions around parenting, which tend to reinforce gender stereotypes. This feedback loop hurts both men and women. Focusing on women's rights has affected this feedback loop somewhat, but it has not fundamentally disrupted it. Disruption requires focusing on both parties caught in the loop, and that means men as well as women.

The stereotypes and biases that construct men as ideal workers and women as inferior ones are bad for men and limit their opportunities, too. Our failure to see this fact has ghettoized the partnership problem as a *woman's problem*,<sup>25</sup> which arguably exacerbates cognitive biases that already swirl around women in law firms. Framing it as a women's problem has also ignored one of the most effective weapons in the fight for equality: *men*.

The women's movement has profoundly changed women's roles, but it has not fundamentally changed men's. For too long we have missed the fact that gender stereotypes limit men's opportunities, too: to be full caregivers at home and to share the responsibility<sup>26</sup> of breadwinning with their spouses. The fact that men want to be so involved in their children's lives is crucial, because men's failure to take substantial paternity leaves is precisely what thwarts

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25. David John Petroski & Paige P. Edley, *Stay-at-Home Fathers: Masculinity, Family, Work, and Gender Stereotypes*, 16 ELECTRONIC J. COMM. 1, 4, 5 (2006), <http://www.cios.org/EJCPUBLIC/016/3/01634.HTML> [<https://perma.cc/5RGS-KSMC>] (“‘Work family balance’ is a gendered issue (read: a woman’s issue) as many issues that women and men might both be concerned about become gendered by the very presence of women’s interests.”); cf. Lydia Dishman, *Why New Moms and Dads Aren’t Taking Their Paid Parental Leave*, FAST CO. (Mar. 23, 2016), <https://www.fastcompany.com/3058150/why-new-moms-and-dads-arent-taking-their-paid-parental-leave> [<https://perma.cc/7RVA-G36K>] (“For a long time, parental leave itself has been the victim of the discrimination women have long faced in the workplace and in society at large; it’s been seen as a ‘women’s issue,’ and therefore shuttled off to the margins of the policy agenda.”).

26. Which is not to say that women are not in fact breadwinners or that women do not in fact share (and sometimes alone shoulder) the “breadwinning” role. Rather, I mean that the breadwinner stereotype defines men and restricts their choices in a way that it does not for women.

women's ambitions.<sup>27</sup> Even when men are offered generous paid parental leave, they often forgo it or take far less than is offered.<sup>28</sup>

Men's failure to take paternity leave, coupled with women's taking maternity leave, creates a cascade of events and decisions that makes it unsustainable for two parents to hold demanding, high-prestige jobs. Something has to give, and that something is most often a woman's work outside the home or, at the least, her giving her all to a law firm. Once this dynamic is set in motion, the cascade of decisions that follow feels inevitable because it follows our script of what men and women do. It is not inevitable. Neither men nor women want things to be this way. Gender roles are at a tipping point and men are on the verge of abandoning the constraints that have kept them from being fully equal partners and caregivers at home.

The solution is clear: getting men to take relatively long, *solo* paternity leaves is the key to resolving the paradox of parenthood. This is doable. Men want to spend more time at home with their babies.<sup>29</sup> Americans support longer paternity leaves. But men generally take short leaves because of the belief that, above all else, dads need to be good providers. Men increasingly feel trapped by this stereotype and want more time at home with their kids.

The breadwinner stereotype, however, can be harnessed for good. Paternity leave that pays men their full salary or close to it for time taken off work can lessen or eliminate the perception that a father on leave fails to fulfill his breadwinning role. Earmarking such leaves for fathers alone means forgoing leave creates unnecessary childcare costs for their families; responsible breadwinners do not fritter away money. Conversely, the focus on responsibility and the condemnation of shirking that are elements of the stereotype already can be refocused to include childcare work.

Paternity leaves can arrest the vicious circle that drives the paradox of parenthood. Even relatively short, *solo* leaves of about a month are enough to fundamentally equalize how men and women divide the labor of children, home, and work, and to help men escape the bonds of the breadwinner stereotype. Other countries' experiences show that once men take leave,

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27. See HARRINGTON ET AL., THE NEW DAD: CARING, COMMITTED AND CONFLICTED, *supra* note 22, at 15; Vivia Chen, *What a Man! He's Taking Paternity Leave!*, AM. LAW. (ONLINE) (Apr. 19, 2016), <https://www.law.com/americanlawyer/almID/1202755372711/What-a-Man-Hes-Taking-Paternity-Leave/> [<https://perma.cc/2K6N-T72U>].

28. Lauren Weber, *Why Dads Don't Take Paternity Leave*, WALL STREET J. (June 12, 2013), <https://www.wsj.com/articles/SB10001424127887324049504578541633708283670> [<https://perma.cc/J99G-ME6C>].

29. HARRINGTON ET AL., THE NEW DAD: CARING, COMMITTED AND CONFLICTED, *supra* note 22, at 16.

societal attitudes that require men to put work before family change remarkably quickly. Within a few years, stereotypes can flip—fathers who take paternity leave become the norm at work. Men who do may even be viewed as *better* workers than those who do not.<sup>30</sup> Thus, relatively long paternity leaves alone at home with the baby transform a father's role as caregiver and spouse and within a relatively short time period also transform stereotypes that have long constricted both men's and women's roles and opportunities.

The stage is set for this revolution in gender roles at work and home. This Article proceeds as follows. Part I introduces the problem of why the standard explanation of the partnership problem is unlikely to provide a fruitful solution and explains why the partnership problem is a problem for women and for men. Part II locates a significant source of the partnership problem at home, where a vicious circle of gender stereotypes causes dual-earner couples to collapse back into traditional roles after having children, despite their wanting to share paid work, housework, and childcare equally. This Part also explains that men want to shed their role as family breadwinner but are having difficulty doing so. Part III makes the case that solo paternity leaves of a month or more disrupt the vicious circle of gender stereotypes that forces women out of challenging careers; it also describes how paternity leave schemes could be designed to induce American men to take long, solo paternity leaves.

## II. GENDER (PARTLY) TRANSFORMED

Most researchers have identified law firms as the source of the partnership problem and have therefore urged law firms to restructure themselves to remove barriers to women's advancement. This Part shows that law firms do indeed perpetuate the problem, and to that extent this explanation is correct. However correct it may be, this explanation cannot provide an effective solution because it neglects the singular role that men's gender script plays in thwarting women's progress at work. Instead, an effective solution to the partnership problem must take advantage of the fact that women's failure to advance to partnership and to leadership positions serves neither women nor men's interests or desires. Freeing men from their gender roles will pave the way for women's progress at work.

### A. *The Current Explanation of the Partnership Problem*

Many legal writers, scholars, sociologists, and business and legal researchers have labored to get to the root cause of the persistently low rates of women making partner and becoming leaders in law or other fields. In general,

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30. See *infra* text accompanying notes 305–21 (discussing changes in attitudes following Germany's adoption of non-transferable leave for fathers).

these articles and reports have diagnosed the problem as existing within law firms, in both the biases of decisionmakers and the structure of practice.

First, cognitive biases about women and mothers<sup>31</sup> combined with men's "in-group" preference for other men impede women lawyers' progress by affecting their performance and the perception of their performance in several different ways.<sup>32</sup> These biases hinder women from getting the plum assignments, and thus the professional experience, necessary to make progress toward partnership.<sup>33</sup> How law firms assess associate and partner performance provide fertile ground for these biases.<sup>34</sup> Open-ended reviews that rely on subjective and underspecified criteria mean that women get less credit for good work that they do, and they are criticized more than men, particularly for being

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31. Cf. Joan C. Williams, *Hacking Tech's Diversity Problem*, HARV. BUS. REV. (2014), <https://hbr.org/2014/10/hacking-techs-diversity-problem> [<https://perma.cc/R62M-B2MX>] ("40 years of social science have taught us that [cognitive, gender] biases will be perpetuated unless they're intentionally interrupted, and people who think they work for meritocracies are less likely to do what it takes to interrupt them.").

32. Two publications in particular stand out for their diagnosis of the problems facing women associates and for its identification of possible solutions to the problem. First, Anna Jaffe et al., White Paper, Stanford Law School Women in Law Policy Lab Practicum, *Retaining & Advancing Women in National Law Firms* 13–16 (May 2016), <https://law.stanford.edu/publications/retaining-and-advancing-women-in-national-law-firms/> [<https://perma.cc/M7WE-3XTN>] [hereinafter White Paper], exhaustively summarizes and expands upon existing research into the myriad forces that have derailed women from ascending to law firm partnership and if there to top leadership positions within those partnerships. Second, Joan Williams and Rachel Dempsey's book, *What Works for Women at Work*, is also an invaluable resource for identifying and changing structures and practices that impede women's professional success and exclude them from positions of power and leadership. JOAN C. WILLIAMS & RACHEL DEMPSEY, *WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW* (2014).

33. White Paper, *supra* note 32, at 13 ("Biases against women lawyers also affect the allocation of work assignments to them, because partners may assume that a woman lawyer cannot handle a high-status project as well as a male colleague could, or that she is too busy with familial commitments."). Nancy J. Reichman and Joyce S. Sterling also argue,

The distribution of assignments is socially constructed in a world where gender stereotypes still operate. Thus, when an assignment is not given to a woman because someone thinks she will not want to travel or because someone thinks the client is too tough or too sexist for her to handle, or simply because she is pregnant, that woman is not given equal opportunity to be productive.

Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27, 62–63 (2004).

34. See, e.g., PEERY, *supra* note 16, at 3–4 (explaining that the lack of formal and standardized criteria for business succession means that it is "ripe for the influence of biases that may lead" women to be "disfavored in the [business succession] process" and end up with smaller books of business); White Paper, *supra* note 32, at 12 (arguing that implicit cognitive biases "are continually used, whether formally or informally, in evaluations of female lawyers" from hiring, performance evaluation, assignments, mentoring, and promotion).

abrasive.<sup>35</sup> Lukewarm or lousy evaluations and less challenging work assignments can discourage some women from giving it their all to make partner.<sup>36</sup>

Second, cognitive biases undermine the perception of women's competence and commitment. Women, whether or not they have children, labor under the suspicion that they are not fully committed to hard work.<sup>37</sup> If a woman has children, however gung ho or hard working a woman is, motherhood can simply derail careers.<sup>38</sup> Mothers suffer from the perception that they are "less committed to the firm."<sup>39</sup> "Motherhood is" also "perceived as incompatible with" the capacity for hard work<sup>40</sup> or leadership.<sup>41</sup> Mothers are considered less

35. White Paper, *supra* note 32, at 28 (reporting that women are two-and-a-half times as likely as men to be criticized for "having an overly aggressive communication style").

36. *Id.* (stating that "women who 'voluntarily' leave firms may thus be responding to the message that partnership is unavailable and so 'tailor their aspirations to what they believe is available to them.')" (quoting Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 299 (1995)); Reichman & Sterling, *supra* note 33, at 70–71 (arguing that the dearth of challenging assignments can lead women to quit their firms, which only reaffirms the stereotype that women are less committed to the law than men are); see Joan C. Williams & Marina Multhaup, *For Women and Minorities to Get Ahead, Managers Must Assign Work Fairly*, *HARV. BUS. REV.* (Mar. 5, 2018), <https://hbr.org/2018/03/for-women-and-minorities-to-get-ahead-managers-must-assign-work-fairly> [https://perma.cc/JH2A-D5XS] (concluding that "if you're stuck taking the notes or making the slide deck for someone else's presentation, how can you show your stuff, get promoted, get that raise, rise to the top[,] [a]nd how will you find your job enjoyable and engaging if you never get a chance to do the exciting work?"). McKinsey's survey of women in law firms found that nearly half of women (and fewer than 10% of men) believed their sex had kept them from getting "a raise, promotion, or chance to get ahead" and that over 60% of women believed that being a woman would make it harder in the future for them to advance. BRODHERSON ET AL., *supra* note 9, at 7.

37. White Paper, *supra* note 32, at 20. The double edge of this bias is that "women without family relationships" seem "'not quite normal' and 'not quite leadership material.'" *Id.* at 14 (quoting DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 67 (2015)).

38. Williams & Multhaup, *supra* note 36 ("[M]others come back to work [from maternity leave] to find that their best projects and clients have been reassigned to colleagues."); *id.* (quoting a woman attorney who participated in their study who said, "I made partner in the shortest time of any female. Things were great. I had my son. I worked part-time during leave and came back in nine weeks. My work was gone. It has taken two years and a change in focus to get back to the level I was at."). Mothers who do not step back from work may get flak for that, too. Superiors and coworkers may criticize "their parenting" (or lack thereof) or consider such women "broken" because they lack "the gene that drives women back . . . home[,] where . . . mothers belong." WILLIAMS & DEMPSEY, *supra* note 32, at 128.

39. White Paper, *supra* note 32, at 14. The double edge of this bias is that women without kids seem "'not quite normal'" and "'not quite leadership material.'" *Id.*

40. WILLIAMS & DEMPSEY, *supra* note 32, at 133 (quoting Stephen Bernard).

41. *Id.* at 133–34.

competent than childless women<sup>42</sup> or than men with or without children. Fatherhood, in contrast, increases the perception of a man's work commitment<sup>43</sup>—people just assume fathers *need* to work to support their families, regardless whether that is actually the case.<sup>44</sup> Woe betide women who work part-time because they are stigmatized for doing so.<sup>45</sup> Women who try “to reduce their schedule or inject flexibility into their working lives is immediately viewed as someone who does not ‘get’ how competitive the [legal] market is.”<sup>46</sup>

Third, law firms task women with less substantive and lower profile work. They burden women with more “support work,”<sup>47</sup> such as serving on committees that are “time intensive” but not necessarily valued, like recruitment and associate mentorship committees<sup>48</sup> or tasks like taking notes in meetings.<sup>49</sup> (At least we have moved beyond making coffee.) Women who do not volunteer for this kind of support work may be disparaged as “not a team player” or conceited.<sup>50</sup> Conversely, law firms give men more “high-profile”

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42. *Id.* at 132–33 (discussing how research demonstrates mothers are perceived as less competent, able, and committed to work than men and childless women); *id.* at 5 (“New research shows that motherhood is the strongest trigger for bias: women with children are . . . half as likely to be promoted[] and earn a lot less money than women with identical resumes but without children.”).

43. “[F]athers are assumed to be breadwinners with families to support[] [and] they are stereotyped as *more* committed to their jobs.” *Id.* 147 (emphasis added).

44. Reichman & Sterling, *supra* note 33, at 71.

45. White Paper, *supra* note 32, at 23. Williams and Dempsey relate the story of one woman who decided to work part-time at her law firm because she had a small child. It was a “career bender,” she moved to a different law firm, and though she never worked part time at *that* firm, “she [had] trouble shaking the stigma” of having taken part-time at her *prior* law firm. WILLIAMS & DEMPSEY, *supra* note 32, at 131.

46. See Savita Kumra, *Busy Doing Nothing: An Exploration of the Disconnect Between Gender Equity Issues Faced by Large Law Firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them*, 83 FORDHAM L. REV. 2277, 2286 (2014) (quoted in White Paper, *supra* note 32, at 23).

47. The National Association of Women Lawyers has found that “[w]omen equity partners and associates completed more non-billable hours, which includes administrative service and other service to the firm hours, diversity and inclusion hours, trainings, etc., as well as some or all pro bono hours.” PEERY, *supra* note 16, at 9.

48. Reichman & Sterling, *supra* note 33, at 67 (reporting results of their study of midcareer lawyers); see also Williams & Multhaup, *supra* note 36 (“Studies . . . show that women and people of color do more office housework and have less access to glamour work than white men do.”).

49. Sometimes that support work is menial, indeed. See Williams & Multhaup, *supra* note 36 (quoting a woman lawyer who responded to their survey, a female lawyer: “‘Despite superior educational credentials and being a lateral transfer from a far more prestigious firm, I was given an appropriate title but slotted into the subservient, support role (i.e., expected to take notes, get coffee, hang men’s jackets, etc.)’”).

50. See *id.*

assignments<sup>51</sup> and more substantive, challenging work that to help them progress toward partnership.<sup>52</sup>

Fourth, “in group” preference and the dearth of women partners to serve as mentors mean that women have a harder time making the professional connections within the firm<sup>53</sup> that would help them get challenging work assignments, develop business,<sup>54</sup> and fight for business credit.<sup>55</sup> When women do make partner, these biases combined with law firm structure and the absence of objective criteria for evaluating performance reduce<sup>56</sup> women’s income and the credit they get for bringing in business.<sup>57</sup>

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51. *Id.*

52. *Id.*; see also BRODHERSON ET AL., *supra* note 9, at 9 (finding that “female attorneys are . . . 20 percent less likely than their male counterparts to credit their supervising attorney or partner with providing . . . opportunities” for “growth and development”).

53. White Paper, *supra* note 32, at 32–33 (arguing that women are less likely to find informal mentors that are even more important to an associate’s progress toward partner); see also MCKINSEY & CO., WOMEN IN THE WORKPLACE 10 (2017), [https://womenintheworkplace.com/Women\\_in\\_the\\_Workplace\\_2017.pdf](https://womenintheworkplace.com/Women_in_the_Workplace_2017.pdf) [https://perma.cc/A2JP-7VGU] (reporting results of a study finding women “are less likely to receive advice from managers and senior leaders on how to advance[, which] is important” because “employees who receive it are more likely to say they’ve been promoted in the last two years.”); *id.* at 11 (finding women have “less frequent interactions with managers and senior leaders” and more frequent interactions “are linked to greater ambition”).

54. For example, women are more dissatisfied than men with their opportunities to develop strong relationships with clients, and they believe this is likely to keep them from making partner. BRODHERSON ET AL., *supra* note 9, at 7–8. Furthermore, “[m]ale clients seem to prefer male partners and choose fewer women to lead matters than might be predicted.” See Vivia Chen, *Male Clients Disfavor Women Partners*, AM. LAW. (Jan. 17, 2018), <https://www.law.com/americanlawyer/sites/americanlawyer/2018/01/17/male-clients-disfavor-women-partners/> [https://perma.cc/R7GY-SPKJ]. In contrast, “Women [in-house counsel] are trying to throw business to women.” *Id.* (quoting Lisa Hart Shepherd). As the *New York Times* observed, “the ‘old boys network’ still has an outsize influence” on business generation. Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, N.Y. TIMES DEALBOOK (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html> [https://perma.cc/2WAB-DWJ7].

55. White Paper, *supra* note 32, at 26; see RIKLEEN, *supra* note 2, at 10 (reporting that having fewer women on compensation committees exacerbates the pay gap between men and women partners).

56. White Paper, *supra* note 32, at 27 (“The stereotypes faced by women lawyers . . . are often compounded by the subjective nature of performance evaluations, which are influenced by confirmation bias.”).

57. *Id.* at 24–27; see also *id.* at 47 (arguing that an informal system for allocating business credit (and thus compensation) hurts women because “they are often penalized for acting too aggressive or boastful about their work.”).

In short, researchers have defined the partnership problem as one in which law firms and the legal profession<sup>58</sup> have in adapting to the reality that women are here to stay in law and in recognizing how valuable women are to the success of their firms (which they most definitely are).<sup>59</sup> On this account, the current structure of law firms and legal work exclude women from powerful and prestigious positions and reward those women who do grab the brass ring

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58. See Williams, *supra* note 31 (“When an organization lacks diversity, it’s not the employees who need fixing. It’s the business systems.”); cf. Williams & Multhaup, *supra* note 36 (arguing that businesses “need to try . . . making systemic changes to the ways businesses are run. . . . [E]ven small tweaks to . . . hiring, promotions, [and] compensation[] can lead to big changes.”).

59. The business case for gender diversity is robust. *First*, clients are insisting on it. Corporate counsel are increasingly demanding that their outside counsel field diverse legal teams with women and minority attorneys in leadership positions on those teams. Jacqueline Bell, *Women See Another Year of Slow Gains at Law Firms*, LAW360 (July 23, 2017), <https://www.law360.com/articles/946586/women-see-another-year-of-slow-gains-at-law-firms> [https://perma.cc/CTQ4-2M77]. In particular, many high-profile companies such as Facebook, MetLife, HP, Microsoft, 3M, and Wal-Mart are actively reviewing the diversity of legal teams and rewarding law firms that meet certain diversity goals. See *Legal Department (AKA Clients) Efforts Designed to Drive Outside Counsel Diversity*, DIVERSITY LAB, <http://www.diversitylab.com/knowledge-sharing/clients-push-for-diversity/> [https://perma.cc/VJ5T-6SQ6] (last updated July 8, 2017). In 2016, “more than 20 general counsel from companies such as American Express, MassMutual, and United Airlines sent a letter to their fellow Fortune 1000 general counsel asking that they” hire law firms based on their success in fielding legal teams with women and minorities in leadership positions. Bell, *supra*. “[W]omen and minority in-house counsel” also “routinely recommend their existing law firms with good diversity records to others within their network.” Roy S. Ginsburg, *Diversity Makes Cents: The Business Case for Diversity*, AM. BAR ASS’N (Apr. 11, 2014), [https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014\\_sac/2014\\_sac/diversity\\_makes\\_cents.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014_sac/2014_sac/diversity_makes_cents.authcheckdam.pdf) [https://perma.cc/VRM4-B6RV]; see also Anne Marie Ruff, *Client Demands Strengthen the Business Case for Law Firm Diversity*, DAILY J. NEWSWIRE (2014), [https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014\\_sac/2014\\_sac/diversity\\_makes\\_cents.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014_sac/2014_sac/diversity_makes_cents.authcheckdam.pdf) [https://perma.cc/5FMG-L9Y6] (“Law firms are looking less and less like the clients they work for. Those firms that recognize they need diversity will be ahead of the pack . . . . If your firm doesn’t recognize this now, in a few years you will find other firms already at the table eating your lunch . . . .”) (quoting Susan Hackett, senior vice president and general counsel of the Association of Corporate Counsel). *Second*, teams made up of diverse persons think better, prepare better, are more creative, and come up with better solutions than homogenous teams. Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> [https://perma.cc/8Z8Q-74C4]. *Third*, companies with women in leadership positions are more profitable than those without. See Marcus Noland et al., *Is Gender Diversity Profitable? Evidence from a Global Survey 7* (Peterson Inst. for Int’l Econ., Working Paper No. 16-3, Feb. 10, 2016) (reporting results of a global survey of business firms that finds that among companies “a more diverse leadership team tends to deliver better outcomes on average” for a business and that “the presence of female executives is associated with unusually strong firm performance.”).



of partnership less generously than men. These studies make excellent suggestions for changing law firm structures and policies to make women's progress a top priority in the legal profession,<sup>60</sup> to ensure women get more challenging work and relevant experience,<sup>61</sup> to dampen the effect of cognitive biases,<sup>62</sup> and to help *women* resolve work-family conflict.<sup>63</sup> Law firms should implement these suggestions.

