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Discrimination against Mothers Is the Strongest Form of Workplace Gender Discrimination: Lessons from US Caregiver Discrimination Law

Stephanie Bornstein, Joan C. Williams & Genevieve R. Painter*

Work-family reconciliation is an integral part of labour law as the result of two major demographic changes. The first is the rise of the two-earner family. The second is that, as Baby Boomers age, caring for elders has become a pressing concern for men as well as women. Despite these changes, most European and American workplaces still assume that the committed worker has a family life secured so that family responsibilities do not distract him from work obligations. This way of organizing employment around a breadwinner husband and a caregiver housewife, which arose in the late eighteenth century, is severely outdated today. The result is workplace-workforce mismatch: Many employers still have workplaces perfectly designed for the workforce of 1960.

Labour lawyers in both Europe and the United States have developed legal strategies to reduce the work-family conflicts that arise from this mismatch. Yet the legal strategies developed in Europe are different from those used in the United States. The Europeans' focus is on public policy, based on a European political tradition of communal social supports – a tradition the United States lacks. Advocates in the United States, faced with the most family-hostile public policy in the developed world, have developed legal remedies based on the American political tradition of individualism, using anti-discrimination law to eliminate employment discrimination against mothers and other adults with caregiving responsibilities. This article explores both the social science documenting that motherhood is the strongest trigger for gender bias in the work place and the American cases addressing 'family responsibilities discrimination' (FRD).

Keywords: *Work-family reconciliation, gender stereotyping, sex discrimination, labor law, workplace-workforce mismatch, maternal wall discrimination.*

1 INTRODUCTION

In our modern economy, work-family reconciliation is now recognized as an integral part of labour law. The issue of how workers can reconcile their work responsibilities with their family obligations has become central because of two major demographic changes. First, the waning of the traditional breadwinner/

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homemaker family: In the United States, for example, women now compose half (49.9%) of the US workforce,¹ and all adults are in the labour force for 70% of American families with children.² Second, as the population of the developed world ages, caring for elders has become a pressing concern, for men as well as women. Given that modern medicine continues to extend people's lives, an ever-increasing number of workers find themselves with day-to-day or crisis-based responsibilities for care of ill or elderly family members.³ At stake are not simply maternity leave and the care of young children: Workers worldwide face caregiving responsibilities that can be very long term, sandwiched between aging parents and children who require extensive parental attention well into their teenage years.⁴

Despite these demographic shifts, most European and American workplaces still assume that the committed worker has a family life secured so that family responsibilities do not distract him from work obligations. This way of organizing employment, around a breadwinner husband and a caregiver housewife, arose in the late eighteenth century as part of the Industrial Revolution and is severely outdated today.⁵ The result is mismatch: Many twenty-first century workplaces have not yet adapted to the twenty-first century workforce, in which most workers also have family responsibilities for children, elders, and ill family members.

Over the last quarter century, labour lawyers in Europe and the United States alike have worked to reduce the work-family conflicts that arise from this mismatch, although using, in part, different legal strategies. Europeans have given significant attention to work-family reconciliation through public policy based on a European political tradition of communal social supports.⁶ At the same time, advocates in the United States, who faced a hostile public policy environment, developed legal remedies based on the American political tradition of individualism, using anti-discrimination law to eliminate employment discrimination against mothers and other adults with caregiving responsibilities.⁷

¹ H. Boushey, 'The New Breadwinners', in *The Shriver Report: A Woman's Nation Changes Everything* (Maria Shriver & The Center for American Progress, 2009), 2, <www.awomansnation.com/economy.php>.

² K. Kornbluh, 'The Parent Trap', *The Atlantic Monthly*, January/February 2003, 111.

³ See J. Levin-Epstein, *Getting Punched: The Job and Family Clock* (Center for Law and Social Policy, July 2006), 3, <www.clasp.org/publications/getting_punched_fullnotes.pdf>.

⁴ See *ibid.*; B. Schneider & D. Stevenson, *The Ambitious Generation: America's Teenagers Motivated but Directionless* (New Haven, CT: Yale University Press, 1999), 147.

⁵ See J. Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (New York, NY: Oxford University Press, 2000), 20–24.

⁶ See J.C. Gornick & M.K. Meyers, *Families that Work: Policies for Reconciling Parenthood and Employment* (New York, NY: Russell Sage Foundation, 2003), 297–303.

⁷ See, e.g., J.C. Williams & C. Thomas Calvert, *WorkLife Law's Guide to Family Responsibilities Discrimination* (Center for WorkLife Law, 2006) and updates; J.C. Williams & S. Bornstein, 'The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias', *Hastings Law Journal* 59, no. 6 (2008): 1311, 1311–1358.

It is well known today that the United States lags far behind Europe, and indeed much of the rest of the world, in terms of legislation to reconcile work and family – embarrassingly so. An oft-cited statistic is that the United States is one of only four nations in the world to lack paid maternity leave – along with Swaziland, Liberia, and Papua New Guinea.⁸ European labour law has made significant progress in terms of legislating generous, paid leave for new parents; providing high-quality, accessible child care; and allowing workers to shift their schedules or reduce their working hours.⁹

While the United States has much to learn from European labour legislation on this front, the United States has lessons to offer labour lawyers in other countries, too. The inability to pass work-family legislation in the United States led to an American legal path of focusing on anti-discrimination law to root out bias against mothers and others who take on family caregiving roles. Addressing employment discrimination against caregivers is of pressing importance for two reasons. First, as the example of Sweden’s ‘daddy months’ legislation demonstrates,¹⁰ without seriously addressing the underlying biases and stigma against caregiving, even the most generous legislation to reconcile work and family will risk falling short of its goals if only women take advantage of it, while men continue to function as ideal workers. Second, recent social science documenting the ‘motherhood penalty’ and the ‘maternal wall’ shows that bias against mothers is the strongest form of sex discrimination and among the strongest forms of employment discrimination today, such that it should be a major concern to any lawyer seeking equality in the workplace.

Much has been written, and should continue to be written, on what labour lawyers and advocates in the United States can learn from European legislation to reconcile work and family. This article seeks to identify what can be learned from the United States on the importance of addressing caregiver discrimination in the workplace. It begins with an overview of the current social science research on the motherhood penalty and the maternal wall, which continue to greatly disadvantage women workers today. The article then describes how lawyers in the

⁸ J. Heymann, A. Earle & J. Hayes, ‘The Work, Family, and Equity Index: How Does the United States Measure up?’ The Project on Global Working Families (2007), 1–2, <www.mcgill.ca/files/ihsp/WFEI2007FEB.pdf>.

⁹ See, e.g., A. Hegewisch & J.C. Gornick, *Statutory Routes to Workplace Flexibility in Cross-National Perspective* (Institute for Women’s Policy Research & Center for WorkLife Law, 2008), <www.worklifelaw.org/pubs/Statutory%20Routes%20to%20WkFlex.pdf>.

¹⁰ ‘Daddy months’ is the nickname of the rule in Swedish law that each parents must take at least two months of the thirteen months of paid parental leave available, or else the family will lose these two months of subsidies. See K. Allard, L. Haas & C.P. Hwang, ‘Family-Supportive Organizational Culture and Fathers’ Experiences of Work-family Conflict in Sweden’, *Gender, Work & Organization* 18, no. 2 (2011): 141–157; A.Z. Duvander & M. Johansson, ‘What Are the Effects of Reforms Promoting Fathers’ Parental Leave Use?’, *Stockholm Research Reports in Demography* (2010): 14.

United States developed anti-discrimination law to address caregiver bias and concludes by discussing caregiver discrimination as part of labour law and of a national agenda for work-family reconciliation.

2 EMERGING SOCIAL SCIENCE RESEARCH: THE MOTHERHOOD PENALTY AND THE MATERNAL WALL

At the root of American employment law, efforts to reconcile work and family are a desire to redress gender inequality at work. As current demographic and social science research demonstrates, motherhood is now a key trigger for gender bias. Social science documenting both the ‘motherhood penalty’ and the ‘maternal wall’ are robust and provide data that should be of interest to labour lawyers in other countries.

2.1 THE MOTHERHOOD PENALTY

Economic studies now document the ‘motherhood penalty’ – that is, a severe and persistent economic penalty associated with motherhood. The wage gap between mothers and others is now larger than that between men and women, and motherhood accounts for much of the pay gap between men and women.¹¹

The motherhood penalty has been documented not only in the United States but also in roughly a dozen other industrialized countries.¹² It shows no sign of declining over time and is largest for poor women.¹³ One study of seven industrialized countries found that the penalty to mothers’ pay after having one child ranges from 4% (in Canada) to 8% (in the United Kingdom), while the penalty in pay after having two children ranges from 5% to 24%, and after three children, from 10% to 31%.¹⁴ Studies that control for human capital factors calculate a wage penalty of from 1% to 5% per child and from 5% to 7% for two children.¹⁵

The traditional explanation for the economic penalties that mothers experience is that their priorities change after they have children. While, no doubt,

¹¹ See S.J. Correll, S. Benard & In Paik, ‘Getting a Job: Is There a Motherhood Penalty?’ *American Journal of Sociology* 112, no. 5 (2007): 1297, 1298.

¹² See J. Misra, M. Budig & S. Moller, ‘Employment, Wages and Poverty: Reconciliation Policies and Gender Equity’, Working Paper, Draft on file with author (13 Apr. 2005).

¹³ See J. Waldfogel & S. Mayer, ‘Male-Female Differences in the Low-Wage Labor Market’, *Institute for Research on Poverty Focus* 25 (1999).

¹⁴ S. Harkness & J. Waldfogel, ‘The Family Gap in Pay: Evidence from Seven Industrialized Countries’, CASE Paper 29 (1999).

¹⁵ S. Avellar & P. Smock, ‘Has The Price of Motherhood Declined over Time? A Cross-Cohort Comparison of the Motherhood Wage Penalty’, *Journal of Marriage & Family* 65 (2003): 597 (citing studies).

priorities may change, when mothers choose to shift their schedules, they do not choose the economic and career marginalization that typically accompanies that decision. That marginalization reflects an arbitrary, and indeed outdated, ideal: that any serious worker is supported by a flow of domestic work from a wife and so is available for ‘full-time face-time’.¹⁶ Organizing work in this way, so that any other pattern of work relegates workers to a lesser, ‘mommy track’, reflects discriminatory workplace ideals. Many existing demographic studies find that, even controlling for a wide variety of factors, some proportion of the wage gap between mothers and others remains unexplained and may well be attributable to discrimination.¹⁷

2.2 THE MATERNAL WALL

In addition to economic analyses documenting the motherhood penalty, a rapidly growing number of social psychology studies documents that mothers experience profound gender discrimination at work.¹⁸ The leading study, published in 2007, involved an experimental audit in which subjects were given matched resumes that were identical except in one respect: one, but not the other, mentioned membership in the parent-teachers’ association, signalling that the applicant was a mother.¹⁹ That single difference was enough to produce dramatically differential treatment: childless women were 6 times more likely to be recommended for hire and were 8.2 times more likely to be recommended for promotion than mothers, and non-mothers were offered an average of USD 11,000 more in starting salary than mothers. Mothers also were held to higher punctuality and performance standards than either childless women or fathers.²⁰ This bias is much more dramatic than typically is seen in studies involving ‘glass-ceiling’ discrimination.²¹ While women who face glass-ceiling discrimination typically experience the ‘death of a thousand cuts’ – that is, many small biases that add up over time – discrimination against mothers is more like a sledgehammer.

¹⁶ M. Travis, ‘Recapturing the Transformative Potential of Employment Discrimination Law’, *Washington & Lee Law Review* 62, no. 3 (2005): 6 (describing the ‘bundle of related default organizational structures – referred to collectively as the “full-time face-time norm”’).

¹⁷ See, e.g., M.J. Budig & P. England, ‘The Wage Penalty for Motherhood’, *American Sociological Review* 66, no. 2 (April 2001): 220, 204. In the Swedish context, see e.g., A. Boschini et al., ‘Trading Off or Having It All? Completed Fertility and Mid-Career Earnings of Swedish Men and Women’, Working Paper 2011:15, 36 (Institute for Labour Market Policy Evaluation).