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60. In particular, Anna Jaffe et al. recommend first, that law firm leaders take visible steps to show that gender diversity is a priority to them and to the firm and use their power within the firm to make concrete changes to promote women to leadership positions. White Paper, *supra* note 32, at 40–41. Reichman and Sterling recommend that law firm leaders must make “the business case for pay equity, advancement, and retention of women”—diverse businesses tend to make more money and if women leave, attrition costs firms hundreds of thousands of dollars. Reichman & Sterling, *supra* note 33, at 74. Second, law firms must make partners accountable for diversity—for example, tracking that partners distribute work assignments to men and women equitably, take women on pitches, informally mentor women, and actually support and promote women in greater proportion. To create real incentives, firms should monetarily reward these partners when they do so. White Paper, *supra* note 32, at 42, 50. Third, appoint a “critical mass” of women to key leadership positions, especially compensation committees. *Id.* at 42–44. Fourth, create objective criteria for evaluation, provide regular feedback, and monitor that feedback for bias. *Id.* at 49–50. Fifth, monitor whether work is being distributed among associates to ensure that they are getting the opportunities necessary to succeed, track associates' progress toward partnership by creating lists of particularized skill sets and experiences that associates need to have and to accomplish, and ensure that associates are making steady progress towards attaining these skills and experiences. *Id.* at 45–46, 50. Sixth, make compensation transparent. *Id.* at 46–47; *see also* Reichman & Sterling, *supra* note 33, at 67.

61. *See, e.g.*, Williams & Multhaupt, *supra* note 36 (making concrete suggestions to ensure that women get their fair share of “plum assignments” and men get their fair share of “support work”).

62. *See, e.g.*, White Paper, *supra* note 32, at 49–51 (stating firms should adopt bias interrupters to combat the effect of gender biases that impede the advancement and retention of women); MCKINSEY & CO., *supra* note 53, at 20–30 (providing a “road map to gender equality” for businesses, including law, to follow to dampen cognitive biases to ensure women's promotion and success); Reichman & Sterling, *supra* note 33, at 75 (suggesting that people openly discuss the prevalence of cognitive biases to dispel their power); Williams, *supra* note 31 (detailing several “bias interrupters” that can stop the gender discriminatory effect of cognitive biases).

63. *See, e.g.*, White Paper, *supra* note 32, at 48–49 (stating law firms should enable flexible work arrangements, like virtual offices, which are “touted as a more flexible option for female attorneys” and adopt a team-based approach to staffing cases, which would reduce the need for 24/7 availability and “ensure[] that . . . lawyers who work part-time” or “have personal commitments, goals or activities outside of work” are not leaving clients in the lurch or matters unattended to); BRODHERSON ET AL., *supra* note 9, at 11 (“Law firms must make [part-time and flex-time] programs culturally acceptable and even encourage attorneys to take advantage of them.”); *cf.* Jennifer Garcia-Alonso et al., *Getting the Most from Your Diversity Dollars*, BOS. CONSULTING GROUP (June 21, 2017), <https://www.bcg.com/en-us/publications/2017/people-organization-behavior-culture-getting-the-most-from-diversity-dollars.aspx> [<https://perma.cc/C8GM-V4JD>] (recommending that firms permit flexible working models for women after their maternity leaves and to help women posted overseas find “housing, childcare, [and] schools”).

The problem is that law firms have known about these problems for decades.<sup>64</sup> In 1995, Professor Cynthia Fuchs Epstein exhaustively documented most of the problems facing women in the legal profession that I have detailed here.<sup>65</sup> In 2001, in a report to the American Bar Association, Professor Deborah Rhode urged law firms to permit more flexibility in work and hours<sup>66</sup> arguing that the model of long hours and constant availability was not essential to law practice.<sup>67</sup> In 2000, Professor Joan Williams decried “ideal worker” norms that led to discrimination against women<sup>68</sup> and trapped men in jobs that demanded unyielding dedication.<sup>69</sup> They were each dead right in their diagnoses and in many of their prescriptions.

Yet the proportion of women partners remains stuck right around 20%. As the National Association of Women Lawyers has observed, “despite the near universal adoption of Women’s Initiatives aimed at improving the position of women in the law firm, women’s progress toward equity partnership in the law firm has changed relatively little over the last 10 years.”<sup>70</sup>

The next Sections will show that the current explanation of the partnership problem is correct that women’s ambitions, accomplishments, and desires cannot be blamed. The current explanation, however, overlooks how men as husbands and fathers contribute to women’s thwarted ambitions. Rather than being a source of despair, this recognition points the way to more effective solutions: Men are eager to shed traditional gender norms, which they find to be constraining and limiting.

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64. See, e.g., Epstein et al., *supra* note 36, at 357; DEBORAH L. RHODE, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE 23–24 (2001), <http://womenlaw.stanford.edu/pdf/balanced.lives.pdf> [<https://perma.cc/U8QT-BCB4>]. Cf. generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) (decrying as unnecessary and unhealthy a work culture that celebrated an ideal worker who was constantly available whenever work demanded it).

65. See generally Epstein et al., *supra* note 36 (detailing a profession rife with gender bias and stereotyping that stacked the deck against women making partner, denied women opportunities to become rainmakers and get credit for bringing in business, stuck women with inferior work opportunities, and evaluated women’s work unfairly).

66. RHODE, *supra* note 64, at 23–24.

67. *Id.* at 14 (arguing that the “problems of oppressive schedules” are not “an inevitable byproduct of effective client representation”).

68. WILLIAMS, *supra* note 64, at 5.

69. *Id.* at 3–4.

70. PEERY, *supra* note 16, at 11.

### B. *Women Are at Least as Educated and Ambitious as Men*

We are poised for a revolution in gender roles at home and at work, and all of the elements for this revolution are in place in the United States.

#### 1. Women are more highly educated than men

Millennial women are more highly educated than millennial men. In 2015, the U.S. Census Bureau reported that among those aged 25 to 34, a significantly larger proportion of women than men had completed at least a bachelor's degree (38% of women and 30% of men).<sup>71</sup> In 2015, women earned more than half of the PhDs<sup>72</sup> and almost 60% of the master's degrees.<sup>73</sup> Women have earned the majority of PhDs since 2009 and the majority of master's degrees since 1981.<sup>74</sup> Men still earn the majority of MBAs (56%). Most relevant for our purposes, men still earn the bare majority of law degrees (52%).<sup>75</sup>

#### 2. Women are as ambitious as men

As women's levels of education approach or exceed men's, women's work ambitions have grown to match men's. The Pew Research Center's recent survey of young people aged 18 to 32 found that men's and women's career ambitions and desires had largely converged. About a quarter of men and women said that opportunities for promotion and advancement were extremely important to them.<sup>76</sup> Only about one in five of either men or women thought

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71. Kurt Bauman & Camille Ryan, *Women Now at the Head of the Class, Lead Men in College Attainment*, U.S. CENSUS BUREAU (Oct. 7, 2015), <https://www.census.gov/newsroom/blogs/random-samplings/2015/10/women-now-at-the-head-of-the-class-lead-men-in-college-attainment.html> [https://perma.cc/2FV4-UTBR].

72. HIRONAO OKAHANA ET AL., GRADUATE ENROLLMENT AND DEGREES: 2005 TO 2015, at 43 tbl.B.25 (2016) <https://cgsnet.org/ckfinder/userfiles/files/Graduate%20Enrollment%20%20Degree%20Fall%202015%20Final.pdf> [https://perma.cc/AE9R-WL6S].

73. *Id.* at tbl.B.24.

74. Mark J. Perry, *Women Earned Majority of Doctoral Degrees in 2014 for 6th Straight Year, and Outnumber Men in Grad School 136 to 100*, AM. ENTERPRISE INST. (Sept. 17, 2015, 11:15 AM), <http://www.aei.org/publication/women-earned-majority-of-doctoral-degrees-in-2014-for-6th-straight-year-and-outnumber-men-in-grad-school-136-to-100/> [https://perma.cc/JY3V-QNBH].

75. Deborah Jones Merritt and Kyle McEntee report some troubling statistics about women in law school. Though women made up just under 50% of law students in 2015, women made up 46% of the students at top 50 law schools. Deborah Jones Merritt & Kyle McEntee, Research Summary, *The Leaky Pipeline for Women Entering the Legal Profession* 2 (2016), [http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary\\_Nov-2016.pdf](http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary_Nov-2016.pdf) [https://perma.cc/LK7V-YLY5].

76. PEW RESEARCH CTR., ON PAY GAP, MILLENNIAL WOMEN NEAR PARITY—FOR NOW: DESPITE GAINS, MANY SEE ROADBLOCKS AHEAD 38 (Dec. 11, 2013), [http://www.pewresearch.org/wp-content/uploads/sites/3/2013/12/gender-and-work\\_final.pdf](http://www.pewresearch.org/wp-content/uploads/sites/3/2013/12/gender-and-work_final.pdf)

high pay was extremely important. In just one respect, men tend to be more ambitious at work. Somewhat more men (70%) than women (61%) expressed ambition to be a boss or top manager.<sup>77</sup> Even so, the difference is relatively small, and the gap is closing.<sup>78</sup> Mirroring these societal changes are women's stated ambitions in law. As associates, women are as or more ambitious than men in seeking promotion; but women are less "excited" about making partner than men are.<sup>79</sup> (This fact is hardly surprising given the barriers to advancement that women perceive they face, as detailed in the prior Section).

A 2015 study by the Boston College Center for Work and Family also uncovered converging ambitions and desires among twenty-two to thirty-five year old, college educated professionals.<sup>80</sup> Seventy-four percent of these young men and 67% of these women had a "strong desire to advance to a position in senior management."<sup>81</sup> Eighty-two percent of women wanted "to advance to a position where they can have a greater influence on policy decisions" within their firms and organizations.<sup>82</sup> Nearly equal numbers of men (82%) and women (80%) agreed that they were "willing to put in a great deal of effort beyond that normally expected in order to help this organization be successful."<sup>83</sup>

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[<https://perma.cc/85GG-7C34>] (reporting that 25% of men and 22% of women said that promotion and advancement were extremely important in a job).

77. *Id.* at 42.

78. *Id.* at 10. Our assumptions that Gen-X and Baby Boomer men and women value work and home differently may not be borne out by reality. A study of Harvard Business School graduates revealed that once they were in their 40s and 50s, men and women from those generations tended to have extremely similar values about work and home. In particular, "nearly 100%, regardless of gender, said that 'quality of personal and family relationships' was 'very' or 'extremely' important" to them. Robin J. Ely et al., *Rethink What You "Know" About High-Achieving Women*, HARV. BUS. REV. (Dec. 2014), <https://hbr.org/2014/12/rethink-what-you-know-about-high-achieving-women> [<https://perma.cc/M9WU-62M3>]. Women and men of these generations also agreed about what was important in their careers. In fact, women valued "opportunities for career growth and development" more highly than men. Men and women in equal proportions ranked "meaningful and satisfying" work and "professional accomplishments," as very or extremely important. *Id.*

79. BRODHERSON ET AL., *supra* note 9, at 5 ("Across the associate levels, women express a strong desire for promotion to the next level," however they "are less excited about making partner" than men).

80. BRAD HARRINGTON ET AL., HOW MILLENNIALS NAVIGATE THEIR CAREERS: YOUNG ADULT VIEWS ON WORK, LIFE AND SUCCESS 5 (2015), <https://www.bc.edu/content/dam/files/centers/cwf/research/publications/researchreports/How%20Millennials%20Navigate%20their%20Careers> [<https://perma.cc/54KF-YUGH>].

81. *Id.* at 31.

82. *Id.*

83. *Id.* at 12 chart 5, 31.

The idea that women generally and women lawyers particularly want to opt-out of demanding (and rewarding) careers is a myth.<sup>84</sup> Upper-middle and upper-class women with the means to stay home want to keep their jobs. Ten years on, when Judith Warner revisited Lisa Belkin's explosive (and highly unrepresentative) 2003 interviews in the "Opt-Out Revolution"<sup>85</sup> she found that the women Belkin had interviewed were deeply ambivalent about having left work to stay at home full-time.<sup>86</sup> Most were struggling to find their way back into the workforce.<sup>87</sup> In 2003 they had viewed the decision to stay home as a choice freely embraced. Ten years on, they realized that they had been *pushed* out of their professions.<sup>88</sup> They rued their loss of financial independence, power, and status.<sup>89</sup> They felt uncomfortable that they had slid into very traditional, gendered marriages.<sup>90</sup>

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84. According to McKinsey & Co.,

Women and men also have similar intentions to stay in the workforce. Roughly 60 percent of all employees plan to remain at their companies for five or more years. Moreover, among those who are planning to leave, about 80 percent intend to find a job elsewhere and remain in the workforce. Notably, just as many men as women say they'll leave to focus on family, and the number that do is remarkably low: 2 percent or less.

MCKINSEY & CO., *supra* note 53, at 8. Furthermore, women who do leave the labor force after having children tend to have high job satisfaction, and indeed on some metrics, they feel more satisfied with their jobs. Ilyana Kuziemko et al., *The Mommy Effect: Do Women Anticipate the Employment Effects of Motherhood?* 33 (Nat'l Bureau of Econ. Res., Working Paper No. 24740, June 21, 2018).

85. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG. (Oct. 26, 2003), <https://www.nytimes.com/2003/10/26/magazine/the-opt-out-revolution.html> [https://perma.cc/7Y2Z-QQ74].

86. Judith Warner, *The Opt-Out Generation Wants Back in*, N.Y. TIMES MAG. (Aug. 7, 2013), <https://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html> [https://perma.cc/L3WD-VB4X].

87. *Id.*

88. None wished they had stayed in their old high-powered jobs—managing work combined with the bulk of the responsibility for home and kids had been unmanageable. (For why this might be so, see *infra* Part III.) Given the demands they faced at home, they did regret that they had not had the option of “intellectually stimulating, respectably paying, advancement-permitting part-time work.” Warner, *supra* note 86.

89. “This is the perfect reason why you need to work. You don’t have to make a million dollars. You don’t have to have a wealthy lifestyle. You just always have to be able to at least earn enough so you can support yourself.” Warner, *supra* note 86 (quoting Sheila O’Donnel).

90. “I had the sense of being in an unequal marriage.” *Id.*; see also *id.* (reporting that women were “troubled by the gender-role traditionalism that crept into their marriages once they gave up work” because they had become junior partners in the marriages, discovered they were “uniquely endowed with gifts for laundry or cooking and cleaning” and also “sometimes had to ‘negotiate’ with [their] husband[s] to get money for child care”).

Confirming this anecdotal evidence is a Families and Work Institute study that finds that among women under thirty, those with children are just as ambitious as those without. About two-thirds of both women with kids and women without kids want jobs with *more* responsibility.<sup>91</sup>

This next Section describes the other part of the gender revolution—how men’s values and desires have converged with women’s.

### *C. Being the Family Breadwinner Makes Fathers Miss out at Home*

Millennial men have the least traditional notions about gender roles of any generation or at any time period. Only 34% of employed millennial men without children said they thought men should be breadwinners and women should be caregivers.<sup>92</sup> Men and women largely agree on work’s place in their lives and on the demands they feel at work. Only 22% of men and about 20% of women think “work should be the primary priority in a person’s life.”<sup>93</sup> Far fewer than half of men or women believe they have “to work more than 50 hours per week” to get ahead professionally.<sup>94</sup> Most men and women disagreed that an ideal employee is “one who is available 24 hours a day.”<sup>95</sup>

#### 1. The changing definition of a good father and the squeeze between home and work

Men’s and women’s attitudes are converging in another area, too—they both feel stress combining work and family. Nearly as many working fathers as working mothers say they have trouble balancing home and work responsibilities (half of fathers and 56% of mothers).<sup>96</sup> A significant plurality

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91. ELLEN GALINSKY ET AL., *TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND AT HOME* 2 fig.2 (rev. ed., 2011), <http://familiesandwork.org/downloads/TimesAreChanging.pdf> [<https://perma.cc/NZQ5-9NKE>] (based on 2008 data reporting that 67% of women 29 or under with children and 63% of those without children want a job with more responsibility, but this difference is not statistically significant).

92. *Id.* at 10 fig.8 (reporting based on 2008 data that only 40% of men and 37% of women agree that “it is better for all involved if the man earns the money and the woman takes care of the home and children”); *cf. id.* at 4 fig.4 (showing that women in 2008 and 2009 were much less likely than men to be unemployed).

93. Here, men and women largely agree: only 22% of men and 19.5% of women agreed with that statement. HARRINGTON ET AL., *HOW MILLENNIALS NAVIGATE THEIR CAREERS*, *supra* note 80, at 10 tbl.1.

94. Here, men and women largely agree: only 43% of men and 38% of agreed with that statement. *Id.*

95. *Id.*

96. KIM PARKER & WENDY WANG, *MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY* 2 (Mar. 14, 2013),

of working moms (40%) and dads (34%) report “always feel[ing] rushed.”<sup>97</sup> If we focus on the population most relevant to the partnership problem—dual earner couples—something very surprising emerges. More fathers (60%) than mothers (47%) reported “work-life conflict.”<sup>98</sup> Most fathers want to work fewer hours.<sup>99</sup>

Working fathers are probably feeling squeezed between family and home because white-collar men in managerial or professional positions define fatherhood differently today than in the past.<sup>100</sup> Men no longer believe being a good provider is the primary criterion for being a good dad.<sup>101</sup> Good fathers must provide for their families, but good fathers must also provide hands on physical and emotional care.<sup>102</sup> The breadwinner stereotype notwithstanding, fathers today see their “happiness, subjective well-being, and life satisfaction” as “more rooted in the[ir] family roles” than in “their work roles.”<sup>103</sup>

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[http://assets.pewresearch.org/wp-content/uploads/sites/3/2013/03/FINAL\\_modern\\_parenthood\\_03-2013.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2013/03/FINAL_modern_parenthood_03-2013.pdf) [<https://perma.cc/UWP6-4STE>].

97. *Id.* at 3.

98. GALINSKY ET AL., *supra* note 91, at 19 fig.15 (reporting 2008 data).

99. KERSTIN AUMANN ET AL., THE NEW MALE MYSTIQUE 11 (2011), <http://familiesandwork.org/site/research/reports/newmalemystique.pdf> [<https://perma.cc/7JHT-DBJT>].

100. See GALINSKY ET AL., *supra* note 91, at 19 (stating that the increase in work–family conflict among fathers “possibly reflects our finding that fathers in dual-earner couples are taking more responsibility for family work today than in the past”).

101. According to the Families and Work Institute, fewer than 30% of fathers put work priorities ahead of family. Indeed, a larger percentage of fathers put family ahead of work—36%—and 35% weight family and work equally. AUMANN ET AL., *supra* note 99, at 7.

102. HARRINGTON ET AL., THE NEW DAD: CARING, COMMITTED AND CONFLICTED, *supra* note 22 (reporting that nearly 70% of the white-collar, professionally employed fathers they surveyed saw their fatherhood responsibilities as “[b]oth caring for my child and earning money to meet his/her financial needs.”); see also Sara Raley et al., *When Do Fathers Care? Mothers’ Economic Contribution and Fathers’ Involvement in Child Care*, 117 AM. J. SOC. 1422, 1425 (2012) (“At the present time, the ideal is increasingly for a father not only to be an economic provider but also to be involved in the day-to-day care of his children and to be emotionally connected to his children—not distant and detached.”).

103. Simon B. Burnett et al., *Fathers at Work: A Ghost in the Organizational Machine*, 20 GENDER, WORK & ORG. 632, 634, 636 (2013); see also AUMANN ET AL., *supra* note 99, at 7 (reporting that fewer than 30% of fathers prioritize work over family life).

## 2. The downsides of being breadwinner for men (and the upsides for women)

Shouldering the breadwinner role even hurts men's "psychological well-being and health,"<sup>104</sup> according to recent study by Kristin Munsch. She found that "[m]en's psychological well-being and health were at their worst during years when they were their families' sole breadwinner."<sup>105</sup> "[D]ecoupling breadwinning from masculinity," on the other hand, benefitted men *and* women.<sup>106</sup> Both men and women's "psychological well-being . . . improves as [women] take on more economic responsibility" for supporting the family.<sup>107</sup>

As men have redefined what makes a good father, men and women with children increasingly want the same things from their jobs. Both men and women value workplace flexibility to spend more time with their children and families.<sup>108</sup> Fathers say they would prefer a job with a flexible schedule over one with high pay.<sup>109</sup> Roughly equal numbers of men (31%) and women (35%) ranked the ability to take time off to care for their children or family as an extremely important job characteristic (behind enjoyable work and job security).<sup>110</sup> Mothers and fathers in white collar positions agree on what matters at work—career growth opportunities, salary, job security, benefits, and work-life balance—though they rank order them somewhat differently.<sup>111</sup>

A Pew Research Center study of working mothers and fathers confirms mothers and fathers' agreement on what matters at work. According to Pew, eight in ten working mothers *and* fathers say job security is extremely important; and three quarters of working mothers and seven in ten working fathers say enjoying their work is extremely important.<sup>112</sup> In contrast, well less

104. *Being the Primary Breadwinner Is Bad for Men's Psychological Well-Being and Health*, AM. SOC. ASS'N (Aug. 19, 2016), <http://www.asanet.org/press-center/press-releases/being-primary-breadwinner-bad-mens-psychological-well-being-and-health> [<https://perma.cc/SZR8-UTPX>].

105. This study was based on 1997 to 2011 survey data from a nationally representative sample of married people between the ages of eighteen and thirty-two collected by the National Longitudinal Survey of Youth. *Id.*

106. *Id.*

107. *Id.*

108. Joseph A. Vandello et al., *When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility*, 69 J. SOC. ISSUES 303, 304 (2013) ("Workers increasingly desire a balance between work life and home life . . .").

109. PARKER & WANG, *supra* note 96, at 16–17.

110. PEW RESEARCH CTR., *supra* note 76, at 38.

111. BRAD HARRINGTON ET AL., THE NEW MILLENNIAL DAD: UNDERSTANDING THE PARADOX OF TODAY'S FATHERS 7 (2016) (more than 70% mothers and fathers ranking each of these attributes as "very important/extremely important" in selecting an employer).