¹⁸ See generally M. Biernat, E.J. Crosby & J.C. Williams (eds), ‘The Maternal Wall: Research and Policy Perspectives on Discrimination against Mothers’, *Journal of Social Issues* 60 (Special Issue) (2004): 667.

¹⁹ Correll et al., *supra* n. 11, 1316, 1320, 1321.

²⁰ *Ibid.*, 1320–1323.

²¹ See V. Valian, *Why So Slow? The Advancement of Women* (Cambridge, MA: The MIT Press, 1999), 140–142.

Other studies help explain why the bias against mothers today is so strong. One leading study showed that, although ‘businesswomen’ are seen as virtually identical in competence to ‘businessmen’, ‘housewives’ are lumped alongside the most stigmatized groups in the entire economy: the elderly, blind, ‘retarded’, and ‘disabled’ – to use the words tested by the researchers.²² Housewives are seen as warm and likeable but not competent; employed mothers are seen as competent but not likeable. Thus, working mothers face a Catch-22 that working fathers do not face.²³

Because the effects of bias against mothers in the workplace are so strong, it is useful for any labour lawyer to understand how such biases operate in the workplace. Maternal wall bias consists of two distinct types of bias. The first is *prescriptive* bias, which involves assumptions about how mothers *should* behave. For example, an American customer service representative was told when she was fired that it was so she ‘could spend more time at home with her children’.²⁴ Prescriptive bias can be more subtle, too – for example, when one American lawyer was told, ‘Don’t you feel bad leaving your kids at home? Don’t you miss them? My wife could never do that’.²⁵ In each case, the message is clear: Mothers belong at home.

The second form of maternal wall bias is *descriptive* bias, which involves assumptions about how women *will* behave *because* they are mothers. Descriptive bias stems from the fact that stereotype-affirming information tends to be noticed, recalled, and used in drawing inferences, while behaviour inconsistent with stereotypes tends to be overlooked or forgotten. This leads to a well-documented pattern of ‘he’s skilled; she’s lucky’, in which men’s successes tend to be attributed to stable, internal causes, while women’s successes tend to be attributed to transient, outside conditions. In part, this relates to status: The successes of high-status people tend to be attributed to talent and their mistakes to outside circumstances, while the reverse is true for low-status people.²⁶ Social status also is linked with competence assumptions: low-status people are assumed to perform poorly. Motherhood appears to depress women’s perceived status, leading to

²² S.T. Fiske et al., ‘A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition’, *Journal of Personality and Social Psychology* 82 (2002): 878.

²³ See *ibid.*; A.J.C. Cuddy, S.T. Fiske & P. Glick, ‘The BIAS Map: Behaviors from Intergroup Affect and Stereotypes’, *Journal of Personality and Social Psychology* 92, no. 4 (April 2007): 631–648.

²⁴ *Sheehan v. Donlen Corp.*, 173 F3d 1039, 1045 (7th Cir. 1999).

²⁵ J.E. Gans Epner, *Visible Invisibility: Women of Color in Law Firms* (American Bar Association Commission on Women in the Profession, 2006), 34.

²⁶ J.C. Williams, ‘The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense’, *Employee Rights and Employment Policy Journal* 7, no. 2 (2003): 401, 416–417.

descriptive stereotypes that mothers are less competent than other adults.²⁷ Another important pattern of descriptive bias stems from the perceived clash between the ‘ideal worker’, seen as always available for work, and the ideal mother, seen as always available for her children.²⁸ The result is what social scientists call ‘role incongruity’ – for example, when a supervisor told an American worker, a lawyer who was a mother, that ‘working mothers cannot be both good mothers and good workers’.²⁹

Maternal wall bias tends to be triggered at three distinct points: at pregnancy, when a worker returns from maternity leave, and when she requests or adopts a part-time or flexible schedule. The earliest studies involve pregnancy, the first point at which a woman’s motherhood becomes salient. A 1990 study of business students found a ‘plummet’ in the performance evaluations of women managers when they became pregnant. Subjects reacted negatively towards a pregnant manager because they expected her to be ‘non-authoritarian, easy to negotiate with, gentle, and neither intimidating nor aggressive, and nice’.³⁰ In other words, pregnant managers encounter prescriptive bias in the form of an insistence that they act docile and feminine; when they behave in the assertive, directive ways required by their role as managers, they encounter workplace detriments. Likewise, a 1993 study found that pregnant women encountered 38% more intrusive personal comments, such as having their behaviour attributed to hormones, 28% reported negative reactions from peers, 12% reported open discrimination, and 48% reported that their subordinates became hostile or upset when they became pregnant.³¹ Other studies have found that pregnancy depressed hiring recommendations, even when the candidates received higher objective ratings, were rated lower on job commitment, and were recommended for lower salaries.³²

The second trigger point for maternal wall bias is after a woman returns from maternity leave and her motherhood itself becomes salient. In addition to the leading study of matched resumes described above, in another experiment involving a profile of a female management consultant, it was found that mothers were rated as

²⁷ See C.L. Ridgeway & S.J. Correll, ‘Motherhood as a Status Characteristic’, *Journal of Social Issues* 60, no. 4 (2004): 683, 683–700.

²⁸ See D. Kobrynowicz & M. Biernat, ‘Decoding Subjective Evaluations: How Strategies Provide Shifting Standards’, *Journal of Experimental Social Psychology* 33 (1997): 579, 587–588. See Williams, *Unbending Gender*, supra n. 5, 1–6 (introducing the concept of the ‘ideal worker’).

²⁹ *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205, 1998 WL 912101, at *5 (S.D.N.Y. 30 Dec. 1998). For a discussion of maternal wall bias in general, see Biernat et. al, supra n. 18.

³⁰ S. Benard, I. Paik & S.J. Correll, ‘Cognitive Bias and the Motherhood Penalty’, *Hastings Law Journal* 59 (2008): 1359, 1369–1370 (citing S.J. Corse, ‘Pregnant Managers and Their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships’, *Journal of Applied Behavioral Science*, 26 (1990): 39).

³¹ *Ibid.*, 1370–1371 (citing J.A. Halpert & J. Hickman Burg, ‘Mixed Messages: Co-worker Response to the Pregnant Employee’, *Journal of Business and Psychology* 12 (1997): 241, 245–248).