112. PARKER & WANG, *supra* note 96, at 16.



than half of each say a high salary is extremely important (though more fathers than mothers say it is).<sup>113</sup> A larger proportion of both fathers and mothers—half of dads and seven in ten moms—say flexible schedules are extremely important.<sup>114</sup> In short, the breadwinner stereotype notwithstanding, men are not necessarily gunning for high pay and promotions while women are yearning to hang back.<sup>115</sup>

Being the primary breadwinner means fathers miss out at home, and they know it. More dads than moms yearn for more time at home. Almost half of working fathers feel like they spend “too little time” with their children,<sup>116</sup> despite the fact that they spend far more time with their kids than their fathers and their grandfathers did. Far more dads than moms want more time with the kids. Almost *twice as many* working dads than working moms felt they spent too little time with their kids.<sup>117</sup> Even compared to moms who work full time, dads are more likely to feel they spend too little time with their kids.<sup>118</sup> A father

113. Thirty percent of working moms and 40% of working dads say a high-paying job is extremely important. *Id.*

114. *Id.*

115. Explosive headlines last year trumpeted young men’s increasing desire to have wives who fulfilled traditional stereotypes. See, e.g., Stephanie Coontz, *Do Millennial Men Want Stay-at-Home Wives?*, N.Y. TIMES OPINION (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/opinion/sunday/do-millennial-men-want-stay-at-home-wives.html> [<https://perma.cc/XY4X-8DYF>] (reporting on General Social Survey data that showed that in 2014 only 52% of men ages eighteen to twenty-five disagreed that “[i]t is much better for everyone involved if the man is the achiever outside the home and the woman takes care of the home and family,” down nearly 30% from 1994). On closer examination, these headlines were all noise—statistical noise, that is. First, GSS data from 2016 showed that 89% of men in this very same age group now disagreed with the statement—higher than ever before. Second, the proportion of men in this age group who hold egalitarian views varies dramatically from GSS wave to GSS wave. The extremely small number of persons in this sample drives this variability—there are only about 60 to 100 men aged eighteen to twenty-five in this sample. Consequently, GSS statistics in for this group have a standard error of 6% to 8%. Emily Beam, *Adventures in Garbage Millennial Confirmation Bias*, SCATTERPLOT (Apr. 1, 2017), <https://scatter.wordpress.com/2017/04/01/adventures-in-garbage-millennial-confirmation-bias/> [<https://perma.cc/9FMA-H9ZN>]; see also Anne VanderMey, *Relax, Millennial Men Don’t Actually Want to Keep Women in the Kitchen*, FORTUNE (Apr. 1, 2017), <http://fortune.com/2017/04/01/millennial-men-gender-roles/> [<https://perma.cc/853B-7KQD>]. Focusing instead on the traditional definition of Millennials—persons aged 18–34—shows a general upward trend in the proportion of young men who disagree that men and women should shoulder traditional roles. See Beam, *supra*.

116. Kim Parker, *Working-Mom Guilt? Many Dads Feel It Too*, PEW RES. CTR. (Apr. 1, 2015), <http://www.pewresearch.org/fact-tank/2015/04/01/working-mom-guilt-many-dads-feel-it-too/> [<https://perma.cc/EB7Q-K9MG>].

117. The figure is 48% of working dads and 26% of working moms. *Id.*

118. PEW RESEARCH CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 35 (2015), <http://assets.pewresearch.org/wp->

in the Boston College Center for Work and Family's study of professional, white-collar workers put it,

Since I am the primary breadwinner with a demanding job, I need to focus much of my attention on work. This often leaves me feeling like I am not part of the "inner circle" of what is going on with my kids, which is hard. I miss out on a lot.<sup>119</sup>

### 3. The breadwinner stereotype is relaxing grip

Men's embrace of the breadwinner role is weakening. Younger, white-collar fathers are the most eager to let go, according to a 2016 report by the Boston College Center for Work and Family. This study focused on the attitudes of younger fathers and mothers in their twenties and thirties who held professional, fairly high-paying jobs for large companies. Dads were strikingly less willing to sacrifice their personal lives for career advancement than single men (16% of dads versus 40% of single men).<sup>120</sup> They were also much "less willing to relocate to advance their career[s]"<sup>121</sup> or judge their success by their salary<sup>122</sup> or in comparison to their peers.<sup>123</sup> These dads were three times as likely as those without kids to think that "their life outside of work was very or extremely important to their identity" and self-definition.<sup>124</sup> They were less likely to believe that work was very or extremely important to their identity.<sup>125</sup>

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content/uploads/sites/3/2015/12/2015-12-17\_parenting-in-america\_FINAL.pdf

[<https://perma.cc/87GP-4NVT>]. Suzanne Bianchi found that when hours are controlled for the difference disappears. Suzanne M. Bianchi, *Family Change and Time Allocation in American Families*, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 32 (2011). The 2015 Pew survey did control for full-time status, but other research suggests that full-time dads may work more hours than full-time moms, and that fact may account for the difference between the two findings. Regardless, however, the fact remains that fully half of working men feel as though they spend too little time with their children, a proportion that is equal to or larger than the proportion of working women who feel the same. *Id.*

119. HARRINGTON ET AL., THE NEW DAD: CARING, COMMITTED AND CONFLICTED, *supra* note 22, at 3.

120. HARRINGTON ET AL., THE NEW MILLENNIAL DAD: UNDERSTANDING THE PARADOX OF TODAY'S FATHERS, *supra* note 111, at 5. Millennial dads are, however, less likely than moms to sacrifice career advancement for family—among these full-time workers, 64% of dads and 82% of moms disagreed that "I want to advance in my career even if it means spending less time with my family or on my personal life." *Id.* at 10.

121. *Id.* at 5 (40% of dads and 58% of single men).

122. *Id.* (67% of dads versus 81% of single men).

123. *Id.* (28% of dads versus 51% of single men).

124. *Id.* at 10.

125. *Id.*

Today fathers and mothers agree that they would prefer a job with a flexible schedule to spend time with family over one with high pay.<sup>126</sup> Men and women's agreement on this point marks a huge change in men's traditional definition of a good family man.<sup>127</sup> "[B]eing the family's main provider" has for long been "a key component of the definition of masculinity."<sup>128</sup> The breadwinner stereotype has meant that men have to be "almost exclusively" devoted to career "to be perceived as a 'real man.'"<sup>129</sup>

Indeed, despite the pressures of the breadwinner stereotype, men's "happiness, subjective well-being, and life satisfaction . . . are more rooted in the family roles of men than their work roles."<sup>130</sup> Roughly equal numbers of men (31%) and women (35%) ranked the ability to take time off to care for their children or family as an extremely important job characteristic (behind enjoyable work and job security).<sup>131</sup>

#### 4. Home calls to men

Many men of this generation in white-collar jobs would be happy to stay at home with their kids. In the Boston College study of white-collar professionals,

126. Vandello et al., *supra* note 108, at 304 ("Workers increasingly desire a balance between work life and home life . . .").

127. Burnett et al., *supra* note 103, at 637 ("[F]athers are still widely assumed to be principally concerned with the iconic activity of breadwinning . . ."); *id.* at 642 (reporting that working fathers in study described that they were expected to have work, not family, as their primary focus); *see also* FRANCINE M. DEUTSCH, HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS 91 (1999); Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004); Fiona Shirani et al., "Why Aren't You at Work?": *Negotiating Economic Models of Fathering Identity*, 10 FATHERING 274, 275 (2012) (the ideal of men as family providers persists even as gender roles relax). English reflects this condemnation of men who do not work and who rely on women for support: unmarried men who live off of women are "gigolos," which is much more insulting than "mistress."

128. Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322, 322 (2012).

129. *Id.*; *see also* Adam B. Butler & Amie Skattebo, *What is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job-Performance Ratings*, 77 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 553, 560 (2004) ("[T]here is a societal expectation that men be achievement-oriented and internalize a strong work ethic . . ."); Scott Coltrane et al., *Fathers and the Flexibility Stigma*, 69 J. SOC. ISSUES 279, 279 (2013) ("[M]en were assumed to be directed toward paid work and civic engagement, fulfilling their family obligations by serving as good providers."); Julie Holliday Wayne & Bryanne L. Cordeiro, *Who Is a Good Organizational Citizen? Social Perception of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233, 236 (2003) ("[A] father's primary role is that of breadwinner[,] and . . . [t]raditionally, a 'good father' works long hours even if he must sacrifice time with his family so that he can provide for them financially.").

130. Burnett et al., *supra* note 103, at 634, 636.

131. PEW RESEARCH CTR., *supra* note 76, at 38.

“*over half* of Millennial dads . . . said they would be willing to consider being a stay-at-home parent if their spouse made enough money to support the family . . . .”<sup>132</sup> Significantly, *more dads than moms* said they’d be willing to stay home—51% of dads versus 44% of moms.<sup>133</sup> Reflecting their willingness to be stay-at-home dads, Millennial men say that a company’s paternity leave policy is very important to them when choosing a place to work.<sup>134</sup>

In sum, all of the pieces for a real revolution in men’s roles are in place. Women are poised to be equal breadwinners; men want to relinquish the responsibility. Men feel like they are missing out at home, and women want to work outside the home. Why we seem to be stuck enacting the same tired, gendered script is the subject of the next Part.

### III. THE COLLAPSE OF EGALITARIAN DUAL-EARNER COUPLES INTO TRADITIONAL ROLES

Women believe kids make it harder to succeed at work.<sup>135</sup> Men think it either will not affect their work or might well make success easier.<sup>136</sup> Millennial mothers are even less sanguine about the effect children will have on their careers—almost 60% of Millennial women say parenthood will make it harder to advance compared to about 20% of Millennial fathers.<sup>137</sup> Men and women are both right.

Many more women than men sacrifice career to accommodate the demands of home and family. According to Pew, 42% of women said that they had cut back on their work hours to care for a child or other family member (compared to 28% of men); 40% of women had taken a significant amount of time off from work (compared to a quarter of men), and one out of four women had quit their

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132. HARRINGTON ET AL., THE NEW MILLENNIAL DAD: UNDERSTANDING THE PARADOX OF TODAY’S FATHERS, *supra* note 111, at 7 (emphasis added).

133. *Id.*

134. BRAD HARRINGTON ET AL., THE NEW DAD: TAKE YOUR LEAVE 6 (2014) (finding that 93% of Millennial fathers said paternity leave was extremely, very, or somewhat important to them in choosing a job, up from 88% of Gen Xers).

135. A majority of mothers say that children make it harder to advance. PEW RESEARCH CTR., *supra* note 76, at 3, 11. The exact figures are 51% of mothers think kids make advancement harder, 46% think it makes no difference, and 2% think it makes it easier. Millennial mothers are even less sanguine about the effect children will have on their careers—59% of millennial women say parenthood will make it harder to advance (compared to 19% of Millennial fathers). *Id.* at 11.

136. 10% of fathers believe that having children makes it easier to succeed at work (compared to 2% of women). The vast, vast majority of fathers believe that it helps their career advancement or make no difference at all. *Id.*

137. *Id.* at 3, 11.

jobs, compared to one out of ten men.<sup>138</sup> Among persons who have taken time off or reduced their leave, about twice as many mothers than fathers believe that it has hurt their careers.<sup>139</sup> (Somewhat surprisingly, however, the vast majority of both think taking time off did not hurt their careers.)<sup>140</sup> Women are also twice as likely to work part time than men.<sup>141</sup> Women are more likely to think that working makes them worse parents.<sup>142</sup>

Other studies have documented how work becomes less rewarding for women after motherhood and how work pre-motherhood was already somewhat less rewarding for women anyway.<sup>143</sup> These forces make leaving law firms or stepping off the partnership track more likely. In keeping with my focus on men, that will not be my focus here.

Having a baby does not precipitate women lawyers' downshift at work. Most women in professional positions *return to work* after taking family leave.<sup>144</sup> Rather, many professional women quit or significantly cut back their hours *a few years later* when they are ground to dust by the crushing combination of towering parenting expectations, their own long work hours,

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138. *Id.* at 3, 11–12; *see also* Mareike Bünning, *What Happens After the 'Daddy Months'? Fathers' Involvement in Paid Work, Childcare, and Housework After Taking Parental Leave in Germany*, 31 EUR. SOC. REV. 738, 739 (2015) (citing Lyn Craig & Killian Mullan, *Parenthood, Gender and Work–Family Time in the United States, Australia, Italy, France, and Denmark*, 72 J. MARRIAGE & FAM. 1344 (2010)) (describing studies of the United States and Western European countries showing that “[b]y taking parental leave and reducing their working hours, mothers shift time from work to home after childbirth, whereas most fathers leave their time allocation unaltered.”).

139. PEW RESEARCH CTR., *supra* note 76, at 12.

140. *Id.* at 3, 12.

141. *Id.* at 15.

142. *Id.* at 3, 57 (reporting that 35% of mothers who reduced their hours believe it hurt their careers compared to 17% of fathers and 32% of mothers who took significant time off from work believe it hurt their careers compared to 18% of fathers).

143. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 9 (2012), <https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf> [<https://perma.cc/9ZG9-TQ2P>] (reporting that 32% of women of color and 39% of white women reported missing out on “desirable assignments”; 32% of women of color and 55% of white women reported having missed out on opportunities for “client development”; 46% of women of color and 60% of white women reported being denied formal and informal “networking opportunities”; 14% of women of color and 28% of white women reported being “denied advancement and promotion opportunities,” each of which women attributed to their sex); Azmat & Ferrer, *supra* note 17, at 1341 tbl.11 (women report that they are billing less because they are not assigned enough work to do).

144. Claudia Goldin & Lawrence F. Katz, *The Career Cost of Family*, GEO. L.: 2010 WORKPLACE FLEXIBILITY 12 (2010), [http://workplaceflexibility.org/images/uploads/program\\_papers/goldin\\_-\\_the\\_career\\_cost\\_of\\_family.pdf](http://workplaceflexibility.org/images/uploads/program_papers/goldin_-_the_career_cost_of_family.pdf) [<https://perma.cc/W7CK-B2HT>] (only 13% of professional women did not return to work after the birth of their first child).

their husbands' long work hours, and the feeling that they are falling short both at home and at work. This Section will discuss each problem.

### A. The “Intensive Parenting” Grind

Parents, particularly moms, feel enormous pressure to spend a great deal of time with their children. Over the last couple of decades, a new norm of “intensive” parenting has taken hold among middle, upper-middle, and upper class families, and it is particularly common in the families of “professional workers.”<sup>145</sup> “Intensive” parenting is the “‘concerted cultivation’ of children through organized leisure activities with intense parental involvement.”<sup>146</sup>

Ironically, intensive parenting took hold just as dual income families became the norm and women started graduating from law school (and other graduate programs) in numbers roughly equal to men.<sup>147</sup> Worse yet, the norm of intensive parenting runs rampant particularly among “highly educated women” “who have the highest earning potential and are also the most likely to work full-time.”<sup>148</sup> High-flying women “spend the most time in child care, particularly in educational and interactive forms of child care.”<sup>149</sup> In other words, women lawyers are among those women who feel the need to spend the most time with their children.

Intensive parenting takes an immense amount of time and energy—far more time than parents spent back in the heyday of stay-at-home moms. In 1965, mothers spent far *less* time with their kids than mothers do today. First, focus on just the amount of time today that parents spend doing things like feeding, bathing, clothing, taking kids to the doctor, playing with, or reading to their children.<sup>150</sup> Today, on average, moms and dads together spend an additional *hour and a quarter* a day—or nine hours more a week—than their 1965 counterparts.<sup>151</sup> Basic childcare, like feeding and bathing, does not drive the

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145. Youngjoo Cha, *Reinforcing Separate Spheres: The Effect of Spousal Overwork on Men's and Women's Employment in Dual-Earner Households*, 27 AM. SOC. REV. 303, 308 (2010).

146. *Id.*

147. Bianchi, *supra* note 118, at 26 (arguing that intensive parenting became the norm “at the very time that families increasingly had all adults in the paid workforce . . . .”); *id.* at 28 (“At the very time when mothers . . . could least afford to increase their time tending to children’s needs, because they were working more hours outside the home, that is exactly what they did do.”).

148. Raley et al., *supra* note 102, at 1426; *id.* at 1447 (finding that regardless of the hours they work, women spend about the same amount of time with their children).

149. *Id.*; *see also id.* at 1447 (finding that regardless of the hours they work, women spend about the same amount of time with their children).

150. Bianchi, *supra* note 118, at 26.

151. *Id.* at 27 tbl.1, 31 tbl.2 (showing time fathers and mothers spent caring for children from 1965 through 2008); *see also* Kuziemko et al., *supra* note 84, at 4 (“[L]arge majorities of mothers tell

increase. What has spiked is intensive interaction with kids—playing with them, reading to them, and helping them with homework.<sup>152</sup> Furthermore, one thing bears repeating—this hour and fifteen minutes a day is how much *more* time parents today spend per day with their kids than in 1965. The total time that parents spend with kids is much higher.

Mothers today spend 40% more time caring for children than 1965 mothers—fourteen hours a week in 2008 up from ten hours in 1965.<sup>153</sup> That is right. As mothers' average hours in paid work nearly tripled between 1965 and 2008,<sup>154</sup> the average woman spent 40% *more time* caring for her children.<sup>155</sup> Compared to 1965 moms, mothers today spend almost *three times* as many hours in the kinds of activities that typify “intensive parenting”—playing with, reading to kids, and helping kids with homework.<sup>156</sup>

By some estimates fathers have also *tripled* their time they spend in active, hands on care since 1965; they have doubled the amount of time they spend doing family related tasks (childcare, housework, and shopping).<sup>157</sup> Men do still spend less time caring for kids than women (eight hours per week compared to fourteen).<sup>158</sup> Men also do about ten hours less housework than women per

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survey takers that motherhood is harder today than for their own mothers and that they are more involved in their children's lives than their mothers were in theirs.”).

152. Bianchi, *supra* note 118, at 26.

153. *Id.*

154. *Id.* (reporting that mothers in 1965 spent eight hours doing paid work compared to twenty-three hours in 2008); *see also id.* at 27 tbl.1 (showing time mothers spent in paid work and caring for children from 1965 through 2008); *see also* EILEEN APPELBAUM ET AL., THE ECONOMIC IMPORTANCE OF WOMEN'S RISING HOURS OF WORK: TIME TO UPDATE EMPLOYMENT STANDARDS 8 tbl.2 (2014), <https://www.americanprogress.org/issues/economy/reports/2014/04/15/87638/the-economic-importance-of-womens-rising-hours-of-work/> [<https://perma.cc/X2XL-FGGQ>] (reporting that, based on Current Population Survey data, the median number of hours a mother worked in 2012 increased by 260% since 1979 from 600 to 1560 hours a year); *cf.* Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950–2050*, MONTHLY LAB. REV., May 2002, at 15, 22 tbl.4 (concluding that the gap between the labor participation rate for men and women age twenty-five to thirty-four—i.e., childbearing age—will shrink to 10% in 2015 from 50% in 1970 based on projections for 2015).

155. Bianchi, *supra* note 118, at 27 tbl.1 (reporting that in 1965 women spent 10.2 hours caring for children compared to 13.9 hours in 2008).

156. *Id.* at 26; *see also* Kuziemko et al., *supra* note 84, at 4 (finding that “associated with child care beyond infancy has been rising, especially for educated mothers.”).

157. Bianchi, *supra* note 118, at 31 tbl.2 (showing fathers' time in household related tasks from 1965 through 2008); PARKER & WANG, *supra* note 96, at 27 (“Fathers have nearly tripled the time they spend with their children (from 2.5 hours in 1965 to 7.3 hours in 2011).”).

158. Bianchi, *supra* note 118, at 27 tbl.1, 29 tbl.2.

week.<sup>159</sup> But as the number of hours a mother spends in paid work increases, so too does the amount of childcare a father performs.<sup>160</sup>

### B. *Women Shield Their Husbands' Breadwinner Status*

#### 1. "Intensive parenting" and the gendered division of labor

Once dual career couples have a child, an unequal division of care work gets established very quickly. A vicious circle, driven by the norm of intensive parenting, the breadwinner stereotype, a husband's high earnings and dedication to his work, and a woman's belief that her husband's work is more important than hers, means that families often put a husband's work first.<sup>161</sup> A woman then begins to shelter her husband from housework and childcare. The truth remains that while dads today spend much more time on housework and taking care of kids than they ever have, "mothers overwhelmingly organize, plan, orchestrate, and worry about children" more than fathers do, and this is true regardless of race, social class, or culture.<sup>162</sup>

#### 2. Kids and housework

A recent study by Ohio State University sociologists of dual earner, college educated, new parents sheds light on how couples divide labor before and after having kids. In general, couples who had split paid work and housework evenly before kids saw their relationships devolve into an inegalitarian arrangement once their child was born. The unequal division of labor at home made it exceptionally hard for women to devote themselves to full time work.<sup>163</sup>

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159. *Id.*

160. *Id.* at 26 (citing American Time Use Survey data).

161. STONE, *supra* note 24, at 64 (explaining that her study showed that couples with kids defaulted to gender stereotypical arrangements in which a dad's career was relatively more important than a mom's).

162. Andrea Doucet, *The Ethics of Care and the Radical Potential of Fathers 'Home Alone on Leave': Care as Practice, Relational Ontology, and Social Justice*, in *COMPARATIVE PERSPECTIVES ON WORK-LIFE BALANCE AND GENDER EQUALITY* 11, 13 (Margaret O'Brien & Karin Wall eds., 2017) [hereinafter *COMPARATIVE PERSPECTIVES ON WORK-LIFE BALANCE*].

163. Jill E. Yavorsky et al., *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 *J. MARRIAGE & FAM.* 662 (2015). Between 2008 and 2010, the study asked 182 dual earner couples in a Midwestern city who were expecting their first child to keep time diaries and respond to surveys about how they spend their time on paid work, housework, and after their child was born, on childcare tasks. About three-quarters of the women and two-thirds of the men had college degrees, and the balance of each group had finished some college. The couples earned an average of \$81,000 per year. *Id.* at 666.



In the months before their first child was born, these couples' time diaries showed that men and women spent about equal amounts of time on both housework and paid work. According to time diaries, women worked forty-two hours and men forty-five hours per week for pay. At home, couples equally divided the burden, including routine tasks like cleaning<sup>164</sup> and shopping.<sup>165</sup> Women cooked more, while men did more yardwork.<sup>166</sup> The fairly equal split of routine tasks matters a lot—"routine tasks are more arduous and tend to be less flexible" than "nonroutine tasks,"<sup>167</sup> and historically, women have done far more routine tasks than men. In total, men worked about two and one-half hours a week more than women.