³² See *ibid.*, 1370–1372 (summarizing studies, citations omitted).

less competent and were less likely to be recommended for promotion or management training than candidates with identical resumes but without children.³³ In sharp contrast, fathers were held to lower performance and commitment standards than non-fathers.³⁴ Note the descriptive stereotypes that help fathers (he has a family to support) and hurt mothers (she has a family to take care of). Both mothers and fathers were seen as less committed to their jobs, but only mothers were seen as less *competent*.³⁵ Another study found that mothers were seen as less career-oriented, less success-oriented, and less reliable than women without children, while men's ratings on similar measures were not affected by parenthood.³⁶ Underscoring these biases, a recent pattern noted by American employment lawyers is 'second child syndrome', whereby women who do not encounter workplace gender bias with their first child then encounter it after having a second child.³⁷ In these cases, having one child may be acceptable for any good worker, but a woman who has two or more children has clearly signalled that she is not just a worker with a child, but she is also a caregiver with competing demands at home, which are viewed as incongruous with her responsibilities at work.

The third trigger for maternal wall bias is when a woman requests or adopts a flexible or part-time schedule. Early studies show that women who work part time often get the worst of both worlds: They are considered less warm than mothers who do not work and less competent than women who work full time.³⁸ A raft of new, yet to be published studies explores this phenomenon, known as the 'flexibility stigma': the stigma often associated with working anything other than a 'standard', full-time schedule.³⁹ Flexibility stigma stems from what American sociologist Mary Blair-Loy calls 'the schema of work devotion', which mandates that employees make work the central focus of their lives and have their personal lives arranged so as to always be available for work.⁴⁰ As when a woman gets pregnant or returns from maternity leave, when a woman alters her schedule, she

³³ A.J.C. Cuddy & Susan T. Fiske, 'When Professionals Become Mothers, Warmth Doesn't Cut the Ice', *Journal of Social Issues* 60, no. 4 (2004): 701, 701–718.

³⁴ *Ibid.*, 711–713.

³⁵ *Ibid.*

³⁶ M. Blair-Loy, *Competing Devotions: Career and Family among Women Executives* (Cambridge: Harvard University Press, 2003), 120.

³⁷ See C. Thomas Calvert, *Family Responsibilities Discrimination: Litigation Update 2010* (Center for WorkLife Law, 2010), 3, <www.worklifelaw.org/pubs/FRDupdate.pdf>.

³⁸ See, e.g., A.H. Eagly & V.J. Steffen, 'Gender Stereotypes, Occupational Roles, and Beliefs about Part-Time Employees', *Psychology of Women Quarterly* 10 (1986), 252.

³⁹ A formal proposal has been accepted by the *Journal of Social Issues* for a forthcoming special issue on the flexibility stigma, and studies are currently in process. For already published studies on penalties to flexible workers, see, e.g., S.A. Rogier & M.Y. Padgett, 'The Impact of Utilizing a Flexible Work Schedule on the Perceived Career Advancement Potential of Women', *Human Resource Development Quarterly* 15 (2004): 89, 89–106; M. Blair-Loy & A.S. Wharton, 'Employees' Use of Work-Family Policies and the Workplace Social Context', *Social Forces* 8 (2002): 813, 813–845.

⁴⁰ Blair-Loy, *supra* n. 36, 1.

makes salient her identity as a mother: ‘First comes love, then comes marriage, then comes flextime and a baby carriage’, opined a supervisor at the American company Novartis, in a quote cited in a subsequent lawsuit brought by employees for gender discrimination.⁴¹ Flexible or part-time work also triggers descriptive bias, as indicated in the following quote from an American attorney:

Before I went part-time, when I wasn’t at my desk, people assumed I was at a business meeting. Afterwards, they assumed I was home with my kids – even if I was with a client. Also, before I went part-time, when I did not give people the turnaround they hoped for, they gave me the benefit of the doubt. All that ended when I went part-time. As a result, my performance evaluations fell, even though the quality of my work did not change.⁴²

Note how, when this attorney worked full time, she was given the benefit of the doubt and assumed to be working. After going part time, she was no longer given the benefit of the doubt and was assumed to be caring for her children even when she was working. In this pattern of descriptive bias, known as leniency bias, members of in-groups (here, full-time workers) tend to be given the benefit of the doubt, while members of out-groups (here, part-time workers, all women) are not.⁴³ The attorney also experienced attribution bias: when she worked full time, people attributed her absences to business reasons, whereas after she went part time, they attributed her absences to family reasons. Her evaluations fell because leniency bias meant she had to ‘try twice as hard to get half as far’, and attribution bias meant that people around her interpreted her behaviour as evidence of a lack of work commitment even when it, in fact, illustrated her work commitment (she was at a business meeting).

2.3 MEN AND CAREGIVER BIAS

Although maternal wall bias typically affects mothers, it can also affect men, having a devastating impact on men who step outside of the ‘breadwinner’ role to actively participate in family caregiving – as European traditions and policies encourage men to do. While gender bias against women reflects automatic assumptions that link motherhood with a lack of work commitment and competence, the matching gender bias against fathers operates differently. When social psychologists simply ask about ‘fathers’, they find that fatherhood actually helps men on the job. Several

⁴¹ *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007); Duff Wilson, ‘Novartis Bias Suit to Begin’, *New York Times*, 6 Apr. 2010, <www.nytimes.com/2010/04/07/business/07gender.html?ref=novartis_ag>.

⁴² J.C. Williams, C. Thomas Calvert & H. Cohen Cooper, ‘Better on Balance? The Corporate Counsel Work/Life Report’, Project for Attorney Retention (December 2003), 29.

⁴³ M.B. Brewer, ‘In Group Favoritism: The Subtle Side of Intergroup Discrimination’, in *Codes of Conduct Behavioral Research into Business Ethics*, eds D.M. Messick & A.E. Tenbrunsel (New York, NY: Russell Sage, 1996), 58–68.

studies have found that fathers are seen as better prospects for hiring and promotion and are held to lower performance and punctuality standards than are men without children.⁴⁴ However, as other studies show, fathers who actually seek time off for family reasons experience serious career penalties: Fathers who took parental leave or even short work absence due to family caregiving were recommended for fewer rewards, viewed as less committed, and given lower performance ratings.⁴⁵ Thus, when a man is simply described as a father, the assumption is that he will do what fathers are expected to do: leave most, or all, of the caregiving responsibilities that conflict with work obligations to his wife, and he benefits from the underlying stereotypes of men as competent and women as warm. However, if a father thwarts the expectations that parenthood will make him *more* committed to work, he may well face a caregiver bias even stronger than that faced by mothers.

Caregiver bias and the flexibility stigma affect men as well as women and are usually triggered when a man takes parental leave, requests a part-time or flexible schedule, or deviates from the expected norm that he will be totally devoted to work. Said one University professor of his experience, 'My request for family leave was met with a sneering denial by my chair'.⁴⁶ Another American man who asked to take family leave was told that by doing so he would be 'cutting his own throat'.⁴⁷ These examples show that caregiver bias is gender bias, despite the fact that it is encountered by men as well as women: It results from prescriptive bias that polices men out of caregiving roles and women out of breadwinning roles. Current theoretical frameworks suggest that the organizational penalties encountered by men who take leave or use flexible work arrangements reflect penalties for gender nonconformity.⁴⁸ Conditioning workplace success on the perceived proper performance of traditional gender roles is not a suitable role for an employer.

⁴⁴ Cuddy & Fiske, *supra* n. 33, 701–718; Ridgeway & Correll, *supra* n. 27, 683–700.

⁴⁵ T.D. Allen & J.E. Russell, 'Parental Leave of Absence: Some Not So Family-Friendly Implications', *Journal of Applied Social Psychology* 29 (1999): 166; J.H. Wayne & B.L. Cordeiro, 'Who Is a Good Organizational Citizen?: Social Perception of Male and Female Employees Who Use Family Leave', *Sex Roles* 49 (2003): 233, 233–234; A.B. Butler & A. Skattebo, 'What Is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job Performance Ratings', *Journal of Occupational & Organizational Psychology* 77 (2004): 553, 553–559. Compare E.-A. Johansson, 'The Effect of Own and Spousal Parental Leave on Earnings', Working Paper 2010:4 (IFAU, Uppsala University, 2010).

⁴⁶ K. Frasch et al., *Creating a Family Friendly Department: Chairs and Deans Toolkit* (2007), 17, <<http://ucfamilyedge.berkeley.edu/ChairsandDeansToolkitFinal7-07.pdf>>.

⁴⁷ Calvert, *supra* n. 37, 2.

⁴⁸ See J.L. Berdahl, 'Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy', *Academy of Management Review* 32 (2007): 641, 641–658.; L.A. Rudman & K. Fairchild, 'Reactions to Counterstereotypic Behavior: The Role of Backlash in Cultural Stereotype Maintenance', *Journal of Personality and Social Psychology* 87 (2004): 157, 157–176.

Understanding the ways in which caregiver bias and the flexibility stigma operates and the points at which it is triggered is important for labour lawyers, especially in light of work–family reconciliation policies that focuses on generous parental leave and working hours legislation but not on gender bias. As social scientific studies over the past decade have documented – and as new studies continue to document – workers who use policies that allow them to take leave or adopt a flexible or reduced schedule may be penalized and marginalized when they return to work, thereby weakening the effectiveness of those policies themselves.

3 CAREGIVER LITIGATION IN THE UNITED STATES

So what are the implications of this new social science for labour law, and how has it factored into the American approach to reconciling work and family? To answer that question requires us to return to the fact that our workplace ideals still enshrine the worker who starts to work in early adulthood and works, full time and full force, for forty years without a break. That way of defining who is an ideal worker embeds gender bias by defining workplaces around men’s bodies – they need no time off for childbearing – and men’s traditional life patterns – women still do the large bulk of child care. Jobs designed around men and masculinity discriminate against women,⁴⁹ 80% of whom become mothers by the time they are forty–four years old (to use the US data).⁵⁰

To address this workplace/workforce mismatch and to remedy bias against mothers and others with caregiving responsibilities at work, American labour lawyers have used the social science on the maternal wall and US anti-discrimination law to develop a legal field known as ‘family responsibilities discrimination’ (FRD) or ‘caregiver discrimination’.⁵¹ Over the past decade, led by the Center for WorkLife Law (which co-author Joan Williams directs), American employment lawyers have developed a variety of legal theories under US law to redress family caregiving responsibilities. The leading theory was developed under

⁴⁹ See Williams, 2000, *supra* n. 5.

⁵⁰ J. Lawler Dye, *Fertility of American Women: June 2006, Population Characteristics, P20-558* (US Census Bureau, August 2008), 1, <www.census.gov/prod/2008pubs/p20-558.pdf> (stating that 20% of women aged 40–44 had no children).

⁵¹ Of course, it is worth noting that American labour lawyers have also been working for many years to expand public policy, looking to Europe for models, yet to virtually no avail: To date, federal law in the United States provides only twelve weeks of unpaid family and medical leave to only certain workers, does not require paid sick leave or vacation, does not provide a right to request reduced or changed work hours, and provides little to no publicly funded preschool for children prior to public school; a few states provide greater public policy. See Heymann et al., *supra* n. 8, 1–5; Hegewisch & Gornick, *supra* n. 9, 18, Table 2. However, the American political traditions of individualism, capitalism, and hostility to publicly funded social supports have left American labour lawyers with little to rely on in the legislative arena.

Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on ‘sex’, among other protected categories (i.e., race, color, religion, and national origin). Title VII allows for two different types of lawsuits: those alleging ‘disparate treatment’, where an employer takes a negative employment action against an employee (or group of employees) because of that employee’s sex, and ‘disparate impact’, where an employer engages in a seemingly neutral policy or practice that has a disproportionately negative impact on one sex. Because at the time these theories were developed, US courts disfavoured the disparate impact type of lawsuit (making lawyers less likely to want to pursue new legal theories using that type of lawsuit),⁵² caregiver discrimination theories in US law developed primarily as disparate treatment lawsuits under Title VII.