Interestingly, men and women's subjective impressions about how much they worked at home and for pay were off. They *underestimated* how much time they spent at their jobs by four hours and *overestimated* housework by seven hours.<sup>168</sup>

Nine months after their first baby was born, these couples again reported how they were spending their time. No surprise. They were working dramatically harder. Both shared paid work pretty much as they had before, which completely runs counter to stereotypes. Women still worked forty-two hours a week, the *same* as before baby. Men now worked *an hour more*, or forty-six hours a week.<sup>169</sup>

At home, their egalitarianism evaporated. Adding a baby's needs to the mix, women doubled the amount of time they spent on care work (housework and physical baby care).<sup>170</sup> Men also did more, but only 40% more.<sup>171</sup> This increase meant that women were now spending *ten hours* a week more than their partners doing housework and physical child care.<sup>172</sup>

They no longer divvied up tasks equally either—gender stereotypes ruled the roost. Women spent fifteen and half hours per week physically caring for the baby (changing diapers, feeding, bathing, and changing the baby), six more

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164. *Id.* at 670–71 (women five hours per week, men four).

165. *Id.* (both three hours per week).

166. *Id.*

167. *Id.* at 671.

168. Men thought they were working forty-one hours not forty-five and women thirty-eight not forty-two. At home, women overestimated the time they spent on housework by 7.5 hours, men 6.5 hours. *Id.* at 670 tbl.2.

169. *Id.*

170. *Id.*

171. *Id.*

172. Specifically, women spent twenty-nine hours a week on housework and childcare to men's ten hours. *Id.*

hours per week than men.<sup>173</sup> Women did four more hours of housework per week than men (both did less than before baby).<sup>174</sup> Mothers and fathers spent roughly the same number of hours playing with their babies—about six hours a week for women and four and a half hours for men.<sup>175</sup> (That works out to about fifteen minutes more for women per day, and it is hard to imagine a parent wanting to give up this time).

Even worse, these new parents thought that the baby and house ate up grossly more time than their time diaries documented, and women overestimated this time more than men. Women perceived that they were doing about 80% more physical child care, men about 60% more.<sup>176</sup> Both also believed that they did more housework, not less, which was the case.<sup>177</sup> In short, these parents thought that they were drowning in the demands of baby and home.

Strangely, these new parents *underestimated* how much time they spent at work—women more so than men. Men believed that they worked three hours less than they really did (or forty-one and a half hours). Women believed they worked *seven hours less*, or thirty-five hours per week. In other words, women believed they were working about *an hour and twenty minutes less per day* than they actually were.<sup>178</sup>

Women's perception gap is particularly noteworthy because women who were working over full-time believed that they were working closer to part time, or at least that they were not managing to make full-time hours.<sup>179</sup> Men's perception gap matters, too. At a time that they faced new economic responsibilities, men felt like their families cut into their ability to provide.

In sum, these new parents had a crushing workload. Women's was now heavier than men's.<sup>180</sup> Women worked a total seventy-seven hours a week, men sixty-nine and a half.<sup>181</sup> That translates into an hour more each day for women.

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173. *Id.*

174. Women did 13.5 hours of housework a week, men 9.5 hours. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* The authors did not know why this was so. They speculated that women had “gendered expectations that they [should] prioritize their child over employment,” so they “underestimate[d] their time in paid work.” *Id.* at 675. Given the sheer amount of time parents spent with the baby, moms and dads may have simply believed that they had to be putting in fewer hours in the office. *Id.*

180. *Id.* at 670 tbl.2.

181. *Id.* at 671 tbl.3.

The Ohio State study may be capturing a particularly hairy point in parenthood—when a baby is still relatively new and all consuming, a mom may still be nursing, expectations at work have ratcheted up to their pre-kid level, and both moms and dads are trying to continue working full-time.

Other studies confirm that couples with kids specialize along traditional gender lines—dads working (more than) full-time hours for pay while moms work quite a bit less for pay; moms do significantly more childcare and housework than fathers.<sup>182</sup> Having more children exacerbates this tendency. Michelle Budig writes, “[t]ime-use evidence shows that . . . fathers’ childcare time declines” with each additional child, while women’s increases.<sup>183</sup> She attributes this to mothers and fathers specializing, with fathers spending more time in paid work and women spending more time on child care and housework.<sup>184</sup>

### 3. Inequality increases as kids get older

Specialization seems “normal” because of our stereotypes about women as nurturing and men as breadwinners. It is actually very odd. Women and men, as Part I shows, tend to be equally ambitious at work and eager to spend time with their kids. So why do couples specialize? A couple of studies of women with high-flying professional careers suggest reasons why this gendered division of labor persists in families where moms are highly educated and employed in prestigious jobs.

A couple’s decision to have children spurs them into more traditional gender roles, according to sociologists Claudia Goldin and Lawrence Katz. They studied mothers with MBAs from the University of Chicago, and these women have a lot in common with women attorneys—inflexible, demanding, forty plus hour work weeks. Couples slowly drift into traditional gender roles. A year after having a baby, the average mother in Goldin and Katz’s study had cut her work hours by less than a fifth, and only 13% had left the workforce.<sup>185</sup>

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182. Pew reports that among all dual income couples, not just college educated ones, the average mother with kids under eighteen at home spends sixteen hours a week keeping house, fathers nine; mothers twelve hours a week on childcare, fathers seven. Outside of the home, these mothers worked thirty-one hours a week for pay compared to fathers’ forty-two hours. PARKER & WANG, *supra* note 96, at 6.

183. Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, THIRD WAY (Sept. 2, 2014), <https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay> [https://perma.cc/R7T5-M37Q].

184. *Id.*

185. Goldin & Katz, *supra* note 144, at 12.

Counterintuitively, as their babies became kids, however, women cut their hours back even more. Three to four years later, nearly a quarter of women cut their hours and an additional 18% had dropped out of the workforce entirely.<sup>186</sup> Women did not cut their hours because they had more kids—Goldin and Katz controlled for that. “It is,” instead, “as if some MBA moms try to stay in the fast lane but ultimately find it is unworkable,”<sup>187</sup> Professors Goldin and Katz conclude. MBA moms with spouses in high-paying (and therefore demanding) jobs were even more likely to have left the workforce; among those who did work, they worked about 20% fewer hours than their counterparts with lower paid spouses.<sup>188</sup>

The fact is, the burden at home does not lighten when kids reach school age. Parents are often shocked to find this out.<sup>189</sup> School-aged kids need even more time and attention from parents, not less. Couples in professional careers may have had nannies or good quality childcare for their babies and toddlers. But as kids get older, “outsourcing” childcare is harder. Parents do not just help kids with homework or listen to how their days went. Parents are engaged in the much more serious task of “transmitting social capital” to their kids. Parents have that social capital; relatively low-paid caregivers do not.<sup>190</sup> Kids need to be socialized and educated properly, which parents can do but relatively low-paid childcare workers cannot.<sup>191</sup> School-aged kids sometimes get sick, too, and last minute childcare is hard to find. Many women find that they, not their husbands, take the day (or more) off work.<sup>192</sup> Kids also have vacations and

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186. *Id.* By year five (when a child reaches kindergarten), even more women had dropped out of the workforce. Marianne Bertrand, Claudia Goldin & Lawrence F. Katz, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 AM. ECON. J.: APPLIED ECON. 228, 248 tbl.8 (2010); see also Kuziemko et al., *supra* note 84, at 28 (finding that women significantly underestimated the amount of care that older children would require).

187. Goldin & Katz, *supra* note 144, at 12.

188. *Id.* at 11 (finding that “MBA moms with high earning spouses (> \$200K, in 2006) have labor force rates that are 18.5% lower than those with lesser earnings spouses [and] work 19% fewer hours (when working) than those with median or lower earnings spouses.”).

189. STONE, *supra* note 24, at 49–50 (reporting that the women in her study discovered that “[o]lder children presented a new set of demands that [women] found more difficult to reconcile with continued employment.”); cf. Kuziemko et al., *supra* note 84, at 10, 42 fig.4 (finding that few women who leave the labor force after having a child do not return as the child gets older).

190. STONE, *supra* note 24, at 50.

191. *Id.* at 50–51.

192. *Id.* at 54–55; see also HARRINGTON ET AL., THE NEW MILLENNIAL DAD: UNDERSTANDING THE PARADOX OF TODAY’S FATHERS, *supra* note 111, at 6 (fathers in survey of college-educated, white-collar professionals were less likely to feel responsible to stay home with a sick child than mothers were and portrayed selves as “backup” or “helpers” to their wives).

days off from school, and here, too, moms more frequently than dads take days off.<sup>193</sup>

Among women with highly paid spouses, the tendency over time to reduce hours or labor force participation is even more pronounced. In contrast, among women with lower-earning spouses, the birth of a child “has only a modest and temporary impact on earnings for MBA women.”<sup>194</sup> These findings confirm that overwork ultimately becomes unworkable for high-flying moms, and those moms that can afford it work less or stop working altogether.<sup>195</sup> Professors Bertrand, Goldin, and Katz conclude,

In sum, the MBA lure for women is large—incomes are substantial . . . . But some women with children find the inflexibility of work insurmountable. Some leave or become self-employed. Gender differences in labor supply are largely driven by the presence of children and those with well-off spouses exit the labor force more often and work fewer hours.<sup>196</sup>

It appeared as though these moms have *chosen* to quit or cut back on work. After all, they said “family” is why they quit or cut back.<sup>197</sup> “Choice” misses the point entirely. Before the birth of their children, the MBA women Bertrand, Goldin, and Katz studied had been harder workers and more successful than the women who ultimately did not have children.<sup>198</sup> These moms did not choose to cut back on or quit work. These “MBA moms [were] forced out,” Goldin and Katz insist, by the unsustainable workload<sup>199</sup> of work outside the home combined with doing more child care<sup>200</sup> and housework than their husbands.<sup>201</sup>

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193. STONE, *supra* note 24, at 54–55.

194. Bertrand, Goldin & Katz, *supra* note 186, at 231; *see also id.* at 249 (reporting that “MBA women with lower-earning spouses” are more likely to be in the workforce two years before giving birth and are not noticeably more likely to leave the workforce after having a baby).

195. “New MBA mothers with higher earning spouses” are 17% less likely to be in the workforce a year after their first baby is born; they are 28% less likely to be in the workforce “three to four years after the birth.” *Id.*; *see also* Goldin & Katz, *supra* note 144, at 12 (reporting the same dynamic).

196. Goldin & Katz, *supra* note 144, at 12.

197. *Id.*

198. Bertrand, Goldin & Katz, *supra* note 186, at 246–47.

199. *See* Goldin & Katz, *supra* note 144, at 12.

200. *Cf.* Raley et al., *supra* note 102, at 1442 (finding that when a woman’s “husband works more hours and earns more,” than she does, she is more likely to do the relatively less pleasurable and routine, physical childcare than her husband, which “is consistent with the notion that [a husband’s] long work hours or higher earnings either pressure her or enable her to devote more time to child care activities.”).

201. Bertrand, Goldin & Katz, *supra* note 186, at 246.

Other researchers confirm that it is an unequal division of labor at home that causes women to exit the high ranks of professions. “[T]ruly voluminous research on dual career couples has shown [that] women’s march into the workplace has not been reciprocated by men’s [march] toward home.”<sup>202</sup> A woman’s “shouldering most of the child rearing” and responsibilities for managing a home make it likely that her career will take a backseat to her husband’s.<sup>203</sup> That in turn makes it harder for women to devote energy and time to advancing their careers.<sup>204</sup>

#### 4. The vicious cycle awaiting high-achieving couples with children

Women do not want their careers to take a backseat. Women who end up playing second fiddle to their husbands rarely set out to do so.<sup>205</sup> Professional women who assume the bulk of child care are more dissatisfied with their careers than those who divide work equally with their spouses.<sup>206</sup> Nor do men set out expecting, or wanting, to divide work with their spouses along traditional, gendered lines.<sup>207</sup> Saying that couples *choose* for a woman to stay

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202. STONE, *supra* note 24, at 63.

203. Women who are “primarily responsible for child care” are “more likely” to find “their careers . . . becom[ing] secondary in importance to their partners.” Ely et al., *supra* note 78; *see also* Cha, *supra* note 145, at 304 (arguing that “husbands’ long work hours can disadvantage married women” by “increase[ing] women’s share of housework” making “it difficult” for women “to maintain their careers” because they cannot put in long hours); WILLIAMS & DEMPSEY, *supra* note 32, at 128 (“I wish it had been possible” to be a good mother and a good worker, “but I wore myself out trying to do both jobs well.”) (quoting woman interviewed in Belkin, *supra* note 85).

204. Ely et al., *supra* note 78 (primary responsibility for child rearing “hinders” a woman’s “equal career importance”); *see also* Raley et al., *supra* note 102, at 1423 (“studies . . . demonstrate that it is the division of labor surrounding children—not housework—that seems to differentiate the activities of men and women and *stall movement toward greater gender equality in labor market outcomes.*”) (citing studies) (emphasis added).

205. Ely et al., *supra* note 78. Only half of Gen X and Baby Boom women HBS graduates had expected to take primary responsibility for raising children, but more than two-thirds of them actually did so. The vast majority (about 80%) of these women MBAs had thought their careers would rank equally with or take precedence over their partners’. Their expectations were “dashed.” Forty percent of these women ended up with a “traditional” division of labor, with their husband’s career taking center stage while they became primarily responsible for child care and the home. “[M]any women watch[ed] their partners’ careers take off and eclipse their own.” True, a majority of these did have “egalitarian or progressive partnerships,” but 40% is a significant plurality. *Id.*

206. *Id.*

207. *Id.* Men who had graduated from HBS were more likely to have expected that they would divide work and home traditionally with their wives—more than half had expected this arrangement compared to 20% of women. But even more—three-quarters—ended up with a traditional division of labor.

home or take part-time work and for a man to devote more time to paid work is just wrong.

So, if neither women nor their husbands want this, why do women assume the bulk of the responsibility for managing a home and caring for children? There are several pieces to this puzzle.

*a. Like marries like*

The first is that highly educated, ambitious women are more likely than ever to marry highly educated, ambitious men.<sup>208</sup> More specifically, “[h]igh-earning women ([for example,] doctors, lawyers) tend to pair up with their economic equals. . . . In other words, female CEOs tend to marry other CEOs.”<sup>209</sup> (The converse, by the way is not necessarily true. Men are somewhat more likely to marry “down.”<sup>210</sup>) A married woman lawyer, therefore, is likely to be married to similarly ambitious man in a high-pressure job who works long hours.

After a couple has children, if “a husband works long hours” (that is, more than fifty to sixty hours a week), “his wife is more likely to quit her job.”<sup>211</sup> With their husbands facing the same pressure to work long hours, high-flying “women are even less likely to receive spousal support [with childcare and housework] from their husbands” than women from other classes.<sup>212</sup> The opposite, of course, does not hold true: “having a spouse who works” more than

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208. Robert D. Mare, *Educational Homogamy in Two Gilded Ages: Evidence from Intergenerational Social Mobility*, 663 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 118, 122 tbl.2 (2016) (“Considerable research supports the observation that levels of educational homogamy, that is, the tendency for individuals to marry partners who have similar levels of educational attainment to themselves, and for the number of homogamous couples to grow in relation to the number of heterogamous couples, have grown during the latter half of the twentieth century.”); see also STONE, *supra* note 24, at 66; Jeremy Greenwood et al., *Marry Your Like: Assortative Mating and Income Inequality*, 104 AM. ECON. REV. 348, 349 (2014) (finding that people from similar educational levels tend to marry each other and this trend has been increasing over time); Jeffrey Sparshott, *One Cause of Inequality: More Rich Marrying One Another*, WALL STREET J. (Jan. 27, 2014, 4:11 PM), <https://blogs.wsj.com/economics/2014/01/27/one-cause-of-inequality-more-rich-marrying-one-another/> [<https://perma.cc/4LMG-S48H>] (reporting that “[i]ncome inequality has gotten worse in past decades in part because college-educated, high-earning men and women are more likely to marry each other, rather than get hitched to partners with divergent education or wage levels.”).

209. Adam Pearce & Dorothy Gambrell, *This Chart Shows Who Marries CEOs, Doctors, Chefs and Janitors*, BLOOMBERG (Feb. 11, 2016), <https://www.bloomberg.com/graphics/2016-who-marries-whom/> [<https://perma.cc/3Z8T-45XJ>] (reporting findings based on government data from the American Community Survey).

210. *Id.*

211. Cha, *supra* note 145, at 324.

212. *Id.* at 307.

sixty hours “significantly increases professional women’s, but not professional men’s, odds of quitting.”<sup>213</sup>

This fact tells us that it is not that there is too much work for *a couple* to bear. The real culprit is the breadwinner stereotype, not choice. Women who think that their career is equally important to their husbands’ often find themselves deferring to their husbands’ careers when the demands of work, family, and home become overwhelming.<sup>214</sup> That is, “women with professional husbands tend to defer to their husbands’ careers, even when their careers are equally high achieving.”<sup>215</sup> There is a silver lining in this story: a woman is much less likely to quit her job when her husband works fewer hours.<sup>216</sup>

*b. Gender norms grease the slide to gender roles*

Which brings us to the second piece of the puzzle: Gender norms. For men, the old breadwinner stereotype makes it harder for them to step back from their careers. The breadwinner stereotype also makes it harder for women to think that their husbands ought to step back.<sup>217</sup> Women therefore take on extra childcare to protect their husbands’ careers from the demands and distractions of home. Sometimes couples hew to this norm unconsciously—it just feels natural to put a husband’s career front and center<sup>218</sup> and to make the home primarily a woman’s responsibility.<sup>219</sup> Pamela Stone calls these background gender norms a “lingering legacy of separate spheres and divided lives.”<sup>220</sup> A highly educated, career-oriented woman’s “deference” to her husband’s career “might seem especially . . . puzzling,” but women and men are “in fact playing out a well-established (some might say well-worn) cultural script.”<sup>221</sup>

*c. Demanding, unforgiving legal work*

The third piece of the puzzle is the nature of legal (and much professional) work. Lawyers’ work, like careers in business that Goldin and Katz studied,

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213. *Id.* at 318.

214. STONE, *supra* note 24, at 60–62.

215. Cha, *supra* note 145, at 308 (citing STONE, *supra* note 24).

216. *Id.* at 318.

217. STONE, *supra* note 24, at 60–62, 68–69; *see also id.* at 64 (“the hold of the traditional family model of male breadwinner and wife at home continues to be strong.”).

218. *Id.* at 70–72 (finding that women in her study of highly successful women who had quit their professional careers were “enact[ing]” “prevailing gendered norms” because they assumed that their husbands could not possibly work fewer hours or step back from their high-pressure careers).

219. *Id.* at 71.

220. *Id.* at 10.

221. *Id.* at 65.



demands long and often unpredictable hours. Practicing law is therefore difficult to reconcile with children's equally unpredictable (and unreasonable) demands. When a dual career couple prioritizes a father's career, the mother gets stuck holding the bag when kids have to stay home, when childcare falls through, or even when kids need help with homework after school. Managing these responsibilities "result[s] in significant and cumulative disadvantages to" women's "careers" compared to "their husbands."<sup>222</sup>

An unequal division of work at home plus a woman's feeling that she is not devoting herself fully to her career creates a death spiral of sorts, which only speeds up with more children.<sup>223</sup> This is why women's mistaken belief, uncovered by the Ohio State study, that they are putting in so many fewer hours at their jobs is important—it undermines their sense of doing a good job at work. When women's careers begin to suffer, it "undermine[s] [women's] relatively more equal position as part of a two-professional career" couple.<sup>224</sup> This dynamic further "weaken[s] [women's] connection to their own careers in a self-perpetuating cycle that [leads] to [their] quitting."<sup>225</sup> The bigger the spread in couples' pay, the less fathers do at home and more the mothers do; the more hours a father works, the fewer a mother does.<sup>226</sup>

*d. Inequality at work means inequality at home makes financial sense*

The gender discrimination in law firms that I described in the Introduction disadvantages many women lawyers in comparison to their professionally employed husbands. Women lawyers earn less than men, and they face obstacles to professional success that men do not. Women's financial disadvantage at work affects how they divide work at home with their husbands. Quite rationally, "families tend to maximize their highest earner's work

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222. *Id.* at 68.

223. As the number of children a family has increases, "[t]ime-use evidence shows that . . . fathers' childcare time declines" but the "opposite is true for women . . . presumably because with larger numbers of children, fathers and mothers experience greater gender divisions of paid and unpaid work." Budig, *supra* note 183.

224. STONE, *supra* note 24, at 68.

225. *Id.* Francine Deutsch explains it this way,

Male investment and female disinvestment in jobs . . . fuels the inequality in parenting. The asymmetries between the parents in pursuing their aspirations, deferring to spouses, and taking time off or reducing time in paid work may perpetuate an unequal balance at home and at work. When those asymmetries result in men's deriving greater financial and psychological rewards at work than their wives, inequality at home just seems to make sense.

DEUTSCH, *supra* note 127, at 49.

226. Raley et al., *supra* note 102, at 1429.

opportunities.”<sup>227</sup> That means “lower-earning spouses,” (usually wives) “cover[] more of the domestic chores at home.”<sup>228</sup> Lather, rinse, and repeat.

*e. A lose-lose solution*

And thus our vicious circle is complete. Like attracts like, and women lawyers today marry equally ambitious men with similarly demanding jobs. The gravitational pull of unspoken gender norms causes women to shoulder a greater burden at home and men to shoulder a greater burden for their family’s financial well-being. Women are ground to dust by the combined pressures of intensive parenting norms and the demands of a professional career like law. Persisting gender discrimination at work (which reflects stereotypes about male breadwinning and female hearth tending) makes a gendered division of labor at home and work make good financial sense.<sup>229</sup> This vicious circle makes it seem natural for women—but not men—to step back from challenging and demanding careers.