To allege caregiver discrimination using a disparate treatment theory under Title VII required starting with the fact that, as noted above, workplaces are designed around an ideal worker who works full time and full force for forty years straight. This approach designs jobs not only around men’s bodies but also around masculinity – in particular, around a de facto requirement that the ideal worker play the role of a male breadwinner supported by a flow of family work from a partner whose workforce participation is framed around her role as a primary caregiver. When jobs are designed around men and masculinity, gender stereotyping arises in everyday workplace interactions. American lawyers, relying on the social science literature that documents that motherhood is a key trigger for gender bias, could then litigate experiences of maternal wall bias as gender discrimination.

As of 2001, when the Center for WorkLife Law began this work, the accepted way to prove that an employee experienced disparate treatment sex discrimination under Title VII was to point to a similarly situated man (a ‘comparator’) who had been treated better than the female employee in question. This approach is not required by the law itself (which requires only proof that the circumstances lead to an inference of discrimination), but it was the customary method of proof – and it had two significant limitations for women seeking to redress sex discrimination. First, some courts had, nonsensically, dismissed claims brought by pregnant women on the grounds that their sex discrimination cases could not be proven because they had failed to provide a comparator – a pregnant man who was similarly situated and had been treated better. Second, because of the extremely high level of sex segregation in American workplaces, many women work in jobs with a predominately or all female workforce, making them unable to point to a male comparator, because no men work in their job category.

⁵² See, e.g., S.R. Bagenstos, ‘The Structural Turn and the Limits of Antidiscrimination Law’, *California Law Review* 94, no. 1 (2006): 44–45; C.A. Sullivan, ‘Disparate Impact: Looking Past the Desert Palace Mirage’, *William & Mary Law Review* 47 (2005): 911, 954–966.

In 2003, in a law review article entitled *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated against on the Job*,⁵³ Joan Williams and a co-author wrote about maternal wall bias, citing the then-available social scientific studies documenting it, and introducing its role in workplace discrimination against mothers. The following year, the article was cited by the federal Second Circuit Court of Appeals in *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004), a landmark case holding that evidence that a negative employment action was taken because of gender stereotypes of mothers alone was enough to sustain a complaint of sex discrimination, even without evidence that a male comparator was treated better. The plaintiff, Elena Back, was a school psychologist with excellent job performance who was denied tenure after she had children. Her female supervisors told her that her job was not for someone ‘with little ones at home’ and that it was ‘not possible [...] to be a good mother and have this job’.⁵⁴ In overturning the lower court’s grant of summary judgment for the employer, the Second Circuit Court of Appeals articulated the stereotyping approach that now lies at the centre of US caregiver-discrimination law: ‘stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive’.⁵⁵

As *Back* signals, the key thrust of US caregiver litigation is to provide protection for mothers who seek nothing more than to continue in their jobs, working in the locations and schedules in which they have always worked. Unfortunately, this modest aspiration eludes many mothers. One woman’s supervisor told her after she became a stepmother that ‘working mothers could not perform as well as men or women without children, that mothers should stay at home, and that she would have to choose between being a mother and a sales manager’.⁵⁶ Another female employee was told she was not promoted because ‘you have kids’.⁵⁷ Another called her employer to arrange for her return from maternity leave and was told she should not come back because mothers belong at home.⁵⁸ Yet another was told that mothers would not be hired because women lose too many brain cells when they have children.⁵⁹ Still another was told, for ten

⁵³ J.C. Williams & N. Segal, ‘Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated against on the Job’, *Harvard Women’s Law Journal* 26 (2003): 77.

⁵⁴ *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004). Back ultimately lost at trial. *Back v. Hastings on Hudson*, 161 Fed. Appx. 96 (2d Cir. 2005) (affirming denial of a motion for a new trial after a jury rejected her claim), but the Second Circuit opinion remains good law.

⁵⁵ *Ibid.*, 122.

⁵⁶ *Cerving v. Ophiz*, 106 FEP Cases (BNA) 221, 222 (9th Cir. 2009).

⁵⁷ *Lust v. Sealy*, 383 F.3d 580, 583 (7th Cir. 2004).

⁵⁸ *Bailey v. Scott-Gallagher*, 253 Va. 121, 123 (Va. 1997).

⁵⁹ *Drebing v. Provo Group, Inc.*, 519 F. Supp. 2d 811, 823 (N.D. Ill. 2007).

years in a row, that she was the top candidate but would not be promoted because she was a mother.⁶⁰

By 2006, the Center for WorkLife Law reported that lawsuits alleging such FRD had increased 400% during the prior decade, during a period in which the general number of employment discrimination lawsuits was decreasing overall.⁶¹ By 2010, that rate of increase had held steady at 400%, with the Center for WorkLife Law documenting that employees in FRD lawsuits prevail in about half of the cases, far more frequently than in employment discrimination suits in general, in which employees' win rate varies from 4% to 30%.⁶² As of January 2010, the average verdict/settlement was over USD 570,000, with twenty-one cases resulting in damages of over USD 1 million and four in over USD 10 million.⁶³ Since then (and not factored into these averages), the largest relevant monetary verdict was decided: A jury in *Velez v. Novartis* handed down a verdict in excess of USD 250 million in a gender discrimination class action suit that involved both maternal wall and other types of gender discrimination.⁶⁴

In 2007, the US Equal Employment Opportunity Commission (EEOC) – the federal government agency that enforces employment anti-discrimination laws – crystallized and further sparked the development of caregiver discrimination law by issuing its *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*.⁶⁵ While not formally binding like a court decision or statute, the EEOC Guidance states the official position of the agency charged with enforcing anti-discrimination law, making it persuasive to courts considering caregiver discrimination cases. Perhaps even more important, employment lawyers who defend employers from discrimination suits took the Guidance as a signal that FRD was a fact of life and began to advise their clients to avoid disadvantaging caregivers in ways that might lead to liability.⁶⁶ In its Guidance, the EEOC adopted the holding in *Back* that sex discrimination in employment may be

⁶⁰ *Lehman v. Kohl's Dep't Store*, Ohio Ct. Common Pleas, No. CV-06-581501 (2007). For a discussion of the development of this case law over time, see generally Williams & Bornstein, *supra* n. 7.

⁶¹ M.C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities* (Center for WorkLife Law, 2006), <www.worklifelaw.org/pubs/FRDreport.pdf>.

⁶² Calvert, *supra* n. 37, 11.

⁶³ *Ibid.*, 12.

⁶⁴ D. Glovin & P. Hurtado, 'Novartis Must Pay \$250 Million in Gender Bias Lawsuit', *Bloomberg Business Week*, 19 May 2010, <www.businessweek.com/news/2010-05-19/novartis-must-pay-250-million-in-gender-bias-lawsuit-update5-.html>. The parties later settled for USD 175 million. Grant McCool & Jonathan Stempel, 'Novartis in \$175 Million Gender Bias Settlement', *Reuters*, 14 Jul. 2010, <www.reuters.com/article/idUSTRE66D57Z20100714>.

⁶⁵ US Equal Employment Opportunity Commission, 'Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities', EEOC Compliance Manual 2 (BNA) §615 (23 May 2007), <www.eeoc.gov/policy/docs/caregiving.pdf>.

⁶⁶ See M.C. Still, 'Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process through which Legal and Social Factors Produce Institutional Change', *Hastings Law Journal* 59 (2008): 1491, 1513–1514.

proven, even without comparator evidence, based on evidence of gender stereotyping of mothers. It then went further to address several ways in which maternal wall bias negatively impacts working caregivers. ‘Employment decisions based on such stereotypes violate the federal antidiscrimination statutes, even when an employer acts upon such stereotypes unconsciously or reflexively’,⁶⁷ the Guidance states – importantly, because the descriptive bias at the root of the maternal wall typically is unselfconscious and automatic (although it can be controlled). Highlighting the negative competence associations of maternal wall bias, the Guidance continues: ‘Investigators [charged with investigating discrimination complaints] should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer’s evaluation of a worker’s general competence’.⁶⁸ The Guidance specifically mentions one common type of maternal wall bias, benevolent prescriptive stereotyping, whereby an employer tells the mother of young children that he did not consider her for a promotion because ‘I knew it wasn’t a good time for you, because of your children’.⁶⁹ (The proper approach is for the employer to ask the mother in question whether she wants the opportunity in question.)

Some commentators have argued that caregiver litigation in the United States can help only women whose work patterns approximate those of the typical man.⁷⁰ This view is much exaggerated. Disparate treatment theory under Title VII, the EEOC Guidance, and American case law provide some redress for those who work part-time or flexible schedules and those affected by the flexibility stigma. In its Guidance, the EEOC notes that part-time work can be a trigger for maternal wall bias: ‘Employers may further stereotype female caregivers who adopt part-time or flexible work schedules as “homemakers” who are less committed to the workplace than their full-time colleagues’.⁷¹ The EEOC links the common conflation of work schedule with work commitment as stereotyping – which makes sense given studies showing that many part-time workers are equally or more committed to and satisfied with their jobs than full-time workers.⁷² American employees also have sued and won various rights related to workplace

⁶⁷ US Equal Employment Opportunity Commission, *supra* n. 65.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See Williams & Bornstein, *supra* n. 7, 1337–1341 (citing Martha Chamallas, ‘Mothers and Disparate Treatment: The Ghost of Martin Marietta’, *Villanova Law Review* 44 (1999): 337, 338–339; Debbie N. Kaminer, ‘The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace’, *American University Law Review* 54 (2004): 305, 307).

⁷¹ US Equal Employment Opportunity Commission, *supra* n. 65.

⁷² See, e.g., D. Comfort, K. Johnson & D. Wallace, *Evolving Workplace Series: Part-Time Work and Family-Friendly Practices in Canadian Workplaces* (Ottawa, Ontario: Minister of Industry, Statistics Canada & Human Resources Development Canada, 2003), 19; E.J. Hill, V. Martinson & M. Ferris, ‘New Concept Part-Time Employment as a Work-Family Adaptive Strategy for Women Professionals with

flexibility. An employee whose flexible work schedule, among other benefits, was taken away after she announced her pregnancy was found to have suffered disparate treatment.⁷³ Likewise, when a female employee who occasionally worked at home was no longer allowed to do so by a new supervisor but men were, she complained and was fired, a court held this to be in retaliation for complaining of sex discrimination.⁷⁴ In a decision later adopted by the US Supreme Court, the Seventh Circuit Court of Appeals held that revoking a mother's alternative 7 a.m. to 3 p.m. work schedule and insisting that she work from 9 a.m. to 5 p.m. could constitute retaliation under Title VII.⁷⁵ Even employees on part-time schedules have sued successfully – for example, when employees were not allowed to change or reduce their work schedules for family caregiving reasons while others were allowed to do so for non-family caregiving reasons.⁷⁶ In addition, while courts are split on this issue, at least one American court has ruled that paying a female chemist on a 75% time schedule less than a proportionately equal pay rate than a male chemist who performed substantially the same work but on a full-time schedule could be unlawful sex discrimination.⁷⁷

Other caregivers have successfully litigated their claims as disparate *impact* suits under Title VII, a legal theory that has the potential to contest directly workplace structures designed around men and masculinity. (The EEOC Guidance only addressed disparate treatment, not disparate impact claims.) That is, arguments that an employer policy or practice had a disproportionately negative impact on mothers, and therefore, women have been a successful way to challenge a variety of facially neutral employer policies. One woman successfully challenged an employer policy that limited promotions to those who could relocate, which had a disparate impact on women because men are less likely to move for their wives'

Small Children', *Family Relations* 53 (2004): 282, 288; T.J. Thorsteinson, 'Job Attitudes of Part-Time vs. Full-Time Workers: A Meta-analytic Review', *Journal of Occupational and Organizational Psychology* 76 (2003), 151, 169.

⁷³ *Otwell v. JHM*, 2007 Mealey's Jury Verdicts & Settlements 1479 (N.D. Ala. 2007).

⁷⁴ *Homburg v. UPS, Inc.*, No. 05-2144-KHV, 2006 WL 2092457 (D. Kan. 27 Jul. 2006).

⁷⁵ *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658-59, 662-63 (7th Cir. 2005). This case was later adopted by the US Supreme Court in *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

⁷⁶ See, e.g., *Tomaselli v. Upper Pottsgrove Twp.*, No. 04-2646, 2004 U.S. Dist. LEXIS 25754 (E.D. Pa. 22 Dec. 2004) (holding that denial of reduced work schedule to a woman for pregnancy and childcare reasons while men were so granted for physical or personal needs is disparate treatment); *Parker v. Dep't of Pub. Safety*, 11 F. Supp. 2d 467 (D. Del. 1998) (holding that refusal to give a woman a fixed, rather than rotating, work schedule for childcare reasons while men are given fixed schedules for other reasons is disparate treatment).