“Natural” but not necessary. As Pamela Stone writes, we ignore “[h]usbands . . . when we think about ‘family reasons’ for [a woman’s] quitting, so closely do we identify family with women.”<sup>230</sup> But, she continues,

it is husbands *and* children who account for why women (as wives and mothers) are so strongly pulled by family. Husbands’ high-demand jobs and high-demand intensive parenting combine on the family front [to put women in this bind]. The major way by which husbands exert their influence in the family is, at root, a function of their careers, however. In their own careers women faced many of the same pressures . . . but as women, they experienced them somewhat differently. The asymmetry of women and men’s positions in the home was also reflected in the workplace.<sup>231</sup>

So far, much of this story is familiar. Traditional stereotypes have proven remarkably durable, and husbands do not pitch in equally at home. For women who work in demanding fields like law, inequality at home spells stymied ambitions at work. The fact that the proportion of women partners has stayed stuck at about 20% vividly illustrates the strength and persistence of these traditional ways of dividing work between men and women.

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227. Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 345 (2013).

228. *Id.*

229. STONE, *supra* note 24, at 76.

230. *Id.* at 79.

231. *Id.*

But, men lose, too. Most commentators have missed this part of the story. Men spend less time with their children and spouses than they want. Men assume more responsibility for financially supporting the family than they want or than is good for them and their health. Alcoholism haunts lawyers at almost twice the rate of other professions.<sup>232</sup> Men in the legal profession are over 60% more likely than women to have serious drinking problems.<sup>233</sup> Men who do not contribute equally to housework and childcare feel conflicted, unhappy, and guilty.<sup>234</sup>

We must empower men to stop feeling that they are primarily responsible for financially supporting their families so that they are able to assume more responsibility for family and home.<sup>235</sup> This stereotype that fuels this sense of responsibility not only derails women's careers, but it keeps men from being the involved, hands-on caregivers they want to be. Two-thirds of Millennial dads in the Boston College study aspired to be equal co-parents, but less than a third of these dads actually did shoulder an equal share of parenting.<sup>236</sup> The rest said their wives did more.<sup>237</sup> It is no surprise that *twice as many* working dads than working moms felt they spent too little time with their kids. "Millennial fathers have" thus "joined Millennial mothers in the quest to 'have it all'"—a satisfying, challenging career, and a satisfying and meaningful family life.<sup>238</sup>

This next Part will show that men's roles can fundamentally change, which will make it possible to arrest the vicious cycle that keeps women out of the top ranks of the legal profession. Men want to do more at home, and they should be empowered to embrace their rightful responsibilities as caregivers and homemakers.

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232. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 51 (2016) (survey of almost 13,000 attorneys finding over 20% of attorneys met the criteria for alcoholism compared to about 12% of other highly educated persons employed in professional careers); *id.* (finding more than twice as many attorneys (36%) than surgeons (15%) reported problem drinking).

233. *Id.* at 49 tbl.3 (finding more than 25% of male lawyers meeting criteria for problem drinking compared to 15.5% of women lawyers). Men also suffer from greater rates of depression, while anxiety dogs women at a higher rate. *Id.* at 50 tbl.4.

234. HARRINGTON ET AL., THE NEW MILLENNIAL DAD: UNDERSTANDING THE PARADOX OF TODAY'S FATHERS, *supra* note 111, at 14–17; HARRINGTON ET AL., HOW MILLENNIALS NAVIGATE THEIR CAREERS, *supra* note 80, at 35.

235. NICHOLAS W. TOWNSEND, THE PACKAGE DEAL: MARRIAGE, WORK, AND FATHERHOOD IN MEN'S LIVES 78, 137 (2002) (finding that the weight of the breadwinner stereotype "means that men's time and energy are devoted to, and consumed by, their paid work," which undermined their ability to be warm, caring, hands-on fathers).

236. HARRINGTON ET AL., THE NEW MILLENNIAL DAD: UNDERSTANDING THE PARADOX OF TODAY'S FATHERS, *supra* note 111, at 3.

237. *Id.*

238. *Id.* at 10.

## IV. FUNDAMENTALLY CHANGING MEN'S ROLES AT HOME AND WORK

Part of the battle has been won: Few men or women think that work is or should be their primary priority, partly because both men and women find combining work and family to be stressful. Men today also fundamentally define a good father differently than men used to: spending time with children and supporting them emotionally are at least as important to fathers as putting food on the table. In short, today, men find happiness and a sense of personal satisfaction at home more than at work while women's work ambitions rival and education levels surpass men's.

Men, like women, need help to resolve work–family conflict as they increasingly feel trapped by the breadwinner stereotype and feel squeezed between home and work. One possible solution is to temper men's work ambitions, and it seems that this generation is part of the way there. Young, white-collar men say that they value workplace flexibility to spend more time with their children over high pay; few say they would “seek career advancement if it meant less time with family or less personal time.”<sup>239</sup> But men are not yet walking the talk. Fathers often portray themselves “as helpers - or backup” not “primary care givers for their children.”<sup>240</sup> So cast, it is easy for men to hand over the reins to women at home.

A. *Men Sharing Breadwinning, Childcare, and Housework*

“Good news”! “[T]he rules of engagement are changing for men,” which gives men “an enormous opportunity to drive the evolution of work cultures to allow [all] caregivers to thrive professionally and to make gender equality a far greater reality at work and at home.”<sup>241</sup> There is reason to be optimistic that this is true. Men's priorities and values about work and family have changed dramatically at the same time as women's work ambitions and education have increased. These twin forces open a new possibility for resolving work–life conflict—*men* could stay home with the kids, which is good, because solo paternity leaves of a month or so are what it will take to disrupt the vicious cycle described above.

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239. Two-thirds of dads said that they were unwilling to seek advancement if they had to sacrifice time with their family or time for themselves. More moms than dads, unsurprisingly, expressed this sentiment—82% were unwilling to sacrifice personal or family time for career advancement. *Id.* at 3.

240. *Id.* at 6.

241. *Id.* 10.

### B. *Americans Favor Generous, Paid Leave for Fathers*

Americans increasingly believe that men and women and mothers and fathers are equal and should have equal opportunities,<sup>242</sup> including access to leave. According to one recent study by the Pew Research Center,<sup>243</sup> the overwhelming majority of Americans today believe that American workers should receive paid family leave. Sixty-nine percent supported paid leave for fathers; 82% supported paid leave for mothers.<sup>244</sup> A survey by the Center for the Study of Elections and Democracy largely confirms Pew's findings. It found that over half of Americans believe that the government should require employers to provide paid *family* leave (the study did not ask about government funded leave).<sup>245</sup>

How much paid leave mothers and fathers should receive varied between these two surveys. Pew found that those who support paid leave for mothers *and* fathers think mothers should get twice as much paid leave as fathers—about eight weeks for mothers and four for fathers.<sup>246</sup> But the Center study's respondents thought men and women should each get more than two months of leave.<sup>247</sup> Regardless, these studies both show that most Americans favor paid paternity leaves of at least a month.<sup>248</sup>

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242. Beam, *supra* note 115; *see also* VanderMey, *supra* note 115.

243. JULIANA HOROWITZ ET AL., AMERICANS WIDELY SUPPORT PAID FAMILY AND MEDICAL LEAVE, BUT DIFFER OVER SPECIFIC POLICIES 4 (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/03/22152556/Paid-Leave-Report-3-17-17-FINAL.pdf> [<https://perma.cc/F87E-WGA2>].

244. *Id.*

245. CHRISTOPHER F. KARPOWITZ & JEREMY C. POPE, THE AMERICAN FAMILY SURVEY: 2016 SUMMARY REPORT: MARRIAGE AND FAMILY—ATTITUDES, PRACTICES & POLICY OPINIONS 36 tbl.26 (2016), <https://www.deseretnews.com/v4/sub-projects/american-family/files/AFS2016Report.pdf> [<https://perma.cc/6VDS-W7RR>] (finding that 54% of Americans surveyed believed that the government should require employers to offer family leave).

246. HOROWITZ ET AL., *supra* note 243, at 4.

247. Richard V. Reeves, *How Much Paid Parental Leave do Americans Really Want?*, BROOKINGS (July 6, 2016), <https://www.brookings.edu/blog/social-mobility-memos/2016/07/06/how-much-paid-parental-leave-do-americans-really-want/> [<https://perma.cc/EB9G-SNCL>] (relying on data collected by KARPOWITZ & POPE, *supra* note 245, at 38 tbl.27).

248. How equal people think men and women's leaves should be depends partly on how the question is posed. If first asked about the length of mothers' paid leaves and then about fathers', respondents said that women should get five months and men four months; when asked about fathers' leaves first, respondents replied that women should get a bit over four months and men just under four. *Id.* One advisor to the survey believes that the fact the question's framing so profoundly affects responses reveals unconscious stereotyping about men's and women's roles. *Id.* It also shows that that these unconscious stereotypes can be fairly easily combatted.

*C. Law Firms Offer Leave, but the Breadwinner Stereotype Causes Fathers to Take Little Time Off*

Increasingly, employers of professional workers (like law firms) are meeting men's stated expectations by providing more generous paid leaves to both moms and dads. For example, men at Working Mother's top fifty law firms for women get an average of seven weeks of paid paternity leave. (These firms on average offer women more than twice more—fifteen weeks).<sup>249</sup> Several firms also offer “primary caregiver” that either fathers or mothers can take.<sup>250</sup> But will men take their leave?

The answer is a mixed yes—men do take leave, but they tend to take significantly less than their firms offer. On average, the average new father at Working Mother's top fifty firms took four out of seven of the weeks of paid leave he was entitled to. New mothers, in contrast, took fourteen of their fifteen weeks.<sup>251</sup> On the positive side, as law firms increase the length of paid leave, men have tended to take longer leaves.<sup>252</sup> Younger fathers are also more likely to take leave than older fathers.<sup>253</sup> Boston College's study of fathers employed in white-collar professional jobs found a similar phenomenon—men, on average, take less paid leave than they are offered, but they will take more leave as it is offered.<sup>254</sup>

These averages, however, conceal a couple of important tendencies. First, Boston College found that the modal amount of leave a man actually took was the amount of paid leave he was offered; as the number of weeks increased, the modal amount increased, too.<sup>255</sup> Nearly 30% of men only took off two weeks

249. WORKING MOTHER & FLEX-TIME LAWYERS, BEST LAW FIRMS FOR WOMEN 2016, at 15 (2016).

250. See HARRINGTON ET AL., THE NEW DAD: TAKE YOUR LEAVE, *supra* note 134, at 15.

251. Angela Morris, *Paternity-Leave Stigma at Law Firms Lifting, Ever So Slowly*, AM. LAW. (May 30, 2017), <https://www.law.com/americanlawyer/almID/1202787758561/?mcode=0&curindex=0&curpage=ALL?mcode=0&curindex=0&curpage=ALL> [<https://perma.cc/N3VW-RWFS>] (reporting that in 2016, Working Mother had found that the top fifty firms had offered men on average seven weeks of leave, but they took four, which was up from 2015, when men were offered six weeks and took three).

252. *Id.*

253. Dishman, *supra* note 25 (“The good news is that attitudes about taking time off after the birth of a child are changing. Younger men and women surveyed were more likely to report that they took parental leave.”).

254. HARRINGTON ET AL., THE NEW DAD: TAKE YOUR LEAVE, *supra* note 134, at 8 chart 3; see also Dishman, *supra* note 25 (reporting that a survey of working men over 18 found that “36% of men reported shorting themselves on time off to be with their new sons or daughters, but 32% of men said they took between 2–6 weeks off. That number dropped to 22% for 7–12 weeks of paternity leave.”).

255. HARRINGTON ET AL., THE NEW DAD: TAKE YOUR LEAVE, *supra* note 134, at 8.

or less even when they had paid leaves of four, six, or even more weeks.<sup>256</sup> Men are also leery of exceeding their companies' maximum leave.<sup>257</sup> Second, men absolutely, positively refuse to take *unpaid* leave—unsurprising given the breadwinner stereotype.<sup>258</sup>

Men leave paid leave on the table for two reasons. First, they worry about leaving their employers or coworkers in the lurch. Significantly, these workplace worries mattered more than how much leave their families needed them to take. Over 40% of the white-collar professionals in the Boston College study said that “pressures at work such as impending deadlines, current projects or the amount of time it would take to catch up when they returned to work” determined how much leave they took.<sup>259</sup> Men who take leave also take work home with them as “co-workers and bosses expect new dads to be on call—and dads themselves fear missing out on important projects.”<sup>260</sup>

Second, men worry about “unwritten expectations for how much time off it is appropriate to take” and they fear “stigma associated with taking more time off from work.”<sup>261</sup> Even when a firm offers fathers generous leave, “there’s still a disconnect between policy and how it plays out in reality.”<sup>262</sup> Anecdotally, men report that parental leave policies on the books deviate from what their real life supervisors will tolerate.<sup>263</sup> Many men are sensitive to even

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256. *Id.*

257. *See id.* at 7–9.

258. *Id.* at 9 (more than three-quarters would not take leave if they were not paid at least 80% of their salaries).

259. *Id.* at 8.

260. *See Weber, supra* note 28.

261. HARRINGTON ET AL., *THE NEW DAD: TAKE YOUR LEAVE*, *supra* note 134, at 8; *see also* David S. Pedulla & Sarah Thébaud, *Can We Finish the Revolution? Gender, Work–Family Ideals, and Institutional Constraint*, 80 AM. SOC. REV. 116, 120 (2015) (describing research that shows that men are particularly reluctant “to take advantage of supportive work–family policies” because they “have a (well-founded) sense that requesting leave or flexible hours would undermine their masculine credibility among co-workers and managers”).

262. Chen, *supra* note 27.

263. Teresa Lo, *Why Are Male Lawyers Rejecting Paternity Leave?*, J.D. J. (Dec. 30, 2016) <https://www.jdjournal.com/2016/12/30/why-are-male-lawyers-rejecting-paternity-leave/> [<https://perma.cc/2XPL-ZBUD>] (describing conservative law firm culture that stigmatizes men if they use all of their paternity leave so that men either do not use all of it or they do and “return to a hostile environment”); Staci Zaretsky, *Paternity-Leave Bias in Biglaw: When Will it End?*, ABOVE LAW (May 31, 2017, 12:28 PM), <https://abovethelaw.com/2017/05/paternity-leave-bias-in-biglaw-when-will-it-end/> [<https://perma.cc/DNX9-DKKB>] (stating that “[m]any male attorneys are too worried that their billable hours will suffer if they choose to take an extended amount of paternity leave time, even though some firms offer months of time off.”); Staci Zaretsky, *The Pink Ghetto: Paternity Leave Horror Stories from Dads Working in Law Firms*, ABOVE LAW (Apr. 22, 2016, 11:32 AM), <https://abovethelaw.com/2016/04/the-pink-ghetto-paternity-leave-horror-stories-from-dads-working->

subtle cues that they may be taking too much leave. One associate took four weeks off instead of the ten his firm offered after a partner remarked that “he wouldn’t know what to do with himself after a couple of days, and his wife would want him out of the house.”<sup>264</sup> Sometimes the cues are not so subtle: A partner at a firm that offered six weeks of leave told an *American Lawyer* reporter that “he was ‘embarrassed’ for a male midlevel associate who [took] six weeks of paternity leave.”<sup>265</sup> These partners are reading from a gendered script that mothers are primary caregivers for infants.<sup>266</sup>

Anecdotes aside, there is some support for the fear that taking leave will undermine men’s careers. On the one hand, one study of middle class workers in a predominately male workforce found that fathers who did a lot of their family’s caregiving and housework were more likely to be mistreated at work than fathers who hewed to traditional stereotypes.<sup>267</sup> But men do not appear to take a financial hit for being caregivers—fathers who work fewer hours for family reasons do not suffer a long-term loss in earnings.<sup>268</sup> Whether they have anything to fear, men do indeed *worry* about taking leave much more than women do. This makes sense given the breadwinner stereotype and the persisting “gender stereotypes dictating that men should be more career-oriented and ambitious than women.”<sup>269</sup>

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in-law-firms/ [https://perma.cc/67Y8-QN4L] (describing men who were denied paternity leave their firms provided, suffered backlash because they took it, were derided as sissies, or were accused of taking advantage of the system).

264. Morris, *supra* note 251.

265. Nell Gluckman, *Firms Offer More Parental Leave, but Will Associates Take It?*, AM. LAW. (May 23, 2016), <https://www.law.com/americanlawyer/almID/1202758457125/Firms-Offer-More-Parental-Leave-But-Will-Associates-Take-It/?mcode=1202615731542&curindex=1&curpage=ALL> [https://perma.cc/745G-67FW].

266. See Jena McGregor, *Are Fathers ‘Secondary’ Caregivers? A JP Morgan Employee Claims its Policy Is Biased*, WASH. POST (June 15, 2017), [https://www.washingtonpost.com/news/on-leadership/wp/2017/06/16/are-fathers-secondary-caregivers-a-jpmorgan-employee-claims-its-policy-is-biased/?noredirect=on&utm\\_term=.a86485f34dbd](https://www.washingtonpost.com/news/on-leadership/wp/2017/06/16/are-fathers-secondary-caregivers-a-jpmorgan-employee-claims-its-policy-is-biased/?noredirect=on&utm_term=.a86485f34dbd) [https://perma.cc/M7QZ-5CJ6] (describing suit by new father against J.P. Morgan who claims he was discriminated against in qualifying for “primary caregiver” leave because he was forced to document his wife’s disability while women employees at J.P. Morgan were not put to such proof).

267. Berdahl & Moon, *supra* note 227, at 356. Coworkers and bosses were more likely to ignore, exclude, insult, and threaten caregiving fathers than traditional fathers and men who were not parents. *Id.* at 355, 357.

268. The study was based on National Longitudinal Survey of Youth and found a small, but statistically insignificant decrease in earnings. Coltrane et. al., *supra* note 129, at 289–90, 290 tbl.2. Men who quit work entirely, however, saw their long-term earnings decrease by slightly more than women who did the same. *Id.*

269. Rudman & Mescher, *supra* note 128, at 322.



More generally, Americans' beliefs about who should bear the primary responsibility for children reflect and reinforce the breadwinner stereotype. Three-quarters of fathers and two-thirds of mothers believed that the ideal situation for fathers of young children is full-time work, according to a 2013 Pew Research Center survey of American parents.<sup>270</sup> But, only 17% of fathers and 7% of mothers thought that ideally mothers of young children should work full time.<sup>271</sup> These beliefs persist despite the reality of American life that both moms and dads work in two-thirds of two-parent families,<sup>272</sup> and both parents work full time in half.<sup>273</sup> The facts on the ground and women's advances in the workplace have not yet upset "gender stereotypes" that "men should be more career-oriented and ambitious than women."<sup>274</sup>

#### *D. Solo Paternity Leaves Promote Gender Equity*

Focusing on paternity leave may seem a little odd because women usually do not scale back their ambitions or quit work because they lack generous maternity leave. Rather, many women scale back their ambitions a few years later after the grind of their caregiving and job responsibilities wears them out. Paternity leave would seem to miss the point as it would just mean that a parent is at home longer with an infant. Paternity leaves, however, profoundly affect a couple's division of labor at home over the long haul.

##### 1. Solo paternity leave, men, and childcare

The decision whether or not to take paternity leave matters a great deal for how a couple will ultimately share work between them. A father's paternity leave lays down persistent egalitarian arrangements between partners. In contrast, a father's forgoing paternity leave lays down stereotypically gendered arrangements between partners. It works this way. When a mom takes leave and a dad does not, she "develops a close bond with her child as well as the confidence and competence to become the primary caregiver" over the months

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270. PARKER & WANG, *supra* note 96, at 16 (survey of parents with children eighteen or younger).

271. *Id.* (survey of parents with children eighteen or younger).

272. PEW RESEARCH CTR., RAISING KIDS AND RUNNING A HOUSEHOLD: HOW WORKING PARENTS SHARE THE LOAD 2 (2015), [http://assets.pewresearch.org/wp-content/uploads/sites/3/2015/11/2015-11-04\\_working-parents\\_FINAL.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2015/11/2015-11-04_working-parents_FINAL.pdf) [https://perma.cc/K2J9-HYUT]; *Employment Characteristics of Families—2015*, U.S. DEP'T LAB. BUREAU LAB. STAT. (Apr. 22, 2016), [https://www.bls.gov/news.release/archives/famee\\_04222016.pdf](https://www.bls.gov/news.release/archives/famee_04222016.pdf) [https://perma.cc/HB9P-QMHE].

273. PEW RESEARCH CTR., *supra* note 272, at 2.

274. Rudman & Mescher, *supra* note 128, at 322.

she is at home alone with the baby.<sup>275</sup> A father who does not take leave becomes a “supporting actor.”<sup>276</sup> Once “in motion,” this early dynamic becomes self-perpetuating. Researchers have found that “[u]nless some extraordinary event occurs . . . there seems to be a low likelihood that the roles will be reversed or even equalized.”<sup>277</sup>

Taking paternity leave, however, *is* an “extraordinary event” that equalizes parental roles (if men start doing housework, too. More on this in a moment). Relatively short paternity leaves—two weeks or longer—help to establish an egalitarian division of labor at home and work. But more is better: longer, solo leaves create even more profound gender shifts. Men who take leaves of a month or more are more likely to do more childcare, housework, and even reduce their hours at work to accommodate the increased workload at home. Several studies support this conclusion.

First, a 2007 study found that nine months after the birth of their child, men who took leaves of two weeks or more were “much more likely to participate in a range of child-care tasks” when they returned to work.<sup>278</sup> Importantly, longer leaves appeared to *cause* men to do more childcare—the researchers controlled for a host of confounding variables, such as a father’s stated commitment to parenting.<sup>279</sup> In particular, among dual earner couples in this study, fathers who took two or more weeks off were significantly more likely to feed and dress their babies at least once a day and more likely to report that they “always or often” got up at night with their children.<sup>280</sup> Fathers who took “less than two weeks off,” however, were “no more likely to” do these tasks “than fathers who took no time off” at all.<sup>281</sup>

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275. HARRINGTON ET AL., THE NEW DAD: TAKE YOUR LEAVE, *supra* note 134, at 3.

276. *Id.*

277. *Id.*

278. This study was based on data from the 2001 Early Childhood Longitudinal Study-Birth Cohort survey of United States workers. Lenna Nepomnyashcy & Jane Waldfogel, *Paternity Leave and Fathers’ Involvement with Their Young Children: Evidence from the American Ecls-B*, 10 COMMUNITY, WORK & FAM. 427, 447 (2007).

279. *Id.* at 440.

280. *Id.* at 443–45, 443 tbl.4. Their finding that men who took two or more weeks of leave were more likely to get up at night was significant before the researchers controlled for the measures of pre-birth parental commitment but only marginally significant once those factors were controlled.