⁷⁷ See *Lovell v. BBN Solutions, LLC*, 295 F. Supp. 2d 611, 615-616 (E.D. Va. 2003). Note, however, that there is also negative precedent on this issue, holding that part- and full-time employees cannot be compared under the Equal Pay Act. See, e.g., *Larocco v. Nalco Chemical Co.*, 1999 WL 199251, at 13 (N. D. Ill. 30 Mar. 1999); *EEOC v. Altmeyer's Home Stores, Inc.*, 672 F. Supp. 201, 214 (W. D. Pa. 1987); *Asher v. Riser Foods, Inc.*, 1993 WL 94305, at 4 (6th Cir. 30 Mar. 1993) (per curiam).

jobs than women are for their husbands' jobs.⁷⁸ Another lawsuit challenged an employer policy of terminating any employee who required long-term sick leave in their first year of employment where fifty of the fifty-three employees terminated under the policy during a four-year period were women, twenty of whom were pregnant.⁷⁹ In another case, a woman who wanted to use her sick leave to care for her premature child challenged her employer's policy limiting use of sick leave to the employee's own illness, which the court said was 'exactly [the] type of harm that Title VII seeks to redress'.⁸⁰ Another struck down an employer policy under which women were required to use sick time for parental leave, but men were not, where it was more advantageous for employees to save their sick time (as accumulated pay).⁸¹

As these disparate impact cases – and the disparate treatment cases described earlier – demonstrate, American employment lawyers have developed a robust area of law using prohibitions against sex discrimination to challenge both adverse treatment of mothers at work based on gender stereotypes around caregiving and employer policies that incorporate those stereotypes into workplace structures to the disproportionate detriment of mothers. The advantage of developing American caregiver discrimination law in this way is that it tackles head-on underlying biases that may be overlooked when public policy focuses exclusively on providing parental leave and workplace accommodations. Of course, if the kinds of family supports available in Europe (and, indeed, elsewhere in the world) were available in the United States, American families would be far better off. Nevertheless, American caregiver discrimination law offers lessons on identifying and addressing the underlying stereotypes that threaten to derail the success of even the most generous public policies for work-family reconciliation.

4 CAREGIVER DISCRIMINATION AS PART OF LABOUR LAW AND OF A NATIONAL AGENDA FOR WORK-FAMILY RECONCILIATION

The view from the United States on caregiver discrimination sends important messages to labour lawyers and work-family advocates worldwide. The key message is that discrimination against mothers is the strongest form of gender bias at work today – and discrimination against fathers who take an active role in

⁷⁸ *Shafer v. Commander, Army and Air Force Exchange Service*, 667 F. Supp. 414 (ND Tex. 1985). On greater likelihood to relocate for men's jobs than women's jobs, see, e.g., Deborah L. Rhode, 'Occupational Inequality', *Duke Law Journal* (1988): 1207, 1214, 1216; Deborah L. Rhode, 'The "No-Problem" Problem: Feminist Challenges and Cultural Change', *Yale Law Journal* 100 (1991): 1731, 1748–1749, 1749, n.80.

⁷⁹ *EEOC v. Warshausky & Co.*, 768 F. Supp. 647 (N.D. Ill. 1991).

⁸⁰ *Roberts v. United States Postmaster General*, 947 F. Supp. 282, 284 (E.D. Tex. 1996).

⁸¹ *Orr v. City of Albuquerque*, 417 F.3d 1144 (10th Cir. 2005).

family caregiving often is even stronger.⁸² A study of labour law that leaves out the issue of caregiver bias overlooks a key driver of gender inequity – and leaves uncontested the common (and unconvincing) view that mothers' economic marginalization reflects nothing more than mothers' own choices.

Further, US caregiver litigation highlights an important point that lies at the heart of any effort toward work–family reconciliation: that the traditional long hours, full-time schedule, itself, is gendered. Indeed, what constitutes 'full time' work has changed a lot, with the only continuity being that 'full time' has always defined the schedule that men typically work.⁸³ As policymakers world wide consider work–family reconciliation, this discussion of caregiver litigation drives home the point that the human capital of women never will be fully tapped until the old-fashioned definition of the ideal worker is replaced by a more modern understanding that workers, simultaneously, are members of a family to whom they have ongoing caregiving responsibilities. Workplaces designed around men's bodies and men's traditional life patterns inevitably lead to widespread attrition among women after they have children. At a microeconomic level, workplace–workforce mismatch hurts the employers who foot the bill for increases in absenteeism and turnover and for decreases in productivity.⁸⁴ At a macroeconomic level, workplace–workforce mismatch hurts a country's competitive position by squandering human capital the country has paid a steep price to develop.

A crucial, final message gleaned from recent social science research and US caregiver litigation concerns the effective design of public policies for work–family reconciliation. The social science on the maternal wall highlights the fact that countries that have passed substantial work–family reconciliation legislation still need to be attentive to whether the intended beneficiaries – women who take maternity leave, men who take parental leave, and workers who request workplace flexibility – are stigmatized when they do so by gender bias. Unless and until that issue is addressed, women will be penalized for taking the leave or using the flexibility promised to them by law. Likewise, men will remain reluctant to take family leave or request workplace flexibility, for fear of encountering stigma and penalties at work. Parental leave and working hours legislation clearly provide promise for reconciling work and family to achieve greater workplace gender equity, yet only by also addressing the underlying biases and discrimination against mothers and other caregivers can this promise become a reality.

⁸² See *supra* n. 45 and accompanying text.

⁸³ See generally A. Kessler-Harris, *In Pursuit of Equality: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (New York, NY: Oxford University Press, 2001) (chronicling the gendered history of wage work and social policy in the United States throughout the twentieth century).

⁸⁴ See, e.g., WFC Resources, 'Making the Business Case for Flexibility', <www.workfamily.com/Work-lifeClearinghouse/UpDates/ud0043.htm> (collecting studies).