281. *Id.* at 447. Brad Harrington notes that “many fathers have difficulty making the time needed to bond with their children in the first year of their lives. As a result, it is not surprising that fathers’ desires to be equal caregivers often do not come to fruition. The critical early days of the children’s lives can set the stage for long term caregiving. Fathers’ absence from this stage may be an important reason why men’s aspirations and current realities do not mesh.” HARRINGTON ET AL., THE NEW DAD: TAKE YOUR LEAVE, *supra* note 134, at 3; *see also* María C. Huerta et al., *Fathers’ Leave and Fathers’ Involvement: Evidence from Four OECD Countries*, 16 EUR. J. SOC. SECURITY 308, 334 (2014)

Studies of other countries confirm this study and explain why men who take long solo leaves with babies do more at home. “Parental leave policies” intervene around the time a child is born, which is a “critical point in” men’s lives when “fathers[] may be more open to changing behaviours” like “sharing childcare-related tasks with their partners.”<sup>282</sup> Dividing these responsibilities more equally from the get-go disrupts traditional gender roles of “mother as exclusive caregiver and father as exclusive breadwinner.”<sup>283</sup> Caring for babies in the first few months of a baby’s life “facilitate[s] father–child bonding,” which then “may lead to continued engagement and involvement and to a more equal division of work between parents.”<sup>284</sup>

The key is whether a father is at home *alone* with the baby. Fathers who take leave with their wives—literally—assume a supporting role. In contrast, a father who spends even a few weeks caring for the baby by himself is more likely to divide responsibilities with his wife without regard to gender stereotypes.<sup>285</sup> No mystery why: “[W]hen fathers have time at home alone, they . . . discover a new found confidence and set of skills.” They also discover that effective caregiving is not “a female prerogative.”<sup>286</sup>

Taking sole responsibility for an infant’s care has several reverberating effects on a man’s view of himself as a father and a partner. First, men learn “the value and the skill involved in” caring for a child as they experience parenting’s “everyday trials and tribulations.”<sup>287</sup> Second, being alone with a

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(“[F]athers’ leave-taking is associated with involvement in childcare . . . especially” when fathers take leaves of “two or more weeks.”).

282. Huerta et al., *supra* note 281, at 310.

283. *Id.*

284. *Id.*

285. Doucet, *supra* note 162, at 12 (“[T]he importance of fathers having time at home alone with children is critical to the shifting of deeply rooted everyday processes of gendered responsibilities . . .”); *id.* at 18 (“Fathers taking time alone with infants, however, can begin to engender change and to lay a foundation for an on-going dismantling of gendered responsibilities . . .”); Margaret O’Brien & Karin Wall, *Fathers on Leave Alone: Setting the Scene*, in *COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE*, *supra* note 162, at 1, 6 (reporting the results of a 2015 study that found that “an observed relationship between fathers’ use of leave and their time for childcare only persisted when at least one leave month was taken alone by the fathers”).

286. Doucet, *supra* note 162, at 19; *see also* Karin Wall & Mafalda Leitão, *Fathers on Leave Alone in Portugal: Lived Experiences and Impact of Forerunner Fathers*, in *COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE*, *supra* note 162, at 45, 57 (“The process of becoming autonomous and confident as a solo caregiver seems to be related to the absence of third parties, partner or other persons, who provide support and act as mediators during the day.”).

287. Doucet, *supra* note 162, at 19; *id.* (“[M]en begin to question” traditionally male attitudes toward work and breadwinning and “adopt perspectives traditionally espoused by women on the need for work–family balance.”) (citation omitted).

child upends notions that primary caregiving is a mother's domain.<sup>288</sup> Men on leave alone discover they are competent *primary* caregivers, not second string.<sup>289</sup> Third, men start to "question" the single-minded devotion to work that underlies the breadwinner stereotype and become convinced of the importance of "work–family balance."<sup>290</sup>

Longer leaves—over a month—promote even greater egalitarianism in couples. European and Canadian men who took longer, solo leaves identified as their baby's "primary parent." Their babies turned to them for comfort,<sup>291</sup> even when their mother was at home.<sup>292</sup>

Month-long solo leaves permanently change how couples divvy up childcare responsibilities. For example, before Iceland created a paid "father quota," only about 40% of Icelandic couples equally divided childcare.<sup>293</sup> That proportion rose to 60% nine years after Iceland instituted the father quota.<sup>294</sup> (Contrary to stereotypes about European and Scandinavian workers, Icelanders work long hours. On average, Icelandic men work forty-eight hours per week.)<sup>295</sup>

288. *Id.* at 18.

289. Elin Kvande & Berit Brandth, *Fathers on Leave Alone in Norway: Changes and Continuities*, in *COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE*, *supra* note 162, at 29, 32 (describing that dads who take solo paternity leave in Norway "tak[e] greater responsibility for the child, which . . . facilitate[d] a move from being the mother's helper to being a more equal co-parent").

290. Doucet, *supra* note 162, at 19.

291. Kvande & Brandth, *supra* note 289, at 32. *See generally* Johanna Lammi-Taskula, *Fathers on Leave Alone in Finland: Negotiations and Lived Experiences*, in *COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE*, *supra* note 162, at 89 (finding longer solo leaves promoted greater feelings of competence and responsibility among fathers).

292. Ann-Zofie Duvander et al., *Fathers on Leave Alone in Sweden: Toward More Equal Parenthood?*, in *COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE*, *supra* note 162, at 125, 135; Ingólfur V. Gíslason, *Fathers on Leave Alone in Iceland: Normal Paternal Behaviour?*, in *COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE*, *supra* note 162, at 147, 157 (study of Icelandic fathers that found "the child trusted" the father who took a solo leave, "sought their company no less than its mother if both were present or even preferred the fathers"); *see generally* Diane-Gabrielle Tremblay & Nadia Lazzari Dodeler, *Fathers on Leave Alone in Quebec (Canada): The Case of Innovative, Subversive and Activist Fathers!*, in *COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE*, *supra* note 162, at 69, 82 (finding that Quebec fathers redefined fatherhood as fully caring for a child and directing the child's activities rather than as backup babysitters for moms).

293. Gíslason, *supra* note 292, at 151.

294. *Id.* ("[W]hen the children born in 1997 were 3 years old 36% were cared for evenly by their fathers and mothers, for children born 2003 and 2009, the figures were 49% and 59% respectively.").

295. This average is based on workers between twenty-five and fifty-four. *Id.* at 159.

## 2. Solo paternity leave, men, and housework

Crucially, longer leaves increase how much housework men do. Housework is important. American men have significantly upped how much time they spend with children over the last several decades; housework not so much. That men who take longer leaves do more housework is significant. In the United States, the time men spend on housework lags far behind their wives', even as men have upped their time with kids.<sup>296</sup> While men are at home alone with their babies for a month or more, they “full[y] assum[e] . . . the stay-at-home ‘mothering mandate.’” They “carry out all tasks related to organizing and doing hands on care,” create “their own routines,” and “clean[], shop[,] and cook[] the family’s evening meal.”<sup>297</sup>

And they do not return to their old, traditional ways when they return to work. Norwegian men on leave for less than a month neglected housework.<sup>298</sup> Men at home longer, however, did housework *and* childcare while on leave,<sup>299</sup> and they *kept doing housework* when they went back to work.<sup>300</sup> “Time use data” in Norway shows that “most fathers of small children do housework on a daily basis,” since most Norwegian dads began taking longer, solo leaves.<sup>301</sup> Since Swedish men started taking long, solo leaves, “the everyday care of children” has become enmeshed with norms of “masculinity.”<sup>302</sup> Researchers in other countries have confirmed the link between longer leaves and men sharing the burden of housework.<sup>303</sup>

296. STONE, *supra* note 24, at 63.

297. Karin Wall & Margaret O’Brien, *Discussion and Conclusions*, in *COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE*, *supra* note 162, at 257, 262–63.

298. Kvande & Brandth, *supra* note 289, at 33.

299. *Id.*

300. *Id.*

301. *Id.*

302. Anna-Lena Almqvist, *Why Most Swedish Fathers and Few French Fathers Use Paid Parental Leave: An Exploratory Qualitative Study of Parents*, 6 *FATHERING* 192, 197 (2008).

303. Duvander et al., *supra* note 292, at 135, 139 (in Sweden, “fathers taking longer leave engaged in more daily housework and took on more responsibility for this than before” longer, solo leaves became the norm); Gíslason, *supra* note 292, at 158 (in Iceland, “generally, the fathers just did what mothers and housewives have done, they took care of the child or children and they did the domestic chores.”); Lammi-Taskula, *supra* note 291, at 101 (in Finland “sharing of parental leave between mothers and fathers correlates with the sharing of daily housework.”); *cf.* Wall & O’Brien, *supra* note 297, at 263 (“[T]he studies in this book reveal men, albeit not all, who take on household tasks and home planning, in line with the idea that the sharing of leave also implies taking on responsibility for both care and work, on a par with what mothers do when at home.”).

This next Section shows that long solo paternity leaves have transformed men in countries with strong, traditional gender roles.<sup>304</sup>

### 3. Solo paternity leave and gender norms in traditional societies

Germany provides striking evidence that paternity leave can quickly transform traditional gender norms. In 2006, only 3.5% of German men took parental leave. Germany provided paltry compensation—only €300 per month.<sup>305</sup> In 2007, Germany radically reshaped its parental leave policies to encourage men to assume a greater share of the childcare burden.<sup>306</sup> Under this new regime, couples can split twelve months of leave however they wish.<sup>307</sup> But, if the father takes at least two months of leave, couples get a bonus of two months for a total of fourteen months of paid leave.<sup>308</sup> Germans dub these two months of leave “daddy months.”<sup>309</sup> Leave is significantly better compensated—two-thirds salary, capped at €1800 a month.<sup>310</sup>

“West Germany long had one of the most entrenched male breadwinner cultures in Europe” before it overhauled its parental leave system.<sup>311</sup> Many German policies, including poorly compensated parental leave, “encouraged . . . men [to] specialize in paid work and women in homemaking.”<sup>312</sup> Before 2007, Germany had given mothers a year off following the birth of a child at full pay, and even today, only about 10% of German mothers with children under a year old work.<sup>313</sup> “Daddy months,” have dramatically increased the number of men who take significant leave in Germany—from 3.5% in 2006 to over 30% in 2013.<sup>314</sup>

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304. Gislason, *supra* note 292, at 151 (commenting that Iceland’s experience “is in line with results from other countries, showing that fathers that are active from the beginning continue to shoulder a greater share of child care than those who have not been very active while the child was very young.”).

305. Alexandra Fleischmann & Monika Sieverding, *Reactions Toward Men Who Have Taken Parental Leave: Does the Length of Parental Leave Matter?*, 72 *SEX ROLES* 462, 463 (2015).

306. *Id.*

307. *See id.*

308. *Id.*

309. Bünning, *supra* note 138, at 738.

310. *Id.*; Fleischmann & Sieverding, *supra* note 305, at 463.

311. Bünning, *supra* note 138, at 739.

312. *Id.* at 739.

313. Clara Welteke & Katharina Wrohlich, *Peer Effects in Parental Leave Decisions* 4 fig.1 (2016), [https://www.diw.de/documents/publikationen/73/diw\\_01.c.541543.de/dp1600.pdf](https://www.diw.de/documents/publikationen/73/diw_01.c.541543.de/dp1600.pdf) [<https://perma.cc/3VB9-XR4G>].

314. OECD, *BACKGROUND BRIEF ON FATHERS’ LEAVE AND ITS USE* 14 (2016), <https://www.oecd.org/els/family/Backgrounder-fathers-use-of-leave.pdf> [<https://perma.cc/DS5L->

With “daddy months,” German men do childcare and housework while on leave and when they return to work. This link is causal.<sup>315</sup> Researchers found that the fathers who took their “daddy months” had worked longer hours and did less childcare before their leaves than the fathers who did not take “daddy months.”<sup>316</sup>

“Daddy months” have transformed traditional German fathers. German fathers who take their leave “spen[d] on average one more hour *per weekday* on childcare than they did before taking leave.”<sup>317</sup> They reduced their working hours by three to five hours per week compared to fathers who did not take leave.<sup>318</sup> Longer, solo leaves have an even greater effect.<sup>319</sup> For years to come, taking leave alters how men divide the burden of paid work and work at home with their spouses.<sup>320</sup> Quite simply, German “fathers who take” solo “parental leave reallocate their time” and spend more time at home and less at work.<sup>321</sup>

Why would men keep doing more housework after they return to work? Portugal’s experience provides a clue. Portuguese men who took longer, solo leaves reported that their solo leaves gave them real empathy for their wives; while on leave they questioned—and ultimately rejected—“preconceived gender norms and practice” of home as a woman’s domain.<sup>322</sup> This is a remarkable change in a society that until recently promoted an ideal of women as homemakers and men as breadwinners.<sup>323</sup>

In sum, solo leaves of a month or more appear to *cause* men to divide housework and childcare more equally with their wives. They do more while

Q9HM]; see also Alex Evans & Frances Foley, *German Parental Leave—Your Guide*, LOCAL (Jan. 13, 2014), <https://www.thelocal.de/20140113/german-parental-leave-our-guide> [https://perma.cc/2XB8-HKB3] (reporting that about 30% of fathers take leaves of two months).

315. The researchers controlled for selection bias—the probable tendency that a man who would take a significant parental leave would have egalitarian attitudes and thus share housework and childcare fairly equally with their wives anyway. Bünning, *supra* note 138, at 747 (emphasis added).

316. *Id.* at 743 (“[F]athers who eventually took parental leave [had] *longer* working hours and were *less* involved in childcare” before taking leave “than fathers who did not . . . take parental leave.”).

317. *Id.* at 744.

318. *Id.* (emphasis added).

319. *Id.* at 746 (finding “fathers only increased the time spent on housework after they took either more than 2 months of leave or solo leave.”).

320. *Id.*

321. *Id.* at 745–46.

322. Wall & Leitão, *supra* note 286, at 63 (finding that these changes were “strongly or even uniquely related to taking ‘home alone’ leave”).

323. *Id.* at 46 (“For nearly 50 years, during the right-wing dictatorship, pro-traditional policies promoted a male breadwinner model emphasizing women’s subordinate role as homemakers and men’s role as ‘head of family’ and provider.”).

on leave and when they go back to work. That relatively short, solo paternity leaves change men's behavior over the long-term is crucial to a woman's ability to invest fully in her professional life.

The breadwinner stereotype still dogs American men who worry that longer leaves will jeopardize their jobs and their prospects for promotion. This next Section shows men exaggerate these worries.

#### 4. Long paternity leaves and ideal worker norms

So men in Europe are willing to take long leaves. American men, however, are reluctant to take all of the leave their employers offer because they fear their bosses and coworkers will think they are not masculine, dedicated workers. They are sensitive to even a whiff of criticism.<sup>324</sup> It may also be true that bosses are in fact "less forgiving of men who take time for caregiving."<sup>325</sup> Regardless how true these fears are, men are more afraid to take leave than women because stereotypes cast men as breadwinners and women as caregivers.<sup>326</sup>

Workplace norms about "ideal workers," however, change—and change quickly—when substantial numbers of men take paternity leave. Just six years after Iceland instituted its father quota in 2000, almost 90% of Icelandic fathers reported that their supervisors reacted positively or at least neutrally when they took leave.<sup>327</sup> In 2012, over 80% of Icelandic employers had a positive view of men who took parental leave<sup>328</sup>—even though on average Icelandic men take *three months* off.<sup>329</sup> It is just what Icelandic fathers are expected to do.<sup>330</sup>

The same goes in other countries, even those that had long promoted traditional gender roles. Germany's experience shows how malleable workplace norms can be, even in societies that have long maintained traditional gender roles. Prior to 2007, Germany had consciously structured its parental

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324. BRAD HARRINGTON ET AL., *THE NEW DAD: THE CAREER-CAREGIVING CONFLICT* 28 (2017) ("[F]athers in our Millennial study were significantly more likely than [mothers] to be susceptible to the cues they receive from the organizational culture regarding what it means to be an ideal worker.").

325. *Id.*

326. *See id.*

327. Gislason, *supra* note 292, at 150.

328. *Id.* (reporting that "[o]pinion polls have shown that even though employers are the social group most negative to fathers being on parental leave, 73.7% were positive in 2003 and 81% in 2012.").

329. *Id.* at 149 tbl.9.1.

330. *Id.* at 150, 160 (reporting qualitative study findings in which men reported that their coworkers and bosses congratulated them when they became fathers and took long leaves, regardless whether they worked for government or private employers, and these fathers expected nothing less).



leave policy to promote the ideal of motherhood<sup>331</sup> by generously compensating long maternity leaves.<sup>332</sup> This policy worked, and most women stayed at home after giving birth or worked part-time for a few years. In 2006, more than 80% of German men worked full-time, while only 44% of women did so; a third of women worked part-time.<sup>333</sup>

Men's taking "daddy months" has transformed German attitudes about the "ideal worker." Sociologists who study gender inequality have long argued that American norms about the "ideal worker" are built around an expectation that workers (men) will be wholly committed to their jobs. Sociologists have speculated that men who take leave (and thus counter masculine stereotypes), would face negative consequences at work. German researchers have found that this is not necessarily the case. In a 2016 study, men who took two months of leave were not called "soft" or "uncommitted" to work.<sup>334</sup> Instead, they were rated as possessing masculine qualities associated with work.<sup>335</sup> Men who took long leaves of two months or a year were seen as equally competent as and more likeable than men who took no leave.<sup>336</sup> Indeed, men who took *twelve months* were viewed at least as—if not more—effective at work as men who took no leave at all.<sup>337</sup> This study has limitations—it was based on business students' ratings of fictional resumés, and so it may not reflect the attitudes of real German bosses toward men who take the "daddy months." But we should not overstate this limitation: This study's methodology is very common to studies about social attitudes, and studies that have uncovered negative attitudes about men who violate gender stereotypes rely on it, too. Consequently, this study about German attitudes has likely demonstrated that when substantial numbers of men take paternity leave, norms about masculinity and "ideal" workers change relatively quickly.

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331. See SOC. ISSUES RES. CTR., THE CHANGING FACE OF MOTHERHOOD IN WESTERN EUROPE: GERMANY 4, 6 (2012), [http://www.sirc.org/publik/motherhood\\_in\\_Germany.pdf](http://www.sirc.org/publik/motherhood_in_Germany.pdf) [<https://perma.cc/TKK9-69AE>] (explaining that traditionally Germans conceived of women's role as being tied to "Kinder (children), Kirche (church), and Küche (kitchen)" and "Germans [still] have a stronger tendency to conceive of mothers as belonging to the home than people do in France, Norway, Sweden and Denmark.").

332. Bünning, *supra* note 138, at 745 ("In Germany, long leaves of 3 years after childbirth in combination with a joint taxation system have long favoured the male-breadwinner model.").

333. Fleischmann & Sieverding, *supra* note 305, at 465.

334. *Id.* at 469.

335. *Id.*

336. *Id.* at 469, 471.

337. *Id.* at 469.

*E. Effective, Enticing, American Paternity Leave*

America is not Norway. Undoubtedly leave policies can transform gender and caregiving roles at home; and when a large proportion of fathers actually take these leaves, employers and coworkers come to see paternity leave as normal for working dads. But men must *actually* take leave for change to happen. Giving men the “entitlement” to take leave does not cut it. French fathers are entitled to take months of leave after the birth of a child,<sup>338</sup> but French men generally only take about two weeks right after the baby is born.<sup>339</sup>

Men who take paid paternity leave do gain *something* financially—paid leave and childcare costs avoided—in addition to the emotional closeness to their children that men today say they crave. Well-compensated leave, however, does not address men’s fears about masculinity or the long term effect leaves might have on their careers (and finances). Successful incentives will have to address both of these concerns. Deeply entrenched norms, especially gender norms, are hard to change. Women have slowly added “masculine” pursuits to their repertoire, but men have been especially hesitant to adopt “feminine” ones.<sup>340</sup> “Feminine” characteristics and pursuits carries less status than “masculine” ones.<sup>341</sup> Men, therefore, risk a lot when they deviate from the masculine gender script.

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338. ORG. FOR ECON. CO-OPERATION & DEV., PARENTAL LEAVE: WHERE ARE THE FATHERS? 2 (2016), <https://www.oecd.org/policy-briefs/parental-leave-where-are-the-fathers.pdf> [<https://perma.cc/G4LL-2NH7>] (reporting that French fathers are entitled to twenty-eight weeks of leave).

339. Kim Willsher, *Extend Paternity Leave and Enshrine It in Law, Says French Petition*, GUARDIAN (Nov. 1, 2017, 1:00 AM), <https://www.theguardian.com/world/2017/nov/01/extend-paternity-leave-and-enshrine-it-in-law-says-french-petition> [<https://perma.cc/Z7VY-M26F>] (stating that French fathers take about eleven days of paternity leave).

340. Paula England, *The Gender Revolution: Uneven and Stalled*, 24 GENDER & SOC’Y 149, 154 (2010) (explaining that strides toward gender equality have mostly been taken by women entering into male professions but not men moving into women’s because women’s professions are lower status than men’s); *see also id.* at 150 (arguing that “women have had more incentive than men to move into gender-nontraditional activities and positions,” which has “led to asymmetric change” as “women’s lives have changed much more than men’s.”).

341. LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLESOME GAPS—AND WHAT WE CAN DO ABOUT IT 110 (2009) (diagnosing the “problem” as “status”—“jobs traditionally held by females are considered lower status . . . than traditional male jobs” and noting that such stereotypes are pervasive in the media); *see also* England, *supra* note 340, at 155 (“Men lose money and suffer cultural disapproval when they choose traditionally female-dominated fields; they have little incentive to transgress gender boundaries.”).

### 1. Exploiting the breadwinner stereotype

Social norms that construct relative status are particularly hard to change because change requires persuading people not only to do something different but also to sacrifice some social status (at least until norms have shifted). One strategy to circumvent the collective action problem is to adopt policies that “ambiguate” what it means either to hew to or deviate from the entrenched social norm.<sup>342</sup>

Let me offer an example of an “ambiguation” in practice. Helmets and face visors protect hockey players’ heads, faces, and eyes.<sup>343</sup> The NHL mandated helmets in 1979 but did not mandate face visors for new players until 2013.<sup>344</sup> It was no mystery that helmets left a player’s face (and eyes) exposed to blows from a stick or a flying puck. Players routinely suffered eye injuries and, as a result, some lost their vision and their careers.<sup>345</sup> In 1985, Hector Martini, an NHL wing, lost an eye (and thus his career) while playing without a visor.<sup>346</sup> “Why I never wore a shield still amazes me,” he once said.<sup>347</sup> “It’s so easy to lose something so precious.”<sup>348</sup> He was not alone. In 2009—more than twenty years after Hector Martini’s accident—44% of NHL players did not wear visors.<sup>349</sup> About 30% of players still did not when the NHL mandated them in 2013.<sup>350</sup> Indeed, the players’ association opposed the NHL mandate.<sup>351</sup>

Why did so many NHL players for so long run the obvious risks of forgoing a visor? Playing without protective gear is macho and manly.<sup>352</sup> More

342. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 967 (1995) (social norms can be changed by changing “the marginal social costs of” compliance to or deviation from social norms “by rendering certain meanings ambiguous.”); *see also id.* at 1010; *see also id.* at 968, 972, 988 (providing examples of ambiguation greasing the way for norm shifts in such masculine pursuits as hockey, dueling, and military service).

343. This example builds on Lawrence Lessig’s example of hockey helmets. *Id.* at 967–68.

344. Associated Press, *Only a Few NHLers Continue to Play Without a Visor*, SPORTS ILLUSTRATED (Oct. 7, 2017), <https://www.si.com/nhl/2017/10/07/nhl-players-visors-use> [<https://perma.cc/5XN4-EE3N>].

345. Robert Sullivan, *Prescription for Safety*, SPORTS ILLUSTRATED (Jan. 13, 1986), <https://www.si.com/vault/1986/01/13/642192/scorecard> [<https://perma.cc/RH6Z-8PJV>].

346. *Id.*

347. *Id.*

348. *Id.*

349. Matt Brigidi, *NHL in Favor of Mandatory Visor Rule; NHLPA Is Not*, SBINATION (Mar. 6, 2013, 1:04 PM), <https://www.sbnation.com/nhl/2013/3/6/4071470/nhl-nhlpa-visors-marc-staal-eye-injury> [<https://perma.cc/HJS2-5H5Y>].

350. Associated Press, *supra* note 344.

351. *Id.*

352. Zack Smith’s experience in the NHL testifies to the power of social status to overcome common sense. When he first started playing for the NHL everyone on his team wore a visor, but for

practically, visors can fog up and literally cloud a player's vision, putting a visor wearer at a competitive disadvantage to those who are not wearing one.<sup>353</sup> Both of these problems are collective action problems, as Larry Lessig has observed.<sup>354</sup> The competitive disadvantage from a foggy visor is "simply relative," such that it is "eliminated" if all wear visors. The loss of masculinity is a collective action problem, too<sup>355</sup>—when everyone wears a visor, it is just part of a hockey player's uniform.

The problem is, of course, that no NHL player wants to be the one sissy guy in a foggy helmet. Early visor adopters need some cover that permits them to retain their masculinity—a reason for wearing a visor that appeals to a competing set of norms integral to being a good NHL player. One NHL player, who chose to wear a visor back in the 1980s when few others did, said that he donned one after a stick to the eye forced him to miss several games.<sup>356</sup> Not wanting to run the risk of missing games and letting down his team gave him "an excuse" to wear a visor—an excuse he was "glad" to have.<sup>357</sup>

The same goes with men and paternity leave. No one wants to be the sissy dad risking his career by taking all of his paternity leave. Persuading men to take paternity leave asks them to do something that many men think imperils both their masculinity and their status as breadwinners. Well-paid paternity leave addresses men's role as breadwinners. But what about men's fears about their masculinity and status as committed workers? I now turn to how paternity leaves can be structured to "ambiguate" men's feared loss of masculinity. Paternity leave schemes have to be designed carefully to entice skittish men to take time off. But surveys of American men, and the experiences of states and other countries with paid leave schemes provide a good recipe for enticing paternity leaves.

### 3. Compensating at full salary

The breadwinner stereotype depends critically on an expectation that men will earn enough to provide for their families. There are both income and cost components to this expectation—the amount brought in must be enough to

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some reason, the helmet he was issued did not have one. "I was the only guy who didn't get one," he said. "[S]o it was like 'who's the new guy with no visor? He must be really tough.'" He said, "[M]eanwhile, I was scared." Not wanting to sacrifice his tough guy rep, "I just never wore one." *Id.*

353. *Id.* (quoting a player who complained that his visor got foggy and was uncomfortable and inconvenient).

354. Lessig, *supra* note 342, at 967.

355. *Id.* at 968.

356. Sullivan, *supra* note 345.

357. *Id.*

cover the cost of what the couple views as a reasonable lifestyle. The revenue and cost elements go together, and ambiguation must aim at both components. On the income side, leaves for men must not only be paid they must be well paid relative to the income to be earned without leave. Women are willing to take unpaid leave to care for a baby, but men will not. Study after study supports this simple fact. Forty-five percent of highly educated, white-collar men surveyed by the Boston College Center for Work and Family told researchers that unless they were paid their full salary, they simply would not take leave.<sup>358</sup> More than three-quarters of these men said that they would not take leave unless they got at least 80% of their salary.<sup>359</sup>

For most couples, this makes financial sense—fathers usually out-earn their partners.<sup>360</sup> Unless fathers receive close to their full salary, a family loses less money if the mother takes leave. A new baby already puts financial stress on a family, so many families may feel that they cannot afford to sacrifice the additional income associated with a father's taking a substantial leave.<sup>361</sup>

What American men have said is confirmed by experience in other countries. Men in France tend to take very short leaves, if any, in part because they are paid a small lump sum that does not replace their wages.<sup>362</sup> As in America, a French father takes a big financial hit when he takes paternity leave because French husbands usually make more money than their wives.<sup>363</sup>

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358. HARRINGTON ET AL., THE NEW DAD: TAKE YOUR LEAVE, *supra* note 134, at 25.

359. *Id.* at 9.

360. *Women in the Labor Force: A Databook*, U.S. BUREAU LAB. STATISTICS (Nov. 2017), <https://www.bls.gov/opub/reports/womens-databook/2017/home.htm> [<https://perma.cc/LU6T-N44Z>] (in 2015, working wives contributed 37% of their families' income, and about 29% of wives out-earn their husbands); *see also* OECD., *supra* note 314, at 13; HARRINGTON ET AL., THE NEW DAD: THE CAREER-CAREGIVING CONFLICT, *supra* note 324, at 10 (reporting that the highly educated, white-collar men in their study earned substantially more than their wives earned).

361. OECD, *supra* note 314, at 13–14.

362. *Id.* at 15 (noting that payments under France's parental leave "replace less than 15% of average earnings," which explains why fathers take so little leave); *see also* Danielle Boyer & Jeanne Fagnani, 'France Country Note', in 13TH INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2017, at 166, 166 (Sonja Blum et al. eds., 2017), [https://www.researchgate.net/profile/Peter\\_Moss2/publication/318324882\\_International\\_Review\\_of\\_Leave\\_Policies\\_and\\_Related\\_Research\\_2017/links/5964a2b2aca2720a5ccda9ce/International-Review-of-Leave-Policies-and-Related-Research-2017.pdf](https://www.researchgate.net/profile/Peter_Moss2/publication/318324882_International_Review_of_Leave_Policies_and_Related_Research_2017/links/5964a2b2aca2720a5ccda9ce/International-Review-of-Leave-Policies-and-Related-Research-2017.pdf) [<https://perma.cc/QU8T-M36F>] (reporting that gender neutral parental leave is compensated by a small lump sum of €3,269 per month).

363. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 338, at 1 (reporting that men comprise only 4% of new parents who take substantial leave to care for a child); *see also* Boyer & Fagnani, *supra* note 362, at 171 (explaining that French men were reluctant to take parental leave because it is poorly paid and "in most couples," French men earn more than women).

Similarly, few British,<sup>364</sup> Australian, Czech, Italian, or Korean fathers take paternity leave because it is compensated at “less than [50%] of . . . earnings.”<sup>365</sup>

Highly compensated paternity leave is a completely different story.<sup>366</sup> It is clear why: men can still be breadwinners while simultaneously subverting gender norms about childcare.<sup>367</sup> When Iceland began offering men three months of non-transferrable leave at 80% of their salaries, almost 90% of new fathers in Iceland took the full three months.<sup>368</sup> Norway earmarks ten weeks of leave for fathers at full salary, and 90% of new fathers take more than two months.<sup>369</sup> Similarly, 82% of Portuguese fathers take four weeks of fully compensated paternity leave.<sup>370</sup>

Men are extremely price sensitive. Iceland capped paternity leave benefits after its financial crisis and decreased compensation from about 80% of salary to about 60%.<sup>371</sup> The number of men forgoing leave entirely increased by about 10%; on average, men took two weeks less leave.<sup>372</sup> Finnish men receive only 70% of their pay, and they take significantly less paternity leave than Swedish fathers (who receive 90% of their salaries)<sup>373</sup> do and pre-financial crisis Icelandic fathers.<sup>374</sup>

364. Margaret O’Brien & Katherine Twamley, *Fathers Taking Leave Alone in the UK—A Gift Exchange Between Mother and Father?*, in COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE, *supra* note 162, at 163, 164, 166 (finding that 84% of British fathers took two weeks or less when they were paid a lump sum of £160 per week).

365. OECD, *supra* note 314, at 15.

366. Huerta et al., *supra* note 281, at 319 (finding that in OECD countries, “fathers’ use of paternity and parental leave is largest when leave is well-paid and when part of the entitlement cannot be transferred, and is lost if not used.”); Elin Kvande & Berit Brandth, *Individualized, Non-Transferable Parental Leave for European Fathers: Migrant Perspectives*, 20 COMMUNITY, WORK & FAM. 19, 31 (2017) (reporting studies that have found that key features of a successful paternity leave system are “the presence of individualized paid leave for men, the structure of non-transferability between parents and thirdly the level of generosity (wage replacement level and duration)”).

367. Kvande & Brandth, *supra* note 366, at 31 (finding that providing paternity leaves with “generous income replacement ensures that the fathers . . . do not have to give up their identity as ‘breadwinners.’”).

368. Gíslason, *supra* note 292, at 148. Iceland also permits men to share some paid leave with their partners, and fathers take a small amount of this.

369. Kvande & Brandth, *supra* note 289, at 30–31.

370. Wall & Leitão, *supra* note 286, at 47.

371. OECD, *supra* note 314, at 16.

372. Gíslason, *supra* note 292, at 149 tbl.9.1.

373. Duvander et al., *supra* note 292, at 126.

374. Johanna Lammi-Taskula, *Doing Fatherhood: Understanding the Gendered Use of Parental Leave in Finland*, 6 FATHERING 133, 136 (2008).

Paid leave is widely *unavailable* in America, and, on average, American fathers take less than two weeks of leave.<sup>375</sup> Several states offer paid leave to parents but compensate this leave meagerly.<sup>376</sup> Predictably they have had mixed success in persuading men to take leave. Since 2004, California has provided new parents with six weeks of paid bonding leave at a rate of 55% of a worker's salary, subject to a benefit cap of about \$1100 per week.<sup>377</sup> (In 2018 the rate increased to 70% for low wage workers and 60% for everyone else).<sup>378</sup>

California's wage replacement is far below the rate that the Boston College study identified as necessary for most men to be willing to take time off from work. No surprise, then, that fewer than 10% of new fathers in California take leave.<sup>379</sup> (That few Californians know about leave does not help—only about 35% of Californians know about paid family leave, and strangely, Californians' awareness has decreased over time).<sup>380</sup>

California's paid leave scheme has achieved a couple of things, and it shows paternity leave schemes can work in America when done right. First, among the 10% of men who do take leave, men take longer leaves than before—40% take six weeks.<sup>381</sup> Second, significantly more men take solo leaves.<sup>382</sup> This is cause for celebration because longer, solo leaves engender the greatest change in how husbands and wives divide labor. How California's leave policy has fallen short also points the way ahead: Full wage replacement would give even more California men the incentive to take long, solo leaves.

Compensating paternity leave at or near full salary is a necessary condition to a successful paternity leave scheme, but not a sufficient one in and of itself. That is because, at bottom, the problem of fathers not taking full advantage of the paternity leaves already available to them is a collective action problem. A

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375. Wen-Jui Han et al., *Parental Leave Policies and Parents' Employment and Leave-Taking*, 28 J. POL'Y ANALYSIS & MGMT. 29, 31 (2009).

376. *Id.*

377. See Associated Press, *California Expands Paid Family Leave Law to Increase Time-Off Pay*, WALL STREET J. (Apr. 12, 2016, 12:32 AM), <https://www.wsj.com/articles/california-expands-paid-family-leave-law-to-increase-time-off-pay-1460435557> [<https://perma.cc/FR69-DCBR>].

378. *Id.*

379. KELLY BEDARD & MAYA ROSSIN-SLATER, THE ECONOMIC AND SOCIAL IMPACTS OF PAID FAMILY LEAVE IN CALIFORNIA: REPORT FOR THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT 10 (2016), [http://www.edd.ca.gov/Disability/pdf/PFL\\_Economic\\_and\\_Social\\_Impact\\_Study.pdf](http://www.edd.ca.gov/Disability/pdf/PFL_Economic_and_Social_Impact_Study.pdf) [<https://perma.cc/3DYE-5YCE>].

380. *Id.* at 22 (reporting results of a Field poll showing about 43% of Californians knew about PFL in 2011 and 49% in 2009).

381. Four weeks is the average length of leave for men in California who do take leave. *Id.* at 14.

382. *Id.* at 10.

majority of fathers say that they want to take paternity leave; yet many of these same men fear that their supervisors, coworkers, and peers will think them unmanly or indifferent to career success in comparison either to men who do not have children or to men with children and who forgo leave.

### 3. The cost of forgoing leave

The breadwinner stereotype has both an income and a cost component. The prior Section addressed the income component, and I now turn to how paternity leave schemes can be structured to address the cost side of the stereotype. Responsible husbands and fathers spend money responsibly. Parental leave makes full-time childcare unnecessary. Childcare is expensive<sup>383</sup>—rivaling the cost of housing—particularly the kind of high-quality childcare upper-middle and upper class parents consider essential. Responsible breadwinners do not blow money on needless expenses.

A father who forgoes paternity leave suffers an opportunity cost, too—the emotional connection and joy he gets from deeply bonding with a child and witnessing such moments as his child’s first smile or burbling laugh.<sup>384</sup> As discussed in earlier Sections, fathers crave more time with their children.<sup>385</sup> Millennials aspire to be equal caregivers with their spouses.<sup>386</sup> Those who fall short of their aspirations pay a price in terms of conflicted and guilty feelings.<sup>387</sup>

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383. According to Zip Recruiter, the average nanny in the United States earns nearly \$42,000. That does not include the cost of health insurance or payroll taxes, which families usually have to pay as well. *Full Time Nanny Salary*, ZIPRECRUITER, <https://www.ziprecruiter.com/Salaries/Full-Time-Nanny-Salary> [<https://perma.cc/FYP4-6D8A>] (last visited Jan. 30, 2019). For comparison purposes, \$4,000 per month is how much house payments on a \$750,000 mortgage cost. Daycare for an infant and a four-year-old is on average much cheaper—about \$24,000 per year in the Northeast, \$20,000 in the West and Midwest, and \$17,000 in the South. CHILD CARE AWARE OF AM., 2017 REPORT: PARENTS AND THE HIGH COST OF CHILDCARE 20 fig.1 (2017), [http://usa.childcareaware.org/wp-content/uploads/2017/12/2017\\_CCA\\_High\\_Cost\\_Report\\_FINAL.pdf](http://usa.childcareaware.org/wp-content/uploads/2017/12/2017_CCA_High_Cost_Report_FINAL.pdf) [<https://perma.cc/CJL8-ZZG6>].

384. Should you require a citation for this point, the eleven qualitative studies of fathers in Europe, Canada, and Japan contained in COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE, *supra* note 162, give ample support. The fathers in these studies who took substantial solo leaves with their infants enthusiastically testify to the depth and richness of the emotional bond they forged with their children. See also Rachel Gillett, *Facebook Is at the Forefront of a Radical Workplace Shift in America by Taking the Lead on Parental Leave*, BUS. INSIDER (Aug. 20, 2015, 4:25 PM), <https://www.businessinsider.com.au/facebook-parental-leave-policy-2015-8> [<https://perma.cc/CF66-FDY2>] (quoting fathers at Facebook who took four months of leave with their kids and found the experience “magical”).

385. See *infra* text accompanying notes 116–19.

386. HARRINGTON ET AL., THE NEW MILLENNIAL DAD: UNDERSTANDING THE PARADOX OF TODAY’S FATHERS, *supra* note 111, at 3.

387. See HARRINGTON ET AL., THE NEW DAD: CARING, COMMITTED AND CONFLICTED, *supra* note 22, at 14–17, 35.



My husband, also a law professor, jokes that had he remained with the notoriously hard-working New York law firm he started at, our twelve-year-old would not be able to pick him out of a lineup. Money is fungible. There is no substitute for a close, emotional connection with a child.

#### 4. Labels matter: “paternity leave” not “parental leave”

Successful leave schemes must be specially earmarked as “paternity leave” for fathers alone. Even if it is fully compensated, most men will not take gender neutral “parental leave.”<sup>388</sup> Country after country proves this. Only 1% of Icelandic fathers took leave when it was offered on a gender neutral basis and either the mom or dad could take it.<sup>389</sup> When Iceland created a three-month father quota compensated at 80% of salary, nearly all new fathers took the full quota.<sup>390</sup> Similarly, nearly 80% of Norwegian fathers took their four-week quota within just five years of its introduction, and today, 90% do.<sup>391</sup> As the quota has increased, so too have Norwegian father’s leaves.<sup>392</sup> Less dramatically, but still significantly, when Quebec introduced three to five weeks of paid, non-transferrable paternity leave, the number of fathers taking leave increased from 3% who took part of shared parental leave time to 33% who took advantage of the paternity leave.<sup>393</sup>

In Sweden, few fathers take any parental leave time, which they share with the baby’s mother; 90% take their father quota.<sup>394</sup> Recognizing the fact that fathers take paternity leave but not shared leave, Sweden is moving toward a system of individual, rather than family, leave entitlements. Under this new proposal, fathers and mothers would each get the same amount of non-transferable leave.<sup>395</sup>

Some countries, like Germany, grant “bonus” parental leave if a father takes paternity leave of a month or more. These are functionally equivalent to father

388. Huerta et al., *supra* note 281, at 319 (stating that “evidence [from OECD countries] suggests that fathers’ use of paternity and parental leave is largest when leave is well-paid and when part of the entitlement cannot be transferred to his partner, and is lost if not used.”).

389. See HARRINGTON ET AL., *THE NEW DAD: THE CAREER–CAREGIVING CONFLICT*, *supra* note 134, at 33.

390. See, e.g., Gíslason, *supra* note 292, at 148, 149 tbl.9.1.

391. Kvande & Brandth, *supra* note 289, at 31.

392. *Id.*

393. Lindsey McKay & Andrea Doucet, “Without Taking Away Her Leave”: *A Canadian Case Study of Couples’ Decisions on Fathers’ Use of Paid Parental Leave*, 8 *FATHERING* 300, 300 (2010).

394. James Crisp, *Take Five Months Parental Leave, Swedish Fathers Told*, *TELEGRAPH* (Dec. 20, 2017, 9:08 AM), <https://www.telegraph.co.uk/news/2017/12/19/take-five-months-parental-leave-swedish-fathers-told/> [<https://perma.cc/6MLJ-245V>].

395. *Id.*

quotas and dramatically increase how many men take long leaves. Within six years of instituting its “daddy months” Germany saw the proportion of men taking leave jump from 3.5% to over 30%.<sup>396</sup> When Portugal gave fathers the option of sharing parental leave with the baby’s mother, only about a half of a percent of fathers took any leave.<sup>397</sup> Within a year of creating a specific, non-transferable paternity leave entitlement, 20% of fathers took leave.<sup>398</sup> Today, 80% of Portuguese fathers take their four-week paternity leave.<sup>399</sup>

Quotas and nontransferable leaves work because they harness gender stereotypes in the service of gender equality. First, they capitalize on a father’s desire to be a good breadwinner. A father who forgoes his quota costs his family money—someone has to care for the infant, and that care is paid for either in the form of the mother’s foregone wages or to pay for childcare directly. A father who takes his nontransferable paternity leave saves his family money. Second, “explicitly labelling leave as ‘for the father’ legitimi[z]es the idea of fathers taking parental leave.”<sup>400</sup> It also reduces the chance that employers and coworkers might object, which could make men feel leery of taking leave.<sup>401</sup> Third, leaves that are earmarked specifically for fathers “construct[]” both “male and female employees . . . as potential parents who will take parental leave.”<sup>402</sup>

Finally, a father-specific entitlement means that a father’s leave does not reduce how much time a mother can stay home with the baby. When men take part of “shared” leave time they feel as though they are doing exactly that. Men find “taking time away” from the mother hard to swallow,<sup>403</sup> and understandably so, given stereotypes about mothers’ superior caretaking abilities.<sup>404</sup> Father quotas disarm these stereotypes by “mak[ing] it clear that all parents have the right to care for their children without risking their jobs,

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396. See Fleischmann & Sieverding, *supra* note 305, at 463 (reporting that 3.5% of German fathers took leave before the daddy bonus); see also OECD, *supra* note 314, at 14 (reporting that in 2013, over 30% of German fathers took the two-month daddy bonus).

397. Wall & Leitão, *supra* note 286, at 46.

398. *Id.*

399. *Id.* at 47.

400. OECD, *supra* note 314, at 14.

401. *Id.*

402. See Kvande & Brandth, *supra* note 366, at 31.

403. See, e.g., Gíslason, *supra* note 292, at 148 (stating that Icelandic men wanted to take more paternity leave but they “did not [want to] infringe on the possibilities of mothers”).

404. See McKay & Doucet, *supra* note 393, at 308.

financial well-being, or work identities.”<sup>405</sup> Fathers then supplement, not usurp, a mother’s care.

##### 5. The problem with “primary caregiver” leaves

Recently, several law firms have begun offering very generous, gender neutral “primary caretaker” leave in addition to maternity and paternity leaves.<sup>406</sup> This is a mistake. Law firms that genuinely want men to take these leaves will find few takers. When leave is called ‘parental’ leave and either the mom or dad can take it, the default is often mom.<sup>407</sup> The experience of country after country shows that men do take paternity leave, but *only paternity* leave.<sup>408</sup> For forty years, Sweden has tried to get mothers and fathers to share gender-neutral parental leave equally, but few “Swedish fathers take more than” their father quota.<sup>409</sup> Almost all of the gender neutral parental leave goes to mothers.<sup>410</sup> The same goes in Norway. Fathers “take their quota and only the quota” and leave the “shared” leave to the mother.<sup>411</sup> Ditto in Spain. Spanish mothers can transfer up to ten weeks of their maternity leave to fathers, but fewer than 2% of Spanish men take any of this leave.<sup>412</sup> So too in Quebec. Men take their five-week non-transferrable paternity leave but almost none of the

405. KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA* 223 (2010).

406. See HARRINGTON ET AL., *THE NEW DAD: THE CAREER–CAREGIVING CONFLICT*, *supra* note 134, at 15.

407. Lotte Bloksgaard & Tine Rostgaard, *Denmark Country Note*, in 13TH INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2017, *supra* note 362, at 128, 136 (“As perhaps a consequence of the lack of a father’s quota, qualitative studies show that often the parents do not in reality negotiate the division of Parental leave; instead leave is often perceived as ‘for women’ and thus automatically divided according to cultural assumptions of gender and parenthood.”); Ankita Patnaik, *Reserving Time for Daddy: The Consequences of Fathers’ Quotas*, 36 J. LAB. ECONS. (forthcoming 2019) (showing “that ‘daddy quotas’ can have a powerful labeling effect” in inducing men to take leave to care for a baby); see also Lammi-Taskula, *supra* note 291, at 103 (finding that among Finnish parents if “parental leave is transferable between parents and not earmarked for the father, only a small minority of fathers take it”).

408. Kvande & Brandth, *supra* note 366, at 22 (stating that “international research has documented that individualized parental leave rights given to fathers, rather than gender-neutral rights to families, are more effective when it comes to getting fathers to take leave.”).

409. McKay & Doucet, *supra* note 393, at 301.

410. *Id.*

411. Kvande & Brandth, *supra* note 289, at 31.

412. Gerardo Meil et al., *Fathers on Leave Alone in Spain: ‘Hey, I Want to Be Able to Do it Like That, Too’*, in COMPARATIVE PERSPECTIVES ON WORK–LIFE BALANCE, *supra* note 162, at 107, 111 tbl.7.1.

leave they share with the baby's mother.<sup>413</sup> Denmark ended its father quota in 2002, and fathers' use of parental leave dropped significantly after that.<sup>414</sup>

Few American men have taken up any "primary caregiver" leave when it has been offered. Ernst & Young, for example, offers men two weeks of paternity leave, and many men take that.<sup>415</sup> The company offers an additional four weeks for a father who affirms he's the "baby's primary caregiver."<sup>416</sup> Almost no men take that.<sup>417</sup> As one commentator put it, "Given the norms at high-powered workplaces, where supervisors seem constantly on alert for signs of anything less than total commitment, men need to have a near heroic level of self-assurance" to take a long "primary caretaker" leave.<sup>418</sup> Ernst & Young's experience bears that out—men at that firm average two weeks and three days of leave, which translates into the earmarked, paid, two week paternity leave plus three days.<sup>419</sup>

## 6. The power of peer pressure

Earlier in this Part, I argued that norms that create and support social status are particularly difficult to change; consequently, paternity leave schemes have to be structured so that men can frame their taking long, solo paternity leaves as congruent with, and their forgoing such leaves as incongruent with, their status as breadwinners. As difficult as this might be initially, evidence from other countries shows that workplace norms surrounding paternity leave change very quickly once fathers start taking paternity leave. First, though men are generally apt to take advantage of generously paid non-transferrable leaves,

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413. Patnaik, *supra* note 407 (finding that "the average father in post-reform Quebec consumed exactly 5 weeks of paid leave [and] . . . did not increase their consumption beyond the amount allocated by the quota even when there were unused weeks of leave still available.").

414. Valeria Criscione, *Paternity Rights . . . and Wrongs*, GUARDIAN (Mar. 18, 2011, 8:01 PM), <https://www.theguardian.com/money/2011/mar/19/parental-rights-norway-reduce-inequality> [<https://perma.cc/KM74-9WPB>] (noting that there was a "dramatic drop in participation by fathers in Denmark after it removed its quota in 2002 . . .").

415. See Noam Scheiber, *Paid Leave for Moms and Dads: Reporter's Notebook*, N.Y. TIMES (Sept. 16, 2015), <https://www.nytimes.com/2015/09/16/insider/changing-attitudes-toward-paid-leave-for-moms-and-dads-reporters-notebook.html> [<https://perma.cc/L6PP-T9SF>].

416. *See id.*

417. Weber, *supra* note 28. Noam Scheiber was snarkier:

Then the firm offers eight weeks of paid leave to the primary caregiver, and four weeks of paid caregiving leave to every new parent. Voilà! The primary caregiver, if she's a biological mother, gets 18 weeks, while the biological father gets four, and the H.R. department sleeps well at night.

Scheiber, *supra* note 415.

418. Scheiber, *supra* note 415.

419. *Id.*

these schemes may take time to take off. For example, when Norway first introduced the non-transferrable father month, two-thirds of fathers left a month of fully paid leave on the table (and presumably their family either paid for infant care or made do without the mother's income).<sup>420</sup> Today, however, taking the father month is the norm in Norway, with the average Norwegian father taking all but three days of his ten week quota.<sup>421</sup> Ninety percent of fathers take leave,<sup>422</sup> and 70% of fathers take *all* of the father quota (or more).<sup>423</sup> Indeed, "Norwegian fathers take it for granted."<sup>424</sup> Co-workers and managers expect fathers to take leave.<sup>425</sup> Demonstrating just how normal paternity leave is, it does not negatively affect men's future employment or earnings.<sup>426</sup>

At first, Norwegian fathers "worried how employers and coworkers would react,"<sup>427</sup> echoing American fathers today. Their reluctance evaporated as workplace norms changed. How these norms changed points the way forward for effective paternity leave policies in America. One father's leave snowballed into other fathers taking leave. In particular, a man was quite likely to take leave if a coworker or his manager or his brother had taken leave.<sup>428</sup> The reason is simple: When a coworker (or manager or brother) was reintegrated into the workforce after his leave, it showed other men that taking leave was not risky.<sup>429</sup> Of particular note to law firms and the partnership problem, peer effects were

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420. Berit Brandth & Elin Kvande, *Norway Country Note*, in INTERNATIONAL REVIEW OF LEAVE POLICIES AND RESEARCH 313, 319 (Alison Koslowski et al. eds., 2018), [https://www.leavenetwork.org/fileadmin/user\\_upload/k\\_leavenetwork/country\\_notes/2018/FINAL.Norway2018.pdf](https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/country_notes/2018/FINAL.Norway2018.pdf) [<https://perma.cc/5JDB-FH8S>].

421. *Id.* (noting that the length of leave taken by the average father has varied as the quota has increased and decreased and is now forty-seven days, three fewer than the fifty days granted by the quota).

422. Kvande & Brandth, *supra* note 289, at 31 (reporting that "90% of eligible fathers use some of—or the entire quota" with the average leave being forty-six days of leave).

423. *Increasing Proportion of Fathers Using the Paternity Leave Quota*, STATS. NOR. (Dec. 20, 2016), <https://www.ssb.no/en/befolkning/artikler-og-publikasjoner/increasing-proportion-of-fathers-using-the-paternity-leave-quota> [<https://perma.cc/AJ29-M5KP>] (reporting that "70 per cent of fathers took the quota or more of the parental benefit period in 2015.").

424. Kvande & Brandth, *supra* note 366, at 31.

425. *Id.* (explaining that "leave for fathers is so well accepted by working life.").

426. See Gordon B. Dahl et al., *Peer Effects in Program Participation*, 104 AM. ECON. REV. 2049, 2063–64 (2014).

427. *Id.* at 2051.

428. *Id.*

429. *Id.*; see also Welteke & Wrohlich, *supra* note 313, at 24–26, 28 (finding that the peer effect on a mother's decision to take a year-long leave was greatest among workers with lower job security, suggesting that a women's concern about "post-birth career opportunities, wage-trajectories, and the possibility of combining family and work" were assuaged by a peer's leave-taking).

particularly pronounced when people worked in jobs with little job security<sup>430</sup>—and, as we all know, making partner is far from certain.

*Managers* who took the father month had the biggest influence on whether workers subsequently took leave. Furthermore, once the snowball got rolling, it picked up speed. The effect “amplified over time” within workplaces “with each subsequent birth exhibiting a snowball effect,” ultimately “cascad[ing] through the firm.”<sup>431</sup> Indeed, peer effects appear to be the main reason why taking the father month is just what new dads do in Norway.<sup>432</sup>

In short, the snowball effect bears out common sense—first movers and opinion leaders (firm managers and leaders) can induce herd behavior. In the American tech industry, we can see the snowball gathering at the industry level and in some individual firms. For example, in 2015, Netflix’s decision to permit parents to take unlimited parental leave “raised the bar” for other tech companies who are hotly competing with each other for the same talented employees.<sup>433</sup> The very next day, Microsoft increased maternity leave benefits to twenty weeks and paternity leave benefits to twelve.<sup>434</sup> Today, among the larger tech firms, upwards of six weeks of paternity leave is the standard (and many offer well north of ten weeks).<sup>435</sup>

Since 2013, Facebook has offered its employees four months of paternity leave. Taking four months off has now become the norm at Facebook.<sup>436</sup> Their

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430. Dahl et al., *supra* note 426, at 2051.

431. *Id.*

432. As the study’s authors put it, “Social interactions could reinforce . . . the direct effects . . . due to a program’s parameters, leading to a long-run equilibrium take-up rate which is substantially . . . higher than otherwise.” *Id.* at 2049. German researchers confirmed the profound influence peers can have on a worker’s decision to take leave. Welteke & Wrohlich, *supra* note 313, at 17 (finding large peer effects on a high-earning woman’s decision to take a year long, partially paid maternity leave).

433. Professor Stewart Friedman said that Netflix’s unlimited leave “create[d] pressure for their competitors to go further.” Regardless of how crazy Netflix’s policy may seem to management at other tech firms, “they’re going to see this internal pressure as the best and the brightest are going to be able to say, ‘Hey, why can’t we do this?’” Richard Feloni, *Wharton Professor Says Netflix’s New Unlimited Parental Leave Policy ‘Raises the Bar’ for the Business World*, BUS. INSIDER (Aug. 6, 2015, 10:36 AM), <https://www.businessinsider.com/netflixs-unlimited-parental-leave-raises-the-bar-2015-8> [<https://perma.cc/4H5U-2XHM>]. Netflix has since capped its unlimited leave to fifty-two weeks. See Rani Molla, *Netflix Parents Get a Paid Year Off and Amazon Pays for Spouses’ Parental Leave*, RECODE (Jan. 31, 2018, 10:35 AM), <https://www.recode.net/2018/1/31/16944976/new-parents-tech-companies-google-hp-facebook-twitter-netflix> [<https://perma.cc/Y7DR-E8DZ>].

434. Feloni, *supra* note 433 (stating that Microsoft increased maternity leave to twenty weeks); see also Molla, *supra* note 433.

435. See Molla, *supra* note 433.

436. Gillett, *supra* note 384.

leaders have walked the talk, and male employees have followed suit. Mark Zuckerberg, their billionaire (once wunderkind) CEO, took two months off for the birth of each of his children. When Vice President Andrew Bosworth announced he was taking two months off when his son was born in 2014, he caught flak from his colleagues for it—because he was taking only *two* months, not *all* four months, off.<sup>437</sup> Bosworth calmed ruffled feathers by explaining he would be taking his four months in two, two-month chunks.<sup>438</sup>

Let me return to my earlier discussion of how a successful paternity leave policy must be tailored so that a man's taking several weeks off of work to care for an infant is consonant with the breadwinner stereotype. Market leaders, like Netflix and Facebook, and firm leaders, like Mark Zuckerberg, provide the best "ambiguation" possible: It is hard to feel like a sissy, or to knock a coworker for being a sissy, if billionaire CEO Mark Zuckerberg has taken two months of paternity leave.

This next Section turns to a few other suggestions that firms (who lack a Mark Zuckerberg at the helm) can adopt to encourage more men to take substantial time off to care for their new babies.

## 7. Nudges

In general, stereotypes that men should be breadwinners and that mothers are natural caregivers simply make it harder for men to take paternity leave than for mothers to take maternity leave. Even men who sincerely want to stay home with their new babies have to overcome these stereotypical barriers. Even small barriers—like having to negotiate the length of a state-guaranteed leave—can reduce the likelihood men will take long enough leaves to make a difference in how they share caregiving with their spouses. This is just what Denmark found when it dropped its "daddy quota" in favor of a gender neutral leave scheme. Once men had to negotiate how long they would be on leave, they started taking far shorter leaves than under the "daddy quota."<sup>439</sup>

The barrier of negotiation probably explains why so few American men have taken advantage of employer-based gender neutral "caregiver" leave when their doing so does not decrease the amount of leave their spouses would take.

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437. *Id.*

438. *Id.*

439. Lotte Bloksgaard, *Negotiating Leave in the Workplace: Leave Practices and Masculinity Constructs Among Danish Fathers*, FATHERHOOD IN THE NORDIC WELFARE STATES: COMPARING CARE POLICIES AND PRACTICE 141, 157 (Guðný Björk Eydal & Tine Rostgaard eds., 2015) (concluding that "the fact that fathers must negotiate leave individually in the workplace, where the ideal connecting masculinity and work is strong and without the support that a legislative father's quota may provide, must be seen as an important explanation for the limited leave use among Danish fathers.").

To qualify for “caregiver” leave, a father has to explain to (or even persuade) a human resources department that he is in fact the child’s primary caregiver. Specifically earmarked “paternity” leaves (or “daddy” quotas) overcome these barriers by implicitly communicating to skittish men that the leave is theirs alone and that a father’s time off is expected.

Given men’s risk aversion, this reassuring message matters. Facebook attributes its success in encouraging men to take long paternity leaves to the fact that it asks expecting fathers, “*When* are you taking leave?” not “Are you taking leave?”<sup>440</sup> Asking “when” not “are you” frames leave as expected and normal, soothing men who fear taking time off will hurt their careers.

“When are you?” borrows a page from the “Nudge” toolkit, popularized by Richard Thaler and Cass Sunstein.<sup>441</sup> The difference between “When are you?” and “Are you?” parallels the difference between an “opt-out” and an “opt-in” system. Forcing a man on his own initiative to notify his supervisor that he intends to take paternity leave functions as an “opt-in” system. Approaching men with “When are you” assumes they *will* take leave, and requires those who do not want leave to explicitly decline it. Opt-in systems depress participation rates in diverse activities such as registering to be an organ donor or contributing to an employer-sponsored retirement plan. In contrast, “opt-out” systems can increase participation rates by several orders of magnitude over opt-in systems.<sup>442</sup> For example, Germany’s organ donor program is an opt-in system, and only 12% of Germans have consented to be organ donors.<sup>443</sup> Neighboring Austria automatically enrolls Austrians onto the organ donor list but permits them to “opt-out.”<sup>444</sup> Ninety-nine percent of Austrians are registered as potential organ donors.<sup>445</sup> Employers that have switched from opt-in retirement plans to opt-out plans have seen huge jumps in employee participation rates. A true “opt-out” system, which would require automatically

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440. Scheiber, *supra* note 415 (reporting that at Facebook, men take relatively long leaves, and “managers are trained to ask not ‘are you taking your leave’ but ‘*when* are you taking your leave . . . .”).

441. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).

442. *Id.* at 111 (citing to study that found that new employee contribution rates to an employer-offered retirement plan increased from 20% under an “opt-in” approach to 90%).

443. Richard H. Thaler, *Opting in vs. Opting Out*, N.Y. TIMES (Sept. 26, 2009), <https://www.nytimes.com/2009/09/27/business/economy/27view.html> [https://perma.cc/3ET3-NGM3].

444. *Id.*

445. *Id.*



enrolling prospective fathers in paternity leave, might seem too coercive, however.

Structuring a paternity leave program as a “mandated choice” could honor individual preferences while still significantly increasing the number of men taking leave. To return to the example of organ donation, Illinois structures its organ donation registry as a “mandated choice.” When you renew your driver’s license in Illinois, you must answer this question: “Do you wish to be an organ donor?”<sup>446</sup> Sixty percent of Illinois drivers have registered, significantly higher than the national average of 38%.<sup>447</sup> Mandated choice in the retirement plan context similarly gooses employee participation.<sup>448</sup> Simply asking a prospective father directly “Are you taking leave?” makes the decision a “mandated choice.” Though not as effective as a true “opt-out” system, these examples show that mandated choice would be likely to substantially increase the number of men taking leave. Approaching a prospective father in person with his “mandated choice” (instead of sending him a standardized memo) would encourage even more men to take paternity leave.<sup>449</sup>

Given that the length of leave matters, too, asking “When are you taking your *twelve weeks* of leave?” (or whatever the firm’s maximum is) could increase the length of time off fathers take. Such a question makes the length of leave a mandated choice, too—a man who wants a shorter leave must affirmatively decline the full amount of leave. That forces men who decline the full leave to come to grips with the fact that they are leaving money on the table.

In sum, this research into “nudges” implies that firms that offer generous paternity leaves—at least eight weeks—and personally approach expectant fathers to ask them *when* they are taking their eight weeks (or longer) of leave will substantially increase the number of new dads who take lengthy *solo* leaves. The snowball effect suggests that such an approach will work even better if a law firm partner—not someone from H.R.—poses the question. Most men already take a short time off, so a soft nudge may just do the trick.

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446. *Id.*

447. *Id.*

448. THALER & SUNSTEIN, *supra* note 441, at 110.

449. *Cf.* MICHAEL SANDERS ET AL., ENCOURAGING PEOPLE INTO UNIVERSITY 17 (2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/603737/Encouraging\\_people\\_into\\_university.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/603737/Encouraging_people_into_university.pdf) [<https://perma.cc/8AVV-UZS3>] (reporting results of study that found that a letter that personally encouraged low-income high school seniors to apply to selective universities made it more likely that they would both apply to and accept offers from such schools compared to students who did not receive personalized letters).

## V. CONCLUSION

The fight for women's equality in law has achieved a lot. When Justice Ruth Bader Ginsburg entered Harvard in 1956, she was one of nine women law students in a class of 500.<sup>450</sup> Nearly half of the Harvard Law School class of 2020 are women.<sup>451</sup> Nearly half of all law firm associates are women,<sup>452</sup> and more than a third of all Federal judges are women.<sup>453</sup> In law firms, women fought for generous, paid maternity leaves, and they are now standard. Many firms also offer part-time and flexible work arrangements for all lawyers. But still far more women than men fail to make partner.

The partnership ranks of law firms are profoundly sex segregated and will remain so for the foreseeable future. This state of affairs is intolerable—the profession that fought for and helped to achieve legal equality on the bases of race, sex, and sexual orientation (and others) is itself dogged by intractable inequality.

A persistent underlying feedback loop continues to impede a substantial portion of women from ascending to the highest ranks of law firm leadership. Gender stereotypical expectations and senses of obligation lead to differences between men and women with respect to their work experience and income, which, in turn, lead to couples making rational, income maximizing (and gender stereotyped) decisions about parenting and managing the home, which reinforce gender stereotypes. Both men and women are caught in this feedback loop. Continuing to focus on fixing law firms so that they are more equal for women cannot disrupt this feedback loop because it ignores the other half of the population—men—who are stuck in the loop.

This vicious cycle serves no one. It sucks women dry of their aspirations and ambitions. It denies men the opportunity to be the equal fathers to their children and partners to their spouses that they want to and deserve to be.

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450. Julia Collins, *Celebration 45: The Alumnae of Harvard Law Return to Cambridge*, HARV. L. TODAY (Feb. 25, 1999), <https://today.law.harvard.edu/feature/celebration-45-alumnae-harvard-law-return-cambridge/> [<https://perma.cc/PX5H-MD7T>]; S.M., *A Portrait of Ruth Bader Ginsburg as a Young Woman*, ECONOMIST (Jan. 1, 2019), <https://www.economist.com/prospero/2019/01/01/a-portrait-of-ruth-bader-ginsburg-as-a-young-woman> [<https://perma.cc/J8JG-UHPE>].

451. See *HLS Profile and Facts, Class of 2020*, HARV. L. SCH. (Sept. 5, 2017), <http://hls.harvard.edu/dept/jdadmissions/apply-to-harvard-law-school/hls-profile-and-facts/> [<https://perma.cc/NSQ6-PWHU>].

452. See NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 7, at 5, 8 tbl.1.

453. Ann Farmer, *Diversity on the Federal Bench: It's About More than Gender and Race*, AM BAR ASS'N (Aug. 5, 2015), [https://www.americanbar.org/groups/diversity/women/publications/perspectives/2014/fall/diversity\\_the\\_federal\\_bench\\_its\\_about\\_more\\_gender\\_and\\_race/](https://www.americanbar.org/groups/diversity/women/publications/perspectives/2014/fall/diversity_the_federal_bench_its_about_more_gender_and_race/) [<https://perma.cc/BXG7-DJ8E>] (stating that “about one-third of all active Article III judgeships (which include the U.S. Supreme Court, U.S. circuit courts of appeal, U.S. district courts, and the U.S. Court of International Trade) are women.”).

The breadwinner stereotype is the culprit behind men's part of the feedback loop; and it lies at the heart of men's and women's decisions about how to share responsibility for paid work, childcare, and housework. For women's equality to be possible, we must dismantle the breadwinner stereotype. Persuading men to take paternity leaves of a month or two by themselves with their new babies has been proven to erode the breadwinner stereotype in many other countries, some of them as hard working as ours and some of them more socially conservative than ours. In the nearer term, men who take substantial, solo paternity leaves become equal partners at home and equal parents to their children, freeing their spouses from the crushing load that has long derailed women's ambitions.

The breadwinner stereotype can be dismantled. Many law firms already offer fully paid paternity leaves of over a month, but too many men take far too little. Paternity leaves need to be carefully designed so as to make men feel as though taking a substantial amount of time off to care for their children fulfills their role as family breadwinner. The tweaks to existing paternity leave policies are relatively small but will require the commitment of leaders in law firms to make such policies successful.

The proposal offered here is by no means the silver bullet that brings down gender inequality. No such silver bullet exists for the gender stereotypes that shape our desires and fears and thus the contours of our lives as individuals, couples, and members of our profession. But it is likely to help a lot, improve the lives of men, their children, and their spouses, while hurting no one. We should give it a go.